

Esan v.The Attorney General (Appeal No. 96/ 2014) [2016] ZMSC 255

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Esan v.The Attorney General
(Appeal No. 96/2014) [2016] ZMSC 255
Nicholas Kahn-Fogel

The Facts

The Appellant, a British national, was the chief executive of Lafarge, South-East Africa. He obtained a two-year work permit effective from February of 2012. On December 3 2012, Zambian immigration officers detained the Appellant at Kenneth Kaunda International Airport on his return from a trip to Malawi. That evening, the Appellant was driven to Ndola. Officers denied the Appellant’s request to stop at his home to collect medicine, and they forbade him from using his telephone. On the trip to Ndola, the Appellant first learned of the purpose of his detention when officers gave him a document, signed by the Director General of Immigration, stating that his employment permit had been revoked on the grounds that he was “likely to be a danger to peace and good order in Zambia.”

The government planned to put the Appellant on a flight from Ndola to Nairobi, but when the party arrived in Ndola, they learned that the flight had been delayed. The government then decided to put the Appellant on a flight to Johannesburg the following afternoon. While officers escorted him to that flight, they handed him a “Notice of Prohibited Immigrant to leave Zambia”. The notice, which was stamped 5 December 2012, informed the Appellant that he was a prohibited immigrant because his permit to remain in the country had expired or been revoked, and because the Minister of Home Affairs had declared in writing that his presence in Zambia was inimical to the public interest. The document was signed by an immigration officer, but not by the Minister.

Procedural Posture

After the Appellant unsuccessfully appealed to the Minister of Home Affairs to return to work pending a long-term settlement, the Appellant sought relief in the High Court on the ground that the Director General’s revocation of his work permit had been procedurally improper and irrational. Specifically, the Appellant argued that the Director General had failed to comply with Section 10 of the Immigration and Deportation Act, which requires the government to give at least forty-eight hours of notice, the reasons for the decision, and an opportunity to be heard to anyone adversely affected by an immigration decision, except for decisions relating to deportation and removal. This provision required the government to give

the Appellant such notice and the opportunity to be heard before revoking his work permit. The High Court condemned the government's treatment of the Appellant and agreed that the Director General's failure to provide the Appellant with forty-eight hours of notice and an opportunity to be heard, along with the reasons for the decision, before the revocation of his work permit, violated the Appellant's rights under the Act. However, the High Court denied relief to the Appellant because it found the Minister's declaration that Appellant's presence in Zambia was inimical to the public interest superseded the violation by the Director General. Because the Act permits the Minister to make such decisions without explaining his reasons, and without requiring notice and an opportunity to be heard, the court held that the Appellant would have been subject to deportation even in the absence of the Director General's actions. The Court noted that the Appellant could seek relief for his mistreatment using other processes of law, but that he was not entitled to an order quashing the decision of the Minister ordering him to leave Zambia.

Issues on Appeal

On appeal to the Supreme Court, the Appellant argued that; 1) the trial judge erred by finding the Director General's revocation of the Appellant's work permit was void for lack of the required notice, but then holding there was no nexus between that decision and the Minister's "Notice to Prohibited Immigrant to Leave Zambia"; 2) that the trial judge had erred in holding that ordering relief against the Director General would serve no purpose, notwithstanding the breach in procedure; and 3) that the trial judge erred by abdicating his responsibility to adjudicate all issues in controversy when he opined that the Appellant could use "other processes of law" to seek redress for his mistreatment.

The Holding

The Supreme Court set aside the High Court's upholding of the Minister's decision, ruling that the removal of the Appellant from Zambia was unlawful. The crux of the Court's holding was that, although the Immigration and Deportation Act permits the Minister of Home Affairs to declare a person's presence in Zambia inimical to the public interest and to deport the person without explaining his reasons and without notice or an opportunity to be heard in advance, Section 35(2) of the Act requires the Minister to issue any such declaration in writing. Although an immigration officer had signed the "Notice of Prohibited Immigrant to Leave Zambia" that the Appellant received as he was escorted to his airplane, there was no document in evidence showing that the Minister himself had ever declared in writing that the Appellant's presence

in Zambia was inimical to the public interest. Thus, there was no lawful declaration by the Minister that could have superseded the Director General's violation of Appellant's statutory rights.

The Court's interpretation of the Act could have dispensed with the case on straightforward statutory grounds. The Court elaborated on its decision, however, by noting that the affront to the Appellant's human rights, along with the potential for arbitrariness created by the Minister's unfettered statutory discretion to declare a person's presence inimical to the public interest, without even the requirement to articulate reasons for doing so, led the court to interpret the statute strictly. The Court repeatedly went beyond mere mechanical application of the statute to suggest its willingness to protect individual rights against government excess. The Court noted, for example, that despite the seemingly absolute discretion the statute conferred on the Minister, "Courts ought to be conscious of emerging trends towards a more open and transparent government that promote the rule of law, human rights and curb arbitrariness." Therefore, a court "should go behind the orders and delve into the circumstances in which the power was exercised especially where there is prima facie evidence of arbitrariness or perverse actions, to ensure that it was exercised lawfully and within the confines of the law."

The Supreme Court went on to assert that, given the sequence of events and the inhumane treatment of the Appellant, the trial court should have "imputed bad faith and unreasonable exercise of power on the part of immigration authorities and granted the order of certiorari." This finding supported the Court's conclusion that there was, in fact, a nexus between the revocation of the Appellant's work permit in violation of the Act and the "Notice to Prohibited Immigrant to Leave Zambia", which invoked the Minister's declaration that the Appellant's presence in Zambia was inimical to the public interest. As the Court noted, the two documents were issued "more or less at the same time," and the revocation of the permit triggered the chain of events.

Given the Court's finding that the government simply had not complied with the statute with regard to either the revocation of the permit or the Minister's declaration, the Court's identification of a nexus between the two decisions may have been unnecessary to its holding. It is unnecessary to conclude that illegitimate government conduct was causally related to an ostensibly valid, subsequent government act, if the subsequent act is illegitimate on its own terms. To use the terminology of American criminal

procedure, there is no need to characterize conduct as fruit of a poisonous tree if the conduct in question is poisonous in its own right. Here, because the government failed to comply with the requirement that the Minister provide a written declaration that the Appellant's presence in Zambia was inimical to the public interest, there was no legitimate basis for deporting the Appellant that could have superseded the violation of his right to notice of the revocation of his work permit and, consequently, no need to demonstrate a nexus between the two decisions.

While the Court took issue with the manner in which the Appellant formulated his second argument, and while it noted that his third argument was inapt in that the Appellant did not seek any alternative relief in the High Court, the Supreme Court's ultimate conclusion gave the Appellant the relief he sought.

Significance

The Court's holding provides welcome evidence of judicial independence and willingness to uphold individual rights and the rule of law against executive arbitrariness and excess. The opinion is impressive as well in its at times majestic description of the importance of exercising judicial power as a check on human rights abuses. As noted, the essence of the Court's decision rested on what could have been characterized as a fairly mundane application of a clearly delineated statutory requirement; although the Minister of Home Affairs has statutory discretion to declare anyone's presence in the country inimical to the public interest without notice or articulation of the reasons for the decision, the statute requires that the Minister make such a declaration in writing, and he did not do so in this case. It has long been recognized that legal directives formulated as precisely delineated rules can insulate judges against threats to their independence, for such directives leave the decision-maker with little discretion or room for manipulation. Yet the Court declined to rely only on a dry application of the statute to the facts. Instead, it clearly and courageously asserted its important role in protecting the human rights of all people in Zambia.