Leone v Palu and others

Supreme Court, Nuku'alofa
Ward CJ
Civil Case No.719/93

18, 22 August, 1994

Court of Appeal
Morling, Burchett, Tompkins JJ
Appeal 14/94

22 February 1995

Administrative - law - judicial review or appeal
Judicial review - struck out - appeal on merits
Practice and procedure - appellate review or judicial review

The applicant applied for judical review of the decision of a Police Tribunal to dismiss him from the Police. On an application to strike out the case, it was,

Held:

1. The applicant had a statutory right of appeal which he had not exercised.
2. An appeal would be concerned with merits of the decision; judicial review with the legality of the decision.
3. Accordingly there is no rule that alternative remedies must be exhausted before judicial review may be sought. As soon as illegality allegedly occurs, it should be possible to challenge it.
4. Appellate review should normally be employed before judicial review is sought (particularly when the remedies are true alternatives) unless there are special reasons for seeking judicial review first.
5. However, here the applicant was questioning the merits of the decision itself and not the manner in which it was made.
6. That, it was not a proper ground for judicial review and the action was struck out.

On Appeal, Held:

1. That conclusion was clearly correct.

Cases referred to : R v Epping & Harlow Commissioners [1983] 3 All ER 257
R v Inland Revenue Commissioners [1985] AC 835
North Wales Police v Evans [1982] 3 All ER 141
R v Entry Clearance Officer [1983] 2 AC 818

Statutes referred to : Police Act, s.49

Rules referred to : Supreme Court Rules O27, r2(2)

Counsel for Applicant/Appellant : Mr Edwards
Counsel for Respondents : Mrs Taumoepeau

Judgment (Supreme Court)

The applicant was a police officer for more than seventeen years.

In 1992 he was absent from work for a week and supplied a medical certificate to say he was unfit for work. He was interdicted and, in June 1993, he appeared before the Police Tribunal the members of which are the first three respondents. There were three charges against discipline all of which related to the same period of absence.

On 19 July 1993 he was convicted of one of those charges and dismissed from the Service. On 13 September 1993 application was made ex parte for leave to apply for judicial review and leave was granted. The respondents now apply to strike the case out.

The notice refers only to paragraphs 18, 19, 22, 23, 24, 27 and 28 and the grounds are:

(i) They disclose no reasonable cause of action
(ii) They have no basis in Law
(iii) They have been misconceived by the Plaintiff
(iv) The Plaintiff has not exhausted the proper lawful appellate procedures available to him in the Police Act.

Those grounds would appear to apply to the whole claim and Mrs. Taumoepeau for the respondents confirms that is the case. The main thrust of her submission relates to the first and the last grounds.

She says there is a clear right of appeal that has not been exercised and that, in any event, the claim is far more in the nature of an appeal than a review. Mr. Edwards rightly says there is no principle of law that precludes judicial review until all other avenues of appeal have been traversed. The applicant did not, he contends, have a fair hearing and is entitled to seek review at this stage.

Under section 49 of the Police Act (Cap.35) the applicant has a right of appeal to the Prime Minister and must lodge the appeal within 21 days. Order 27 rule 2(2) of the Supreme Court Rules provides than an application for leave shall be made promptly and in any event within 3 months from the date when the grounds for the application first arose.

It is not uncommon for anyone wishing to challenge a decision of a public authority to have to choose whether to proceed by appeal or judicial review. Past authorities have presented a confused picture as to the appropriate remedy based all too frequently, it is

suggested, on a failure to distinguish between the purposes of appeal and review; the former being concerned with the merits of the decision and the latter with the legality. That is why there should be no rule that alternative remedies must be exhausted before review may be sought. As soon as illegality occurs, it should be possible to challenge it. The apparently conflicting statements have been the result, to some extent, of the remarkable growth in administrative law in recent years and stem from attempts to slow the tide. Thus statements that it is only "in the most exceptional circumstances" (per Donaldson M.R. in M v Epping and Harlow General Commissioners exp Goldstone [1983] 3 All ER 257 at 262) or that it "will only be very rarely" (per Lord Scarman in R v Inland Revenue Commissioners exp. Preston [1985] AC 835 at 852) that judicial review will be allowed before other remedies have been pursued do not, with respect, give the true picture. It is clear that recent authorities tend to the view that appellate review should normally be employed before judicial review is sought unless there are special reasons for seeking the judicial review first and I accept that is the correct position when the remedies are true alternatives.

However, judicial review provides, in many cases, a quicker and cheaper method of correcting an injustice. The court should not be too restrictive over its use and, when considering an application for leave, should include that as a relevant matter. Thus, an applicant will be wise in future to state the reasons why he considers it more appropriate to pursue judicial review than to use an available right to appeal. In this case, an appeal under section 49 must be quicker and more convenient than an application such as the present one so it does not help the applicant here.

Whatever assertions are made in the pleadings and by counsel that this involves a breach of natural justice and that the decision of the tribunal is unreasonable, the applicant is questioning the merits of the decision itself and not the manner in which it was made. Inconsistency in the manner in which the tribunal evaluated a medical certificate as is alleged by the applicant are matters for appeal, not judicial review.

Judicial review is not an appeal from a decision but a review of the manner in which the decision was made. The difference is explained in Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141 where Lord Brightman at 154 emphasised the danger of losing sight of the distinction.

> "I turn .... to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed in Ridge v Baldwin [1964] AC 40 at 96. His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to -
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> > 'a danger of usurpation of power on the part of the courts .... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case the present the need for giving to the party dismissed an opportunity for putting his case.'
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> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In R v Entry Clearance Officer, Bombay, exp Amin [1983] 2 AC 818 at 828 Lord Fraser stated:

> "... although the discretion of the administrative officer .... is unrestricted, its exercise is always subject to judicial review on the principles ..... in the well-known case of Associated Picture Houses Ltd v Wednesbury Corporation. But that concession does not in any way imply that there is a right of appeal on the merits against an administrative decision. Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made."

Leave was granted in the present case because review was sought on the grounds that the Tribunal's finding was unfair and in breach of natural justice. The applicant makes detailed allegations of bias, ill will and lack of impartiality that apply, not to the Tribunal, but to the police authorities. They form no part of the decision that it is sought to impeach and neither is the officer concerned a party. Counsel has suggested the second defendant was joined because it was the employer of the officer alleged to have been biased. If that is the case, it should have been pleaded and it is not. The review is clearly directed only at the Tribunal's findings and the basis of challenge is an analysis of the evidence. That, and the allegation of bias leading to the applicants dismissal, may give rise to a separate cause of action but it is not a proper ground for judicial review of the Tribunal's decision and the action is struck out with costs to the respondents.

Court of Appeal

MR JUSTICE BURCHETT (delivering the first judgment at the invitation of the presiding judge).

This is an appeal against an order made by the Chief Justice upon an application to strike out a Statement of Claim. The Statement of Claim purported to support a claim for judicial review of a decision of a police disciplinary tribunal.

His Honour the Chief Justice took the view that the claims made were not claims which could lead to review, but amounted to an attempt to appeal on the merits against the decision of the tribunal. It seems to me that that conclusion is clearly correct. Under the Act there was indeed a right of appeal on the merits, but it was not a right of appeal to the Supreme Court.

However counsel for the Appellant now says that there was a denial of natural justice, because no reasons were given by the tribunal. But the point, it is clear from the reasons of the learned Chief Justice, was not put at the hearing below. What was said, and what was pleaded in the Statement of Claim, was that there was an inconsistency in the reasons of the tribunal.

In my opinion there was plainly in fact no such inconsistency. What was alleged to be an inconsistency was the finding of guilt on one count, while at the same time two other counts were dismissed. But all three counts arose from the same fundamental allegation of malingering, and it was entirely appropriate not to record three separate convictions for what was in substance the one offence.

There is simply no evidence on which it could be concluded that reasons were not in fact given, and the point was not previously suggested, although quite detailed evidence was put before the Chief Justice. Had the point been relied upon, I have no doubt that an affidavit would have been filed making the assertion that no reasons were given. On what was suggested before His Honour it is not now disputed that the decision he reached was

inevitable.

In those circumstances I would dismiss the appeal with costs.

MR JUSTICE TOMPKINS

I agree that the appeal should be dismissed for the reasons that have been stated by Mr. Justice Burchett. I should perhaps recall that Mr. Edwards acknowledged that, although he said paragraphs 1 to 17 of the Statement of Claim should remain, all the remaining paragraphs of the Statement of Claim did not disclose grounds for judicial review, save the general paragraph 25.

210 At the hearing of the appeal all that remained was the cause of action or at least the grounds of review set out in paragraphs 16 and 17. For the reasons that have been expressed I am satisfied that those did not provide any proper grounds for an application for review, so the proceedings were correctly struck out.

The Appellant is left to his remedy of appeal under Section 49 of the Act. Although I note that any notice of appeal to the Prime Minister must be given within 21 days, the Prime Minister has power to extend the time for lodging the appeal. Whether that time should be extended, if an application were made, would of course be a matter for the Prime Minister.

220 MR. JUSTICE MORLING

I agree with what my brothers have said, and the order of the Court is that the appeal is dismissed with costs.