

R. v FINANCIAL SECRETARY, ex p. Garson and others

Supreme Court
Unsworth, C.J.,
23 June 1967.

Imports and exports — extent of powers of Financial Secretary.

Mandamus — exercise of discretionary powers — what are extraneous considerations.

Mandamus — whether court may consider validity of Government contract.

The Financial Secretary, on behalf of the Government of Gibraltar, entered into an agreement with a Portuguese company, Sociadada Industrial & Exportadora Rimalpi Limitada, giving that company the exclusive right of supplying fruit and vegetables from Portugal to Gibraltar and containing an undertaking that no import licence would be issued for such goods unless supplied by the company.

The applicants applied for an import licence under the Imports and Exports (Control) Regulations. It was refused, with a statement that imports of fruit and vegetables from Portugal would only be authorized if effected through Rimalpi.

The applicants sought relief by way of an application for an order of mandamus. They based their application inter alia on submissions that the Financial Secretary had no power to enter into an agreement which inhibited the exercise of his discretion under the Regulations and that in refusing the applicants' application he had been actuated by extraneous considerations.

The Financial Secretary filed an affidavit, in which he gave, in detail, his reasons for regarding the agreement and the consequent conditions as in the public interest, so as to ensure an orderly, regular and reasonably-priced supply of fruit and vegetables.

Held: (i) The powers conferred on the Financial Secretary under the Imports and Exports Ordinance (Cap. 75, 1965-69 Ed.) were wide enough to allow him to enter into arrangements such as that with Rimalpi and to refuse licences unless the applicants were prepared to accept such conditions.

(ii) It was not open to the court on an application for mandamus to adjudicate on the validity of the agreement made between the Government and Rimalpi.

Cases referred to in the judgment.

R. v Bowman, [1898] 1 Q.B. 663.

R. v Sylvester, (1862) 31 L.J.M.C. 93.

R. v Port of London Authority, ex p. Kynoch Ltd. [1919] 1 K.B. 176.

R. v Board of Education, [1910] 2 K.B. 165.

R. v Lancaster (Inhabitants), (1900) 64 J.P. 280.

Mayor, etc. of Stepney v John Walker and Sons Ltd., [1934] A.C. 365.

R. v Special Commissioners of Income Tax, 2 T.C. 248.

R. v Rotherham Licensing JJ., [1939] 2 All E.R. 710.

Rederiaktiebolaget Amphitrite v The King, [1921] 3 K.B. 500.

Application

This was an application for an order of mandamus directed to the Financial Secretary requiring him to issue a licence under the Imports and Exports (Control) Regulations without the condition which he had indicated would attach to any licence for the import of fruit and vegetables from Portugal.

J.J. Triay and J.E. Triay for the applicant.
P.J. Isola for the respondent.

14 July 1967: An order, of which the following forms part, was read—

(After setting out in detail the nature of the proceedings, the relief sought, the provisions of regulations 7 and 8 (now re-numbered 6 and 7) of the Imports and Exports (Control) Regulations, the affidavit of the Financial Secretary giving his reasons for entering into the agreement with Rimalpi and consequently imposing the condition objected to, and the agreement itself, the Chief Justice continued—)

I am satisfied from the affidavits and documents before the court that the Financial Secretary considered the application made by the applicants but that, in refusing it, was influenced by the terms of the agreement made with Rimalpi Ltd.

In dealing with this case I have to consider whether the Financial Secretary took into account extraneous considerations. Counsel for the applicants referred to a number of cases in which the courts have granted a mandamus on this ground.

In *R v Bowman*¹ the licensing justices granted a licence upon the applicant paying to them a sum of money which was to be used for the purpose of reducing the rates or some other similar purpose. Certain persons who had appeared before the justices, in opposition to the application, obtained a mandamus on the ground that the objectors had a right to be heard before the licensing justices according to law and that the justices in annexing the condition for the payment of money showed that their decision had been influenced by extraneous considerations. In these circumstances the hearing was equivalent to no hearing at all. In the course of his judgment Wills, J., said²

“If the justices allow themselves to take into consideration matters which have no bearing upon the merits of the case before them, and which influence their minds in arriving at their decision, it cannot be said that the objector has been heard according to law”.

*R v Sylvester*³ was a special case stated by licensing justices upon the question whether they had acted illegally in refusing to renew certain beerhouse licences because the appellant refused to take out a spirits licence also. The court in reply to this special case held that the justices were wrong in law in so doing and Wightman, J., said

¹ [1898] 1 O.B. 663.

² At p. 666.

³ (1862) 31 L.J.M.C. 93.

"They came to the meeting with a general resolution already prepared; and I answer the question put to us by saying that they were wrong in the way in which they exercised the discretion which is given to them".

It should be noted (as was pointed out in the case of *R v Port of London Authority, ex p. Kynoch Ltd.*¹ that *Sylvester's* case was not an application for mandamus and the issue whether the justices had or had not refused jurisdiction was not before the court.

In *R v The Board of Education*² certain questions were submitted to the Board of Education under s. 7(3) of the Education Act, 1902. The Board dealt with the matter without answering all the questions and a mandamus was issued directing them to deal with all the matters according to law. Farwell, L.J., at page 179 said

"If the tribunal has exercised the discretion entrusted to it bona fide, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the courts cannot interfere; they are not a court of appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the courts have regarded them as declining jurisdiction."

In *R v Lancaster (Inhabitants)*³, a local Act had provided that 2, 3 or 4 householders, to be nominated yearly by the inhabitants of the township should be the tithe collectors for the township. The inhabitants resolved that no person should be appointed who did not pledge himself to comply with certain conditions which they had no power to impose under the local Act. It was held that there had been a refusal to appoint any collectors except on a condition which there was no power to impose under the Act and a mandamus was issued directing the inhabitants to deal with the matter according to law.

The principles stated by Lord Wright in the case of *Mayor, etc., of Stepney v John Walker and Sons Ltd.*⁴ were referred to by counsel.

Lord Wright said this:—

"I do not wish in any way to detract from the seriousness of the duties with which the Court is charged in dealing with an application for a writ of mandamus, or the importance of the Court giving the most liberal consideration in the interests of the applicant. In the words of Lord Mansfield in *R v Barker*, "A mandamus is a prerogative writ; to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used

¹ [1919] 1 K.B. 176.

² [1910] 2 K.B. 165.

³ (1900) 64 J.P. 280.

⁴ [1934] A.C. 365, at p. 395.

upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice." More compendiously it was said by Bowen L.J. in *In re Nathan* "If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done." Thus the judges have a wide discretion in exercising this remedial jurisdiction; but it is to be exercised as a judicial discretion. There are in the books a vast number of cases illustrating the rules which govern the exercise of this power. Some of these cases are difficult to reconcile with others. I shall merely seek by a few citations to justify the principles which I think should govern this case".

In the case of *R. v Port of London Authority, ex p. Kynoch Ltd.* the exercise of discretionary powers under s. 109 of the Thames Conservancy Act, 1894, were considered. The section provides that the Port Authority may "grant to any owner . . . of land adjoining the Thames a licence . . . for the making of any dock, basin, pier, jetty, wharf, bank, quay or embankment wall or other work immediately in front of his land and into the body of the said river." An applicant who applied for a licence was refused on the ground that the accommodation applied for was of the character which the Authority was itself charged with providing. He applied for mandamus and was refused by the Court of Appeal on a number of grounds including the fact that the Authority had considered the application and that the Authority in view of its position, powers and duties was warranted in adopting a general policy in granting licences. Bankes, L.J.,¹ said this after the principles relating to mandamus.

"Now to apply these principles to the facts of this case. There is the letter of November 2 written on behalf of the Port authority by their secretary, and much relied on by the prosecutors, and there is his affidavit. It negatives the suggestion that the only matter considered by the Port authority was that specified in the letter. We must decide this case upon the affidavit. Read carefully and fairly it amounts to a statement that the Port authority did nothing which could be properly described as a refusal to hear and determine. But I go a step further. Even assuming that the letter contains the only ground on which the application was refused, I think, considering the position of the Port authority, that the matters involved in that decision were rightly and properly considered by them, and warrant the adoption of a general policy in granting licences for works of this particular class. Therefore on the main point the rule must be discharged".

Scrutton, L.J.,² said:—

"As the grounds on which a mandamus will be granted are difficult to state accurately, I prefer to adopt the words of Wills J., in *Reg. v Cotham*: "I take the governing principle to be that if the justices have applied themselves to the consideration of a section of an Act of Parliament, and have, no matter how erroneously, determined the question which arises upon it before them,

¹ At p. 185.

² At p. 186.

their decision cannot be reviewed by process of mandamus. That is so whether there is an appeal from their decision or not. If there is an appeal, mandamus will not lie; if there is not, their decision is final. But when it appears that they have taken into consideration matters which are absolutely outside the ambit of their jurisdiction, and absolutely apart from the matters which by law ought to be taken into consideration, then they have not heard and determined according to law." I may add that if, before they sit to hear a matter, they have absolutely come to a determination their sitting may not be a hearing and determining because they have determined before hearing. Mr. Talbot says that the Port authority determined, before hearing this application, that they would grant no licence for a wharf likely to compete with the accommodation which by the Act constituting them they themselves are bound to provide, and that it was not open to them to take into account the question of competition. Now I state it as my view, because it is the substantial question in this case and that which the parties want decided, that the Port authority representing various interests in the Port are by virtue of the Act entitled in this matter of granting licences to regard the effect of the proposed accommodation upon the accommodation which they themselves have provided, or may have to provide, in discharge of their statutory duty. An applicant who cannot obtain a licence from the Port authority has his remedy by appeal to the Board of Trade, or he may promote a Bill in Parliament authorizing his undertaking. On this point, which goes to the merits, Mr. Talbot fails to show that the Port authority has taken into consideration, in the words of Wills J. "matters which are absolutely outside the ambit of their jurisdiction."

In *R. v Special Commissioners of Income Tax*¹ the District Commissioner of Income Tax granted the applicant certificates of over payment for three years but the Special Commissioners declined to grant repayment for more than one year. Mandamus proceedings were commenced and it was argued that mandamus did not lie as the proceedings were virtually a claim against the Crown for the repayment of money and that there was no duty as between the Special Commissioners and the applicant. It was held on appeal that mandamus lay to the Special Commissioners to show cause why repayment should not be made on all three certificates.

In *R. v Rotherham Licensing JJ.*² the justices acted on a general rule without taking into account the circumstances of the particular case and an order of mandamus was issued.

I have considered the present case in the light of the authorities mentioned above. There is no precise definition of extraneous circumstances but in the words of Wills, J., (as approved by Scrutton, L.J., in *R. v The Port of London Authority, ex p. Kynoch*) it means that in exercising their discretion the authorities "have taken into consideration matters which are absolutely outside the ambit of their jurisdiction and absolutely apart from the matters which by law ought to be taken into consideration". In considering whether a matter ought to be taken into consideration one must look at the statute under which the discretion is exercised because the law may (as in

¹ 2 T.C. 248.

² [1939] 2 All E.R. 710.

Kynoch's case) be sufficient to authorise the licensing authority to adopt a general policy in the granting of licences.

In my view the principles in *Kynoch's case* apply here. The powers conferred upon the Financial Secretary under the Imports and Exports Ordinance are extremely wide and, in my view, sufficient to justify him when considering applications, in following a general policy and having regard to arrangements made for the importation of goods into Gibraltar from a foreign country. In these circumstances I consider that he would be justified in imposing conditions on a licence to give effect to arrangements such as those with *Rimalpi Ltd.* or to refuse a licence unless the applicant was prepared to accept such conditions.

It has been submitted by counsel for the applicants that I should now inquire into the validity of the agreement made by the Government with *Rimalpi Ltd.* and, if I find it invalid, rule that the Financial Secretary was influenced by extraneous considerations. I am not aware of any authority for such a procedure. The agreement was made by the Government and was signed by the Financial Secretary with the approval of the Gibraltar Council. It is a contract by the Government as such in respect of which mandamus does not lie. I do not think that it is open to the court in these mandamus proceedings to adjudicate on an agreement which cannot be challenged by mandamus and which was made between parties who are not before the court. There are ways in which the validity of a Government agreement can be brought before the courts for consideration but mandamus is not one of them.

I now turn to the question whether the Financial Secretary fettered his discretion. Counsel for the applicants referred to a number of cases in which it was held that a person entrusted with statutory powers cannot by contract bind himself not to exercise the discretion conferred upon him. I think that these cases are authority for the proposition that a person entrusted with statutory powers cannot by contract fetter his discretion in a manner which is inconsistent with the provisions of the law granting the power. But the position here is that any fettering of discretion was not done by the Financial Secretary but by the Government as such under an agreement which (for reasons I have already stated) the Financial Secretary was entitled to take into account when exercising his discretion.

Counsel also referred to the case of *Rederiaktiebolaget Amphitrite v R.*¹ In that case neutral shipowners during the war, being aware of the ability of neutral ships to be detained in British ports, obtained an undertaking from the British government that if they sent a particular ship to England with a particular class of cargo she would not be detained. On the faith of that undertaking the owners sent the ship to a British port with a cargo of a stipulated kind. The British government subsequently withdrew their undertaking and refused her clearance. On a petition of right for damages

¹ [1921] 3 K.B. 500.

for breach of contract it was held that the government's undertaking was not enforceable in a court of law, it not being within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future. This case might be relevant in any proceedings on the agreement; but it is not an authority for saying that a public officer must disregard a Government undertaking which has not been withdrawn.

For the reasons given in this judgment the application for an order of mandamus against the Financial Secretary is refused.