In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 172 & 173

BETWEEN:

(1) MARIA CECILIA AGUIAR
(2) ASHLEY SILVIA AGUIAR

Appellants

-and-

CHIEF IMMIGRATION OFFICER

Respondent

Before: **Chief Justice Hargun**

Appearances: Mr Peter Sanderson of Benedek Lewin Limited, for the Appellants;

Mrs Lauren Sadler-Best, Crown Counsel, Attorney General's Chambers for the Respondent.

Date of Hearing: **18 October 2018**

Date of Judgment: **20 November 2018**

JUDGMENT

Whether working without remuneration in order to obtain practical experience is in breach of section 57 of Bermuda Immigration and Protection Act; whether any discretion as to quantum in imposing a penalty under section 71A (3); the scope of discretion in imposing penalty under section 71A(1); role of the Court in reviewing a decision of the Chief Immigration Officer

Introduction

1. These are two appeals against the Decision Notices issued on 24 November, 2017 and 10 November, 2017 by the Respondent against Maria Aguiar ('MA") and Ashley Aguiar ("AA") respectively, the Appellants, pursuant to section 71B(3) of the Bermuda Immigration and Protection Act ("the Act"). The Decision Notice in respect of MA imposed a civil penalty of $15,000 for three violations of section 71A(1)(c) of the Act. The violations consisted of working without a work permit for Beatrice Signor, Camille Kampouris and Marion Paley. The Decision Notice in relation to AA imposed a civil penalty of $5000 for violation of section 71A(1)(c) of the Act. The violation consisted of working at Tranquil Hair and Beauty without a work permit. The appeals are by way of Notice of Originating Motions both dated 22 May, 2018.The appeals are brought pursuant to section 71C of the Act. The appeals raise certain common issues relating to the civil penalty regime under the Act.

Statutory Scheme

2. Regulation of engagement in gainful occupation in Bermuda is governed by Part V of the Act. Section 60 provides that no person (a) other than a person who for the time being possesses Bermudian status; or (b) other than a person who for the time being is a special category person; or (c) other than a person who for the time being has spouse's employment rights; or (cc) other than a permanent resident; or (d) other than a person in respect of whom the requirements of subsection (6) are satisfied, shall, while in Bermuda, engage in any gainful occupation without the specific permission of the Minister.

3. Section 57(2) defines what is meant by "gainful occupation". It provides that to "engage in gainful occupation" means (a) to take and continue in any employment; or (b) to practise any profession; or (c) to carry on any trade; or (d) to engage in local business, where such employment, profession, trade or local business is taken or continued, or is practised, carried on or engaged in, for reward, profit or gain.

4. Section 57(6) provides that for the purposes of section 57(2) any employment, profession, trade or local business shall be deemed to be taken or continued, practised, carried or engaged in, for reward, profit or gain if such employment, profession, trade or local business is ordinarily in Bermuda continued, practised carried on or engaged in for reward, profit or gain, notwithstanding that no reward, profit or gain be obtained or obtainable in the circumstances of the particular case.

5. Section71A to 71C introduce the power to impose penalties for work permit violations. Section 71A(1) provides that the Chief Immigration Officer may impose a civil penalty on a person who, in contravention of this Part engages in gainful occupation without a work permit. Section 71A(3) provides that the amount of the civil penalty imposed under this section shall be (a) $5000, for a first violation; or (b) $10,000, for a person's second or subsequent violation within a period of seven years beginning with the date of the first violation.

6. Section 71B sets out the procedure which the Chief Immigration Officer must follow in cases where the imposition of the civil penalty is considered appropriate. When the Chief Immigration Officer proposes to impose a civil penalty on a person, he must give that person a Warning Notice of the amount of the penalty; the reason for imposing the penalty; and the right to make representations within seven days of the date of the Warning Notice.

7. After considering any representations, the Chief Immigration Officer must decide, within seven days of the end of the period specified whether to impose a penalty. After considering the representations the Chief Immigration Officer must give the person a Decision Notice of his decision not to impose a penalty; or his decision to impose a penalty and setting out the amount of the penalty; the reasons for his decision; and the right to appeal to the Supreme Court within 21 days of the date of the decision notice is provided by section 71C of the Act.

Review of the decision of the Chief Immigration Officer by the Supreme Court

8. An appeal against the decision of the Chief Immigration Officer under section 71C is governed by order 55 of the Rules of the Supreme Court 1985. Order 55 (3)(1) provides that such an appeal shall be by way of rehearing and must be brought by an originating motion. This provision replicates the position relating to appeals from the Supreme Court to the Court of Appeal. An appeal by way of a rehearing indicates that the court considers (so far as may be relevant) the whole of the evidence given to the court or the tribunal below. The court does not rehear the witnesses who gave evidence below and the rehearing is limited to the review of the documents and the transcript of the proceedings before the tribunal appealed from.

9. As a general rule an appeal is unlikely to succeed from an order which was within the discretion of the judge to make unless it can be shown that he exercised his discretion under the mistake of law (*Evans v Bartlam* [1937] AC 473) or in disregard of the principle or under a misapprehension as to the facts or that he took into account irrelevant matters or failed to exercise his discretion or the conclusion which the judge reached in the exercise of his discretion was "outside the generous ambit within which a reasonable disagreement is possible" (*G v G* [1985] 1 WLR 647; and the Supreme Court Practice 1999 at 59/1/142). Counsel for the Appellants submits that these provisions must be modified when an appeal is from an administrative decision rather than from a judicial body. He relies upon *Allen & Hanburys Limited's (Salbutamol) Patent* [1987] RPC 327, where the Court of Appeal considered the issue of the function of the Patents Court on the hearing of an appeal from a decision of a hearing officer acting for the Comptroller. The Court of Appeal held that an appeal against the Comptroller, not being a legally trained person, and against a decision heard on the papers, was a full rehearing in which the Patent Court was entitled to substitute its own discretion for that of the Comptroller. Counsel argues that a decision of the Chief Immigration Officer is analogous, and that it is a decision by somebody with

unrivalled experience of dealing with work permit violations, but without a legal background.

10. *Allen & Hanburys* confirms that the hearing in the Patent Court from an appeal from the Comptroller was indeed a rehearing, and not merely a supervisory exercise. It confirms that circumstances may arise when the Patent Court is called upon to exercise fresh discretion in place of the discretion exercised by the Comptroller. However, *Allen & Hanburys* reconfirms that great weight must be attached to the discretionary decision of the Comptroller and the Court of Appeal did not quarrel with the views of Whitford J in the *Hoffman- La- Roche cases* [1973] RPC 587 and 601, at page 599 lines 37-40:

> "*It has already been pointed out in decisions given in this Tribunal that a decision in the Office or licence terms will not be interfered with unless it can be established that there has been some gross error in principle"*

And at page 620, lines 44-48:

> *"Once it has been determined at the Office that in the circumstances of some particular case there shall be one method of assessment of royalty, be it on a per kilo or percentage of selling price basis, then that decision should not be altered in this Tribunal unless quite plainly the result which has been arrived at is one which cannot be supported upon the facts in the case".*

11. In *Kenneth Dill Jr v The Chief Immigration Officer* [2016] SC (Bda) 95 Civ Hellman J noted at paragraph 29 that whilst the appeals from the Chief Immigration Officer are by way of rehearing "the Court will treat with respect any findings made by the [Chief Immigration Officer]".

12. In *Thobani v The Pharmaceutical Society of Great Britain* [1990] Lexis Citation 2690, a case cited in the Supreme Court Practice 1999 commentary on Order 55, Watkins LJ stated the position as follows:

"*The function of this court when reviewing a sentence of the Society, as has been said on many previous occasions, is not to impose its own view in substitution for a view taken by the committee unless it comes to the conclusion that the decision of the committee was plainly wrong or unless of course the committee has, in reaching its conclusion, misdirected itself for the reasons which I have already given.*

13. These authorities show that even in a case where the appeal is by way of a rehearing the decision of the tribunal below is entitled to a great weight and respect. However, that decision can be departed from and the appellate body can exercise its own discretion where it comes to the view that the decision of the tribunal below was, for whatever reason, plainly wrong.

Appeal relating to Maria Aguiar ("MA")

14. The Respondent received an anonymous tip about MA working illegally in May 2015. The Respondent investigated the matter and the witnesses were interviewed by the Immigration Department between August and November 2015.

15. In September 2015, MA admitted to Immigration Department that she had been working without a work permit as a cleaner. In summary, her evidence was that she had to work or her children would not be able to eat as her husband had made it clear to her that he expected her to buy groceries and pay bills. She felt that she was trapped at the hands of her abusive husband and had been reluctant to come forward and confess to the Immigration Department for fear that it may result in the deportation of her children from Bermuda.

16. On 6 November 2017, the Respondent issued a Warning Notice to MA warning her of the possibility of issuance of a civil penalty. The response to the Warning Notice was provided by MA's attorneys on her behalf, querying whether it would be in the public interest to penalise somebody who was working due to pressure from an abusive husband, the length of the time that has passed since the

investigation began, and the amount of the penalty for a person on a low income of a cleaner. Subsequently, a civil penalty was issued on 24 November 2017 in the sum of $15,000 on account of three violations.

17. In the Notice of Motion dated 22 May, 2018 three grounds of appeal are advanced:

    (1) It was unreasonable or disproportionate to impose a penalty when her reason for working without a work permit was on the demands of her husband who was abusive to her;

    (2) It was unreasonable or disproportionate to impose a penalty, given the delay between the initial investigation and the penalty being imposed; and

    (3) Further or alternatively, the amount of penalty imposed is excessive having regard to the circumstances of the case, mitigating factors, and her means.

Is the quantum of penalty fixed or discretionary?

18. In response to the plea for leniency the Respondent replies that the quantum of penalties levied under section 71A(3) is fixed and are not discretionary. On the other hand Counsel for the Appellants argue that section 71A sets out the amount of civil penalties, but fails to specify whether they are fixed or maximum penalties. He submits that, without clear language to the contrary, they should be construed as maximum penalties. Reliance is placed upon section 56 of the Criminal Code which provides that: *"except where otherwise expressly provided, in the construction of this Act or any other enactment… A person liable to pay a fine of any amount may be sentenced to pay a fine of any lesser amount".*

19. Appellants also rely upon the Court of Appeal decision in C*ox & Dillas v R* [2008] Bda LR 65 where the court dealt with the issue of minimum sentences of imprisonment.

20. As to the construction of section 71A the starting point is that it is dealing with a civil "penalty" and not a fine under a criminal statute. The statutory provision is in mandatory terms: it provides that the civil penalty imposed under this section "*shall be"* $5000 for the first violation and $10,000 for a second or subsequent violation. The statutory provision does not appear to give any discretion to the Chief Immigration Officer as to the amount of the penalty once the Chief Immigration Officer has determined that a penalty should be imposed.

21. The Court of Appeal decision in *Cox & Dillas v R* does not assist in construing the terms of section 71A of the Act. In that case the issue raised was whether the minimum sentence provisions for the criminal offence of having a knife ("any article which has a blade or is sharply pointed, except a folding pocket knife") in a public place was unconstitutional or inconsistent with the provisions regarding "Purpose and principles of sentencing" given statutory effect in Part IV of the Criminal Code Act 1907 as amended in 2001. Specifically, section 54 provided that: "*A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".* The Court of Appeal accepted that the requirement of a minimum sentence in section 351C(6) is subject to the fundamental principle that the sentence must be proportionate in the circumstances of the particular case, as specified in section 54. For this reason the Court of Appeal held that it is incumbent on the sentencing judge, in every case, to determine whether the prescribed minimum sentence would infringe the defendant's rights under section 54, taking into account both the statutory guidelines set out in section 55 and the minimum term requirement which, subject to section 54, itself has the force of law. The Court of Appeal held that the provisions so interpreted were not unconstitutional. The reasoning of the Court of Appeal in C*ox & Dillas* does not assist in construing the civil penalty provisions in section 71A of the Act.

22. In my judgment section 71A does not merely set out the maximum amount which may be levied as a penalty but lays down fixed penalties to be imposed in accordance with that section. As Hellman J explained in *Kenneth Dill Jr v The*

Chief Immigration Officer [2016] SC (Bda) 95 Civ at paragraph 41 the reference to a person's first violation in section 71A(3) is to a person being dealt with for a violation for the first time, even if on that occasion he or she is being dealt with for more than one violation. Thus, Hellman J held that had he found four separate penalties should be imposed upon the appellant, the appropriate amount would have been $20,000 (i.e. 4 X $5000) rather than $35,000 (i.e. 1 X $5000 and 3X $10,000). Hellman J's analysis was clearly based upon the assumption that the penalties in section 71A(3) were fixed amounts and not merely maximum amounts.

Discretion whether to impose a penalty

23. The scheme of section 71 envisages that the Chief Immigration Officer may, in the case of a relevant infringement of the Act, issue a Warning Notice with or without a penalty. Section 71A(1) provides that the Chief Immigration Officer *may* impose a civil penalty of the person who has contravened this part of the Act. Section 71B(3) provides that in the Decision Notice the Chief Immigration Officer must give the person notice in circumstances, inter alia, where the Chief Immigration Officer has decided not to impose a penalty.

24. An issue which arises in relation to the exercise of the discretion whether to impose a penalty is the identification of the relevant factors. Hellman J in *Kenneth Dill*, at paragraph 26, identified one such consideration as whether, if the contravention had been dealt with by way of a criminal charge, there would have been a defence under section 65. There are of course other relevant considerations which may affect the exercise of that discretion. In principle these factors may include whether a person has fully cooperated with the Immigration Department in its investigation; the personal circumstances which led the person to engage in gainful occupation without the requisite permission from the Minister; the ability or lack thereof of a person to pay a penalty; the effect of an imposition of a penalty on other members of that person's household; and the length of time which has elapsed since the commencement of the investigation by the

Immigration Department. The overriding consideration is whether the imposition of a particular penalty is reasonable and proportionate having regard to all the relevant considerations relating to the violation and at the relevant personal circumstances of the person who has engaged in gainful occupation without the consent of the Minister.

25. In a case where there are a number of violations one relevant factor the Chief Immigration Officer may take into account, in considering whether penalties should be imposed in relation to all the violations, is the total amount of the penalty which the relevant person would have to pay.

26. It appears from the Record that the Respondent did not fully appreciate the wide ambit of the discretion she had when considering whether to impose a penalty or not. In particular it does not appear that the Respondent fully appreciated that she may impose a penalty on some but not all the charges in order to arrive at a total penalty amount which was reasonable and proportionate having regard to all the relevant circumstances.

27. By way of an explanation the Respondent states that the calculation of the penalty was based on a previous case (Bella Bella Nail Salon) in which the Court provided guidance in cases where more than one breach of the law occurred. This was a reference to Hellman J's decision in *Kenneth Dill* where the learned judge referred to culpability as one of the factors to be taken into account. By way of explaining the total amount of the penalty the Respondent states that "*The value of the penalty is fixed by the Act at $5,000 for a person's first violation. For her three offences, the civil penalty of $15,000 was properly levied against the Appellant".*

28. In the Decision Notice dated 24 November, 2017 the Respondent, by way of an explanation, states that "*the amount of the penalty is not discretionary; the only discretion in regards to a civil penalty is whether the Chief Immigration Officer is minded to impose or not to impose a penalty. As Ms Aguiar worked for three*

different persons (and had work permits been applied for and approved, three work permits would have been issued to Ms Aguiar) hence the civil penalty of $15,000 has been levied".

29. In the circumstances it is open to the Court to consider afresh whether penalties should be imposed in relation to all three violations having regard to all the relevant circumstances. Counsel for MA urged the court to take into account that the reason for working was to feed her children; she was under pressure from an abusive husband; and the amount of $15,000 is grossly excessive compared with the mischief caused and the income of a cleaner. Counsel suggested (albeit there is no reference to it in the Record) that the penalty amount of $15,000 was the equivalent of six months wages paid to MA. Counsel also argued that there was no explanation why it took over two years from concluding the investigation in September 2015 to issuing a Warning Notice in November 2017. In the absence of a good explanation, counsel submitted, it was unjustifiable to impose a penalty given the circumstances and that a warning to comply would have been sufficient. On the other hand it is clear that MA was fully aware that to work without a work permit was unlawful and despite that she undertook such work with 3 separate employers.

30. Having regard to all the circumstances the Court considers a reasonable and proportionate result would be the imposition of the penalty in respect of one violation and a warning in relation to the other two violations. This would result in a penalty of $5000 being imposed upon MA instead of the $15,000 penalty imposed by the Respondent.

Appeal in relation to Ashley Aguiar ("AA")

31. By Decision Notice dated to 10 November 2017 the Respondent imposed a civil penalty on AA in the amount of $5000 under section 71A(c) for the violation of the Act in that she worked at the Tranquil Hair and Beauty ("the Salon") without a work permit contrary to section 60(1) of the Act.

32. AA appeals against the Respondent's decision to impose a penalty on the grounds that: (1) AA's actions, in styling hair gratuitously for family members and charitable events, does not amount to violation of the Act; (2) It was unreasonable or disproportionate to impose a penalty in such circumstances against a lifelong resident of Bermuda; (3) It was unreasonable or disproportionate to impose a penalty, given the delay between initial investigation and the penalty being imposed; and (4) The amount of penalty imposed is excessive with regard to the circumstances of the case, mitigating factors and AA's means.

33. The Respondent clearly took the view that AA's actions were in breach of the Act and in that regard she was influenced by the terms of section 57(6) which provides that the person may be in breach of the Act "*notwithstanding that no reward, profit or gain may be obtained or obtainable in the circumstances of the particular case".*

34. The issue whether AA's actions were in breach of the act requires closer examination and in that regard the following facts would appear to be relevant:
    (1) At the relevant time AA was a student at Berkeley Institute studying to become a hairdresser.
    (2) The owner of the Salon has known AA and her family since AA's childhood.
    (3) The owner of the Salon allowed AA to be in the Salon because she was studying to be a hairdresser and to allow her to gain experience as a hairdresser.
    (4) The arrangement was informal and unstructured without any obligation on the part of either party.
    (5) The owner of the Salon never treated AA as an employee of a business.
    (6) The owner of the Salon never paid AA for being at the Salon.
    (7) AA never charged any person for styling their hair.

(8) AA attended the Salon to gain practical experience. She first started attending the Salon as part of the day release arrangement from the Berkeley Institute.

(9) On occasion AA has helped to style her family and boyfriend's hair on a non-commercial basis.

35. Counsel for AA argues that these activities when taken as a whole do not amount to gainful occupation within the meaning of section 57(2). This issue requires careful consideration. In order to "*engage in gainful occupation"* a person has to come within section 57(2)(a) or (b) or (c) or (d) and in addition it has to be shown that the relevant employment, profession, trade or local business is taken or continued, or is practised, carried all or engaged in, for reward, profit or gain.

36. This unstructured informal arrangement to obtain practical experience would not appear to come within the meaning of "employment" within the meaning of section 57(2)(a). Ordinarily an employee is one who serves, in the sense that he puts himself and his labour at the disposal of another (his employer), in return for some remuneration in cash or in kind (*Harvey on Industrial Relations and Employment Law* at division AI [5]; *Daley v Allied Suppliers Ltd* [1983] IRLR 14 at paragraphs 21-22). The informal arrangement between the owner of the Salon and AA does not amount to the relationship of an employer and employee. Likewise, this unstructured informal arrangement to obtain practical experience would not appear to amount to the practice of a "profession"; or "carry on any trade" or "engage in local business".

37. The crucial fact in this regard is that AA was not engaged in the ordinary business of a hairstylist but was limited to the activities undertaken in order to gain practical experience. An essential feature of this arrangement was that it was carried out without "reward, profit or gain". Section 57(6) has limited scope to the facts of this case. Section 57(6) only applies if the relevant activity "*is ordinarily in Bermuda continued, practised and carried on or engaged in for reward, profit or gain"* but in this particular case no reward, profit or gain is obtained. The relevant activity here is the obtaining of practical experience as a hairstylist. The

gaining of unstructured practical experience as a hairstylist is not engaging in "*any employment profession, trade or local business"* which "*is ordinarily in Bermuda continued, practised and carried on or engaged in for reward profit or gain".*

38. In the circumstances the Court concludes that the informal, unstructured arrangement AA had with the owner of the Salon and her activities related to it did not amount to engaging in gainful occupation within the meaning of section 57(2) and as a result no permission was required under section 60(1) of the Act. As a result there was no relevant basis for imposing a penalty.

39. Counsel for AA also complains that even if there was a violation of the Act it was unreasonable and disproportionate to impose a penalty of $5000 in the circumstances of this case and a warning would have been sufficient. He relies on the facts that no payment was received by AA; the purpose of the activities complained of was for vocational/educational development; AA was born in Bermuda and vocational training must be available to all residents of Bermuda; AA was unaware that it was illegal to do unpaid work experience without a work permit; her hairstyling was done openly and published online as she did not believe she had anything to hide; and the mischief caused by AA styling hair for free would appear to be minimal and insignificant.

40. The consideration of this issue is unnecessary given that the court has already concluded that there was no breach of the Act. Given that this issue has been argued by counsel the Court can say that having regard to the circumstances of this case and particular the factors highlighted by AA's counsel the Court itself would not have imposed the penalty of $5000. It is likely that the Court would have considered that a warning would be sufficient and appropriate in the circumstances of this case. However, the Court recognises that the decision whether to impose a penalty is left to the discretion of the Respondent and this is not a case where the Court would have interfered with the Respondent's discretionary decision to impose a penalty on AA.

Summary

41. In relation to the appeal by Maria Aguiar the Respondent's decision to impose a penalty in the sum of $15,000 is set aside and a penalty in the amount of $5000 is substituted in its place.

42. In relation to the appeal by Ashley Aguiar the Respondent's decision to impose a penalty in the sum of $5000 is set aside.

43. I shall hear counsel in relation to costs.

Dated the 20 of November 2018.

_____

NARINDER K HARGUN
Chief Justice