IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE COLONY OF

MONTSERRAT

(Civil)

CASE NO: MNIHCV2015/0017

BETWEEN:

DOUGLAS ANDERSON — Applicant

AND

HON ATTORNEY GENERAL
CHIEF IMMIGRATION OFFICER — Respondents

Appearances:

Mr. Jean Kelsick for the Applicant
MS Karen Reid for the Respondents

2015: June 30
2015: July 24

Judgment

[1] **Redhead, J. (Ag):** The Applicant Douglas Anderson on April 21, 2015 filed an Application for Leave to apply for Judicial Review of the following:

(1) The 2nd Respondent's determination on 24th February 2014 pursuant to Section 5(C) of the Immigration Act, Cap 301 (of the Act) that the Applicant is a prohibited immigrant liable to deportation.

(2) The 2nd Respondent's subsequent deportation of the Applicant from Montserrat on 26th March 2014

(3) The 2nd Respondent's refusal to signify in writing that he will not prevent the Applicant from entering Montserrat, despite the ruling of the Court of Appeal made on 27th November 2014 setting aside a decision of the Magistrate's Court delivered on 26th March 2014 confirming the 2nd Respondent's determination that the Applicant is a prohibited immigrant.

(4) The Applicant is an American Citizen who first took up permanent residence in Montserrat in 2004/2005. He owns a dwelling house at Olveston, Montserrat and vacant land at Drummonds, Montserrat.

(5) The 1st Respondent is the Attorney General and is joined as a party to this Application as the Crown's Legal representative and because the Applicant intends, if this application is granted to seek constitutional and other relief in his claim.

[2] The Second Respondent as the Commissioner of Police has responsibility for all Immigration matters and is the party who deported the Applicant from Montserrat.

[3] The grounds of the Application are as follows:

(a) The Second Respondent's said determination is null and void ultra vires the provisions of the Act and was arrived at in bad faith in that in breach of Section 5(C) thereof, in arriving at his decision, the second Respondent took into consideration matters that were irrelevant and prejudicial thereby rendering his determination bias, unfair, irrational, unreasonable, ultra vires.

(b) As the said determination is null and void and was arrived at in bad faith, the Applicant's subsequent deportation from Montserrat was illegal.

(c) The second Respondent's refusal to signify in writing that he will not prevent the Applicant from entering Montserrat is in contravention of a ruling of the Court of Appeal made on 27th November 2014 setting aside a decision of the Magistrate's Court delivered on 26th March 2014 confirming the Second Respondent's determination that the Applicant is a prohibited immigrant.

(d) Further or in the alternative the Second Respondent's refusal is manifestly unreasonable in that the Applicant has a right to know in advance of travelling to

Montserrat whether or not he will be granted entry there by the Second Respondent thereby avoiding loss and financial hardship of travelling to and from Montserrat if entry is denied.

(e) Further or the alternative the 2nd Respondent's said refusal demonstrates bad faith on his part and is biased, unfair irrational, illegal, unreasonable and in breach of the Applicant's legitimate expectations.

[4] The relief sought by the Applicant, if he is granted leave to apply for Judicial Review is as follows:

(i) A Declaration that the Second Respondent's said determination is null and void and ultra vires the provisions of that Act:

(ii) An order quashing the said determination.

(iii) An order that the Second Respondent's refusal to signify in writing that he will not prevent the Applicant from entering Montserrat is in breach of the ruling of the Court of Appeal made on 27th November 2014. The rules of fairness and the Applicant's legitimate expectations are unfair, irrational, illegal and unreasonable.

(iv) A Declaration that the Applicant is entitled to enter Montserrat and reside thereon unhindered by the Second Respondent.

(v) An order that the Second Respondent do forthwith permit the Applicant to enter Montserrat and reside therein unhindered by him.

(vi) An order that the Respondents pay to the Applicant damages and / or compensation both general and exemplary for the Second Respondent's said determination, his deportation of the Applicant from Montserrat, his refusal to signify in writing that the Applicant will be allowed to enter Montserrat, the emotional distress and embarrassment suffered by the Applicant and the financial loss and hardship incurred by him as a consequence of having to travel to and from Montserrat and being prevented from occupying his said dwelling house.

[5] I have at the forefront of my mind that in this exercise, I am not to engage on a trial but to determine whether there is an arguable ground for judicial review, having a realistic

chance of success. See The Hon. Satnarine Sharma v Carla Browne-Antoine[1]. "The Governing principles at paragraph 14(4) as 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..."

[6] Learned Counsel for the Applicant Mr. Kelsick in his written submission contends that the Applicant was deported by the 2nd Respondent on 20th March, 2014. The Second Respondent's refusal to signify in writing that he will not prevent the Applicant from entering Montserrat, despite a ruling of the Court of Appeal made 27th November 2014 setting aside a decision of the Magistrate Court delivered 26th March 2014 confirming the Second Respondent's determination that the Applicant is a prohibited immigrant.

[7] To put it another way, as I understand the issues, the Applicant was declared a prohibited immigrant by the Second Respondent. The Applicant appealed the decision to the Magistrate who upheld the determination of the Second Respondent. The Applicant appealed the Magistrate's decision to the Court of Appeal. On 27th November 2014, Court of Appeal set aside the decision of the Magistrate. This meant that the Applicant was no longer a prohibited immigrant.

[8] Learned Counsel contends in his written submission argued: "The Second Respondent's refusal to signify in writing that he will not prevent the Applicant from entering Montserrat despite the ruling of the Court of Appeal made on 27th November 2014, setting aside a decision of the Magistrate's Court delivered on 26th March 2014 confirming the Second Respondent's determination that the Applicant is a prohibited immigrant".

[9] The Applicant was deported as a prohibited immigrant. The Court of Appeal's decision is in effect that he was not a prohibited immigrant. In my opinion I do not see that the ruling places an onus on Second Respondent that he, the Second Respondent will not prevent the Applicant from entering Montserrat. As if the Second Respondent were to prevent the

[1] PLA 75 of 2006

Applicant from entering Montserrat on the basis that he was a prohibited immigrant, the Second Respondent would be in contempt of Court.

[10] Learned Counsel for the Applicant also contends:
Pursuant to the Affidavit of Charles Thompson filed on 15th May 2015, the Second Respondent conceded for the first time that as a result of the decision of the Court of Appeal on 27th November 2014, the Applicant is no longer a prohibited immigrant per the Second Respondent's determination of 24th February 2014. As a result of the Second Respondent's late concession, there is no longer the need to pursue the first matter.

[11] There can be no doubt in law that as a result of Court of Appeal's decision on 27th November 2014, the Applicant was no longer, from that date, a prohibited immigrant.

[12] The law is what it is and in my considered view there is no obligation placed on the Second Respondent in this regard to tell or inform the Applicant what his legal right is under the law, particularly when the applicant is represented by experienced Counsel. It is not a concession but rather a declaration of what the law is.

[13] Mr. Kelsick in his submission contends that the second matter is still very much alive as in both affidavits filed by the Applicant, he contends unequivocally that he was deported from Montserrat. This is in direct conflict with the claim made by Charles Thompson in his affidavit that the Applicant left Montserrat voluntarily.

[14] This issue argues Learned Counsel can only be resolved by the Court if leave is granted to the Applicant for Judicial review and the evidence in this critical issue is tested by cross-examination at a trial and amplified by disclosure/discovery. In support of this proposition, he referred to Next Level Engineering v Antigua Public Utilities Authority[2].

[15] The third issue identified by Learned Counsel for the Applicant i.e. the review of the Second Respondent's refusal to signify in writing that he will not prevent the Applicant from

[2] Antigua Civil Appeal 2008 paragraph 465 (per Rawlins JA)

entering Montserrat is also a live issue. While it is conceded that per Section 41 of the Immigration Act, the Applicant has an alternative remedy to judicial review if he is denied entry into Montserrat.

[16] Mr. Kelsick submits that exceptional circumstances exist which should persuade the Court to grant him leave for judicial review. In support of his submission Learned Counsel referred to the Privy Council: Harley Development Inc. v CIR[3].

[17] Mr. Kelsick Learned Counsel has identified nine exceptional circumstances

(a) The manner and unfairness of the Second Respondent's determination of 24th February 2014 and the extent of prejudicial and irrelevant matter taken into account by him in arriving at that determination.

The Court of Appeal says quite explicitly "**Having heard the submissions of Counsel for the Appellant and Counsel for the Respondent and bearing in mind Section 5(C) of the Immigration Act Chapter 30.01 of the Laws of Montserrat, is penal in nature and as such should be construed strictly:- The Court holds that Immigration Officer, Inspector Kirwan took into account irrelevant and prejudicial matters i.e. (a) The previous convictions of the Appellant other than the relevant conviction of the 9th of January 2014 for which the Appellant was imprisoned for a term of three months and (b) the Petition signed by twenty five (25) persons indicating that the Appellant's presence in Montserrat is detrimental to the safety and wellbeing of all residents, in arriving at his decision in declaring the Applicant a prohibited Immigrant contrary to Section (c) of the Act.**

For these reasons, we will allow the Appeal and set aside the Decision of the Magistrate Upholding the decision of the Immigration Officer declaring the Appellant a Prohibited Immigrant pursuant to Section 5(C) of the Act.

Cost to the Appellant in the sum of $1,500.00".

It is beyond doubt that this issue was litigated and pronounced upon by the Court of Appeal.

[3] 1 WLR 1996 727 at page 735 G.H

[18] Learned Counsel referred to the Second exceptional circumstance as

(b) The several breaches to date by the Second Respondent of the Provisions of the Immigration Act i.e. The Second Respondent's failure to answer a letter from the Applicant's Attorney-at-law dated 3rd March 2014 calling on him to honour Applicant's Statutory rights under the Act and then his failing to do so.

- Arresting the Applicant at the gate of the prison immediately upon his release.
- Refusing to bring the Applicant before the Learned Magistrate within a reasonable period of time so that the Applicant could apply for bail, necessitating the issuance of a warrant by the Learned Magistrate to the Second Respondent compelling him to bring the Applicant to court, where he was granted bail forthwith

(c) The Second Respondent's failure to comply with Section 21(2) of the Act

(d) The Second Respondent's failure to comply with Section 8 of the Immigration Regulations.

(e) Deporting the Applicant despite the fact that he had already informed the Magistrate through his Counsel that he intended to appeal the Learned Magistrate's dismissal of his appeal to the Court of Appeal.

(f) The intervention of the Governor of Montserrat, the content of his email dated 29th January 2015 and the inferences that can be drawn from it.

(g) The fact that the Applicant has been permanently resident in Montserrat since 2004 where he owns a dwelling house. This distinguishes him from a first time or occasional visitor to Montserrat who is not normally resident and does not own a dwelling house in Montserrat.

(h) The financial hardship placed on the Applicant namely (1) incurring additional legal expense if he has to pursue his remedies under Section 41 of the Act which is in addition to the legal expense already incurred by him (2) his additional living expenses due to his not able to occupy his dwelling house in Montserrat and (3) the cost of having to travel to and from Montserrat if he is denied entry, which is in addition to the travel expenses he incurred when he was deported.

(h) above in my view is highly speculative.

(i) The fact that the appeal process under Section 41 of the Act is nowhere near so convenient, beneficial and effectual as judicial review and that if the Applicant has to

appeal to the Court of Appeal, it could be a much slower process than judicial review, I do not accept this or any of the above as exceptional circumstances.

[19] Ms. Reid in her Skeleton submissions argues that insofar as the Applicant seeks to challenge the determination of the 24th February 2014 that the Applicant was a prohibited immigrant and the consequence that flowed from it, such an action would be an abuse of process as it amounts to mountain a collateral attack on a final decision already reached by the Court of Appeal. The Court of Appeal has already considered that the Immigration Officer took into consideration irrelevant considerations making the determination and set aside the order of the Learned Magistrate. This issue is therefore res judicata and the Applicant is estopped from issuing fresh proceedings in respect of it.

[20] In Hunter v Chief Constable of West Midlands Police[4] - The House of Lords held that initiation of proceedings in a Court of Justice for the purpose of mounting a collateral attack on a final decision adverse to the intending plaintiff reached by a court of competent jurisdiction in previous proceedings in which the plaintiff had a full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of the court.

[21] Learned Counsel contends further that decision affirming the determination that the Appellant was a prohibited immigrant was already set aside by the Court of Appeal. So the determination that the Applicant was a prohibited Immigrant no longer exists. There is no such determination capable of review.

[22] Ms. Reid argued that insofar as the claim seeks to challenge the refusal to confirm that the Applicant will be allowed entry into the Territory should he arrive, that challenge is premature. She contends that the Applicant, like all immigrants, does not enjoy an automatic right of entry into the Territory. He is not the holder of a permanent resident permit or an automatic resident. He does not belong to the Territory. He is not the holder of a permanent resident permit or an economic resident. He does not belong to the Territory, nor does he fall within any Class of persons under the Act entitled to enter into the

[4] 1981 3 All ER 727

Territory. He is an ordinary immigrant whose entry is determined each time he attempts to enter the Territory.

[23] Learned Counsel for the Respondents argued that the power/discretion to determine whether to allow an immigrant entry into the Territory falls to be made when the immigrant arrives in the Territory. Upon entry, the immigrant must meet the requirements of Sections 16, 17, 18 and other sections of the Act and only then that the Immigration Officer determines whether to allow entry, and if so, for how long under Section 22. These periods are ordinarily not longer than 6 months, unless extended by the Chief Immigration Officer or the Governor [S.22 (3)].

[24] Finally on this aspect of the case, Learned Counsel for the Respondents contends that the reliefs sought by the Applicant seeks various orders essentially ordering that the Applicant be granted entry into Montserrat and incredibly to remain indefinitely with no "hindrance" from the Chief Immigration Officer. See Chief Constable v Evans[5]. She argues that the Court is precluded from making such orders as they would amount to an unlawful usurpation by the Court of the powers of the Immigration Authorities, from exercising its powers/discretion under the Act and making such determination by itself usurping the powers of the Immigration Authorities and deciding that a particular immigrant ought to be allowed entry.

[25] Ms. Reid contends that it is permissible under the Act, to simply allow an immigrant to enter Montserrat and to reside there indefinitely. As such it is not an order that can be lawfully made. An order cannot be made allowing the Applicant to reside in Montserrat indefinitely as the decision whether to issue to any person a permit for residence is within the authority/discretion of the Governor acting on the advice of Cabinet.

[26] Learned Counsel for the Respondents contends that Section 41 of the Immigration Act provides an alternative remedy. She argues that where a Statute lays down a Comprehensive appeals procedure against an administrative decision it will only be in

[5] 1982 1 WLR 1155

exceptional circumstances, typically an abuse of power, when the court will entertain an application for judicial review of a decision which has not been appealed. Harley Development v Commissioner of Inland Revenue.[6]

[27] I am entirely in agreement with contentions expressed by Learned Counsel for the Respondents above. In addition I have held that there are no special circumstances in this case as adumbrated by Mr. Kelsick.

[28] Learned Counsel for the Applicant contends as stated in "7" above, if it is more convenient to bring a matter on application for judicial review rather than engaging Section 41 of the Act, this in my opinion could not be special circumstance.

[29] In view of the foregoing the Application for Judicial review is denied.

[30] No Order as to costs

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Albert Redhead

High Court Judge

[6] (1996) 1 WLR 727