



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION 2009: NO. 268

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

IN THE MATTER OF THE ADMINISTRATION OF JUSTICE  
(PREROGATIVE WRITS) ACT 1978

IN THE MATTER OF THE BERMUDA IMMIGRATION AND  
PROTECTION ACT 1956

IN THE MATTER OF THE DECISION OF THE MINISTER  
FOR LABOUR HOME AFFAIRS & PUBLIC SAFETY HON  
MR. DAVID BURCH REF NO IMM REF 140656

AND IN THE MATTER OF THE DECISION OF THE CABINET APPEAL  
TRIBUNAL TO DISALLOW THE APPEAL REF NO 1100-25 AGAINST  
THE MINISTER FOR LABOUR HOME AFFAIRS & PUBLIC SAFETY  
HON MR. DAVID BURCH

BETWEEN:

FERNANDO COUTO SOARES RALEZA

Applicant

-v-

THE ATTORNEY-GENERAL

1<sup>st</sup> Respondent

-and-

THE MINISTER FOR LABOUR HOME AFFAIRS  
& PUBLIC SAFETY

2<sup>nd</sup> Respondent

-and-

APPEAL TRIBUNAL OF CABINET

3<sup>rd</sup> Respondent

**JUDGMENT**  
(in Court)

Date of Hearing: April 5, 2010

Date of Judgment: May 7, 2010

Mr. Darrell Clarke, Darrell Clarke, for the Applicant  
Mr. Martin Johnson, Attorney-General's Chambers,  
for the Respondent

**Introductory**

1. The substantive hearing of the Applicant's application for judicial review and the Respondent's application to strike-out the application were heard together. The legal principles applicable to challenging the legality of the impugned decisions were essentially common ground; as a result, the present case turns primarily on its facts. Accordingly, although I afforded the Applicant's counsel 14 days after the conclusion of the hearing to file supplementary authorities, I neither consider those authorities below nor requested the Respondent's counsel to respond thereto.
2. On August 8, 2007 the Applicant was granted a one year work permit as a mason with a firm known as Building Blocks, expiring on August 8, 2008. On August 11, 2008, the Applicant applied to the Department of Immigration for permission to continue to reside and seek alternative employment in Bermuda. On November 24, 2008, the Minister refused this application, requested the Applicant to settle his affairs and leave Bermuda by December 24, 2008 and notified him of his right of appeal. On December 5, 2008, the Applicant appealed to the Cabinet Appeal Tribunal and this appeal was dismissed on January 30, 2009. By letter dated February 11, 2009, the Applicant was required to leave Bermuda by February 24, 2009. On February 11, 2009, he was involved in a road traffic accident and not certified fit to travel until June 11, 2009.
3. On June 29, 2009, the Applicant applied for leave to seek judicial review of both decisions. Leave was granted by Acting Chief Justice Norma Wade-Miller on July 20, 2009, together with an interim stay. The Notice of Motion for Judicial Review was filed by the Applicant on July 29, 2009. By Summons dated September 8, 2009, the Respondent applied to strike out the Notice of Motion and set aside the interim stay ordered by this Court on the grounds that the application disclosed no reasonable cause of action, was scandalous, frivolous or vexatious or was otherwise an abuse of process. On

September 24, 2009, the Chief Justice adjourned the hearing of the strike-out application to the hearing of the Applicant's Notice of Motion for Judicial Review.

### **Grounds of the Application**

4. The primary complaint originally made by the Applicant was that the Minister's decision was unlawful because (a) contrary to the rules of natural justice, he took into account information received from the former employer which the Applicant was not allowed to respond to; (b) the Minister and Appeal Tribunal failed to take into relevant information about bad employer practice; and (c) because of the failure to find that the Applicant was the victim of bad employer practice (and therefore entitled to be exempted from the usual policy of refusing permission to seek fresh employment for persons who have worked in Bermuda for less than two years) was unreasonable (in the administrative law sense of irrational). It was accepted in the Applicant's grounds that "*there is an Immigration policy in place which is that there is only a 'very slim chance' of a person having a work permit who wished to leave a job before they had worked for 2 years at that job being granted permission to do so. Apparently there are also exceptions to that policy and one of those exceptions is where there has been 'bad employer practice'*" (paragraph 13).
5. The additional complaint that the Cabinet Appeal Tribunal does not comply with section 6(8) of the Constitution was not pursued as it required a separate application under section 15 of the Constitution.
6. There was no suggestion that the Applicant had any family ties to Bermuda which fell to be taken into account. Indeed, his work permit specified that his family was not to reside in Bermuda.

### **Factual findings: the Minister's decision**

7. The Applicant's August 11, 2008 application for "permission to continue to reside and seek alternative employment": (a) admitted the Applicant had under his then employer's instructions worked otherwise than as a mason due to lack of work within his permitted job category "*in the hopes that matters in Company would improve*"; (b) described speaking to his employer and then Labour Relations Officer Glenn Fubler in July about obtaining a release; (c) stated that his employer had told Mr. Fubler that he does not believe in granting releases; (d) expressed the belief that the Applicant's employer became angry when he learned that a complaint had been made against him to the Department of Labour and Training; (e) stated that the Applicant was terminated from his employment before he completed a full year's employment; and (f) stated that several other foreign workers, save for a supervisor with a close relationship to his former employer, had also left Bermuda.
8. Since the Applicant was seemingly unaware of the need to bring himself within the exception to the general policy of refusing applications to seek fresh employment within

a worker's first two years in Bermuda, the letter understandably did not expressly invoke the "bad employment practice" exception. But the renewal letter did explicitly complain about the employer's alleged (a) reluctance to grant releases, and (b) victimisation of the Applicant by prematurely terminating him for having made a complaint to the Department of Labour and Training in early July 2008. At the same time, the letter implied the Applicant's former employer had been more than generous to him, by risking prosecution by retaining him in work outside the scope of his permit due to a "lack of work" in his job category.

9. The applicable policy as published on the Immigration Department's website states as follows:

**"POLICY: Restrictions on Non-Bermudians Seeking or Obtaining Employment REF: W5 PURPOSE:**

*To define clearly certain conditions that apply to non-Bermudians who request permission to reside and seek employment in Bermuda.*

**STATEMENT:**

**Seeking Employment**

*A non-Bermudian resident may not look for a job without first obtaining permission from the Department of Immigration, unless exempted from work permit control by law. This does not apply to the holder of a WRC holder, a permanent resident or to the divorced parent of a Bermudian.*

*A non-Bermudian who was a primary work permit holder, but who is no longer employed, may not seek employment or apply for employment without the permission of the Department of Immigration.*

*An application to employ someone for whom another employer holds a valid work permit will not normally be considered unless the application is accompanied by a letter of release from the current employer.*

*In cases where the current employer refuses to give a release, the Minister will make a decision as to whether the employee should be allowed to move, after consultation with the current employer when that is appropriate. Normally, permission will not be given during the first two years of the permit holder's employment without a letter of release from the current employer, unless there has been some unfair employment practice/ employer abuse." [emphasis added]*

10. It is unclear what types of conduct would qualify under this policy as "unfair employment practice/employer abuse", but the exception read in light of the policy as a whole would seem designed to cater to persons who come to Bermuda on a fixed term contract and are forced to leave their initial employment before its completion due to some form of exploitation which they report to the Immigration authorities as a basis for seeking fresh employment before their existing permit has expired. In such cases, the abusive employer would be unlikely to give a release. The Applicant's case, as reflected in his August 11, 2008 letter, was reasonably open to two possible interpretations as far as employer abuse is concerned:

(a) the employer was abusive in dismissing the Applicant in the last month of his employment because he complained about not getting a release to the Department of Labour and Training; or

(b) it was outrageous for the Applicant to work illegally for several months in the hope that he would get a release at the end of his contract, and only report the matter to the authorities when he suspected his employer would not give him a release. It was entirely understandable for the employer to take retaliatory action (even if it was unlawful from an employment law standpoint), and the employer's conduct in these circumstances was not something it was open to the Applicant to rely upon to bring himself within the ambit of the exception to the policy.

11. In addition to the August 11, 2008 letter, the Minister was apparently briefed by public officers whose affidavit evidence was not challenged. Glenn Fubler deposed that the Applicant came to him with a translator in July 2008 and complained that he had not been able to do masonry work and had been cleaning the employer's limousines for "*most of the hours that he had been employed*"<sup>1</sup>. Fubler deposed that he spoke to the employer, who explained that the Applicant lacked the requisite masonry skills. He then met with the Applicant again, relayed the employer's version of events which the Applicant, which the Applicant disputed. The Labour Relations Officer put to the Applicant that his story made no business sense and seemed strange, but the Applicant advanced no further explanation. On September 20, 2008, Fubler briefed the Chief Immigration Officer.
12. The Chief Immigration Officer, Majiedah (Rozy) Azhar deposed that apart from Glenn Fubler's September 20, 2008 Memorandum, which she exhibits, the "*Minister did not consider any other report*"<sup>2</sup>. This memorandum was presumably the source for the Fubler Affidavit. The Minister also took into account the fact that the Applicant had not only admitted working illegally but to working in a job category for which a work permit would not be granted. The unchallenged evidence is that: (a) the Applicant was told what his former employer said about why he wanted to seek fresh employment; (b) he was given an opportunity to respond to the employer's version of events, and (c) the Minister considered no representations from the Applicant's employer that the Applicant was not given a chance to rebut.
13. In the course of argument Mr. Clarke suggested that the September 20, 2008 Memo was grossly unfair because it made no mention of the fact that the Applicant had first made his complaints before the expiry of his contract. The Memo, carefully read, makes it clear that the Applicant visited the Labour Relations Officer before his employment was prematurely terminated, a point which was also made clear in the Applicant's own renewal letter. It follows that when the Applicant sought assistance from the Labour Relations Officer with a view to obtaining a release during his permit term, the allegedly retaliatory dismissal had not yet taken place. So the only "complaint" which the Applicant made before the August 11, 2008 renewal application letter (according to the

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<sup>1</sup> First Affidavit, September 24, 2009, paragraph 5.

<sup>2</sup> First Affidavit, November 9, 2009, paragraph 11.

Ministry's own officers) was that his then employer had not been willing or able to give him masonry work. This issue was recorded in the Memo not as a complaint, but as a reason for wishing to change jobs. Mr. Fubler's conclusion that he was "*not in a position to recommend that the Board grant Fernando Razela permission to seek alternate employment*" is hardly startling. Moreover, the employer's disputed explanation was consistent with the Applicant's implicit case in his own August 11, 2008 letter that his former employer had generously kept him on the payroll in a lower job category in circumstances where he was unable to do the skilled work he was employed to carry out.

14. In my judgment the Applicant has failed to show that the Minister's decision to refuse the application for permission to seek fresh employment was arrived at in a manner which either: (a) breached the rules of natural justice; (b) failed to take into account relevant matters or took into account irrelevant matters; or (c) was for any other reasons so irrational or unfair as to impeach the validity of the decision. Having regard to the policy, the burden was on the Applicant to bring himself within the employer abuse exception, or to at least raise it as an issue requiring further investigation, but this he failed to do. The Applicant filed evidence complaining of favourable treatment his former employer allegedly receives from the Immigration Department; this went beyond the proper scope of the present application because it had no direct bearing on the validity of the impugned decision.
15. Mr. Johnson was right to submit, in effect, that it was absurd for the Applicant to contend that he ought to have been granted leave to seek fresh employment having admitted violating the terms of his initial work permit. This view of the facts was not apparent at the leave stage, and was only elucidated when the Respondent's evidence was filed and revealed that the potentially valid complaints of the Applicant had no solid evidential basis.

### **The Cabinet Appeal Tribunal's Decision**

16. The Cabinet Appeal Tribunal presumably considered only the same information considered by the Minister, together with the Applicant's December 5, 2008 appeal letter addressed to the Secretary to the Cabinet<sup>3</sup>. Far from making a case for regarding him as an exceptional case, the Applicant's appeal letter makes it more clear that he waited until the end of his permit term to report the fact that he had been denied an opportunity to work in his permitted job category:

*"I have been unemployed since July, 2008...I feel that I was unjustly let go, I believe it was due to the fact that I used to speak up when situations were wrong. I never worked in my capacity of Mason, my duties at Building Block were always clearing up debris, painting and landscaping from different properties in the Island..." [emphasis added]*

17. This is an even more incriminating admission to the effect that *from the commencement of the Applicant's employment in August, 2007*, he was engaged in breaking Bermuda's

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<sup>3</sup> The version of this letter exhibited to the Applicant's First Affidavit has no signature page and may be incomplete.

Immigration law by working outside of his applicable job category. Moreover, no explanation was even advanced as to why the Applicant could not have sought the assistance of the Department of Labour and Training as soon as he discovered that he was not going to be able to do masonry work. The suggestion that the Appeal Tribunal's decision is invalid because the Tribunal ought to have found that the Applicant came within the exception to the Policy is wholly unsustainable. Any other complaints directed at the Tribunal's decision are also rejected for the same reasons set out above in relation to the Minister's decision.

18. The position would possibly have been otherwise if the Applicant had sought the assistance of Labour and Training near the beginning of his employment, demonstrating both (a) a genuine dissatisfaction with his working conditions, and (b) a desire to abide by the law and the terms of his permit in circumstances where his legitimate expectation of working in Bermuda for the full term of his contract would potentially be infringed by a refusal of permission to seek alternate employment.

### **Summary**

19. For the above reasons, the application to quash the decision by the Minister affirmed by the Cabinet Appeal Tribunal refusing the Applicant permission to seek alternative employment is refused. No error of law or fact has been made out on the hearing of the present application.
20. Persons employed on short-term work permits who have not been employed in Bermuda for more than two years cannot expect to be able to easily challenge the validity of the Minister's refusal of permission to seek employment, having regard to the published policy in this regard. The employment abuse exception is not intended to encourage employees to enjoy the benefits of working in Bermuda for almost the full term of their permits, only to complain that they have been compelled to do unauthorized work once they discover that their allegedly unfair employer is not likely to seek to extend their permit for a further term.
21. Subject to hearing counsel, as the Applicant is legally-aided I would not propose to make any Order as to costs.

Dated this 7<sup>th</sup> day of May, 2010,

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KAWALEY J