[1991–92 Gib LR 361]

R. v. DIRECTOR OF LABOUR AND SOCIAL SECURITY, ex parte AMIMI

SUPREME COURT (Alcantara, A.J.): August 5th, 1992

Employment—foreign workers—equality of treatment—provisions of Employment Ordinance, s.21 to be strictly observed—employer refused work permit for foreign worker to exhaust right of appeal under s.23 before applying for judicial review—prospective employee has locus standi to apply as interested party

Employment—foreign workers—equality of treatment—controls on work permits for foreign labour in Employment Ordinance, s.21 not unlawfully discriminatory against Moroccan nationals—Moroccan worker accorded equal status in labour market with EEC national under EC-Moroccan Co-operation Agreement 1978, art. 40—once accepted as worker, status impliedly confers equal right to work

Employment—foreign workers—equality of treatment—for purposes of EC-Moroccan Co-operation Agreement 1978, art. 40, Moroccan national is "worker" until ceases, for reasonable time, to be legally employed here—ceasing to work excludes temporary period of unemployment, illness, or extended vacation—court may consider state of local labour market

The applicant applied for judicial review of the Director of Labour and Social Security's refusal to issue a work permit.

The owner of a bar applied to the Department of Labour and Social Security for permission to employ the applicant, a Moroccan national, as a barman. The application was refused on the basis of s.21 of the Employment Ordinance, namely that the Department was not satisfied that there was no Gibraltar resident registered as unemployed who was capable of doing, and suitable for, the job (s.21(1)(*a*)), and refusal was warranted by the situation in the labour market (s.21(3)(*d*)).

The applicant applied for prerogative orders to quash the decision, to require the Director to reconsider the application for a work permit, to declare the decision unlawful, and to award damages. The court suspended an order for his deportation made by the magistrates' court in criminal proceedings against him for being in Gibraltar without a visitor's permit.

The applicant had lived and worked here since 1972; the Department's records showing that he had been employed from 1972 to 1979, and had

drawn unemployment benefit for a few months afterwards. No further record existed until an application in 1991 to employ him. He stated that he had done casual and part-time work from 1980 to 1988, but neither he nor any employer had paid any social insurance for him during that time. Officially, he had held a residence permit until 1979 and then returned as a visitor in 1991, on a three-month visitor's permit, after which he was granted monthly permits for a short period. An application by another employer to employ him as a barman was refused on the same grounds prior to the present application.

The applicant submitted that (a) the policy operated by the Director was unfairly discriminatory against Moroccan nationals and aimed at reducing the number of Moroccan workers in favour of Gibraltarians and EEC nationals; and (b) accordingly, the policy was in breach of the 1978 Co-operation Agreement between the EEC and the Kingdom of Morocco, art. 40 of which proscribed discrimination in the treatment of Moroccan workers employed in the territory of EEC member states, in relation to their own nationals.

The Director submitted in reply that (a) the Employment Ordinance was not discriminatory against Moroccan nationals as such, but aimed merely to protect the rights of local labour in a limited market; and (b) the Co-operation Agreement applied only to Moroccan *workers*, namely persons legally working here, and then only in respect of their remuneration and working conditions, not in respect of their right to work.

Held, dismissing the application:

(1) The Director's refusals of both applications by local employers were unimpeachable, since s.21 had not been complied with. Neither employer had exercised its right of appeal under s.23, and if either had applied for judicial review, they should first have exhausted other remedies. The applicant had *locus standi* to apply, however, as an interested party. The Employment Ordinance was, indeed, protective of local labour and discriminatory against foreign workers, since only local labour had the right to work, and employers could import foreign labour only upon compliance with the strict requirements of s.21 (paras. 9–12).

(2) Although there had been a tightening of controls on foreign labour, there was no campaign against Moroccans in particular. Moroccan workers were accorded treatment equal to EEC nationals under the EEC-Morocco Co-operation Agreement, which was incorporated by the European Communities Ordinance into the Laws of Gibraltar, and that protection was not confined to the matters expressly stated in art. 40 (working conditions and remuneration) but extended, by implication to the right to work. However, unlike EEC nationals, to whom, by virtue of the EC Ordinance, s.21 did not apply, a Moroccan had first to be accepted as a worker before the Agreement conferred any status on him (paras. 14–19).

(3) The applicant was not a worker, since he had ceased to work here in lawful employment in 1979. A Moroccan *national* who ceased to work

here legally and to comply with social insurance requirements for more than a reasonable time would cease to be a Moroccan *worker*. Ceasing to work did not include a temporary period of unemployment, illness or an extended vacation, and whether a person had ceased to work was a question of fact in each case. The court was entitled to take into account that another foreign worker had probably taken his place in the labour market, and that at present the labour market was full as a result of a recession and the scaling-down of employment by official employers. The Director was justified in requiring full compliance with s.21 (paras. 20–21).

(4) The suspension of the deportation order against the applicant would therefore be lifted (paras. 22–23).

Cases cited:
(1) *Office National de L'Emploi* v. *Kziber,* [1991] E.C.R. I-199, applied.
(2) *R.* v. *Director of Labour & Social Security, ex p. Chainani*, 1991–92 Gib LR 129, considered.

Legislation construed:
Employment Ordinance (1984 Edition), s.21(1): The relevant terms of this sub-section are set out at para. 7.
s.21(2): The relevant terms of this sub-section are set out at para. 7.
(3), as amended by Ordinance No. 10 of 1991: The relevant terms of this sub-section are set out at para. 7.
s.23(1): The relevant terms of this sub-section are set out at para. 11.
(2): The relevant terms of this sub-section are set out at para. 11.
(3): The relevant terms of this sub-section are set out at para. 11.

Co-operation Agreement between the European Community and the Kingdom of Morocco of September 26th, 1978, Council Regulation (EEC) No. 2211/78, Annex, art. 40: The relevant terms of this article are set out at para. 16.

C. Finch for the applicant;
P. Dean, *Acting Attorney-General*, for the respondent.

1 **ALCANTARA, A.J.:** This is an application for judicial review. Leave to apply was granted on May 20th, 1992. The applicant is seeking relief against the decisions of the Director of Labour and Social Security dated April 22nd and 23rd, 1992, refusing to issue a work permit to the applicant. The applicant claims the following relief:

> "(a) Certiorari to quash the said decisions and each of them. Further and in the alternative,
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> (b) mandamus to order the Director of Labour and Social Security to reconsider the applicant's application for a work permit, according to law. Further and in the alternative,

(c) a declaration that the said decisions and each of them, are unlawful and/or should be reconsidered, according to law. Further and in the alternative,

(d) damages."

2 The applicant is a Moroccan national. According to him, he has lived and worked in Gibraltar for the past 22 years. This assertion is not substantiated by the records of the Department of Labour and Social Security, which supports the fact that the applicant commenced employment in Gibraltar on February 18th, 1972. He was employed first with the Rock Hotel, then the R.A.F., followed by the Caleta Palace Hotel, and finally at St. Michael's Cabin. He finished his employment there early in 1979, and after that he was paid unemployment benefit by the Department of Labour and Social Security until July 1979. After this the Department has no record of him.

3 The applicant, in his affidavit dated May 14th, 1992, in support of this application, states:

"For the years 1970 to 1979 I worked at various hotels and bar restaurants in Gibraltar or other catering establishments, including the Rock Hotel, the Royal Air Force Officers' Mess, the Caleta Palace and the Holiday Inn. In 1979 I spent some time in London and returned to Gibraltar and worked at St. Michael's Cabin."

I accept this part of his evidence. There are many points of coincidence with the records of the Department of Labour and Social Security. He then goes on to depose: "For the years 1980 to 1988 I was employed doing casual work in Gibraltar and part-time work." I do not accept this latter part. Not only is it not confirmed by the records of the Department of Labour and Social Security, but it is vague and lacks precision, in not stating with whom or for whom he worked. During this period it is possible that he might have done odd jobs, but he was not a "worker." There is no record of him or his "employer" having paid any social insurance during that period.

4 In so far as his residence in Gibraltar is concerned, the applicant asserts that he has been residing here for 22 years. The Chief Immigration Officer swears that the applicant held a permit of residence until 1979, and that he again returned to Gibraltar as a visitor in July 1990. On this occasion he had a visitor's permit, valid for a total period of three months, expiring on July 18th, 1991. I accept the applicant's version in the affidavit of Josephine Slater dated June 9th, 1992, where she states:

"The applicant further informed me that his identity card was taken from him in or around July 1991, and thereafter he was granted a casual monthly permit until he was told he would not have his permit of residence renewed until he got a permanent job and a work permit."

5 In April 1991 there was an application by Birchwood Ltd., the owner of California Bar & Restaurant, to the Department of Labour and Social Security, seeking to employ the applicant as a barman. That application was refused by letter dated July 19th, 1991. No reasons were given. On December 6th, 1991, solicitors on behalf of the applicant asked for reasons. The following reasons were given on December 16th, 1991 and on February 6th, 1992:

> "Due to the current labour situation your request for a work permit to employ Mohamed Amimi with the above-mentioned cannot be acceded to."

And:

> "I cannot trace a vacancy having been opened with this Department or, for that matter, with the Employment and Training Board, other than a request for a work permit in respect of Mr. Amimi which has already been refused. Under s.21 of the Employment Ordinance, I am unable to issue a permit of employment unless all the requirements under that section have been fulfilled."

6 This application by Birchwood Ltd. has not been pursued and is not the subject of the present judicial review, but it provides a background. There was a subsequent application dated March 18th, 1992 by Mr. Redoune Rambouk to employ the applicant as a barman in the Ark Royal Bar at Irish Town. This application was again refused and the following reasons were given by the Department of Labour and Social Security on March 22nd and 23rd, 1992, respectively:

> "I have to inform you that the matter of Mr. Amimi has been considered and the request for a work permit to be issued cannot be acceded to. It should be noted that the requirements of s.21 of the Employment Ordinance have not been met and therefore the refusal to issue the said permit."

And:

> "Under s.21 of the Employment Ordinance, the Director shall not issue a work permit if there are persons registered as unemployed within the local labour market who, in the opinion of the Director, are capable and suitable for the vacancy in question, and, taking into account the unemployment situation, your request for a work permit for the above-named cannot be acceded to."

7 As in the case of Birchwood Ltd., two reasons were given: (a) non-compliance with s.21; and (b) the labour or unemployment situation. I think I should set out s.21 of the Employment Ordinance in full:

> "(1) Subject to subsection (3), the Director shall not issue a permit for the employment of a worker who is not a resident of

Gibraltar unless he is satisfied that all of the following requirements have been fulfilled:—

(*a*) that there is no resident of Gibraltar registered under section 15 who is, in the opinion of the Director, capable of undertaking and suitable for the particular employment in respect of which the permit is sought (hereinafter in this section called 'the employment');

(*b*) that the terms and conditions of the employment are not less favourable than those prescribed by law or generally observed by good employers;

(*c*) that the prospective employer has made adequate efforts to find a resident of Gibraltar who is capable of undertaking and suitable for the employment, and where these have been unsuccessful, no suitable worker who is in the opinion of the Director capable of undertaking and suitable for the employment is registered under section 15;

(*d*) that the prospective employer genuinely intends to employ the worker in the employment;

(*e*) that a valid written contract of employment which shall include the matters set out in Schedule 1 is duly entered into by the prospective employer and the worker and has been produced to and approved by the Director;

(*f*) that any accommodation required to be provided by the employer for the worker whether by virtue of a contract or otherwise—

(i) is available;

(ii) has been recently inspected and approved for the purpose by health authorities of the Government within the immediately preceding two weeks; and

(iii) a certificate of inspection and approval under subparagraph (ii) of this paragraph has been furnished by those authorities to the Director;

(*g*) that a deposit of money has been made by the prospective employer with the Director, sufficient in the opinion of the Director for the repatriation of the worker on termination of the employment:
Provided that the Director, in his discretion, may permit the prospective employer to enter into a bond or other adequate security in lieu of such deposit;

(*h*) that the employment of the worker is in accordance with the terms of any quota determined under section 4(1); and

(*i*) that the worker is in possession of a valid passport as defined in section 2 of the Immigration Control Ordinance and that the passport will continue to be valid for a period not less than the duration of the contract.

(2) A permit granted under subsection (1) may be made subject to either or both of the following conditions:—

(*a*) that the employer shall ensure that a resident of Gibraltar is trained for that employment within a reasonable time;

(*b*) that the worker shall not cease to reside at the accommodation referred to in paragraph (*f*) of subsection (1) without the written permission of the Director.

(3) The Director may in his discretion refuse to grant a permit:—

(*a*) for the employment of a worker who fails to satisfy the Director that he has reached the age of nineteen years;

(*b*) for the employment of a worker to fill a vacancy in employment which, in the Director's opinion, has occurred as a result of a trade dispute or as a result of a dismissal which has caused a trade dispute while such trade dispute, in his opinion, continues to exist;

(*c*) for the employment of a worker who has entered Gibraltar before the requirements in paragraphs (*e*), (*f*) and (*g*) of subsection (1) have been satisfied; or

(*d*) for the employment of a worker where, in the opinion of the Director, that decision is warranted by the situation in the labour market."

8 Kneller, C.J. had an opportunity to comment on the Employment Ordinance in *R.* v *Director of Labour & Social Security, ex p. Chainani* (2). This is what he said (1991–92 Gib LR 129, at para. 56):

> "The Ordinance reflects the will of the legislature and at first blush discriminates initially but not finally or exclusively in favour of 'locals' against those defined as 'non-residents,' and it is not *ultra vires* the Constitution."

9 My own view is that the Ordinance is highly protective of local labour and consequently discriminatory against foreign labour. The pattern, as I see it, is that local labour has the right to work. Foreign labour has no such right. Employers, however, are given the right to apply to import foreign labour, provided that the employer is able to comply with the strict provisions of s.21 of the Ordinance.

10 In the present case, two prospective employers, Birchwood Ltd. and Mr. Redoune Rambouk applied to import a foreign worker. It is true that at the time of the application by the prospective employers the foreign worker was physically in Gibraltar, but he was here as a visitor not as a worker. Both applications were refused. The refusals cannot be faulted. The respective applications did not comply with the strict provisions of s.21.

11 In any case, the prospective employers had a remedy against such refusals, which they are bound to exhaust before they attempt to apply for judicial review. That remedy is to be found in s.23 of the Employment Ordinance, which provides:

> "(1) Where the Director—
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> (*a*) refuses to grant a permit or extend the validity of a permit; or
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> (*b*) makes a permit subject to any condition; or
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> (*c*) gives notice under section 22(3) of his intention to revoke a permit—
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> the employer in any such case, and also the worker in the case specified in paragraph (*c*), may within seven days after being notified in writing of the Director's decision appeal against it to the Control of Employment Appeals Tribunal.
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> (2) Notwithstanding subsection (1), no appeal shall lie against any exercise by the Director of the discretion vested in him by section 21(3).
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> (3) On an appeal under this section the tribunal may make such order in the matter as they think proper, including directions as to the costs of the appeal, and the order of the tribunal shall be final and no appeal shall lie therefrom."

12 Neither of the prospective employers has appealed. Neither of the prospective employers has applied for judicial review. The application for judicial review has been made by the foreign worker. I find that he has *locus standi*, as he is an interested party.

13 Mr. Finch, for the applicant Amimi, has argued that there is at present a policy operating against Moroccan nationals, in so far as the declared policy of the present Government is to reduce the number of Moroccan labourers in Gibraltar in order that people like "locals" and EEC nationals have more opportunity.

14 I think that the policy of the Employment Ordinance is and has always been to keep the importation of foreign labour to an absolute

minimum. I do not think that there is anything wrong in this aim, taking into account that Gibraltar is, in a worldwide context, not much bigger than a postage stamp and the opportunity for work is very limited. The evidence before me does not show that there is a campaign against Moroccan nationals as such, although it does show that there is a tightening of controls against foreigners.

15 Who are the locals and who are the foreigners? Up to 1972 the "locals" were the Gibraltarians and also those who had a permanent permit of residence in Gibraltar. Historically, an Englishman—or a Scot, for that matter—did not have the right to reside or work in Gibraltar, and he was known in our legislation as a "statutory alien." Now, in 1972 Gibraltar became part of the European Community and, by virtue of the European Communities Ordinance 1972 and amendments to the Immigration Control Ordinance, Community nationals became, for the purpose of the Employment Ordinance, "locals," and s.21 of that Ordinance no longer applied to them. They could come and work in Gibraltar.

16 Now, as to the foreigners, they are all those who are not "locals," and this, surprisingly enough, includes Canadians, Australians and New Zealanders. The Moroccans are, however, in a somewhat privileged position in relation to the other foreigners by virtue of EC Council Regulation No. 2211/78, which came into force on September 26th, 1978, whereby a Co-operation Agreement between the European Economic Community and the Kingdom of Morocco, signed in Rabat on April 27th, 1976, was adopted. Article 40 of the said agreement lays down that—

> "the treatment accorded by each Member State to workers of Moroccan nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions or remuneration, in relation to its own nationals. Morocco shall accord the same treatment to workers who are nationals of a Member State and employed in its territory."

17 The above article applies and is part of the Laws of Gibraltar by virtue of the European Communities Ordinance. This has been made clear by the European Court decision in the case of *Office National de L'Emploi* v. *Kziber* (1), where the European Court, dealing with a Moroccan national in relation to another article of the Agreement had this to say in relation to art. 40 ([1991] E.C.R. at I-226):

> "The object of the Agreement, as has already been stated, is to promote overall co-operation between the Contracting Parties, in the field of labour. The fact that the Agreement is intended essentially to promote the economic development of Morocco and that it confines itself to instituting co-operation between the Parties without

> referring to Morocco's association with or future accession to the Communities is not such as to prevent certain of its provisions from being directly applicable.
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> That finding applies in particular to Article 40 and . . . which form part of Title III relating to co-operation in the field of labour and which, far from being purely programmatic in nature, established, in the field of working conditions and remuneration, a principle capable of governing the legal situation of individuals."

18 It should be noted that the rights are given to Moroccan *workers* not to Moroccan *nationals*. In this respect, I have come to the conclusion that a Moroccan worker in Gibraltar has the same rights as, say, a Spanish or Danish worker, but a Moroccan national has no equal rights to those of a Spanish or Danish national. The rights of a Moroccan worker arise after he has been accepted as such, his employer having complied with all the provisions of s.21 of the Employment Ordinance. After that, I dare say that some of the provisions of s.21 would cease to apply to him, in the same way as they do not apply to a Spanish or Danish worker.

19 Mr. Dean, the Acting Attorney-General, on behalf of the Director of Labour and Social Security, has argued that the rights of a Moroccan worker are confined to remuneration and conditions of employment, and that s.21 of the Employment Ordinance would apply to him if he were to change his employment. I do not think that I can agree with him. The right to work in the same manner as a Spanish or Danish worker is implicit once he has been accepted as a Moroccan worker, and the right to better himself in a new employment is a necessary corollary.

20 The question I must ask myself is: When does a Moroccan national cease to become a Moroccan worker? The obvious answer is when he ceases to work or gets his pension under the social security legislation. The fact of ceasing to work requires clarification. I would say that a Moroccan worker does not cease being a Moroccan worker because he becomes unemployed and is in receipt of unemployment benefit. Neither does he cease to be a Moroccan worker because he is temporarily ill and cannot work, or because he takes an extended vacation. This is a question of fact which must be decided in each individual case. I think that a Moroccan worker who has not worked in a lawful employment and has not complied with the social insurance commitments for more than a reasonable time ceases to be a Moroccan worker. This must be so because, as the result of his absence in the local market, some other foreigner has been "imported," and the local labour market is swelled beyond the capacity for employment, particularly at the present time when there is not only a recession but a running-down of activity by official employers. I think I can take judicial notice of the present precarious situation.

21 In the case of the applicant Amimi, it cannot be said that he is a Moroccan worker. He ceased to work as such in 1979. It was not until 1991 that a prospective employer applied to employ him, a Moroccan national, as a Moroccan worker. He had lost all his rights as a Moroccan worker having ceased to work in 1979 and the application of s.21 of the Employment Ordinance was more than justified. There can be no justification for the proposition "once a Moroccan worker, always a Moroccan worker," as this would—to take an extreme case—enable someone to work here for, say, three months and come back 20 years later and say that he has the right to work. The application for judicial review is refused.

22 When the applicant went to the Department of Labour and Social Security in connection with the application to work as a barman at the Ark Royal Bar he was arrested by the Police for being in Gibraltar without a permit (his visitor's permit had expired). At the magistrates' court he pleaded guilty, and a deportation order was made but suspended. The deportation order was further suspended but the applicant was remanded in custody. Since the granting of leave to apply, I made an order staying the deportation order and further, at the hearing, granted to the applicant bail on his own recognizance until today.

23 I have now to deal with these ancillary matters. The suspension of the deportation order is now lifted as from today and is fully operative. I think that a further remand in custody is unnecessary. I think that the applicant will be well advised to leave the jurisdiction voluntarily without the need of executing the deportation order within the next few days by the police granting him a two- or three-day permit.

24 The application is refused. The applicant is to pay the costs of and occasioned by this application.

Order accordingly.