CL 17/2018

IN THE SUPREME COURT
OF THE TURKS AND CAICOS ISLANDS

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN

And

1. THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS
2. THE TURKS AND CAICOS ISLANDS WORK PERMIT BOARD – ZONE 2
3. THE TURKS AND CAICOS ISLANDS IMMIGRATION APPEAL TRIBUNAL

Respondents

Ex parte (1) ANTHONY STEPHEN GRUCHOT, (2) CLAIRE ELIZABETH McAVINCHEY, and (3) GRAHAM THOMPSON & CO. (A FIRM)

Applicants

BEFORE THE CHIEF JUSTICE, THE HON. MRS. JUSTICE RAMSAY-HALE
Mr. Stephen Wilson QC for the 1st and 2nd Applicants and Mr. Tony Gruchot for the 3rd Applicant
Ms. Clemar Hippolyte for the Respondents
Heard on the 9th May 2018

JUDGMENT

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1. The Applicants' application for judicial review of the decision of the 3rd Respondent, the Immigration Appeals Tribunal, ("the Tribunal") made at the meeting of the Tribunal held on 24 January 2018 to uphold the decision of the 2nd Respondent, the Work Permit Board - Zone 2 ("the Board") to refuse the Applicants' applications to renew their work permits each for a period of 4 years, was heard on the 19 May 2018 and the relief sought by the Applicant was granted for reasons which the Court undertook to produce in writing. These are the reasons.

2. The Immigration Ordinance provides that, in respect of skilled workers such as the Applicants, the first of whom is an Attorney-at-Law admitted to the Turks and Caicos Islands Bar and the second a Solicitor admitted to the Roll of Solicitors of Ireland, the Board has a discretion to issue work permits for such period not exceeding five years as the Board may determine.[1]

3. The 1st and 2nd Applicants each sought to renew their work permits for 4 years but the Board refused the applications, granting each applicant a renewal for one year only. No reason was given by the Board for its decision. The Applicants subsequently appealed to the Tribunal which

[1] Section 24 Immigration Ordinance and Reg 43 of the Immigration Regulations

upheld the decision of the Board on the ground that "*work permits are currently being issued for no more than one year at a time.*"[2]

4. In an affidavit sworn on behalf of the Respondents, Mrs. Susan Malcolm, Permanent Secretary in the Ministry of Border Control, sought to explain the genesis of this blanket policy of issuing work permits for no more than a year at a time, which had been applied by the Board and the Tribunal. It was her evidence that there is currently "*widespread circulation of fraudulent paper Work Permits... and almost every aspect of the process in the issuance of a work permit has been compromised*"[3] and that, "*in an effort to rid the market of the compromised documents*", a decision had been made to replace paper permits with plastic cards. Having considered and discarded several methods for transitioning from paper to plastic, it was determined that on expiry and renewal of every work permit in 2018, the new cards would be issued. It was felt that this could not be achieved within the year if the Board continued to issue paper permits for up to 5 years, "*so a ministerial directive was issued explaining to the Board the need to allow transition to the plastic cards and that work permits should only be issued for a one-year period*."[4]

5. She accepted that this policy directive was never published.

GROUNDS OF REVIEW
Illegality

6. Mr. Wilson QC submitted that, as a consequence of the Directive, the Board and the Tribunal adopted a blanket policy to the grant of all work permits for one year which was inconsistent with the statutory regime and unlawful as the applications were not then considered on their merits. Further, as the new policy was not published, the Applicants were denied the right to make representations to the Board.

7. In support of his submissions, Mr. Wilson relied on the case of *R (on the application of Lumba) v Secretary of State for the Home Department; R (on the application of Mighty) v Secretary of State for the Home Department* [2011] 4 All ER 1. In that case, over one thousand Foreign National Prisoners were released from prison before consideration was given to the question of whether they should be deported. To address this, the Secretary of State adopted a new - unpublished - policy which provided for the detention of all Foreign National Prisoners. On a challenge to the policy by two detainees, the Supreme Court held that *"a policy must not be a blanket policy admitting of no exceptions; if unpublished it must not be inconsistent with any published policy; and it should be published if it would inform discretionary decisions in respect of which the potential object of those decisions had a right to make representation. ... The failure to publish the detention policies meant that relevant representations could not be made. Accordingly the policies applied to L and M had been unlawful."*[5]

8. In response, Ms. Hippolyte submitted that it was within the Minister's purview to implement a policy which he believed to be both urgent and necessary as the presence of a large number of foreign nationals within the Islands in possession of fraudulent immigration documents was

[2] Exhibit ASG1 to Affidavit of Anthony Stephen Gruchot filed 20 February 2018
[3] Paragraph 8 of Susan Malcolm's affidavit
[4] Paras 11 and 12 of Susan Malcolm's affidavit.
[5] Headnote, [2011] 4 All ER at pages 2 -3

having a profoundly negative impact on the islands.[6] Counsel submitted that the Court ought to engage in a balancing exercise to weigh the rights of the Applicants against the wider public interest and to find that the public interest in safeguarding against an influx of foreign nationals not subject to Immigration control outweighs the interest of the Applicants to be notified of the policy. She submits, further, that even if on the merits of the application the Court finds that the Applicants had a legitimate expectation to have their work permit renewed for more than one year, the Government is entitled to frustrate that expectation.

DISCUSSION

9. While I accept that it is within the Executive's remit to implement policy to govern its processes, the authorities are clear that *"(t)he rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. "*[7] This would then allow a person affected to advocate for why a policy should or should not apply to him.

10. Lord Dyson SCJ in his opinion in *Lumba* stated the law this way:

"(26) … a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see Wade and Forsyth Administrative Law (10th edn, 2009) p 316…

"(35) The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see Findlay v Secretary of State for the Home Dept [1984] 3 All ER 801 at 830… There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In R (on the application of Anufrijeva) v Secretary of State for the Home Dept. [2003] UKHL 36 at [26], [2003] 3 All ER 827 at [26], [2004] 1 AC 604, Lord Steyn said:

> *'Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice.'*

"(38) … What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made."

11. This means that the Respondents must follow their published policy unless they have good reason not to do so and if a new policy is adopted it must be published to allow a person affected by it to make representations as to why it should not be applied to him or her before a decision is made.

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[6] Paragraph 8 of Susan Malcolm's affidavit

[7] Dyson SCJ at para 34

12. In the case at Bar, I am not persuaded that there was any urgency requiring the implementation of this policy without publishing the fact that the policy with respect to the grant of multi-year permits had changed. I can readily accept that there is, as Mrs. Malcolm says, persistent and pervasive fraud affecting the issuance of work permits but it is not new and it does not justify the implementation of an unpublished policy that fetters the discretion of the relevant decision-makers and denies the rights of applicants for work permits from making representations as to why the policy should not be applied to them.

13. The policy, being a blanket policy, was unlawful as it allowed no exceptions. It was unpublished which meant that representations could not be made by the Applicants. The Board improperly fettered its discretion when considering the Applicants' applications for renewal of their work permits by adopting the policy of issuing permits for one year only. The error was compounded when the Tribunal failed to consider the merits of the Applicants' appeal but instead determined the appeal on the basis of the policy.

14. The decision of the Tribunal is therefore quashed and the Applicants' appeals are remitted to the Tribunal for reconsideration and the Tribunal is to direct the Board to consider the application in accordance with section 37 of the Immigration Ordinance 2015 and Regulation 43 of the Immigration Regulations (Legal Notice 28 of 2016) made under section 111 of the Immigration Ordinance.

15. Costs follow the event and the Respondents shall pay the Applicants' costs, such costs to be taxed if not agreed.

DATED THIS 4TH DAY OF JUNE, 2018

CHIEF JUSTICE