

(1)

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 of 1989

BETWEEN:

OMAR WALLACE HODGE - Appellant

and

1. JOHN MARK AMBROSE HERDMAN
2. HAMILTON LAVITY STOUTT - Respondents

Before: The Honourable Sir Lancelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Byron (Acting)

Appearances: Dr. Ramsahoye, O.C., and Mr. G. Farrara for the Appellant
Dr. Lloyd Barnett and Attorney General Atterbury for the Respondent

1990: June 25, 26,
1991: Jan. 14.

JUDGMENT

BYRON, J.A. (Acting)

This appeal is from the judgment of Matthew J. dismissing an action brought by the appellant for declaratory and other relief for the revocation of his appointment as a Minister of Government. In the trial the only witness was the appellant himself and so there was no dispute on the facts

The episode began when Honourable Conrad Maduro a member of Parliament made statements in a radio broadcast which were reported in a local newspaper "The Island Sun" on January 23, 1988 alleging the payment of bribes to top Government officials.

On or about 29th January, 1988 the Chief Minister, the Second Defendant announced that as a result of allegations about improprieties on the part of the appellant who was then the Deputy Chief Minister and Minister of Natural Resources and Labour he was requesting the setting up of a Commission of Inquiry to look into the matter.

The Governor, the First Defendant is empowered by the Commission of Inquiry Ordinance Chapter 212 to appoint Commissions of Inquiry.

/On 16th....

On 16th February, 1988 the official Gazette published the appointment made on 19th February, 1988 of Mr. Justice Charles A. Ross as a one-man Commission to inquire into matters related to the issue of a cheque in the amount of \$5,000.00 made by Peter Island Hotel in favour of Omar Hodge dated 14th December, 1987 and to report the findings to the Governor making such recommendations as seem fit.

The Commissioner held sittings between February 24 and March 4 and on 10th March, 1988 addressed his report to the Governor, the First Defendant.

The Commissioner's report included finding that the appellant had asked one Mr. Brian Webb, General Manager of Peter Island Hotel whether the latter could do him a favour, and then falsely represented to Mr. Webb that he and the Chief Minister had purchased Christmas gifts for their constituents to an amount of \$35,000 which they had expected to be paid from Government funds, but this had not happened and that they were going to friends and supporters to try and raise the money to pay the bill.

After finding that Mr. Webb issued the cheque under those circumstances the Commissioner stated in his report:

"There has been serious misconduct on the part of a Minister who has enriched himself by his false representation and has also attempted to implicate the Chief Minister whose name was apparently thrown in to add weight to his request for a donation. Such conduct is quite reprehensible and my first recommendation must therefore be that the Minister concerned should be relieved of his Ministerial responsibility without delay."

Events moved rapidly after that.

On 11th March, 1988 the appellant and the Chief Minister spoke to each other about the Report and during the conversation the Chief Minister said "I went through the report and it is very adverse. I am suggesting to you to temporarily resign your position as Minister and leave the rest to me". The appellant replied "No Sir, I have done nothing wrong, nothing illegal and I will not resign". The Chief Minister then told the appellant that the Governor would like to see him the following morning.

On 12th March, 1988 about 9.00 a.m. the appellant met the Governor and during their meeting the Governor told the appellant that the Ross Report had bad news for him and asked him to resign. The appellant refused to resign.

/On 14th.....

On 14th March, 1988 during a breakfast meeting at the Long Bay Restaurant between the appellant and the Chief Minister the Chief Minister again asked the appellant to resign temporarily and when the appellant refused to do so the Chief Minister said "you leave me no choice".

The Virgin Islands (Constitution) Order 1976 section 16(4) (b) reads as follows:

"A Minister other than the Chief Minister shall also vacate his office if his appointment is revoked by the Governor, acting in accordance with the advice of the Chief Minister, by instrument under the public seal."

Section 7(6):

"When the Governor is directed by this Order to exercise any function in accordance with the advice of or after consultation with, any person or authority, the question whether he has so exercised that function shall not be inquired into in any Court."

On 16th March, 1988 at approximately 10.30 a.m. a police officer served the appellant with a document under the Public Seal issued by the Governor revoking his appointment as a Minister.

The Notice of Appeal contained some eight grounds of appeal. It is however unnecessary to recite them or any of them as Counsel for the appellant in his argument before the Court raised only one issue which could have been related, though distantly, to one of the grounds in his Notice of Appeal.

He stated his proposition in these terms:

"The main issue is whether the exercise of a power or authority granted by the Constitution is subject to judicial control in the same way as the exercise of a power and authority granted by other statutes is subject to judicial control and whether there was illegality or procedural impropriety in the exercise of the Governor's power to revoke the appointment of a Minister in the events which occurred so as to render the exercise of the power the subject of judicial review."

He argued that Section 16(4) (b) contemplates that in tendering advice to the Governor the Chief Minister must exercise his own deliberate judgment and that the establishment of the Commission to enquire into and make recommendations wrongfully interposed a non Constitutional functionary in the decision making process. He argued that the appointment of the Commission of Inquiry resulted in a usurpation of the function of the Governor and the Chief Minister in the decision making

/process....

process to remove a Minister.

Counsel for Respondent in his response submitted that

(1) Legal presumptions and the evidence adduced required the Court to find that the Chief Minister had advised the Governor to revoke the appointment of the appellant and

(2) the exercise of executive power granted by statute is not subject to judicial review unless expressly or by implication the power should be exercised in accordance with some prescribed rules or procedures, and no such rules or procedures are laid down with regard to section 16(4) (b).

Cases referred to in Appellant's argument:

Braygate v Inner London Education Authority (1989) 2 All E.R. 417

In this case an Education Authority removed members of the Governing Body of Voluntary Schools it maintained who had failed to support its policy in their voting at meetings. The Authority acted under section 21(i) of the Education Act 1944 which prescribed that a Governor "shall be removable by the authority by whom he was appointed". In giving the decision of the House of Lords rejecting the removal as an unlawful exercise of its power Lord Bridge of Harwich said at 421:

"The true view in my opinion, is that to allow removal in any case of non-compliant governors on the grounds of their non-compliance with the wishes of the authority is inevitably to allow a usurpation of the governors' independent function, which, on the true construction of the 1944 Act, is an unlawful exercise of the power conferred by section 21."

With respect to Counsel I did not think that the issues in this case were sufficiently similar to be of any assistance.

Anisminic v Foreign Compensation Commission (1969) 2 WLR 163

was relied on to show that the question whether there was a defect in the process by which the exercise of executive power was exercised was a justiciable issue.

Lord Reid at 170 expressed the point in this way:

"But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity."

/This case....

This case also pointed out that the scope of the authority granted must be determined by the relevant statutory provisions and the nature of the subject matter. This was expressed by Lord Wilberforce in this way:

(1969 1 All E.R. 243:

"In every case, whatever the character of the tribunal, however wide the range of questions remitted to it, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute; at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited.

The question, what is the tribunal's proper area, is one which it has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality, or unquestionability on its decisions. These clauses in their nature can only relate to decisions given within the field of operation entrusted to the tribunal."

Council of Civil Service Unions v Minister for the Civil Service

(1984) 3 WLR 1174:

The House of Lords supported the contention that powers exercised by a tribunal set up under the Royal prerogative are subject to judicial review.

Judicial Review was defined by Lord Roskil at 1199:

"Judicial review, as my noble and learned friend Lord Brightman stated in *Chief Constable of the North Wales Police v Evans* (1982) 1 WLR 1155 at 1174 is not an appeal from a decision, but a review of the process in which the decision was made."

Lord Diplock in his speech classified under three heads the grounds upon which administrative action is subject to contest by judicial review namely, illegality, irrationality and procedural impropriety.

Counsel for the appellant urged that in this case there was illegality and procedural impropriety.

Lord Diplock's definition of these were at p. 1197:

"By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law regulating his decision making process and must give effect to it."

And

"I have described the third head as 'procedural impropriety' rather than failure to observe basic

/rules of.....

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 when such failure does not involve any denial of natural justice."

These cases formed the basis for Counsel's rather ingenious argument that since the Commission of Inquiry Ordinance required the Governor to appoint a Commission of Inquiry on the advice of the Executive Council the procedure laid down in section 16(4)(b) of the Constitution was not followed, that both the Governor and the Chief Minister allowed or caused the Commission of Inquiry - which has no status in the relevant provisions of the Constitution - to intrude in the decision making process and usurp the duty of the Chief Minister to use his own deliberate judgment to advise the Governor on the revocation.

were:

If this argument/to succeed however it would necessarily involve the logically implausible conclusion that a decision or opinion arrived at or held by the Chief Minister is not his own if it is derived from or influenced by the advice of or consultation with a third party.

In Hochoy v N.U.G.E. (1964) 7 WIR 174; T. & T. Reports Vol. xix 1966-69 p. 221, Court of Appeal of Trinidad & Tobago determined that the question whether the appointment by the Governor General of a Commission of Inquiry was justiciable and that the Governor General was a proper defendant in such an action.

Pierce in Hochoy (1966-69) T. & T. LR part 2, p. 297 the Court of Appeal of Trinidad & Tobago in dealing with the question whether it was competent to issue a writ of certiorari to remove the report of a Commission of Inquiry and to have it quashed said at p. 300:

"In our judgment however, the vital consideration is not whether action of any sort whatever may be taken upon the opinions or recommendations set forth in the report, but rather whether the inquiry by the Commissioners was merely administrative machinery for ascertaining information and opinions without determining the rights or the guilt or innocence of anyone. If it is merely administrative machinery, then it falls outside the scope of a judicial proceeding. There is abundance of authority we think in support of that proposition."

I think that this case supports the conclusion that neither the Chief Minister nor the Governor were bound by the findings or recommendations. When one looks at the evidence however I think it is very clear that the Chief Minister in fact accepted the findings and recommendations expressed in the report.

/Adeghenro.....

Adegbenro v Akintola (1963) 3 WLR 63 - Privy Council

Section 33(10) of the Constitution of Western Nigeria prescribed:

".....The Ministers of the Government of the Region shall hold office during the Governor's pleasure; provided that (a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly."

The Governor of Western Nigeria after receipt of a letter signed by 66 members of the House of Assembly which was composed of 124 members, stating that they no longer supported the Premier, removed him from office and appointed the appellant in his place. It had been argued that it was incompetent for the Governor to remove the Premier without a prior decision or vote on the floor of the House of Assembly that the Premier no longer commanded the support of a majority of the House.

Viscount Radcliff delivered judgment of Privy Council.

At p. 70:

"Where the Premier's office is concerned it is proviso (a) that limits the Governor's power to withdraw his pleasure constitutionally if by that process he is precluded from removing the Premier from office "unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly". By these words, therefore, the power of removal is at once recognized and conditioned - and since the condition of constitutional action has been reduced to the formula of these words for the purpose of the written Constitution it is their construction and nothing else that must determine the issue."

.....

"By the words they have employed in their formula "it appears to him" the judgment as to the support enjoyed by a Premier is left to the Governor's own assessment and there is no limitation as to the material on which he is to have his judgment or the contents to which he may ~~revoke~~ ^{revoke} for the purpose."

This case emphasises the importance of looking at the words of the Constitution as it is the meaning attributed to them which must determine the issue in this case.

The tenure of office of Ministers of Government is regulated by section 16 of the Constitution. Section 16(3) and (4) stipulate the circumstances under which a Minister shall vacate his office.

Under section 16(4) (b) the Chief Minister can cause a Minister to vacate his office by advising the Governor to revoke the appointment of /the Minister.

the Minister. There is no ambiguity or difficulty in the section.

It was generally conceded that there can be no question that the appointment of the Minister could be revoked by the Governor acting in accordance with the advice of the Chief Minister.

The issue in this appeal covers the very narrow issue as to whether the Governor by appointing the Commission of Inquiry used a procedure which was illegal and procedurally improper to replace the advice of the Chief Minister which was required by the Constitution.

It was argued that the result of this is that the Chief Minister did not advise on the revocation but the Governor revoked on the recommendation of the Commission which he appointed in consultation with the Executive Council thereby excluding the Chief Minister who was the appropriate constitutional authority from the decision making process.

In my view nothing in section 16 of the Constitution imposes any limit on the sources which could be employed to guide the Chief Minister in arriving at his decision to advise the Governor to revoke the appointment of a Minister of Government.

I would consider that a Chief Minister could if he wished consult with or take a decision of the Executive Council if there was concern as to whether a Minister of Government departed from Government policy in the conduct of his duties as Minister, or in a case where there was concern about his loyalty to the ruling party a decision of the party's executive body may also influence a Chief Minister, or he could respond to a suggestion from the Governor himself.

In a case where there has been an allegation of misconduct in public office both prudence and fair play would indicate that it is undesirable to take action without some investigation and without affording an opportunity for the allegations to be refuted or explained away.

I do not think that any reliance which a Chief Minister places on decisions, resolutions or findings and recommendations in any of the above situations is inconsistent with his duty to advise. The views expressed if adopted by the Chief Minister would not have replaced his opinion but may have shaped, influenced or reinforced it. The power to revoke the Minister's appointment conferred by section 16(4) (b) of the Constitution was exercised in the precise manner which the Constitution laid down. The Governor revoked the appointment in a document under the Public Seal and he did so in accordance with the advice of the Chief Minister and as ingeniously as the appellant's argument was presented, there was no factual basis to support any other conclusion..

/The instrument....

The instrument of revocation which was issued under the Public Seal by the Governor included the following recital:

"And whereas the Chief Minister has advised me that the appointment of the Honourable Omar Wallace Hodde as a Minister should be revoked."

The evidence of the appellant described the conversations he had with the Chief Minister and the only conclusion that seems to flow from that evidence is that the Chief Minister unequivocally communicated to the appellant that if he did not resign temporarily he would leave the Chief Minister with no choice but to have him removed from office. In his evidence, the appellant explained the Chief Minister's course of conduct and then concluded:

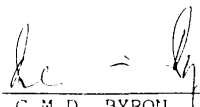
"All of these led me to the opinion that he was going to so advise the Governor."

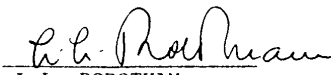
The Chief Minister's announcement on 29th January, 1988 supports the conclusion that even then he was entertaining the view that the appellant may have misconducted himself in his public office.

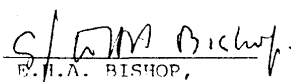
The legal presumption which section 7(6) of the Constitution creates reinforces the position absolutely, because it prescribes that the question whether the Governor has exercised his function in accordance with the advice of the Chief Minister cannot be inquired into in any Court.

I think that both the facts and the legal presumptions point unwaveringly to the conclusion that the Governor revoked the appointment of the Minister in accordance with the advice of the Chief Minister.

I would dismiss the appeal with costs.


C.M.D. BYRON,
Justice of Appeal (Acting)


L.L. ROBOTHAM,
Chief Justice


E.H.A. BISHOP,
Justice of Appeal