LAM ENG RUBBER FACTORY (M) SDN BHD

v.

PENGARAH ALAM SEKITAR, NEGERI KEDAH DAN PERLIS & ANOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: K-01-44-1995]
18 FEBRUARY 2005

ADMINISTRATIVE LAW: *Exercise of administrative powers - License to operate rubber factory - Licence yearly issued since 1940 refused in 1994 - Appeal against refusal rejected by Director of Department of Environment - Whether director had jurisdiction to reject appeal - Whether jurisdiction with appeal board - Environment Quality Act 1974, s. 36*

ADMINISTRATIVE LAW: *Exercise of administrative powers - License to operate rubber factory - Licence yearly issued since 1940 refused in 1994 - Whether applicant had legitimate expectation to have licence regularly issued*

The appellant operated a rubber factory in Sungai Petani, Kedah that was in operation since 1940. Each year the appellant applied for and obtained a licence from the local authority. In 1974 when the Environment Quality Act 1974 ('EQA') had come into force, the appellant was required to obtain and did obtain the requisite licence from the Department of the Environment Kedah pursuant to the provisions of the said Act. In 1994, the first respondent (the Director of Environment for Kedah and Perlis) informed the appellant that the 1994 licence could not be issued since the appellant's land was not converted from agricultural to industrial use. The appellant responded and submitted that there was no such necessity in view of the judgment of KC Vohrah J in originating motion no. 32-33-1987. In that judgment between the appellant herein and the State Director, Kedah and the Land Administrator Kuala Muda, Sungai Petani, Kedah, it was held that there was no necessity for the appellant to apply for a change of land user. The appellant also submitted that it was unlawful for the first respondent not to issue the appellant the said licence. It so followed that with the issue of the 1994 licence yet to be resolved, the first respondent conscientiously applied for the 1995 licence. That application was refused on the ground that the area surrounding the factory had become

a residential area and so it was unsuitable for the appellant to carry on operations there. The appellant appealed to the appeal board created by the EQA. However, the first respondent rejected the appeal and that led to the appellant's application in the High Court for *certiorari* to quash the first respondent's decision. The High Court, however, dismissed the application on the ground that since the appellant had no licence for the year 1994, they had carried on their factory illegally and therefore had no legitimate expectation to have a licence for 1995. Hence, this appeal.

Held (allowing the appeal):
Per Gopal Sri Ram JCA

[1] It was wrongful conduct of the first respondent that led the appellant having had no licence for 1994. The first respondent had informed the appellant that the 1994 licence was not forthcoming unless the condition of land use was altered. That objection was of no consequence in the light of KC Vohrah's ruling in the said judgment. So the appellant was legitimately entitled to have the licence issued to it. Even though Parliament had conferred upon the first respondent the power or discretion to decide whether to issue the licence or not, the law required him to exercise this power or discretion fairly, justly and without misdirecting himself on the law or the facts. (pp 162 g-h & 163 a)

[2] Each and every member of the public has a legitimate expectation to have his or her written communication to a government department looked into and dealt with in a timeous, courteous and efficient manner. There must be a response within a reasonable time. Otherwise it will be a case of poor administration. The law does not sanction poor administration. (p 164 e-f)

[3] For many years the motto of the civil service administration has been "Cekap, Bersih dan Amanah" (Clean, efficient and trustworthy). It is the duty of the judicial arm of government, *ie*, the courts, to ensure good administration by the due observance of this motto on a case by case basis. Otherwise members of the public who are adversely affected by a breach of the spirit and the intendment of the motto in question will be left without resort to administrative justice. (pp 164 h & 165 a)

[4] The first respondent had no jurisdiction to deal with the appellant's appeal. The EQA vested the appellate power in the appeal board and not in the first respondent. His act was *ultra vires* the EQA. (p 165 b-c)

Per Abdul Aziz Mohamad JCA:

[1] The decision of the first respondent that the appeal could not be considered was obviously unlawful. The appellant's appeal, being a matter within the jurisdiction of the appeal board, was not for the first respondent to decide that the appeal could not be considered. It was for the appeal board to decide the fate of the appeal. (p 166 c-d)

[Appeal remitted to appeal board under s. 36 EQA.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu mengusahakan sebuah kilang getah di Sungai Petani, Kedah sejak 1940. Setiap tahun perayu memohon dan memperolehi lesen bagi perniagaannya itu dari pihak berkuasa tempatan. Pada tahun 1974, dengan berkuatkuasanya Akta Kualiti Alam Sekeliling 1974 ('EQA'), perayu diminta supaya memohon kepada, dan telah pun memohon dan diberikan lesen berkenaan oleh Jabatan Alam Sekitar Kedah di bawah Akta tersebut. Pada tahun 1994, responden pertama (Pengarah Alam Sekitar Kedah dan Perlis) memberitahu perayu bahawa lesen bagi tahun 1994 tidak boleh dikeluarkan oleh kerana tanah perayu belum ditukar syarat dari pertanian kepada kegunaan industri. Perayu membalas bahawa keperluan sedemikian tidak berbangkit mengambil kira keputusan KC Vohrah H dalam usul pemula no. 32-33-1987. Dalam kes tersebut yang melibatkan perayu di sini dengan Pengarah Alam Sekitar Negeri, Kedah dan Pentadbir Tanah Kuala Muda, Sungai Petani, Kedah, ianya diputuskan bahawa adalah tidak perlu bagi perayu untuk memohon pertukaran syarat penggunaan tanah. Perayu menambah bahawa adalah salah bagi responden untuk enggan mengeluarkan lesen tersebut kepadanya. Namun begitu, apa yang berlaku ialah, semasa isu lesen tahun 1994 masih belum selesai, perayu memohon lesen untuk tahun 1995. Permohonan tersebut telah ditolak atas alasan bahawa kawasan sekitar kilang telah menjadi kawasan kediaman dan kerana itu adalah tidak sesuai bagi perayu meneruskan operasinya di situ. Perayu merayu ke lembaga rayuan yang ditubuhkan di bawah EQA. Rayuan telah ditolak oleh responden pertama sekaligus menyebabkan perayu memohon ke Mahkamah Tinggi untuk perintah *certiorari* bagi membatalkan keputusan responden pertama itu. Mahkamah Tinggi, bagaimanapun, menolak permohonan atas alasan bahawa, oleh kerana perayu tidak memiliki lesen pada tahun 1994, mereka telah mengusahakan kilang secara haram dan kerana itu tidak mempunyai harapan sah untuk mendapat lesen bagi tahun 1995. Ini membangkitkan rayuan semasa oleh perayu.

Diputuskan (membenarkan rayuan):
Oleh Gopal Sri Ram HMR

[1] Kegagalan perayu mendapat lesen bagi tahun 1994 adalah berpunca dari salah laku responden pertama. Responden pertama memberitahu perayu bahawa lesen bagi 1994 tidak akan dikeluarkan kecuali syarat penggunaan tanah ditukar. Bantahan ini tidak mempunyai apa-apa erti mengambil kira keputusan KC Vohrah dalam kes yang berkaitan. Maka perayu adalah berhak untuk diberikan lesen. Walaupun Parlimen memberi kuasa atau budibicara kepada responden pertama untuk memutuskan sama ada untuk mengeluarkan lesen ataupun tidak, undang-undang mengkehendakinya supaya melaksanakan kuasa atau budibicara tersebut secara adil serta tanpa menyalah-arahkan dirinya di sisi fakta atau undang-undang.

[2] Setiap ahli masyarakat mempunyai harapan sah supaya setiap komunikasi bertulisnya kepada jabatan kerajaan diambil perhatian dan tindakan dengan cepat, tertib dan efisyen. Harus ada jawapan dalam masa yang munasabah. Jika tidak ia akan menjadi suatu kes kelemahan pentadbiran dan undang-undang tidak memberi sanksi kepada pentadbiran yang lemah.

[3] Sejak bertahun-tahun, moto pentadbiran perkhidmatan awam adalah "Cekap, Bersih dan Amanah". Maka menjadi tanggungjawab cabang kehakiman kerajaan, yakni mahkamah-mahkamah, untuk mempastikan suatu pentadbiran yang berwibawa dan mematuhi moto ini atas dasar kes ke kes. Jika tidak, keadilan pentadbiran tidak akan terbuka kepada orang ramai yang terjejas oleh pelanggaran semangat dan tujuan moto.

[4] Responden pertama tidak mempunyai bidang kuasa untuk bertindak atas rayuan perayu. EQA memberikan kuasa mendengar rayuan kepada lembaga rayuan dan bukan kepada responden pertama. Oleh itu, tindakan responden pertama adalah *ultra vires* EQA.

Oleh Abdul Aziz Mohamad HMR:

[1] Keputusan responden pertama bahawa rayuan tidak boleh dipertimbang adalah jelas salah. Rayuan perayu, sebagai perkara yang termasuk dalam bidang kuasa lembaga rayuan, tidak seharusnya diputuskan oleh responden pertama dengan mengatakan bahawa ianya tidak perlu dipertimbangkan. Tanggungjawab menentukan nasib rayuan adalah terletak pada lembaga rayuan.

Rayuan dikembalikan ke lembaga rayuan di bawah s. 36 EQA.]

Case(s) referred to:
Laker Airways Ltd v. Department of Trade [1977] QB 643 ***(refd)***
Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 ***(refd)***
Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 ***(refd)***
Padfield v. Minister of Agriculture, Fisheries and Food [1968] AC 997 ***(refd)***
Savrimuthu v. PP [1987] 2 MLJ 173 ***(refd)***

Legislation referred to:
Environmental Quality Act 1974, ss. 18(1), 35(1)(a), 36

For the appellant - Ghazi Ishak (B Jayasingam with him); M/s Ghazi & Lim
For the respondents - Suzana Atan SFC

[Appeal from High Court, Alor Setar; Originating Motions No: 25-11-1995]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:
This appeal was heard and allowed on 23 November 2004 for the reasons now produced. The facts are relatively simple. The appellant operates a rubber factory in Sungai Patani, Kedah. The factory has been in operation since 1940. Each year the appellant applied for and obtained a licence from the local authority. In 1974, the Environmental Quality Act ("the EQA") came into force. By reason of its provisions, the appellant had to obtain a licence from the Department of the Environment, Kedah. After the EQA came into force, the appellant applied for and were issued the requisite licence by the Department. Then a problem arose in 1993 when the appellant applied for their 1994 licence. It happened in this way.

In November 1993, the appellant applied for the licence as it had done in the preceding years. It filled up the prescribed form and submitted it with the processing fee of RM250. The first respondent, the Director of Environment for Kedah and Perlis responded in mid-February 1994. He wrote, saying that according to his department's records the appellant's land had not been converted from agriculture to industry and for that reason the appellant's application for a licence could not be considered. The first respondent also drew the appellant's attention to s. 18 EQA which made it an offence to operate a factory without a licence. There was then an exchange in correspondence culminating in the appellant's solicitors sending to the first respondent a copy of the judgment of KC Vohrah J in O.M. No. 32-33-1987

(High Court Alor Setar) between the appellant in the instant appeal and the State Director, Kedah and the Land Administrator, Kuala Muda, Sungai Petani, Kedah where that learned judge held that the appellant had not infringed the condition of the issue document of title to their land. In other words, there was no necessity for the appellant to apply for a change of land user. The solicitors' letter which is dated 21 February 1994 also said that it would be contrary to law for the first respondent not to issue the appellant the licence it had applied for. On 6 March 1994 the first respondent wrote to the appellant's solicitors calling for a meeting on 26 March 1994. Why a meeting was required is unclear. After all, the appellant had complied with all the statutory requirements and was plainly entitled to a licence. In any event, no meeting appears to have taken place because the appellant's solicitors replied saying that the appellant's representative was not available on the date of the proposed meeting. Then on 12 April 1994 the appellant sent a reminder asking for the licence to be issued. The rest was silence.

Then, as usual, the appellant applied for the licence for 1995. On this occasion its application was refused. The reason given was that the area surrounding the factory had become a residential area and it was unsuitable for the appellant to carry on operations there. It is significant that no complaint was made that the appellant had operated their factory without a licence for the year 1994. The appellant was dissatisfied and appealed to the appeal board created by the EQA. However, its appeal was purportedly refused by the first respondent. This was plainly illegal. For, the EQA had vested the appellate power in the appeal board: not in the first respondent. The appellant accordingly moved the High Court for *certiorari* to quash the first respondent's decision. Its application failed. And for the oddest of reasons. The High Court accepted the submission of learned senior federal counsel that since the appellant had no licence for the year 1994 they had carried on their factory illegally and had no legitimate expectation to have a licence for 1995. This, in my judgment, is not correct.

In the first place, it was the wrongful conduct of the first respondent that led to the appellant having had no licence for 1994. He (the first respondent) had in so many words told the appellant that the licence for 1994 was not forthcoming unless the condition of land use was altered. That objection was of no consequence in the light of KC Vohrah J's ruling in O.M. No. 32-33-1987 (referred to earlier). So the appellant was legitimately entitled to have the licence issued to it.

Of course, Parliament has conferred upon the first respondent the power or, to use a more well worn expression, the discretion to decide whether to issue the licence or not. But the law requires him to exercise this power or discretion fairly, justly and without misdirecting himself on the law or the facts. As Salleh Abas said in *Savrimuthu v. Public Prosecutor* [1987] 2 MLJ 173:

> public interest, reason and sense of justice demand that any statutory power must be exercised reasonably and with due consideration.

The same principle was laid down in slightly different language by Lord Denning MR in *Laker Airways Ltd v. Department of Trade* [1977] QB 643. There are two passages in the judgment of the Master of the Rolls that merit reproduction. This is what he said in the first:

> The underlying principle is that the Crown cannot be estopped from exercising its powers, whether given in a statute or by common law, when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to a private individual: see *Maritime Electric Co Ltd v. General Dairies Ltd* [1937] AC 610 where the Privy Council, unfortunately, I think, reversed the Supreme Court of Canada [1935] SCR 519. It can, however, be estopped when it is not properly exercising its powers, but is misusing them; and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public: see *Robertson v. Minister of Pensions* [1949] 1 KB 227, *Re Liverpool Taxi Owners' Association* [1972] 2 QB 299, *HTV Ltd v. Price Commission* [1976] ICR 170.

And this is what he said in the second:

> The two outstanding cases are *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997, and *Secretary of State for Education and Science v. Metropolitan Borough of Tameside* [1976] 3 All ER 769, where the House of Lords have shown that when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers, so as to see that they are used properly, and not improperly or mistakenly. By mistakenly, I mean under the influence of a misdirection in fact or in law.

The judgment of Lord Denning MR in *Laker Airways Ltd v. Department of Trade* [1977] QB 643 has been referred to and applied by our Federal Court. See, *Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204; *Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337.

Now apply these pronouncements to the present facts. Here we have a case where any reasonable man in the appellant's shoes would have been led by the words and conduct of the first respondent to believe that the 1994 licence would be issued once the problem about the condition in the title to the land had been resolved. As for words, you only have to look at the letter he wrote. As for conduct, he accepted the payment made by the appellant and also did not respond at all to the appellant's reminder. Then at the hearing comes the suggestion that the appellant was not entitled to relief because it carried out its operations in 1994 without a licence. Now put that altogether and put it in any appropriate terms. You may say that the first respondent is estopped from refusing the 1994 licence. Or you may say that it is a case where the appellant was put in a position where it had a legitimate expectation that the 1994 licence would be issued. It does not matter. What in reality you have is a smacking of unfairness and injustice in administration?

Learned senior federal counsel suggested in her argument that the appellant had not acted reasonably because it had only sent one reminder to the first respondent. Now, how many reminders is a member of the public supposed to send to a Government Department before its staff will act? Quite frankly, I am unable to find an answer to that question.

In my judgment, each and every member of the public has a legitimate expectation to have his or her written communication to a Government Department looked into and dealt with in a timeous, courteous and efficient manner. It may be an application for a licence. It may be a letter of query. Or it may be a letter of complaint. Whatever the nature of the communication, there must be a response within a reasonable time. Otherwise it will be a case of poor administration. And the law does not sanction poor administration. Indeed, in *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997, the House of Lords approved Lord Denning's dissent in the Court of Appeal in that case where he said:

> Good administration requires that complaints should be investigated and that grievances should be remedied.

I recall at one point of time when Tun Abdul Razak our second Prime Minister introduced a system whereby every letter received by a Government Department was responded to promptly by an acknowledgment card which carried a file number with the pre-printed remarks that the matter was receiving attention. This enabled the writer to have a file reference with which to follow up with his inquiry or complaint. I cite this merely as an example of good administration in practice. One should not lose sight of the fact that for these many years the motto of the civil service administration has been

"Cekap, Bersih dan Amanah" (Clean, efficient and trustworthy). In my judgment, it is the duty of the judicial arm of Government, the courts, to ensure good administration by the due observance of this motto on a case by case basis. Otherwise members of the public who are adversely affected by a breach of the spirit and intendment of the motto in question will be left without resort to administrative justice.

That brings me to this case. The first respondent, as I have said, had no jurisdiction whatsoever to deal with the appellant's appeal. His act was ultra vires the EQA. We therefore allowed the appeal with costs here and below and remitted the appeal to the Appeal Board appointed under s. 36 of the EQA to hear and dispose of the appeal in accordance with law. The orders of the High Court were set aside. The deposit was ordered to be refunded to the appellant.

My learned brother Mohd Ghazali bin Mohd Yusoff JCA had seen this judgment in draft and has expressed his agreement with it.

Abdul Aziz Mohamad JCA:

The problems faced by the appellant company and the events surrounding them are broadly outlined in the grounds of judgment of my learned brother Gopal Sri Ram JCA. The problems concerned licensing in respect of the appellants' rubber factory. By virtue of an order of the Minister under s. 18(1) of the Environmental Quality Act 1974, the occupation or use of the factory required a licence.

In the High Court the appellants sought orders to quash a decision that the first respondent made on 15 January 1995 and a decision of 25 February 1995, said in the appellants' notice of motion to have been made by the second respondent board. The decision of 15 January 1995 was a decision to refuse to renew the licence for the period 1 April 1995 to 31 March 1996. The decision of 25 February 1995 was actually a decision of the first respondent himself on the appellants' appeal to the second respondents against the decision of 15 January 1995. The decision of 25 February 1995 was that the appeal could not be considered because there had been complaints of offensive smell emanating from the appellants' factory and because the discharge of effluent from the factory had often failed to comply with the conditions of licence. The appellants also sought by their notice of motion an order either to compel the first respondent to consider the renewal application (which he had done) or to compel the second respondents to hear the appellants' appeal.

At the close of his oral submission in the appeal before us, which arose from the High Court's dismissal of the appellants' notice of motion, the appellants' counsel said that basically the appellants' grievance was over the summary rejection by the first respondent of their appeal to the Appeal Board. It may be mentioned that the appellants' right of appeal is given by s. 35(1)(a) of the Act and the appeal is to the Appeal Board constituted under s. 36. The appellants' notice of appeal had been addressed to the second respondent, described as "Badan Rayuan Jabatan Alam Sekitar, Negeri Kedah and Perlis", as to which the judge said that there was no body that was known by that name, but no question arose before us that that was not the Appeal Board mentioned in s. 36.

In view of what the appellants' counsel said, the only issue that I saw that we had to decide was whether the decision of the first respondent that the appeal could not be considered was lawful. If it was not, the decision had to be quashed and an order had to be made to enable the appellants to pursue their appeal. The decision was obviously unlawful. The appellants' appeal being a matter within the jurisdiction of the Appeal Board, it was not for the first respondent to decide that the appeal could not be considered. It was for the Appeal Board to decide the fate of the appeal.

We accordingly quashed the decision of 25 February 1995 and remitted the matter to the Appeal Board to consider and decide the appellants' appeal according to law. In the event, other matters that had been submitted on in the appeal before us, which turned on the question whether it is correct that, as the learned judge held, the appellants had no legitimate expectation to a renewal of licence because the appellants had not been issued a licence for the previous period of 1 April 1994 to March 1995 and therefore there was no licence to renew and also because in that period they had been operating illegally since they had no licence, and which included the question of who was at fault in the appellants' not being able to obtain a licence for that period, were not matters that we needed to decide; and as they are matters that may be relevant to the appeal to the Appeal Board and that the Appeal Board may have to consider, I refrain from expressing any views about them.