

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 331 OF 2008



BETWEEN:

JOMO THOMAS

Applicant

v

THE COMPTROLLER OF CUSTOMS

First Respondent

THE DIRECTOR GENERAL OF FINANCE

Second Respondent

THE ATTORNEY GENERAL

Third Respondent

Appearances: Ms. Maia Eustace for the Applicant
Mr. R. Williams for the Respondents

2010: April 19th
October 20th

JUDGMENT

- [1] THOM, J: Mr. Jomo Thomas is a citizen of Saint Vincent and the Grenadines (St. Vincent). He resided in the United States for a number of years. In April 1996 the Cabinet of St. Vincent decided that citizens of St. Vincent who returned to St. Vincent to reside permanently would receive a duty concession of 75% of the duty payable on their motor vehicle imported into St. Vincent or purchased in St. Vincent.
- [2] In March 2007 Mr. Thomas applied to the Customs Department pursuant to the decision of the Cabinet for duty free concession on the importation of household and personal effects and a motor vehicle. The Customs Department referred Mr. Thomas to submit his application to the Director General of Finance. Mr. Thomas made the application to the

Director General of Finance. On June 5, 2007 the Director General of Finance wrote to Mr. Thomas informing him that he was not entitled to any concession since such application should have been made within one (1) year of his return to St. Vincent.

- [3] Mr. Thomas seeks leave to apply for judicial review of the decision of the Comptroller of Customs of 27th March 2007 refusing to deal with his application on the ground that such decision is unreasonable, irrational, erroneous in law and was procedurally improper.
- [4] Mr. Thomas also seeks leave to apply for judicial review of the decision of the Director General of Finance dated June 5, 2007 on the ground that the decision is unreasonable, irrational, erroneous in law and was procedurally improper.
- [5] The Application was heard on April 19, 2010 and the parties were ordered to file submissions on or before April 26, 2010. Learned Counsel for Mr. Thomas filed submissions on September 23, 2010. No submissions were received from the Respondents.
- [6] Learned Counsel for Mr. Thomas submitted that the manner in which the Comptroller of Custom dealt with Mr. Thomas' application was illegal and was procedurally improper and it amounted to fettering and delegation of discretion.
- [7] Learned Counsel submitted that the procedure is for the application to be determined by the Comptroller of Customs. The procedure is contained in the document for public information that was produced by the Customs Department entitled "Duty Free Concession for Returning Nationals General Conditions (The Guidelines)." The determination of an application for concession was not a matter for the Director of Finance or the Cabinet. The Cabinet having divested itself of the power to determine whether to grant concession to the Comptroller of Customs it could not lawfully exercise the power on terms and conditions not known to the Applicant. Further the Comptroller of Customs could not delegate his discretion to the Director General of Finance or to the Cabinet.

- [8] Learned Counsel also submitted that Mr. Thomas was not given an application to be heard by either the Comptroller of Customs or the Director General of Finance.
- [9] Learned Counsel further submitted that Mr. Thomas had a legitimate expectation that the application would be dealt with in accordance with the procedure set out in the Guidelines.
- [10] Learned Counsel referred the Court to the case of R v Secretary of State for the Home Department exp Fire Brigade Union [1995] 1A.C p. 513 and Lanader v Minister of Housing and Local Government [1970] 1WLR.1231.
- [11] Learned Counsel further submitted that there was no alternative redress. Sections 131 - 134 were not applicable. The sections only provide redress where the basis for the amount of duty paid is in dispute. It does not apply to a dispute concerning the interpretation of the scheme of duty free concession for returning citizens.

LAW AND ANALYSIS

- [12] The grounds upon which judicial review maybe sought were set out by Lord Diplock in Council of Civil Service Union v Minister for the Civil Service to include:
 - (a) illegality
 - (b) irrationality
 - (c) procedural impropriety

Lord Diplock explained the terms in the following manner:

"By "illegality" as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not par excellence is a justifiable question to be decided in the event of dispute by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what by now can be succinctly referred to as Wednesbury unreasonableness (see Associated Provincial Picture House Ltd v Wednesbury Corp. [1947] 2 ARE p.680. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

- [13] Mr. Thomas' application for judicial review is made on all of the grounds mentioned above.
- [14] On an application for leave to seek judicial review the test to be applied by the Court is the test as stated by the Privy Council in the case of Satnarine Sharmer v Browne-Antoine P.C. Appeal No. 75 of 2006. The Privy Council stated the test in the following terms:

"The ordinary rule now is that the Court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy: R v Legal Aid Board Exp. Hughes [1982] 5 Admin L. R623, 628; Fordham Judicial Review Handbook 4th ed. (2004) p.426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application... It is not enough that a case is potentially arguable. An applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen."

- [15] Applying the above mentioned test the Applicant must prove on a balance of probabilities:
 - (i) that he has an arguable ground for judicial review with a realistic prospect of success; and
 - (ii) the application is not subject to a discretionary bar such as delay or alternative remedy.

ARGUABLE GROUND WITH REALISTIC PROSPECT OF SUCCESS

- [16] The gravamen of the submission on behalf of Mr. Thomas is that the Comptroller of Customs did not observe the procedure in the Customs Guidelines and consider the application, he did not give Mr. Thomas a fair hearing and he unlawfully delegated his duty to determine the application to the Director General of Finance. The Director General of Finance had no legal authority to determine the application and he did not give Mr. Thomas a fair hearing.

- [17] Under Section 17 of the Customs Act 1999 Cabinet is empowered to remit the duty payable on goods on such terms and conditions as it sees fit. On 17th April 1996 in the exercise of its powers under the Customs Act Cabinet decided that citizens of St. Vincent who had resided outside of St. Vincent for 10 years or more and had returned to St. Vincent to reside permanently would be granted a waiver of 75% of the duty payable on a motor car or jeep owned by him/her. On the 5th June 1996 the Cabinet decided inter alia that the application for concession must be decided by the Comptroller of Customs. Guidelines were issued by the Comptroller of Customs to guide persons how to apply for the concession.
- [18] In view of Section 17 of the Customs Act and the decisions of Cabinet of 17th April 1996 and July 5th, 1996 in the issue whether the Comptroller could legally delegate the power given to him by the Cabinet to determine applications for duty concession to the Director General of Finance is an arguable ground with a reasonable prospect of success. Also whether the Director had any legal authority to determine whether or not the Applicant qualified for concession as a returning citizen is an arguable ground with a realistic prospect of success. There is nothing on the record to show that Cabinet delegated any authority to the Director General of Finance to determine applications for concession by returning citizens pursuant to the Guidelines.

DISCRETIONARY BARS

(a) Delay

- [19] The issue of delay is addressed in Rule 56.5 of CPR 2000 which reads as follows:
- “(1) In addition to any time limit imposed by any enactment, the judge may refuse leave or grant relief in any cause in which the judge considers that there has been unreasonable delay before making the application.
- (2) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to :-
- (a) be detrimental to good administration; or
 (b) cause substantial hardship to or substantial prejudice to the rights of any person.

[20] While the application was filed one year after the decisions complained of Mr. Thomas, Mr. Thomas' evidence is that he by way of appeal requested the Director General of Finance to reconsider the application. No written response was received. Having regard to the nature of this case, I find that the grant of leave would not in any way be detrimental to good administration in this case nor would it cause substantial hardship or prejudice to the rights of any person. I find that the delay in this case is not a bar to the grant of leave.

(b) **Alternative Remedy**

[21] At the hearing it was submitted by Learned Counsel for the Respondents that Mr. Thomas has an alternative remedy under Sections 131-134 of the Customs Act. I agree that where there is an alternative remedy which is appropriate the Court may decide not to grant leave, the alternative remedy should be pursued.

[22] Section 131 of the Customs Act reads:

"131.(1) where the amount of duty requested by an officer is disputed by the person required to pay the amount, that person shall pay the amount but they may before the expiration of three months from the date of payment, by notice in writing require the Comptroller to reconsider the amount of duty requested.

(2) A notice under subsection (1) shall state the grounds for disputing the amount of duty requested.

(3) The Comptroller after reconsidering the amount of duty requested and having taken into account the grounds contained in the notice may increase, decrease or confirm the amount and shall notify the person who paid the amount of his decision.

[23] The effect of Section 133 is that it makes provision for a person who is aggrieved by a decision under Section 131 to appeal to the Customs Appeal Commissioners. While Section 134 makes provision for either the Comptroller , or the Appellant to appeal the decision of the Customs Appeal Commissioners to the High Court on a point of law, or mixed fact and law and a further appeal to the Court of Appeal.

- [24] Sections 131-134 deals with persons who have been required to pay duty on items imported into Saint Vincent and they dispute the amount of duty requested by the Customs Officer. This is not the situation in the present case. In this case, Mr. Thomas is a person who made application to qualify for exemption under the Returning Nationals Customs Exemption Programme. I find that Sections 131-134 do not provide an alternative remedy to the Applicant.
- [25] In view of the above I find that Mr. Thomas has shown that he has an arguable ground with a realistic prospect of success and the discretionary bars of delay and alternative remedy are not applicable to his case. I will therefore grant leave to Mr. Thomas to seek judicial review of the decision of the Comptroller of Customs and the Director General of Finance.
- [26] IT IS ORDERED:
- (a) That leave is hereby granted to the Applicant to file and serve a claim for judicial review within fourteen (14) days hereof on the grounds:
 - (i) Judicial Review of the decision of the Comptroller of Customs of the 27th day of March 2007 refusing to deal with the application of the Applicant for duty free concession for returning nationals on the ground that such decision is unreasonable, irrational and procedurally improper in that it was arrived at without due consideration of the Applicant's claim in accordance with the declared policies and guidelines of the Customs and Excise Department.
 - (ii) Judicial Review of the decision of the Director General of Finance of the 5th day of June, 2007 denying the Applicant the duty free concessions for returning nationals on the ground that such decision is unreasonable, irrational and was procedurally improper in that it was arrived at without due consideration of the Applicant's claim in accordance with the declared policies and guidelines of the Customs and Excise Department.

- (b) The first hearing shall take place on the 22nd day of November, 2010.
- (c) The Respondents shall pay the Applicant cost in the sum of \$1000.00



Gertel Thom

HIGH COURT JUDGE