

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 1/96

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN THE ATTORNEY GENERAL APPELLANT
AND HUGH GRAHAM RESPONDENT

Lennox Campbell, Senior Assistant Attorney-General for Appellant

David Muirhead, Q.C. & Priya Levers for Respondent

25th, 26th, November & 17th December, 1997

RATTRAY, P.

On the 1st December 1995 the Full Court of the Supreme Court (Malcolm, Langrin and Granville James JJ) in an oral judgment delivered by Langrin J ordered as follows:

"(1) Certiorari to go to quash the decision of the Minister which was communicated to the applicant dated the 31st day of March, 1995.

(2) An order of mandamus granted to repay the sum of \$256,946.43 to the applicant.

(3) Costs to the applicant to be agreed or taxed."

The applicant was the respondent in this appeal Hugh Graham, and the relevant Minister represented in the suit by the Attorney-General was the Minister of Finance. The facts were as follows.

The applicant/respondent Graham, is a businessman residing in the parish of St. Andrew. He stated that he also farmed land in the parish St. Elizabeth which he leased from one Mr. Irving and which he utilized for the planting of Ginger for the export market. Based upon this agricultural activity he applied for a 20% duty concession with respect to a motor vehicle which he intended to import into the island for this purpose. His application was on the 4th of December, 1992 recommended by the Rural Agricultural Development Authority Officer in the parish of Saint Elizabeth. The relevant affidavits disclose that the Minister of Agriculture, The Hon. Seymour Mullings in pursuance of the procedure established, notified the Trade Administrator by form letter dated December 6, 1993 as follows:

"Dear Sir/Madam:

Mr. Hugh Graham of 3 1/4 Graham Heights Kingston 8 has been given the concession of paying 20% duty on one (1) Panel Van/Farm Truck(s) for use in transportation related to his/her agricultural activities.

This is an incentive given to qualifying farmers on the recommendation of this Ministry, to the Ministry of Finance, but does not give permission for the importation of the vehicle(s).

If this Concession is not utilized before the expiry date, the applicant MUST re-apply.

The Collector General has been so advised.

Yours sincerely
MINISTRY OF AGRICULTURE

SEYMOUR MULLINGS
DEPUTY PRIME MINISTER AND
MINISTER OF AGRICULTURE
EXPIRES: NOVEMBER 16, 1994"

By letter dated 20th September, 1994 the Financial Secretary wrote as follows to the Commissioner of Customs -

"Please refer to our memo of even numbers dated November 1, 1993 to which was attached a list of applicants who are qualified for the 20% duty concession on farm vehicles.

This is to advise you that the address at item #5, Hugh Graham should be amended to read 4 Courtney Drive, Kingston 10.

All other information remains the same."

The letter was copied to Hugh Graham.

In 1994 a Chevrolet Pick-up Truck imported by Mr. Graham duly entered the country and the relevant duties paid on the 21st September, 1994 in accordance with the concession.

It is clear that the grant of the concession by the Minister of Finance was based on the applicant's representation as to his involvement in the specific agricultural undertakings stated and as an incentive for the carrying on of this agricultural activity.

Consequent upon an investigation carried out by officers of the Revenue Protection Division of the Ministry of Finance, a report was made on the 20th of October, 1994 to the Minister of Agriculture which

resulted in his recommendation on the 2nd November, 1994 to the Minister of Finance that the concession granted to Mr. Graham should be revoked. The revocation recommendation was also based upon information from the Chief Internal Auditor of the Ministry of Agriculture that Mr. Graham was "an absentee farmer who did not productively cultivate crops and as such would not qualify for a duty concession." The investigations of the Revenue Protection Division, the Minister had been told, had revealed that Mr. Graham's application had been supported by a fraudulent lease. Consequent on the recommendation of the Minister of Agriculture on the facts given to him the Minister of Finance on the 3rd of November, 1994 revoked the duty concession which had been granted to Mr. Graham.

Mr. Graham's complaint upon which the Full Court ordered the issue of certiorari and mandamus is that the concession was revoked without affording him an opportunity of being heard. The determination of this appeal rests upon whether the learned judges of the Full Court were in error in arriving at the conclusion as they did that Mr. Graham was deprived of his concession without being given this opportunity. This indeed is a very narrow issue. The evidence that is relevant to this determination has nothing to do with an assessment of the information upon which the Minister based his decision to revoke. The relevant consideration is whether the applicant was afforded a real opportunity of being heard. The appropriate authority had granted him the concession. The matter had proceeded beyond the boundary of a

legitimate expectation that the concession would be granted. Insofar therefore a submission in the court below and before us rested upon the doctrine of legitimate expectation, that expectation would be that the concession once granted would not be revoked without the grantee being afforded an opportunity to be heard. The Court had to determine from the evidence whether to use the phrase adopted by Mr. Muirhead, Q.C. "a proper opportunity" was afforded the respondent Mr. Graham to be heard before the revocation decision was taken. The principles of natural justice demanded this.

The Revenue Protection Division is an investigative arm of the Ministry of Finance. Its investigations are of assistance to the Minister in arriving at a decision as to whether or not to grant the concession and also as to whether or not to revoke it. Its investigations may also result in criminal charges of fraud if such is discovered to be the case.

An affidavit of Mr. Lloyd Christie, the Senior Investigator of the Revenue Protection Division reveals that he was a member of the Revenue Protection Division team which investigated the circumstances under which the Pick-up was imported. His investigation concerned the circumstances of the grant of the 20% customs duty concession to Mr. Graham in respect of the Pick-up. At his invitation on the 6th of October, 1994 Mr. Graham attended on him at his office at 1 Shallimar Avenue, Kingston 3. He questioned Mr. Graham and it is clear that the subject-matter of his questioning involved matters relevant to the basis on which he had obtained the duty concession, that is, the nature of his

agricultural activity on the property at St. Elizabeth, the number of persons employed and his sale arrangements. Mr. Graham answered some questions and refused to answer others. On that date he ordered the seizure of the Pick-up and the relevant documents. The vehicle was subsequently released to Mr. Graham on the 25th of October, whilst the investigations were continuing. On the 26th October Mr. Christie carried out further investigation in St. Elizabeth relating to the user of the land and the existence of the lease. He made observations on the condition of the farm. Consequently, he made a report to the Minister of Agriculture on the 28th of October 1994. On the 2nd of November, 1994 he requested the applicant to attend at the Revenue Protection Division for a further interview as he deponed - "Because the Revenue Protection Division obtained additional information between the 26th October, 1994 and the 28th October, 1994 and it was desirable in those circumstances to inform him of the additional information received and to give him an opportunity to respond. He declined the invitation to attend". On the 3rd November, 1994 the Minister of Finance revoked the concession.

Is there additional evidence to establish that the applicant was given a proper opportunity to be heard before the concession was revoked? By letter dated 7th November, 1994 Mrs. Priya Levers, Attorney-at-law for the applicant wrote to the Revenue Protection Division stating inter alia in respect to her client that -

"I am also given to understand that he has on two occasions voluntarily made himself available for questioning by your officers."

Furthermore, by letter dated 9th November, 1994 to the Revenue Protection Division Mrs. Levers further expands as follows:

"I have now had the opportunity of taking full instructions on your request and am advised as follows:

(1) That my client attended your offices on one occasion with his Attorney-at-law and answered all questions pertaining to the duties paid on his vehicle and the licence obtained.

(2) That on another occasion he again submitted himself to extensive questioning by yourself and answered or rather repeated what he had already told you.

In view of the above it is clear that once again you wish to question him regarding the same matters, ...

Please therefore be advised that my client can assist you no further."

The affidavit of Mr. Graham in support of his application for an order of mandamus and/or certiorari admits the interview between Mr. Christie and Mr. Graham of the 6th of October, 1994. Mr. Graham was accompanied by his then Attorney-at-law Mr. Walter Scott. It was at the termination of that interview that the vehicle was seized but subsequently released after representation on the 25th October, 1994. He admits further, that he was invited to an interview by Mr. Benjamin of the Revenue Protection Division on the 2nd November, 1994 but did not attend. On the 28th of November he was charged under section 210 of the Customs Act in respect of the motor vehicle. On the 31st March

1995, that charge was withdrawn. On April 3, 1995 Mr. Benjamin of the Revenue Protection Division wrote to Mrs. Levers as follows -

"On March 6, 1995 Mr. C K Ifill, of the Ministry of Finance, wrote a letter to Mrs. Lorna Rhoden at the Motor Vehicle Unit informing her that, based on a recommendation from the Minister of Agriculture, the Minister of Finance had revoked Mr. Graham's duty concession and that Mrs Rhoden should take appropriate steps to recover the full duty. This letter was copied to your client. (See copy of letter attached).

Furthermore, attached to this letter are the following documents:

*Motor Vehicle Registration Certificate No.
LA054798
Certificate of Fitness No: TAA630475
Motor Vehicle Cover Note No: GA80927
Importers copy of C-78 No: 94-16-002864
Import Licence No: 603305*

These documents were seized from your client together with his motor vehicle.

I would suggest that your client take the enclosed documents to Mrs. Lorna Rhoden at the Motor Vehicle Unit and pay the outstanding duty. Once the duty has been paid and documented, your client may contact this office for an appointment and on presentation of proof of Duty payment his vehicle will be restored to him."

The letter of March 6, copied to Mr. Graham advised of the revocation of the duty concession. Mr. Lennox Campbell, Senior Assistant Attorney-General on behalf of the appellant has urged that there is abundant evidence to establish that the respondent was given a proper opportunity to be heard before the revocation of the concession. He

adopted the language of Tucker, L.J. in Russell vs. Duke of Norfolk [1949]

1 All E. R. 109 at page 118 as follows:

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting; the subject-matter that is being dealt with, and so forth. ... whatever standard is adopted, one essential is that the person concerned, should have a reasonable opportunity of presenting his case."

Mr. Campbell maintains that there is abundant evidence of the applicant being afforded a fair hearing and indeed the applicant refused at a later stage to avail himself of a further opportunity being offered for him to be heard. If the respondent voluntarily, as he did, deprives himself of the further opportunity given to him he cannot complain.

*Mr. David Muirhead, Q.C. on behalf of the applicant/respondent submits to the contrary. He challenges the sufficiency of the interviews based upon questions and answers. Furthermore, he maintains that the investigations were in respect of criminal charges and not with regard to the duty concession. Mr. Muirhead, Q.C. relies for the first limb of his submission on *Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346* which involved an illegal immigrant to Hong Kong against whom an order for removal was made by the Immigration Tribunal without, as claimed by the applicant his being afforded a fair hearing. The Court of Appeal of Hong Kong on his application for Judicial Review granted an*

order for prohibition against the Director of Immigration prohibiting the execution of the removal order until an opportunity was given to the appellant to put the circumstances of his case before the Director. The applicant had a legitimate expectation because the Government had announced that illegal immigrants would be interviewed in due course, and although not guaranteeing that they would not be removed, each case would be heard on its merits. The applicant's interview was restricted to questions asked by the interviewing officials and answers given by the applicant. He was not allowed to go outside the framework of these questions. Roberts, C.J. in the Hong Kong Court of Appeal had concluded that the applicant -

"should have been asked whether there were any humanitarian reasons or other special factors which he would like to be taken into account before a decision was reached. If this had been done, he would not have been able to claim that he had no opportunity of making it clear that he was a proprietor of a business and not just a technician."

*It is upon this foundation that Mr. Muirhead, Q.C. bases his challenge to the interviews afforded Mr. Graham. Unlike the Hong Kong case there is no evidence that at the interview Mr. Graham was not allowed to say anything except to answer the questions put to him by the official who was interviewing him. The answer to Mr. Muirhead Q.C.'s submission lies in the passage from *Russell v. Duke of Norfolk* already cited. There is no patented method of interview applicable to every case. Their Lordships of the Privy Council considered the case to be a narrow one on the facts*

and were not disposed to differ from the view of both Courts below. They varied however the order made by the Court below in respect of prohibition and substituted therefor an Order for Certiorari.

It is clear from the evidence that the Revenue Protection Division was investigating the circumstances under which the concession was obtained and further whether they constituted fraud, so as to support a criminal charge. The criminal charge was withdrawn. No inference arises from the withdrawal of the criminal charge and the return of the vehicle to Mr. Graham that the interviews did not relate to the grant of the concession and its subsequent revocation.

The Full Court erred in concluding that what emerged from the evidence was that the Revenue Protection Division was inspecting a case under the Customs Act and sub silentio therefore not in relation to whether the duty concession was improperly granted and if so should be revoked. The Full Court further erred in holding that the request for the interview was after the revocation of the duty concession. The interview of the 6th October, 1994 attended by Mr. Graham with his Attorney-at-law present and the request by the Revenue Protection Division for a further interview on the 2nd of November, 1994 also admitted by the applicant/respondent but which was refused, all preceded the revocation on the 3rd November, 1994.

In the circumstances, the Full Court was in error in making the Order for certiorari to quash the decision to revoke and mandamus in ordering the repayment of the additional duty of \$256,946.43.

Indeed, even if the Full Court had been correct with respect to the Order of certiorari, which it was not, I can find no authority which establishes that mandamus could be ordered to re-pay the excess duty allegedly paid by the applicant/respondent. Mandamus lies to secure the performance of a public duty. The Order for Certiorari as it was in *Attorney-General of Hong Kong v Ng Yuen Shiu (supra)* would be entirely without prejudice to the holding of another inquiry at which an opportunity would be given to the applicant/respondent to make such representation as he deemed fit, as was pointed out by Lord Fraser in varying the order of the Court of Appeal in *Attorney-General of Hong Kong v Ng Yuen Shiu (supra)* at page 352 of the report.

The appeal therefore is allowed, the order of the Full Court is set aside the appellant will have the cost of the appeal as well as the cost of the proceedings before the Full Court.

Downer, J.A.

I agree.

Harrison, J.A.

I agree.