Case Ref: SC/CIV/06/20

IN THE SUPREME COURT
OF THE FALKLAND ISLANDS

Courts and Tribunal Service
Stanley
Falkland Islands

Date: 14th December 2020

Before:

THE HONOURABLE JAMES LEWIS QC
(CHIEF JUSTICE OF THE FALKLAND ISLANDS)

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BETWEEN:

THE QUEEN

(On the Application of)

KRISTEN LEE SCOTT FOWLER

Applicant

-and-

THE DIRECTOR OF EMERGENCY SERVICES AND ISLAND SECURITY FOR THE FALKLAND ISLANDS

-and-

THE GOVERNOR IN COUNCIL

Respondents

Ms Rebecca Chapman for the Applicant instructed by Falklands Legal

Mr Stuart Walker for the Respondents instructed by the Attorney General

THE CHIEF JUSTICE:

1. This is an application for interim relief. On 9 November 2020 this court granted leave to move for judicial review of the decision made by the Principal Immigration Officer on 6th August 2020 to revoke the Applicant's work permit under section 22(2)(e) of the Immigration Ordinance 1999 ("the 1999 Ordinance"), and the decision of the Governor in Executive Council on 23 September 2020, to uphold the decision on appeal.

2. The decision to dismiss his appeal although made on the 23 September was not communicated to the Applicant until 6 October 2020. In fact, his work permit had expired on the 4 October 2020.

3. On the 7 October 2020 the Applicant, through his employer, applied to renew his work permit, this was refused by the Principal Immigration Officer on the 2 December 2020.

4. On 26 October 2020, the Applicant's employers wrote to the Director of Emergency Services, informing him that he had enquired of the St Helena travel department of the Government as to whether he could book a place on the flight due to leave on 26 October 2020 but he was informed that it was fully booked with no seats available and that the Applicant had applied for a seat on the November flight.

5. The Applicant then wrote to the Immigration Officer on 11 November 2020, informing them that he had not been given a seat on the flight to St Helena via the UK in November and the next available flight would be in January 2021. He also repeated his urgent request that he be given permission to work, so as to be able to pay for food and accommodation. This request was refused by the Principal Immigration Officer.

6. Although his employer is willing to employ him, he is unable to do so in the light of the refusal to issue a temporary work permit. The Applicant, 19 years old, is surviving on food handouts and to date one food parcel from the food bank organised by his probation officer. He has no money or resources.

7. The Respondents take the position that the Applicant has no entitlement to public funds for support. Their only answer is that he can and should leave the Falkland Islands on the 11 January 2021; but gave no answer as to what could be done to alleviate his destitute position until then.

8. The determination of his challenge to the dismissal of his appeal against revocation of his work permit is due by agreement of the parties to be heard on a date after 22 February 2021.

SUBMISSIONS

9. Ms Chapman for the Applicant submits that the court should issue a stay of the decision to dismiss the applicant's appeal pending the determination of this court whether the appeal was conducted lawfully.

10. She submits that a stay should be granted on the familiar test for the grant of interim relief in a public law case is set out by the Privy Council in *Belize Alliance of Conservation Non-Governmental Organisations v. Department of the Environment* [2003] UKPC 63. Namely, the *American Cyanamid v Ethicon* [1975] AC 396 test as modified by the public law element of the case, which is a special factor. Under that test the Court must consider whether there is a serious issue to be tried, whether damages would be an adequate remedy, and where the balance of convenience lies.

11. She submits that this court has the power to stay the effect of an administrative decision. In *R v Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 QB 558. It is sufficient to quote from the headnote:

> "Held, dismissing the appeal, that a "stay of proceedings" in R.S.C., Ord. 53, r. 3(10)(a) embraced not only judicial pro-ceedings but also extended to decisions of the Secretary of State and the process by which such decisions had been reached; that a distinction was to be made between civil litigation, where an injunction might be ordered at the suit of one party against the other, and public law judicial review, where the decision maker was not in any true sense an op-posing party and where the order that the decision should not take effect until the challenge had been determined was to be correctly described as a stay; and that, accordingly, applying that distinction, the relief sought by the local authority was properly a "stay of proceedings" within rule 3(10)(a), and the court could in principle stay the Secretary of State's decisions, although the availability of an expedited hearing of the judicial review made it unnecessary to do so."

12. Further, in the case of *Regina (H) v Ashworth Special Hospital Authority* [2003] 1 WLR 127 where a mental health review tribunal had ordered a patient's release, the court stayed the tribunal's decision pending the hospital authority's application for judicial review of that decision. Lord Dyson MR said at [41] – [42]:

> "41 So does the court have jurisdiction to grant a stay in cases B and C? I see no difference in principle between the two categories of case. The relevant rule is CPRr 54.10, which is in substantially the same terms as its predecessor, RSCOrd 53, r 3(10), and so far as material provides: "(1) Where permission to proceed is given the court may also give direc-tions. (2) Directions under paragraph (1) may include a stay of proceedings to which the claim relates."

> 42 The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In Avon, Glidewell LJ said that the phrase "stay of proceedings" must be given a wide interpretation so as apply to administrative decisions. In my view it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in Vehicle and Supplies, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would [2003] 1 WLR 127 at 139 expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review."

13. It follows in her submission this court can stay the decision of the Governor acting on the advice of the Executive Council to dismiss the Applicant's appeal against revocation of his work Permit.

14. Ms Chapman further submits that the effect of a stay will allow the position to continue exactly as it was before the Governor acting on the advice of the Executive Council dismissed the appeal.

15. A problem arises in this case that the work permit expired on the 4 October 2020. She submits that while the 1999 Ordinance has no direct counterpart to section 3C of the Immigration Act 1971 in the United Kingdom, which extends a person's leave to remain by statute while an in-time application for further leave is pending, a combination of section 22(4), read with section 27(5) of the 1999 Ordinance must mean that a person's presence in the Falkland Islands does not become unlawful until the appeal is finally determined.

16. Mr Walker for the Respondents does not disagree with the correct test for interim relief. He disagrees with the effect of any stay. In his written submissions he said:

> [17] The remedy that is sought in respect of both decisions is an order of certiorari to quash the decision. If the Applicant is successful, the outcome of the proceedings will be that the decisions to revoke the work permit, and refuse the appeal, will have no lawful force and no legal effect. The court is likely to remit the matter back to the decision maker with a direction to reconsider the matter and reach a fresh decision, in accordance with the judgement of the court.
>
> [18]It is therefore submitted that the most that the Applicant can achieve as a result of these proceedings is that there is no decision to revoke the work permit, anything beyond that outcome is outside of the scope of the proceedings. The result will be the reinstatement of a now expired work permit.
>
> [19]The expiry of the work permit renders the challenge to the revocation decision moot. Regardless of the Applicant's convictions and the decision to revoke the work permit, the permit was always going to expire on 4th October 2020.

> [20] From the date of expiry, the Applicant has no right to work and no right to remain in the Falkland Islands.

17. In particular he submits that the interim relief being sought far exceeds the final remedy and the most that the Applicant can achieve as a result of these proceedings is an order quashing the decision to revoke the work permit that expired on 4 October 2020. In short challenge being made to the decision to revoke the now expired work permit is moot and even if successful the outcome will have no practical effect because the work permit has expired.

18. Moreover, he submits a stay is a suspensive remedy and it cannot possibly result in the Principal Immigration Officer being compelled to take a positive act and issue a new work permit allowing the Applicant to work beyond 4 October 2020. A stay of proceedings cannot have the effect of placing a positive obligation on the Government to provide the Applicant with public funds.

19. He bases much of his position on the fact that judicial review is not an "appeal" for the purposes of the 1999 Ordinance and so does not result in an entitlement to work under that statute pending the outcome of the judicial review proceedings.

ANALYSIS

20. There is clearly a serious issue to be tried. Leave to move for judicial review of the decisions has been granted. O.53, r.3(10) permits the court to grant a stay of the proceedings where leave to apply for judicial review is granted.

21. The balance of convenience also clearly falls on the side of the grant of interim relief. Common humanity requires that the Applicant is not left destitute while his challenge to the lawfulness of the revocation to his work permit is determined. The Respondents do not accept, or say at least the Applicant has not identified, that he has any entitlement to state funds. They offer no solution to this 19 year old's plight. In the current Covid situation he cannot under any circumstances leave the Islands until 11 January next year.

22. If this court can do justice by the grant of interim relief to the Applicant by way of stay in the intervening period before his challenge is determined, it must do so.

23. There is conflicting authority in that the Privy Council held in *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd* [1991] 1 WLR 550 (an appeal from Jamaica) that a stay of an administrative decision was not possible. This decision was fully considered in *Avon* and it is clear that the position in England remains that a stay of

an administrative decision is an available tool for the court in England to do justice. This was recently confirmed by the Divisional Court in *R (McCourt) v Parole Board for England and Wales* [2020] EWHC 433 (Admin) at [10]-[11].

24. In the Falkland Islands the Rules of the Supreme Court 1949 apply. However, if there is no Rule (or other matters of practice and procedure not repugnant) in the 1949 Rules then Rule 48 of the RSC 1949 means the practice and procedure of the High Court of Justice in England shall, as far as possible, be adopted.

25. By section 2(2) of the Administration of Justice (Practice and Procedure) Ordinance 1999 the Administration of Justice Ordinance 1949 (of which section 38 gives the Falklands Supreme Court the same powers as the English High Court) shall continue to have effect as if the Civil Procedure Rules 1998 in England had not been made.

26. The net result of which is that these judicial review proceedings are governed by the RSC 1999 and this court has the same powers as the High Court of England and Wales.

27. In those circumstances I prefer to follow the jurisdiction as set out in *Avon* as being applicable in the Falkland Islands. As Lord Dyson MR said:

> "It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In Avon, Glidewell LJ said that the phrase "stay of proceedings" must be given a wide interpretation so as apply to administrative decisions"

28. Contrary to the submissions of Mr Walker, if the appeal to the Governor was quashed by this court with relief given in the form of either a mandatory order or declaration that the appeal should be allowed, or if remitted for reconsideration to the Governor who then allowed the appeal, section 27(5) of the 1999 Ordinance would not render his challenge moot. It reads:

> [27(5)] If the Governor allows an appeal against the refusal of a work permit or of an extension of a work permit, the Principal Immigration Officer shall grant a work permit to the appellant, or as the case may be the revoked work permit shall be deemed never to have been revoked. [Emphasis added]

29. A reading of the provision is that a work permit is granted after a successful appeal presumably when the work permit has expired during the time expended on hearing the proceedings. If the work permit remains extant then it is deemed never to have been revoked.

30. It follows I do not agree that these proceedings are moot or academic for the Applicant.

31. In addition, in evidence, Jennifer Smith, an Immigration Officer said on behalf of the Respondents at paragraph [9] of her First affidavit:

> "On 4th October 2020 Mr. Fowler's work permit expired and on 6th October 2020 he was informed in writing that his appeal against the revocation decision had been unsuccessful. Mr. Fowler had remained in employment until 6th October 2020 and so notwithstanding the revocation decision Mr. Fowler worked to the full extent permitted by the work permit."

32. There appears to be no suggestion he worked illegally on the 5 October 2020. This chimes with the position as stated by Mr Walker before me. He accepted that if a work permit expired before an appeal as to revocation had been decided the person could still work until the decision was made. This position appears to coincide with common sense and justice.

33. However, Mr Walker's point remained that this suspensive effect (allowing a person to work pending appeal notwithstanding the permit had expired awaiting that appeal) only applied to an appeal under the 1999 Ordinance and not a challenge by way of judicial review.

34. I cannot agree with that submission. Judicial review is a supervision of administrative and inferior tribunal's decisions. If the suspensive effect suggested by Mr Walker only applied for an appeal under a statutory scheme such as the 1999 Ordinance the ability of this court to do justice by way of review would be substantially reduced. The effect of a stay of an administrative or inferior tribunal's decision is as Lord Dyson MR said in *Avon*:

> [46] …Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It over looks the fact that a successful judicial review challenge does in a very real sense rewrite history. Take a decision by a tribunal to discharge a patient. The order has effect for the purposes of being implemented, i e, releasing him into the community. But it also has effect in a more general sense: it declares that at the time it was made the tribunal was not satisfied that the criteria for the patient's continued detention were fulfilled. If the order is ultimately quashed it will be treated as never having had any legal effect at all: see R (Wirral Health Authority) v Finnegan [2001] EWCA Civ 1901. If that occurs it will be treated as if it had never been made, and the patient will once again become subject to the Men-tal Health Act regime to which he was subject before the order was made. It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented as in cases B and C.It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented…[Emphasis added].

35. The position will be by the grant of a stay, legally, that the decision of the Governor in Council has not been made or put into effect. It follows, I agree with Ms Chapman that the grant of a stay will have the effect for which she advocates in this case. I grant the interim relief sought.

THE CHIEF JUSTICE