

LAUB
v.
ATTORNEY-GENERAL AND ANOTHER

COURT OF APPEAL

ISMAIL, J.

C. A. 556/93

SEPTEMBER 8 AND 20, 1994.

Immigrants and Emigrants Act (Cap. 235) – Foreign National – Visa – Extension – Legitimate Expectation – Natural Justice – Uberrima fides – Should a hearing be given before an application for the extension of the Visa, is refused.

The Petitioner, a German National holding a German Passport arrived in Sri Lanka on 8.2.93, on a one month Visit Visa. This Visa was subsequently extended till 7.7.93. An application for a further extension of the Visa was refused by the Controller; and the Petitioner was asked to leave the country on or before 4.8.93.

The Petitioner seeks to quash the said Order of the Controller.

Held:

(1) The Petitioner has not acted with *uberrima fides*, he has suppressed material facts – this application could be dismissed in limine.

(2) Though reasons need not have been given for the non-extension of the visa, the 2nd Respondent has in his affidavit set out the matters taken into account by him in exercising his discretion. The contention that he had the legitimate expectation of a right to be present in Sri Lanka to oversee his business cannot be justified. The demand of procedural justice in such a case do not include a right to a hearing or to be provided with reasons for a decision.

(3) The Controller has the sole discretion in the matter of issuing visas and of considering applications for extensions. An alien has no right to an audience before the Controller or Authorised Officer before he decides not to extend his visa.

"A foreign alien has no right, no legitimate expectation of being allowed to stay. He can be refused without reasons given and without a hearing – once his time has expired, he has to go."

APPLICATION for a Writ of Mandamus/Prohibition.

Cases referred to:-

1. *Alphonso Appuhamy v. Hettiarachchi* 77 NLR 131.
2. *King v. The General Commissioners for the purpose of Income Tax. Ex parte Princess Edmond de Poignac* 1917 – 1 KBD 4864.
3. *Castelli v. Cooke* (1848) 7 Hare 89.94.
4. *Kusumawathie v. Aitken Spence and Another* CA 895/85 C.A.M. 29.5.92.
5. *R. v. Lancashire-cc-exp. Huddleston* – 1986 2 AER 941.
6. *Attorney-General of Hong Kong v. Ng Yuen Shiu* – 1983 2 AER 346.
7. *Re Westminster CC* – 1986 ACC 688.
8. *Schmidt v. Secretary of State, Home Affairs* 1969 2 Ch. D. 149, 171.
9. *Age Gunner Hansen v. Siriwardane* 1986 2 CALR 195.

V. E. Selvarajah with Asoka Lokugamage for Petitioner.

A. Gnanathasan, S.C. for Attorney-General.

Cur. adv. vult.

September 27, 1994.

ISMAIL, J.

The petitioner is a German national holding a German passport bearing No. L1052136. He arrived in Sri Lanka on 8.2.93 and a visit visa was granted to him initially for a period of one month. The visa was extended on his application to be valid for three months till 8.5.93 and then for a further period of two months till 7.7.93. The reason for the extension of the visa being that he was awaiting approval for a "GCEC (BOI) project" – 2R5 and 2R6. He then made an undated application (2R7) for a further extension of the visa to be valid for a further period of one month. This application was refused and the Controller for Immigration and Emigration advised him to leave the country on or before 4.8.93 (P4).

This application is for a writ of prohibition to restrain the Controller from interfering with the petitioner's stay and taking steps to remove him from Sri Lanka, and a writ of mandamus directing the Controller to grant him the extension of his visa.

The petitioner obtained an order from this Court on 30.7.93 in terms of which he was permitted to remain in this country till the final determination of this application.

Learned State Counsel submitted that the petitioner was not entitled to be granted 'interim relief' or a 'stay order', in view of his non-compliance with the Court of Appeal (Appellate Procedure) Rules 1990, regulating the grant of interim relief. It was pointed out that he has not even prayed for such relief in his petition. However, in view of the 'stay order' issued by this Court on 30.7.93 the petitioner has enjoyed a privileged stay in this country for a period of about one year and three months without a valid visa on a German Passport which has now expired.

It was the submission of State Counsel that the petitioner has suppressed relevant material facts in regard to his previous visits to Sri Lanka.

The petitioner appears to have visited Sri Lanka even in 1989, as it appears from the affidavit (P6) of the parents of a person named Lakmal Munindradasa that he was taken by the petitioner with their consent to Germany and brought back after an year's stay there. He has been a frequent visitor to this country since then and his movements into and out of Sri Lanka are set out in detail in the affidavit of the Controller. He arrived in Sri Lanka on 27.6.91 and obtained a visit visa valid for period of one month. It was extended from time to time till 26.9.91 and in view of several complaints received against his conduct during his stay here, the Assistant Controller requested him to leave the country by 24.9.91 (2R1) dated 9.9.91).

He came back to Sri Lanka three days later on 29.9.91 and obtained a visit visa which was extended up to 20.11.91.

His next visit to Sri Lanka was on 26.11.91 and he was issued with a visit visa which was periodically extended up to 25.5.92. The Deputy Director-General of the Greater Colombo Economic Commission by his letter dated 26.5.92 (2R3) informed the Controller that the petitioner is a Director of BNS Software Corporation (Pvt) Ltd., a project approved by the GCEC for the export of PC custom software, in collaboration with M. I. M. Naleem Hadjar and Company Ltd. He recommended that as the petitioner's services were essential for the project that he be granted a residence visa for a period of one year. The petitioner was thus issued a residence visa valid up to 25.11.92. The project referred to did not materialize and it appears to have been abandoned.

The present application of the petitioner before this Court is one in which the principles set out in the case of *R. v. Kensington Income Tax Commissioners (supra)* could be followed and the application dismissed in limine. However, as counsel for the petitioner has referred to the legitimate expectation of the petitioner of being permitted to stay in this country, and of being afforded a hearing, it would be appropriate to deal with this aspect of his case.

The petitioner has stated that he applied to the Board of Investment for the approval of an investment project for the establishment of a German Speciality Restaurant on 5.3.93 and that it was approved on 14.5.93. A company named Lak-Mahals German Restaurant (Pvt) Ltd. (P1 and P2) was incorporated for this purpose and the petitioner brought in Rs. 3.5 million and invested same in the purchase of land and in the construction of the building. It appears that the application for approval for the project was made in the name of Lakmal Munindradasa with the petitioner being named as his foreign collaborator.

The petitioner has this to say about Munindradasa in his counter-affidavit.

"Munindradasa is a person who comes from a respectable family from Aluthgama. His parents are retired teachers and good family friends and I had implicit trust in him. As I was impressed with his talent for business I have spent money on his education and training in Hotel Business so that he could become the Manager of the Hotel Business, which I was proposing to set up in Colombo and hence I enlisted him as my nominee in my business operations in Sri Lanka and as such nominee I got him to apply and obtain the necessary approval for my projects in Sri Lanka and the approval has been granted on his name".

After the present application was filed in this Court, the Director of the Board of Investment in Sri Lanka, who appears not to have been informed of these proceedings, wrote to Controller of Immigration and Emigration on 26.10.93 – P8. He stated that the temporary visa granted to the petitioner has expired (on 7.7.93) and that the

petitioner is the foreign investor in an approved enterprise. He recommended that the petitioner be issued with a residence visa valid for a period of six months from the date of the expiry of the current visa. It must be observed that even if the recommendation of the Director was accepted and acted upon by the Controller, the visa that would have been issued to the petitioner would have lapsed about six months ago.

The petitioner in his application has stated that no reasons have been given for the refusal of the extension of the visa and that the Controller has not given him a hearing before taking a decision to refuse the extension of the visa. Although there is no general rule of law requiring the giving of reasons, an administrative authority may be unable to show that it has acted lawfully unless it explains itself. Though the petitioner has not demanded reasons for such refusal in his application, the 2nd respondent has in his affidavit set out the matters taken into account by him in exercising his discretion. This appears to be in conformity with the guidelines set out by this Court recently in *Kusumawathie v. Aitken Spence and Another* ⁽⁴⁾, following the statement of Sir John Donaldson M. R. in *R v. Lancashire ex p. Huddleston* ⁽⁵⁾. It was held in that case, that though reasons need not be given for the refusal by the local authority to make a discretionary grant to a student, once leave to apply for judicial review had been given, then it is the duty of the authority to make a full and fair disclosure, 'to explain fully what has occurred and why'.

It does not appear that the Board of Investment has given any assurance to the petitioner that as a foreign investor he would be given a residence visa to oversee his business. It was certainly not a condition upon which the approval for the enterprise, the German Speciality Restaurant, was granted to Lak-Mahals German Restaurant (Pvt) Ltd. by the Board of Investment of Sri Lanka.

The contention of the petitioner that he had the legitimate expectation of a right to be present in Sri Lanka to oversee his business cannot be justified. He may have had a hope of a favour and having failed to obtain it has lost nothing save an advantage to which he had a legitimate expectation. The demands of procedural justice in such a case do not include a right to a hearing or to be provided with reasons for a decision.

Learned counsel for the petitioner relied on the decision in *Attorney-General of Hong Kong v. Ng Yuen Shiu* ⁽⁶⁾, decided by the Privy Council, for his submission that the petitioner had a legitimate expectation that his visa would be extended to enable him to oversee his business upon an implied assurance given to the petitioner by the Board of Investment. The judgment in this case is not applicable to the circumstances of the petitioner's situation as I would endeavour to show.

The principles of natural justice undeniably apply to a situation where some legal right, liberty or interest is affected but good administration demands their observance also where a person may legitimately expect to be treated fairly. As Lord Bridge explained in *Re Westminister CC* ⁽⁷⁾ – "The Courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation".

An example of a 'promise' is the case *AG of Hong Kong v. Ng Yuen Shiu* (*supra*) relied upon by counsel. In this case the Government of Hong Kong announced that certain illegal immigrants who were liable to deportation, would be interviewed individually and treated on their merits in each case. The Privy Council quashed a deportation order where the immigrant had only been allowed to answer questions without being able to put his own case, holding that when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.

In the present case the Controller of Immigration has the sole discretion in the matter of issuing visas and of considering applications for the extension of visas in terms of the Immigrants and Emigrants Act (Cap. 235 L.E.C.) Revised Edition (unofficial). The Controller has not prescribed a procedure that he would follow in this regard. The principle laid down in the case referred to above and relied on by the counsel for the petitioner is applicable to a person having a legitimate or reasonable expectation of being accorded a hearing, where some statement to that effect has been made or

undertaking given by or on behalf of an authority who had the duty of making the decision.

Lord Denning M.R. used the term legitimate expectation in the following passage for the first time in elucidating the position in regard to aliens in *Schmidt v. Secretary of State, Home Affairs* ⁽⁸⁾.

"He has no right to enter this country except by leave; and, if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked before the time limit expires, he ought, I think to be given an opportunity of making representations; for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right, – and I could add, no legitimate expectation – of being allowed to stay. He can be refused, without reasons given and without a hearing once his time has expired, he has to go."

This judgment was followed in *Aage Gunner Hansen v. Siriwardane* ⁽⁹⁾ in which it was held that an alien has no right to an audience before the Controller or Authorised Officer before he decides not to extend his visa.

The petitioner's time on the extended visa has expired: it expired a long time ago on 7.7.93. He has to leave the country, now.

The interim order made by this Court on 30.7.93 has now no effect.

The application of the petitioner is dismissed with costs fixed at Rs. 5,000/-.

Application dismissed.