MISC. APP. 370/15 2015 T. NO. 58

IN THE HIGH COURT OF SIERRA LEONE

DAVID TAM-BARYOH - APPLICANT
(ABDULAI & ASSOCIATES)

AND

INDEPENDENT MEDIA COMMISSION - RESPONDENTS
(TANNER LEGAL ADVISORY)
(B. KOROMA)

JUDGMENT DELIVERED BY HON. MRS. JUSTICE M. D. KAMARA J.A.
DATED 17TH JUNE, 2016.

By an Originating Notice of Motion dated the 15th day of September, 2015, Counsel for the Applicant made an application on behalf of the Applicant herein for the following Orders to wit:-

1. That this honourable court do hereby declare the action of the Independent Media Commission illegal on the following grounds:
a. That the suspension of monologue Program is illegal and has no basis in law.
b. That the procedure followed by the IMC to suspend indefinitely the Monologue Program is incorrect and illegal.
c. That the action violates the cardinal principle of natural justice of audi alterem patem (i.e. hear the other side).
d. That the suspension of the Monologue Program is arbitrary and lack legitimacy.
e. That an indefinite suspension is hash, excessive and disproportionate.
2. An interim injunction be granted against the Respondent from suspending or continue to suspend the Applicant from continuing to air his Monologue Program.
3. An interlocutory injunction be granted against the respondent from suspending or proscribing the Applicant from airing his Monologue Program.
4. Any other order(s) as this Honourable Court may deem fit and just.
5. That the cost of this application be borne by the Respondent.

The Applicant David Tam-Baryoh deposed to the following on the 15th day of September, 2015 to support his application.

1. That he is the Executive Director of Citizens radio and the Producer of Monologue Program. That on the 17th August, 2015 he received a letter from the IMC informing him of a complaint from

Leonard B. M Koroma. Minister of Transport and Aviation about a program he aired on the 8th – 9th August, 2015 – exhibited and marked DBI.

That on the 21st August, 2015 he caused his Solicitor to reply to the letter of 17th August, 2015 providing information to the IMC that indeed a Monologue Program was aired on 8th – 9th August, 2015 concerning the One Hundred buses exhibited and marked DTB 2.

That in exhibit DTB 2 his Solicitor informed the IMC that he "raised a question that had been put to him by a listener and wanted his listener to hear the question posed".

That his Solicitor informed the IMC that "to create a level playing field as a professional radio show presenter, our client in a subsequent program, aired an interview with the Deputy Minister Karamoh Kabba giving him an opportunity to answer to the question and rebut whether the allegation that the buses are not indeed 100 in number is true or false".

That on the 19th August, 2012 he received another letter from the Executive Secretary of the IMC informing him of a complaint from the Inspector General of Police claiming hate speech against the police – exhibited and marked DTB3.

That he caused his Solicitors to reply to letter dated 19th August, 2015 – exhibited and marked DTB 4.

That in DTB 4 his Solicitors informed the IMC that he "In order to pre-empt the hearing of 25th August, 2015 and to provide you with full information our client cannot deny raising issues of unprofessionalism within the police force, which is a national force. As a media house, its business is to raise malfeasance and defects in national institutions like the police. Therefore, our client is shocked that the complaint from the police, which talks about hate speech, gives no specifics on what hate or anger has been incited or stirred against the police. Further, that "additional, our client also maintained that the police, spokesman was allowed to give the side of the police force in a discussion on the same program covering the force and other allegations of unprofessionalism. In an interview with ASP Samura, he accepted that there are certain police officers causing trouble for the force, but that the police management has taken steps to weed out the bad element".

That he did appear before the complaint committee on the 25th August, 2015 and presented his case in front of the complainant.

That whilst he was awaiting the findings of the Investigative Committee, he received a letter dated 25th August, 2015 informing him of immediate and indefinite suspension of the Monologue Program by the Respondent.

That he was shocked at the sudden turn of event and caused his Solicitor to write to the IMC challenging its action as arbitrary, and lacks legitimacy, exhibited and marked DTB 6. That on the 7th of September, 2015, the IMC wrote to his Solicitors defending its action and insisting that the suspension remains in force, Exhibited and marked DTB 7. That his expectation was that the investigative committee should have completed its investigation before a suspension is slammed on his program.

That he believes an indefinite suspension is hash, excessive and completely disproportionate.

That the suspension of the Monologue Program without the finding of the Investigative Committee did not follow the due process, therefore arbitrary in nature.

That the contents herein are true to the best of my knowledge, information and belief.

That IMC letter dated the 7th September, 2015 to the Solicitors of the Applicant is instructive, and provides:

Dear Sir,

RE: SUSPENSION OF BROADCAST OF "MONOLOGUE PROGRAMME" ON CITIZEN RADIO.

Your letter of 31st August, 2015 refers, kindly note the following;

1. The suspension of the Monologue Program was not based on the complaints of the Ministries of Transport and Aviation.
2. It is presumptuous to suggest that the Decision to suspend the Programme has no basis in law. We hold a contrary view and in the circumstances the Commission will maintain the decision until further notice.
3. Finally, we are amazed for you to hold the view that it is a novelty to suspend while an investigation is ongoing. Unlike you we know of cases where people are suspended while they are being investigated. It is profitless to enumerate such cases.

Yours sincerely,

Signed: Ambassador Allieu Kanu
Chairman I M C

The respondents Solicitors entered an appearance on their behalf dated the 23rd day of September, 2015. They also filed a notice of appearance on the same date.

The matter was first slated for hearing on the 19th October, 2015 – but hearing was deferred to the 22nd October, 2015. The hearings continued at an interval that was dictated by the convenience of the parties. Until finally, the submissions were closed on the 21st March, 2016. And authorities relied upon trickled in from the end of March, 2016.

Also of relevance in this cause is the statement of case for and on behalf of the Respondent. Where it is alleged the Applicant failed to attend follow-up meetings, which culminated into forcing the Commission to hold an emergency board meeting in which a motion was proposed and passed to suspend Monologue Programme on the grounds of National Security and protecting the interest, of the public whilst an indepth investigation into possible breaches of the IMC Act and/ or Media Code of Practice is

being carried out. That the said suspension was communicated to the Station Manager of Citizen Radio by a letter dated 25th August, 2015.

Furthermore to justify its action to suspend the monologue program, the IMC narrated the unfortunate coincidence of complaints made by the Ministry of Transport and Aviation and the Inspector General of Police-both of which were said to have the propensity to undermine state security by the presenter tending to incite the public against these institutions.

Similar reference was made to the defamatory and character assercination of the Minister of Information and Broadcasting, Nassit, UDM Leader, State House and other important personalities in land deal scandal. Also highlighted in this regard were issues such as: the presenter of Monologue making comments about the Judiciary's inability to give justice unless called to order by the media, his exaggeration of insecurity in the country, giving the removal of the Vice President a tribal taint etc. the presenters use of inappropriate language in the radio discussions such as Halakie Mortalman the Respondent states that the foregoing were captured by the monitoring Unit. And that all the above negative attributes of the presenter violates the media code of ethics and that they were captured on the presentations of the 8th and 15th August, 2015 on Citizen and Eagle Radios respectively. The chronology of events as they unfold from documents exhibited herein by the Respondent, in particular the one that purports to be the report and findings of the IMC monitoring unit, this was compounded by the two complaints from the Minister of Transport and Aviation and the Inspector General of Police respectively. The applicant is invoking the supervisory jurisdiction of the High Court under the purview of Judicial review to determine the lawfulness of the decision taken by the Respondent on this occasion.

Judicial Review strictly so called involves the courts reviewing the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function. The remedy involves one or more of the prerogative remedies to wit: a quashing order, a mandatory order or a prohibition order, an injunction or a declaration.

The court's jurisdiction in judicial review is supervisory rather than appellate. Its task is to determine the lawfulness of decisions, rather than to re-take those decisions itself. The grounds on which a claim for judicial review may be brought are synonymous to those on which an appeal on a point of law may be brought.

However, in considering whether a failure to take a particular step made any difference to the eventual decision makes blurred the distinction between lawfulness of the decision and their substantive merits. Whereas irrationality challenge in effect is inviting the court to form a view as to the substantive merits of the decision under challenge, as such I will shy away from that.

In judicial Review handbook 5th Edition by Michael Fordham Qc,

Under the rubric statutory formulae in London Clyde side Estate v Aberdeen District Council (1980) IMLR 1820 I H ("the word shall---is a mandatory provision meaning that what is thereby enjoined is not merely

desired to be done but must be done" in R V Immigration Appeal Tribunal ex. P Jeyeanthan (2000) IWLR 354, 358 H Lord Woolf M R states "The requirement is never intended to be optional if a word such as "Shall" or "Must" is used "360-C-E "the word shall is normally inserted to show that something is required to be done" but more important is to focus on the consequences of non compliance. Under order 52-Application for judicial review-under the rubric hearing of application-r619), it is provided that the application shall be considered and disposed of by the court on the basis of the papers filed and if considered necessary by the court, oral submissions from the parties or their solicitors may also be received and considered by the court.

The Supreme Court Practice 1999 Volume 1 Order 53/14/19 under the Rubric nature and scope of judicial review states: The remedy of judicial review is concerned with reviewing not the merits of the decision in respect, of which the application for judicial review is made, but the decision making process itself. That it is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.

From the foregoing I am of the view that what is required of this court is to examine the decision making process in this cause and determine whether itself was improperly carried and on the other hand, where an appeal on the merit of the decision does lie, the avenue of appeal should be pursued.

Furthermore where a tribunal (and by extension a commission) has misunderstood its functions and as a result its functions are not exercised or are not exercised in a proper manner, the appropriate remedy is by way of judicial review R V chief commissioner exp Winnington (1982), the times November 26, RV Winds Licensing Justices exp Hides (1983) I W L R 685 (1983) 2 A E T 551 C.A.

Judicial review is not available to permit the enforcement of Private rights such as rights of particular employees vis-à-vis their employer. Only activities of a public nature " can be the subject of judicial review (R V B B C ex-p Lovelle (1983) I W L R 23, (1983) I A E R 24. approved and applied by the Court of Appeal in Law vs National Greyhound – Racing Club Limited (1983) I W L R 1302, (1983) 3 A11 E R 300). The distinction between infringement of public law rights and private rights is that in the former, judicial review is the appropriate remedy and the latter an ordinary action should be brought.

Essentially, review is concerned with validity rather than merits of the reasoning process, rather than the correctness of the decision that has been reached. Judicial Review and Crown Office Practice. (3-109 Judicial Review and other forms of process, conceptual distinction between review and appeal). That there is a fallacy of equating review with some kind of evaluation of the fairness or correctness of a decision on the merits. In judicial review, the court confines its attention to the decision making process, that if it ventures to prevent the abuse of power it will be found guilty of usurping power (of appeal).

Chief constable of the North Wales Police vs. Evans (1982) I M L R 1155, at 1174.

The special supervisory jurisdiction is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the Merits.

That the question is not whether the judge disagrees with what the public body has done, but whether there is some recognizable public law wrong.

By judicial review the administrative court exercise a supervisory role over public bodies – it is the judiciary's historic constitutional responsibility of protecting against abuses of power by public authorities. It is an important safeguard, which promote public interest, assists public bodies to act lawfully and ensures that they are not above the law. It also protects the right and interests of those affected by the exercise of public authority power. Lord Diplock in Council of Civil Service unions Vs, Minister for the civil service (1985) AC 378, 408 E, stated that the basis of judicial review rests in the free-standing principle that every action of a public body must be justified by law, and at common law the High Court is the Orbiter of all claimed justifications (R Beeson) v Dorset County Council (2002) E W C A Civ. 1812 (2003) UK H R R 353 at (17).

In R V Hansberry Road magistrates Court exp Bennet (1994) (A C 42, 62B it is stated that – "The great growth of administrative law .during the latter half of this century has occurred because of the recognition, by the judiciary and parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as parliament intended.

For our purpose in this cause, we review the decision making process of the Respondents in the light of the parent act which gives a clear guide in such a situation as is provided for in the following:

The Independent Media Commission Act No. 12 of 2000 section 9 Subsection (1) authorised the appointment of specialized Committees such as:

a. An Applications Committee: which shall receive and screen applications for the licensing and registration of media institutions.

b. Complaints Committee which shall be responsible for inquiring into complaints against the contravention of the media code of practice and the settlement of disputes between the public and media institutions and

c. An Advisory Committee.

(2) A Committee appointed under (1) shall consist of qualified members of the Commission and the general public.

(3) A Committee appointed under (1) shall in pursuance of their functions hold public hearings and receive petitions.

Section 21 (1) provides: The Commission may where it is satisfied that a radio or television broadcasting institution has not complied with any of the conditions of a license granted under this act, either suspend or cancel that license.

(2) No suspension or cancellation shall be made under subsection (1) unless the commission has given a written notice to the media institution concerned specifying the conditions of the license which have not been complied with giving directions for rectification of the breach and the action proposed to be taken by the commission in the event of non-compliance with the notice.

(3) Subject to subsection (2) the commission shall not suspend or cancel a license unless the media institution has been given an opportunity to comply with the directions of the commission and to rectify the breach.

(4) The commission may also suspend or cancel a radio or television license in respect of which there has been a second or subsequent contravention of the media code of practice.

From the foregoing exposition, it goes without saying that the respondent exhibited execubrance in the performance of their oversight function on this particular occasion as there was little or no observance of the provisions of sections 9 and 21 of the IMC act. And I stand to be corrected that the reports of the monitoring unit is not equivalent to a finding of guilt of contravention of the media code of practice or the IMC Act until such a finding is made by the appropriate authority established under section 9 (1) (b). The respondent, fell short in grounding their action by any findings, of the Investigating Committee establishing breach of either the IMC act/the Media Code of Practice. Therefore, the suspension could be said to have been based on speculation of security raised both by the monitoring unit and the complainants.

If the Respondent had followed the due process of the law as provided for in sections 9 and 21, and they come to the conclusion that indeed the Plaintiff is in contravention and he is given the opportunity for rectification with notice of repercussion for non compliance, S 21 (1) is instructive on that with a wider ambit, i.e. suspension or cancellation of license, which is wider than suspension of a single program. If we are being guided by the parent act of the IMC – Act No. 12 of 2000, then the provisions of sections 9 (1) (b) and 21 (1), (2) and (3) ought to be observed to ground validity of decisions of the commission.

Therefore, the commission having ignored the provisions of the parent Act and having placed reliance on conventional practice, reports, complaints etc. without waiting for a finding of a breach of either the parent Act of the IMC or the media code of practice by the investigative committee, it having failed to follow laid down procedure as required by the IMC Act, it follows that the suspension was pre-maturedly invoked, notwithstanding that the commission has wider power under S. 21 (1) to suspend or cancel the license upon a finding of breach, which is wider and more embracing than a single program.

The eventual suspension of the monologue program on the 25th August, 2015 whilst the investigative committee were still in the process of assessing whether or not there has been a breach of the IMC act or code of Practice could be assimilated to a pre-emptive strike.

From all indications it would appear the monologue program had become a subject matter of investigation before those complaints were received; i.e. the censoring by the IMC monitoring unit and their damming report of the 8th and 15th August, 2015 respectively refers.

It stands to reason that the action of the IMC was pre-meditated based on the data at their disposal as exhibited herein, in particular that from the IMC monitoring unit. It seems to me that the suspension was as a result of the cumulative effect of the foregoing report, later triggered by subsequent complaints from the Minister of Transport and Aviation and the Inspector General of Police. And the last straw that broke the camel's back as narrated by the Respondent was the Applicant failure to attend follow-up meetings, forcing the commission to hold an emergency meeting to suspend the monologue program on the grounds of national security and protecting the interest of the public whilst an indepth investigation into possible breaches of the IMC Act/Media Code of Practice is being carried out.

However, let me caution the plaintiff at this point that his matter is still under investigation and the outcome of same is pending. It would be in the best interest of restoring normal relation between the parties if the status quo is maintained until the findings of the investigating committee are out or further decision is taken by the IMC at its earliest convenience in the light of the foregoing exposition. The rational for the above reasoning lies in this proverb:- when a wise old man has a small bird in his closed hands, and he asks a child to predict whether it is alive or dead. The following possible answers and consequences may follow:-

a. If the child says it is dead, the wise old man may open his hands and let it fly to prove him wrong.
b. If the child says it is alive, the wise old man may squeeze it until it dies, and later opens his hands to show that it is dead, to prove the child is wrong.
c. If the child says I do not know wise one only you can tell, the child will be saved an embarrassment.

In my view, the plaintiff's position could be assimilated to that of the child in this case, and the IMC the wise old man. And let me hasten to state that because some practice has been on going does not make it become law simply through usage, rather it gives a sense of direction that could be exploited for an amendment in due course. As such, the Respondents may think of what to include in the IMC Act so as to serve as an effective weapon in the form of a pre-emptive strike when confronted with dire situations such as where suspension has been invoked by the IMC whilst investigation is ongoing by the investigative committee, so as to serve as a tranquilizer meanwhile, pending the outcome of the

investigative committee. It is suggested that proper remedy be put in place to remedy this lacuna than make use of a discretion only grounded in long usage.

To the Plaintiff, common sense dictates that in a gullible society like ours, sensitive and controversial questions emphatically put would be viewed and interpreted with a difference, in particular when aired by those of you who have earned your selves an enviable position of credibility in your field of calling. Therefore it behooves the Plaintiff as he ascends the social ladder to continually weigh rather than count his words in his daily interaction with the public on the air. As the same word could be assigned different meaning depending on the intonation and/or context, similarly the same information could be the subject of different interpretation depending on the standing of the communicator, as opposed to the rest of mankind in a given society.

It will be a disservice if we fail to give true guidance in matters of this nature.

A word to the wise is quiet sufficient.

Cost of this application to be borne by the Respondent, to be assessed if not agreed upon.

.....

Honourable Mrs. Justice
M. D. Kamara JA.

3/6/14