IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 60 of 1959

Between:

REGINA Appellant

v.

PAULA KAHO AND OTHERS Respondents

Immigration Ordinance (Cap. 67)—permit to enter and reside—conditions which Principal Immigration Office may impose under s. 8 (2)—conditions restricting holder to a certain place of employment invalid.

The first two respondents, who were musicians each held a permit to enter and reside in the Colony issued by the Principal Immigration Officer. The permits contained the condition that each respondent " will be employed by The Fiji Mocambo Hotel and will remain in the employment for the duration of the permit; and will report to the Principal Immigration Officer if he ceases to be so employed." The Principal Immigration Officer purported to impose this condition under s. 8 (2) of the Immigration Ordinance (Cap. 67) which provides as follows:—

> " The Principal Immigration Officer may issue a permit to any person entitling him to enter and reside or remain in the Colony upon such conditions as to the security to be furnished the profession or occupation which the holder may exercise or engage in within the Colony, and to any other matter whether similar to the foregoing or not which the Principal Immigration Officer may deem fit to impose or as may be prescribed."

The first two respondents left the Fiji Mocambo Hotel while the permits were still effective and took up employment as musicians with the third respondent. Both the first two respondents and the fourth respondent reported this fact to the Principal Immigration Officer. Subsequently the first two respondents were charged with failing to comply with the conditions of their respective permits, in that each terminated his employment with the Fiji Mocambo Hotel, contrary to section 9 (1) and (2) of the Immigration Ordinance. The third and fourth respondents were charged with harbouring the first two respondents contrary to section 9 (1) and (2) of the Immigration Ordinance. The trial Magistrate concluded that the conditions which the Principal Immigration Officer had sought to impose were invalid, and he acquitted all the respondents. The Crown appealed by way of case stated. Three questions of law were submitted for the opinion of the Supreme Court, the first two by the appellant, the third by the respondent. The questions were as follows:—

(1) Was the condition imposed on persons Kaho and Tuinukuafe contained in their immigration permits that they must remain in the employment of the Fiji Macambo Hotel, a valid condition lawfully imposed ?

(2) Was the decision dismissing all the charges against all the accused correct in law?

(3) What is the meaning of Condition No. 3 in the Immigration Permit granted to the respondent Kaho, reading—

"When in Fiji he will be employed by the Fiji Mocambo Hotel, and will remain in the employment for the duration of this permit; This permit will expire on 24/2/57, and will report to the Principal Immigration Officer if he ceases to be so employed."

Held—(1) The answer to the first question is the Principal Immigration Officer was not empowered to impose a condition restricting the holder of a permit to a certain place of employment.

(2) In answer to the second question, the Magistrate was correct in law in dismissing the charges.

(3) In answer to the third question, the condition as framed was in the most contradictory terms and could only be taken to mean that the first two respondents must notify the Principal Immigration Officer if they ceased to be employed at the Fiji Mocambo Hotel: once the Principal Immigration Officer was so acquainted there was no breach of the condition.

Decision of the Magistrate's Court affirmed.

Cases cited:—

Barron and Ors. v. Potter and Ors. (1915) 3 K.B.D., 593; *Brierley v. Phillips* (1947) 1 K.B.D., 541.

J. F. W. Judge for the appellant.

A. D. Leys for the respondents.

LOWE, C.J. [17th December, 1959]—

This is an appeal by way of case stated.

The first two respondents are Tongan subjects and are musicians. On the 21st December, 1957, the first respondent was granted a permit to enter and reside in the Colony, and the second respondent obtained a similar permit on the 24th February, 1956.

After various extensions of the permits, that of the first respondent was due to expire on the 1st January, 1959, and that of the second respondent on the 24th February, 1959. Each entry permit issued to those respondents, with a slight variation in the case of the second respondent, contained a condition that each respondent "will be employed by the Fiji Mocambo Hotel and will remain in the employment for the duration of the permit; and will report to the Principal Immigration Officer if he ceases to be so employed".

While the permits were still effective each respondent gave notice to the Mocambo Hotel of an intention to leave his employment. They and the fourth respondent kept the Principal Immigration Officer fully informed and acquainted him with the future change of address of the permit holders. Later, when the first two respondents had been employed by the third respondent for some time, proceedings were taken against all of the respondents in the following manner:—

The first two respondents were charged with failing to comply with the conditions of their respective permits, contrary to section 9 (1) and (2) of the Immigration Ordinance (Cap. 67) in that each terminated his employment

with the Mocambo Hotel. The third and fourth respondents were charged with harbouring each of the first two respondents contrary to section 9 (1) and (2) of (Cap. 67), when they had reasonable ground to believe that the first two respondents had acted in contravention of the conditions of their respective permits to enter and reside in Fiji.

In a long and carefully considered judgment, the learned Magistrate came to the conclusion that the conditions sought to be imposed were invalid, not being within the competence of the Principal Immigration Officer as envisaged by section 9 (1) of the Ordinance. He acquitted all of the respondents. The Attorney-General then requested that the following questions of law be submitted for the opinion of this Court:—

(*a*) Was the condition imposed on persons Kaho and Tuinukuafe contained in their immigration permits that they must remain in the employment of the Fiji Mocambo Hotel, a valid condition lawfully imposed ?

(*b*) Was the decision dismissing all the charges against all the accused correct in law ?

The respondents submitted the following questions of law:—

(1) What is the meaning of Condition No. 3 in the Immigration Permit granted to the respondent Kaho, reading—

> " When in Fiji he will be employed by the Fiji Mocambo Hotel, and will remain in the employment for the duration of this permit; This permit will expire on 24/2/57, and will report to the Principal Immigration Officer if he ceases to be so employed "; . . .

with the result that there would be no breach of the condition if the holder on ceasing to be so employed, did report to the Principal Immigration Officer ?

Section 8 (2) of the Ordinance is as follows:—

> " The Principal Immigration Officer may issue a permit to any person entitling him to enter and reside or remain in the Colony upon such conditions as to the security to be furnished the profession or occupation which the holder may exercise or engage in within the Colony, and to any other matter whether similar to the foregoing or not which the Principal Immigration Officer may deem fit to impose or as may be prescribed."

It was under this subsection that the Principal Immigration Officer issued permits to the first two respondents. The relevant portion of section 9 (1) of the Ordinance, under which all of the respondents were charged, is as follows:—

> " Any person who acts in contravention of or fails to comply with any of the provisions of this Ordinance or any conditions lawfully imposed in pursuance of the provisions thereof or any lawful order or requirement given by an immigration officer, or aids or abets in any such contravention or harbours any person whom he knows or has reasonable grounds to believe, has acted in contravention thereof, shall be guilty of an offence against this Ordinance."

For the appellant, it was submitted that the main purpose of the Ordinance was to protect the lawful residents of Fiji and that the Principal Immigration Officer was entitled to impose the condition which he did impose and could restrict the employment of the respondents to a particular locality or

place of employment for the purposes of the protection the Ordinance intended. It was also argued that "occupation" was co-extensive with "employment" but Counsel for the appellant conceded that if section 8 (2) left any doubt as to its intention, the subsection must be construed in favour of all of the respondents.

For the respondents it was argued that the first part of each condition was qualified by the second portion and that they were not separate conditions.

It was contended that as the respondents did, in fact, report to the Principal Immigration Officer as required, they had not broken any portion of the condition embodied in the permit.

It will be seen from section 8 (2) that a permit issued by the Principal Immigration Officer may contain conditions, *inter alia*, as to "the profession or occupation which the holder may exercise or engage in within the Colony". The subsection certainly adds the words "any other matter whether similar to the foregoing or not which the Principal Immigration Officer shall deem fit to impose or as may be prescribed." There is nothing prescribed except a form of permit which, in my view, has no direct bearing on the issue involved.

The legislature did not, in section 8 (2) authorise the Principal Immigration Officer to impose a condition which would conflict with and be a complete negation of that portion of the section, relating to profession or occupation, to which I have referred. In other words, as the legislature had made provision whereby a permit could be issued which could limit the holder of that permit to engaging in a definite profession or occupation, the Principal Immigration Officer is not empowered to impose a condition restricting the holder of a permit to a certain place of employment. The words of the section are clear and unambiguous and, in my opinion, the particular portion, while meaning that the holder of a permit can be put under a condition that he must engage in a certain profession or occupation, which would be stated in a condition of the permit, such a person is to be entirely free, within the Colony, to engage in that profession or occupation during the validity of the permit. I cannot agree that in section 8 (2) "occupation" is co-extensive with "employment" or that the two words are synonymous. "Profession" is certainly not in either category.

In *Barron and Ors. v. Potter and Ors.* (1915) 3 K.B.D., 593, at 606, the Court of Appeal, referring with approval to judgments of Kelly C.B. and Martin B. given in cases referred to in Barron's case, was dealing with the word "occupation" as contained in the Bills of Sale Act, 1878, and the conclusion reached adds strength to my contention. Kelly C.B. said:—

> "This is a question of the meaning to be put upon the word 'occupation' in the Act of Parliament. In my opinion it means the trade or calling by which the maker of the bill of sale ordinarily seeks to get his livelihood."

Martin B. said:—

> "The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours."

The definitions are particularly apt in the instant case.

In section 8 (2) the legislature was unambiguous and did not indicate an intention that the Principal Immigration Officer could restrict any person to a particular place of employment.

Counsel for the respondents referred to *Brierley v. Phillips* (1947) 1 K.B.D., 541, at 543, where Lord Goddard C.J. referred to an ambiguous order which had been made under certain Price Control Regulations, and said:—

> " It is surely desirable that orders creating criminal offences should be stated in language which the persons who may commit the offences can understand. It is a very serious thing to produce orders, . . . which create serious offences, if they are couched in language which does not make clear whether a person is committing an offence or not. I am certainly not prepared to support such orders and to find persons guilty of criminal offences when the orders which they are charged with violating are couched in language which is open to all sorts of meanings and causes all sorts of difficulties, so that the persons to whom they apply cannot know whether they are acting legally or not. . . ."

I do not find section 8 (2) to be ambiguous but that portion of the judgment in the case cited is very pertinent for it applies with equal force to the condition which the Principal Immigration Officer purported to impose in the case of each of the first two respondents. The condition itself is in the most contradictory terms. It says on the one hand that the permit holder shall have no right to change the employment mentioned in the condition and on the other it implies, without qualification, that he can leave that employment so long as he reports to the Principal Immigration Officer. The facts would seem to be that the first two respondents were required to have a definite means of livelihood in Fiji and had been engaged by the Mocambo Hotel. The first portion of the condition imposed, so far as the law is concerned, merely contained an address of the respondents. This seems to be abundantly clear from the second portion of the condition which, in effect, clearly suggests that the permit holders could go to any part of the Colony for employment. It is noticeable that there is nothing in the condition to require the first two respondents to engage only in their profession or occupation of musicians. This should have been made a condition if it was agreed that it was not contrary to the interests of the Colony that they should be so employed while they resided in Fiji. The issues in this case seems to have arisen because of a dispute between the two employers and, if I am correct in my assumption, they should have been left to any remedy each might have had in law, by way of breach of contract or otherwise, and it was not appropriate that the matter should have come before the Courts by way of prosecution. The first two respondents should certainly not suffer as a result.

It will be apparent that I must answer the questions submitted for my opinion as follows:—

(*a*) The condition imposed on the first two respondents that they must remain in the employment of the Fiji Mocambo Hotel was not a valid condition lawfully imposed; and

(*b*) The decision of the learned trial Magistrate in dismissing all the charges against all of the accused was correct in law.

There can be no doubt that the invalidity of the condition imposed dispelled any question of the second and third respondents having committed any offence whatsoever but, in any event, the evidence before the learned trial Magistrate was such as to show that they had carefully and adequately complied with the law and had committed no offence even had the condition

been valid. There does not seem to be any reasonable possibility that " they had reason to believe the first two respondents had acted in contravention of the conditions of their permits " and it is surprising that they were charged.

As to the question raised by the respondent: Condition 3 in each of the permits is most conflicting in its wording and, so far as the law is concerned, can only be taken to mean that the respondents' address when the permit was issued was the Fiji Mocambo Hotel, where they had been employed, and that they must notify the Principal Immigration Officer if they ceased to be so employed, no doubt in order that the latter would in a position to obtain fresh security if necessary and would know of the change of address. There was no breach of a condition once the Principal Immigration Officer was acquainted with the fact that the employment of the first two respondents with the Mocambo Hotel was to cease.

I agree with the conclusion of the learned Magistrate but it must not be assumed that I approbate all of the reasons which led him to that conclusion.