IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ANSAH, JSC (PRESIDING)
GBADEGBE, JSC
BENIN, JSC
APPAU, JSC
PWAMANG, JSC

CIVIL MOTION
NO. J5/10/2018

8TH MARCH, 2018

THE REPUBLIC

VRS

HIGH COURT, GENERAL JURISDICTION '5', ACCRA

EX PARTE:

1. THE MINISTER FOR THE INTERIOR
2. THE COMPROLLER-GENERAL OF IMMIGRATION SERVICE ……. APPLICANTS

ASHOK KUMAR SIVARAM ……. INTERESTED PARTY

RULING

BENIN, JSC:-

The applicants herein seek to invoke this court's supervisory jurisdiction for an order of certiorari to quash the decision and/or order of the High Court, General Jurisdiction 5, dated 18th September 2017. The background facts recount that the

interested party herein, an Indian national, has been lawfully resident in this country for a number of years prior to his deportation from the country on the orders of the 1st applicant herein, the Minister for the Interior (hereafter called the Minister) dated 15th May 2017 and carried out by the 2nd applicant herein, the Comptroller-General of Immigration Service (hereafter called the Comptroller), on 1st June 2017. On the same day of his deportation, the Comptroller cancelled the residence/work permit of the interested party. Following an application made on behalf of the interested party herein, the High Court, presided over by His Lordship Justice Kweku T. Ackaah-Boafo, revoked the deportation order in a ruling delivered on 31st July 2017. That decision is the subject of a pending appeal before the Court of Appeal. Three days later on the 2nd day of August 2017, the interested party returned to the country without a visa. On arriving at the Kotoka airport, the interested party was denied a visa on arrival by the Immigration authorities who also detained him for having entered the country without visa.

An application for an order of Habeas Corpus was granted by the High Court on 4th August 2017 so the interested party was released from custody. The Court also directed the interested party to approach the Comptroller to regularize his stay. Subsequently, on 8th August 2017 the interested party approached the Comptroller for the regularization of his stay in the country by the issuance of a visa and a restoration of his residence/work permit. To cut a long story short, the Comptroller did not accede to the interested party's request; he even refused to accept the processing fee from the interested party. Consequently, the interested party went back to the High Court with an application for an order of mandamus to compel the Minister and the Comptroller to grant his requests. The reliefs sought before the High Court were the following:

(1) A declaration that the decision by the 2nd respondent not to accept the application for visa on arrival with the requisite statutory fees is a deliberate attempt to decline to process the said application and that decision made by the 2nd respondent as an administrative official was unfair, unreasonable and same is not supported by any law.

(2) An order of Mandamus directed at the 2nd respondent to accept the requisite statutory fees to process the visa on arrival and to issue same.

(3) An order of Mandamus directed at the respondents to restore the applicant's residence/work permit which was cancelled by the 2nd respondent on the basis of the Deportation Order dated 15th May 2017 and which same has been quashed by the High Court in a ruling dated 31st July 2017.

(4) An order of injunction restraining the respondents, agents, assigns, privies, servants or anyone acting on the authority of the respondents from making any attempt to remove the applicant from the jurisdiction or harass the applicant in whatever shape or form until this application is heard and disposed of.

The High Court granted the application. By the said decision, the High Court presided over by Her Ladyship Justice Naa Adoley Azu (Mrs.) made these material orders:

"1. An order of mandamus is hereby directed at the 2nd respondent herein, to restore the applicant's residence or work permit which was cancelled by the 2nd respondent on the basis of the deportation order dated 15th May 2017 which has been quashed by the High Court in a ruling dated 31st July 2017.

2. The court further orders the said residence or work permit to be issued within 7 days of this order.

3. The court further grants an order of injunction restraining the respondents, their agents, assigns, privies, servants or anyone acting on the authority of the respondents, from making any attempt to remove the applicant from the jurisdiction, or harass the applicant in whatever shape or form, until the said

residence or work permit is duly and effectively issued by the Immigration Service."

The instant application is in reaction to these orders. The grounds are the following:

i. The court exceeded its jurisdiction, when it ordered the restoration of the work/resident permit of the interested party when the conditions precedent for the grant were not present.

ii. There was a procedural irregularity such as the issuing of two different rulings/judgments on the same matter (one, a 22 page ruling and the other a 1 and a half page ruling) with the same date, the 18th September 2017.

iii. The court committed errors of law patent on the face of the record by wrongly assuming jurisdiction in making orders for the restoration of resident/work permit and visas, when the conditions precedent for that grant were not present, thus totally usurping the powers of the Executive arm of the Government of Ghana.

if. The precedent or grounds upon which a court could make an order of mandamus were not present but the court still held that mandamus could lie.

v. There was another procedural irregularity such as the court ordering that its ruling be executed within 7 days, when by law the applicant herein had a right of appeal and an automatic 7 day stay of execution.

vi. There was breach of the rules of natural justice by the court when it absolutely refused to let the applicant herein even refer to an exhibit "exhibit AG12" a video coverage which formed a very vital part of their case.

Counsel for the applicants re-classified the grounds into only three issues and argued same in support of this application and we share in that view. The issues as formulated are these:

A. Whether the High Court exceeded its jurisdiction.

B. Whether there was an error of law patent on the face of the record.

C. Whether there was a breach of the natural law of Justice.

The first two issues listed above are dispositive of this application. The third one was literally rejected by the court in the course of the oral arguments for the reason that the television interview which they sought to tender was not relevant to a determination of the application before the court, if indeed the applicants herein had failed to perform a statutory duty. Moreover, the effect of the refusal to admit the exhibit was not a patent error on the face of the record, its determination would depend on other factors, thereby making it an appealable question. That piece of evidence is still available to be used in any subsequent inquiry, if need be, as long as it has not received any judicial pronouncement as to create res judicata. It is thus not necessary and indeed an unfit subject for this court's supervisory jurisdiction. The principle being that an application founded on the court's supervisory jurisdiction must be confined or restricted to the decision and/or order complained of. Wrongfully excluded evidence is a proper subject for appeal, as that is an error committed within jurisdiction. On issues A and B supra, the argument was that the "High Court General Jurisdiction 5, exceeded its jurisdiction when it made orders for the restoration of the work/resident permit which had been legally revoked by the applicants herein when the conditions precedent for that grant were not present."

Counsel cited section 6 of the Immigration Act, 2000 (Act 573) and stated that this provision imposes a duty on the Immigration authorities to make necessary enquiries to ascertain the truthfulness or otherwise of the assertions made by an applicant. Such enquiries are purely administrative in nature, and belong to the executive arm of government to make, counsel opined. Counsel was of the view that by the orders made, the court below was wrongly ignoring the conditions precedent to the issuance of a permit to a foreigner by ordering the applicants to issue one to the interested party. They cited the case of **Republic v. High Court, ex parte Soku (2001-2002) SCGLR 901** which explained error of law apparent on the face of the record to be error going to the wrong assumption of jurisdiction and that the error must be so obvious as to make the decision a nullity. In counsel's candid view, certiorari does not look to the merits of the decision but focuses on issues of

jurisdiction or those related to procedural impropriety. For this proposition, they relied on the case of **Republic v. Court of Appeal, ex parte Ghana Cable Limited (2005-2006) SCGLR 107**. They also cited the case of **Republic v. High Court, Denu; ex parte Kumapley (Dzelu IV Interested Party (2003-2004) SCGLR 79,** where the court held that the High Court, having wrongly assumed jurisdiction over the Anlo Traditional Council, had committed an error of law apparent on the face of the record.

Counsel forcefully argued that the court below erred by not considering the conditions precedent to the issuance of a permit under Act 573. They relied on this court's decision in the case of **Republic (No. 2) v. National House of Chiefs; ex parte Akrofa Krukoko II; (Enimil VI interested party) (No.2) (2010) SCGLR 134**. In that case, the court, relying on the case of **The Republic v. Chieftaincy Secretariat, ex parte Adansi Traditional Council (1968) GLR 736** set out the four conditions that an applicant for an order of mandamus must satisfy, namely:

1. that there was a duty imposed by the statute upon which he relied;
2. that the duty was of a public nature;
3. that there had been a demand;
4. that there was refusal to perform that public duty enjoined by statute.

According to counsel, these four conditions were not present when the order was made. Counsel stated that "there was no duty imposed by statute upon which the interested party relied for his application for mandamus, which compelled the Ghana Immigration Service to restore a resident/work permit which had been legally revoked.....

The interested party had no right to demand the restoration of a resident/work permit which had been legally revoked.

And indeed there was actually no demand and a refusal to perform a public duty enjoined by statute."

Counsel also had issues with what purported to be a second ruling by the court

bearing the same date and said the second one was procedurally wrong. Counsel for the interested party sought to justify the second ruling saying the judge read it from an electronic equipment. This last assertion was not backed by any affidavit in verification and was thus not acceptable. We were not enthused by the explanation offered by counsel for the interested party. It is clear that the 22-page ruling was produced subsequent to the proceedings recorded and certified for 18th September 2017. It sought to expand the ruling delivered in open court that day. We would have found nothing wrong with that if the Learned Judge had made an indication in the proceedings that she would produce a fuller and more detailed reasoning of the decision and orders. Whether by oversight or mistake, there was no such indication or reservation on the record, so the second document, a 22-page ruling, was not procedurally and legally justified. We accordingly reject that piece of document and indeed expunge it from the record and we hereby order the Registrar of the said court not to issue it out again as an authentic ruling of the said court. However, we decline the applicants' invitation to us to quash the lower court's decision on account of the second ruling, as there is a valid ruling on the record for our consideration. Moreover, this entire application has been based on the ruling which forms part of the proceedings of 18th September 2017.

Now in response to the substantive arguments on the patent errors as outlined above, learned counsel for the interested party urged the court to discountenance those arguments. Rather unfortunate to recall, counsel for the interested party did not address the core point raised in this application, which is that the court below ignored the existing legislation and assumed the powers entrusted to the executive arm of government. Counsel devoted a lot of the statement of case on unrelated or immaterial points. He talked at length about what constitutes 'the record' for purposes of exercising the court's supervisory jurisdiction. This was not an issue in this matter. He talked about what constitutes the essential portion of the record that the court may quash, if need be. This was also not in issue. He also talked about the requirement of the common law for a demand before an application for mandamus would lie. He cited this court's decision in the case of **Larbie Mensah IV alias Aryee Addoquaye v. National House of Chiefs & Another (2011) 2 SCGLR**

883, holding 1 where according to him the court cast doubt on the continued existence of the requirement of prior demand, in view of article 23 of the 1992 Constitution. He went on to say that the interested party nonetheless made a prior demand on the Comptroller to issue a visa on arrival.
Having devoted virtually the entire address on these immaterial matters, counsel concluded thus: "My Lords, we shall now turn our attention to the ruling itself to ascertain whether there is any error apparent on the ruling. My Lords respectfully, we do not find any error apparent on the face of the ruling delivered by the High Court on 18th September, 2017 by Her Ladyship Justice Naa Adoley Azu (Mrs.) My Lords, in conclusion, we humbly submit that the Applicants have failed to meet the legal requirements worth considering to warrant this Honourable Court's discretion to issue Certiorari to quash the decision of the High Court. We humbly pray that this application be dismissed with cost."

It is convenient to commence this discussion on the requirement of prior demand before commencing proceedings for mandamus. It was a point raised by counsel for the applicants, relying on the authority of **Republic v**. **National House of Chiefs; ex parte Akrofa Krukoko**, supra. The court held that as a general rule the order of mandamus would not be granted unless the party complained of had known what it was he was required to do, so that he had the means of considering whether or not he should comply; and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desired to enforce and that demand was met with a refusal. The court was quick to add that this was not applicable in all cases and would not apply where a person had by inadvertence omitted to do some act he was under a duty to do, and where the time to do the act had passed. The court added that mandamus would also lie where the applicant has been substantially prejudiced by the respondent's procrastination.

Counsel for the interested party stated that the Supreme Court has made an "authoritative decision" in **Larbie Mensah v. National House of Chiefs**, supra, that there was no requirement for a prior demand before mandamus would lie. With all due respect to learned counsel, his submission is not borne out of a careful

reading of that decision. At page 888 of the report, the court speaking through Atuguba JSC said this:

"On the issue of prior demand before the pursuit of the remedy of mandamus, the relevant law has been stated in the recent decision of this court in Republic (No. 2) v. National House of Chiefs; ex parte Akrofa Krukoko.....(supra). That case plainly approved the exception stated in Halsbury's Laws of England (4th ed) para 156 at 159....."

It is apparent counsel was relying entirely for his submission on the head note by the editor. It must be noted that the editor's summary is for quick reference and guidance only and is not the court's decision, though most often it is reflective of what the court has said. But where, as in the instant case, counsel was relying on the decision as having upset existing case law, he ought to have delved into the decision itself. If he had done so he would have discovered that the court had unreservedly endorsed the existing case law. It was only in the context of that particular case that the court doubted whether the common law requirement of prior demand was applicable.

It is to be stated that where the court casts doubt on existing case law or principle, it does not amount to laying down any new law or principle, let alone departing from the existing case law. Article 129(3) of the Constitution 1992 enables this court to depart from its previous decision. And it means the existing law must be clearly stated and the point/s of departure must equally be clearly stated, without equivocation. Merely casting doubt or even criticizing an existing decision is not tantamount to departing therefrom. We therefore state with emphasis that the law remains the same as stated in **Republic v. National House of Chiefs; ex parte Akrofa Kukroko**, supra.

We now turn attention to the core issue that was raised herein, namely errors patent on the face of the record. There is no dispute as to the facts. The Comptroller cancelled the residence/work permit of the interested party on 1st June 2017 before

he was deported from the country. The High Court has ordered the Comptroller to restore the said permit to the interested party. The court also issued order of injunction against the applicants herein, pending a restoration of the permit. The applicants are saying that the court committed patent error by these orders since it failed to take cognizance of the relevant provisions of Act 573.

Section 20 of Act 573 permits the Comptroller to revoke a permit which has been issued to a foreign national, on grounds of fraudulent misrepresentation or concealment or any other illegal practice. In the instant case the Comptroller relied on what was said to be a fake marriage certificate presented to his outfit for consideration to become a citizen of Ghana, which fact was partly relied on by the Minister to order the deportation of the interested party. It must be noted that the deportation order is independent of the revocation of the permit; the former was the act of the Minister under section 36 of Act 573, whilst the latter was the act of the Comptroller under section 20 of the said Act 573. Consequently, the fact that the deportation order was quashed by the High Court did not result in an automatic restoration of the permit which was revoked by the Comptroller, even if the Comptroller relied on the facts constituting the deportation order to cancel the permit. The Comptroller acts independently of the Minister when it comes to cancellation of a permit. The same set of facts may be acted upon by different persons or institutions and may thus result in different consequences, and as such actions taken pursuant to those facts should be examined independently in the context of the existing law.

Section 6 of Act 573 enjoins the Immigration authorities to make enquiries to satisfy themselves "as to the truth of any statement made in the application for the permit." In the affidavit in opposition, the interested party annexed a letter written by his solicitor wherein he had stated that no court had made a finding of fraud against the client, and that it is only the court which can make that determination. He also sought to say that the marriage certificate was the handiwork of some staff of the Kumasi Metropolitan Assembly (KMA) who his client had identified. In short, the interested party did not know the certificate was faked as stated by the authorities of the KMA in response to the inquiry made by the Comptroller. These depositions

were put in in order to justify the decision taken by the High Court. Without going into any details, it suffices to state that (i) the applicant bears the ultimate responsibility for the truthfulness of the information and authenticity of the documents presented for the visa or permit; (ii) the enquiries to be made do not extend to judicial finding of fraud before the Immigration authorities could make a determination as to the veracity or otherwise of the statement made in the application for permit. If a document is annexed to an application, for instance, a certificate of company registration, it suffices for the purposes of section 6 of Act 573 for the Immigration authorities to seek confirmation from the Registrar-General's department and to rely on their response. If the Registrar-General says they have no records of the company, the Immigration officer is not obliged to seek a court's finding of criminal culpability for fraud before deciding to reject the application for permit on account of illegality or misrepresentation. If such were the requirements, a lot of decisions would be indefinitely deferred, and independent state institutions could hardly operate. Certainly that is not the object of the provisions of articles 23 and 296 of the Constitution, 1992, and certainly not that of section 6 of Act 573. An objective test to be applied is whether the official's decision or action is reasonable. Since the ultimate responsibility rests with an applicant, whether he was complicit in the contents of a document or not is a matter of no moment; he cannot be absolved on account of his lack of knowledge of the contents of a document or its preparation.

Two decisions from the courts in Australia are worth citing in respect of this discussion. The case of **Trivedi v. Minister for Immigration and Border Protection (2014) 220 FCR 169** decided that it was not necessary for the Department (responsible for Immigration) to show that a visa applicant was knowingly complicit in the use or production of a false document that he/she lodged or caused to be lodged with the Department. The court was of the view, which we agree with, that it would impose an impossible task on those administering the visa system for them to determine whether a visa applicant was himself or herself complicit in a document being false. Hence in the case of **Kishore v. Minister for Immigration and Border Protection (2017) FCA 1254** the court upheld the

decision of the Immigration authorities in rejecting the applicant's application for a visa because the bank statement annexed to his application was denied by the issuing bank on ground that it did not emanate from them. The court rejected the applicant's assertion that the bank statement was procured at the instance of his grandfather in India to support his application in Australia and that he was in no way involved. The court relied on the ultimate responsibility test as well as the reasonableness of the Immigration in relying on the correspondence from the Bank. The fact that the applicant was not involved in the issuance of the statement or did not know of its falsity was of no consequence.

It is the duty of an applicant to ensure that any document he presents in support of his application is true and authentic, failing which the Immigration may refuse an application under section 6 of Act 573; and to rely on the false presentation to cancel an approval already given under section 20 of the said Act.

What happens after the Comptroller has revoked a permit under section 20 of Act 573? The procedure is clearly set out in section 46 of the Act 573. It provides:

(1) Any person other than a prohibited immigrant aggrieved by a-

(a) refusal to grant or renew a permit under this Act,

(b) revocation of a permit under this Act, or

(c) repatriation ordered by an immigration officer may submit a petition to the Minister within seven days of such action and the Minister shall subject to subsection (3) take action as he considers appropriate.

(2) Subsection (1) does not apply to a deportation order issued under an executive instrument under the hand of the Minister.

(3) The Minister shall in determining a petition under subsection (1) be assisted by a committee comprising the following persons:

(a) a representative of the Attorney-General not below the rank of a Senior State Attorney, who shall be the chairman of the committee,

(b) a representative of the Minister for Foreign Affairs not below the rank of a Director, and

(c) one other person appointed by the Minister who shall not be an officer or employee of the Immigration Service.

These provisions are clear and unambiguous. When the immigration authorities revoke a permit, they have nothing to do with the matter of its restoration in the first place, unless ordered by the Minister following a petition to him. The statute has designated the Minister for the Interior as the person to be petitioned. The statute has also set out what procedure the Minister is to follow upon receipt of a petition. Section 46 is akin to an appeal procedure enabling an aggrieved person the opportunity to have his case re-heard by a different group of people. Hence the Act totally excludes any worker in the Immigration Service in the consideration of a petition under this section. It is for the Committee set up by the Minister to advise him whether the Immigration authorities acted rightly or not and to make appropriate recommendations to the Minister. Upon receipt of the recommendations, the Minister in turn may issue appropriate directions to the Immigration authorities who will then be bound by the Minister's directions in the matter.

It is common knowledge that where a statute has provided a right with remedies and has also prescribed the procedure to follow in order to secure the right or remedy, it is only that procedure which must be followed. The point was made clear by the Supreme Court in its early days in the case of **Tularley v. Abaidoo (1962) 1 GLR 411**. It was endorsed by this same court in the case of **Boyefio v. NTHC Properties Ltd (1996-97) SCGLR 531 at 546.**

Thus the High Court did not have jurisdiction to entertain an application for mandamus when the interested party had not commenced, not to talk of having exhausted the procedure provided under section 46 of Act 573. The Comptroller has no role to play in the sense that there is no public duty cast on him in respect of proceedings under section 46 of the Act. Once he has cancelled a permit, the act does not confer on him a right of review of his decision. An aggrieved party, as earlier pointed out can only petition the Minister for redress. Consequently, the application for, and the court's order of mandamus issued against the 2nd applicant was clearly misconceived and incompetent in law.
And the order made against the Minister too was patently in error, as the interested

party did not send any petition to him as required by the law, within seven days but dragged him straight before court. It is noted that the interested party had the opportunity to have complied with this provision following the revocation of the deportation order by the High Court on 31 July 2017. He did not act but rather allowed the time to elapse. The expiration of the seven days deadline did not entitle a party affected by the order of revocation of a permit to proceed to court. Like an appeal process, it amounts to forfeiture of the right to petition the Minister to overturn the Comptroller's decision. The High Court, therefore, had no jurisdiction to go into the case when at the point in time the Minister had not been given the opportunity to make a determination which task he had failed or refused to perform. Wrongful assumption of jurisdiction or as often described as lack of jurisdiction by a court, as occurred in this case, is a perfect reason for certiorari to lie.

We observed at the hearing that at the time the application for an order of mandamus was put in, there was an appeal pending before the Court of Appeal against the very decision which constituted the foundation of the application. Indeed the application was premised on the fact that the deportation order had been cancelled by the High Court. We are aware an appeal does not operate as a stay of execution, yet since an application for an order of mandamus seeks the court's discretion the pendency of an appeal is a factor to consider. This is so because where there is an alternative remedy or avenue for redress, mandamus will not lie. However, the interested party cannot be faulted as the application was founded on failure to restore the permit which is quite different from the subject-matter on appeal which is in respect of the deportation order. Thus he could not obtain a restoration of the work permit in the appeal before the Court of Appeal in view of the provisions of Act 573. Consequently, the High Court could not be faulted for taking the application on this ground of the pendency of the appeal; it committed no error of law here.

But for the reason that the conditions precedent to the invocation of the court's jurisdiction had not yet arisen in view of section 46 of Act 573, and therefore the court lacked jurisdiction to entertain the application, this application for an order of

certiorari succeeds. All the orders made by the High Court, presided over by Her Ladyship Justice Naa Adorley Azu (Mrs) made on the 18th day of September, 2017 are ordered to be brought up into this court to be quashed and same are hereby quashed.

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

GBADEGBE, JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

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