Samuel v. Director of Outer Island Affairs and Solicitor-General

High Court
Speight C.J.
17 September 1987

Elections – review of decision of Director of Outer Island Affairs – island of Mangaia – conduct of elections – qualification of voters – special voting – whether procedures at the heart of the electoral system have been ignored.

Judicial review – privative clause – Director of Outer Island Affairs as elections dispute tribunal – whether Director ever enquired into the fundamental question.

The applicant, Samuel, was an unsuccessful candidate in an election held to choose the Tavaena representative on the Island Council of Mangaia. It was alleged – and not contradicted by the evidence – that the official responsible for conducting the elections, the Chief Administration Officer, had adopted an unauthorized set of procedures for the election. The applicant lodged a dispute under section 11 of the Outer Islands Local Government Act 1976, in timely fashion with the Director of Outer Island Affairs. The Director refused to uphold the applicant's complaints. There was no record of how – or if – the Director dealt with the serious matters raised.

HELD: The decision of the Director was quashed, the election declared invalid, and a fresh election ordered to be held.

(1) Minor informalities and procedural irregularities in elections can be excused: *l.* 180. *Woodward* v. *Sarsons* (1875) L.R. 10 C.P. 733 and *R.* v. *Liverpool City Council* [1975] 1 W.L.R. 701; [1975] 1 All E.R. 379 applied.

(2) Mandatory provisions which go to the heart of the legislation may not be excused: *l.* 180.

(3) As there was no evidence showing that the administrative authority had directed itself to the important legal and factual questions raised by the dispute, it would not be assumed that the authority made a non-reviewable mistake of law: *l.* 260. *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208 applied.

(4) A privative clause may apply where an authority enquired into a matter within jurisdiction and, after asking the proper questions makes a mistake of fact or law, although judicial review may operate more closely respecting conclusions reached by a tribunal as against a court: *l.* 220. *In re Racal Communications Ltd.* [1981] A.C. 374; [1980] 3 W.L.R. 181; [1980] 2 All E.R. 634 applied.

Other cases referred to in judgment:
Bulk Gas Users v. *Attorney-General* [1983] N.Z.L.R. 129

O'Reilly v. *Mackman* [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124
Pearlman v. *Keepers and Governors of Harrow School* [1979] Q.B. 56; [1978] 3 W.L.R. 736; [1979] 1 All E.R. 365
Public Service Board of New South Wales v. *Osmond* (1986) 159 C.L.R. 656; [1987] L.R.C. (Const.) 681
R. v. *Awatere* [1982] 1 N.Z.L.R. 644

Legislation referred to in judgment:
Judicature Amendment Acts 1972, 1977 (N.Z.)
Outer Islands Local Government Act 1976
Outer Islands Local Government Amendment Act 1980

P. Driscoll for the applicant
A. Manarangi for the respondent

SPEIGHT C.J.

Judgment:

This is an application for a writ of certiorari to quash a decision of the Director of Outer Island Affairs wherein he refused to uphold a dispute filed by the present plaintiff against an election in the Tavaenga Constituency held on 23 April 1986 for a member of the Island Council of Mangaia.

Under section 5(d) of the Outer Islands Local Government Act 1976 Island Councils shall include one elected member of each constituency and the mode of election is prescribed in section 10(1) which reads:

> 10. *Election of elected members* – (1) In the month of April in each year on a date or dates to be appointed by the Chief Administration Officer there shall be held in each constituency on the island (as prescribed in the Schedule to this Act) a meeting to be chaired by the Chief Administration Officer of all residents of that constituency who shall from among themselves elect by secret ballot the elected members of the Island Council.

It will be noted that no other parts of the Act prescribe the qualifications or procedures for the meeting – no roll of electors is referred to, nor any provision for special voting by absentees or for voting in advance. Counsel have been unable to draw my attention to any subsequent amendment or Regulation providing for such matters apart from one matter to be mentioned shortly. Presumably Parliament thought that this was the most appropriate way of ascertaining the wishes of residents within the constituency, and perhaps the residents at such a meeting would be those best qualified to challenge and determine disputes as to qualification of persons present.

The Outer Islands Local Government Amendment Act of 1980 made some changes. Most of these were administrative, including an alteration to a triennial election, alterations to the mode of making by-laws – and most relevant to the present discussion to the mode of conducting the election of the constituency representative. This was altered by inserting a new section 10A which reads as follows:

> 10A. *Conduct of Elections* – (1) For the purposes of the election to be held before the 31st day of May 1980 the Chief Administration Officer on each

Island shall:

(a) call for nomination from persons qualified for election under Section 10 of the principal Act.
(b) compile a roll of qualified electors for each constituency as provided in the schedule.
(c) post in a public place in each village the names of the nominees.
(d) fix the date for election and ensure that the date is publicized.
(e) on the day of election provide for each Constituency a ballot box, paper and pencils.
(f) appoint a Polling Clerk for each village.
(g) count, with the assistance of the Polling Clerk and under the supervision of a member of the Police, votes cast.
(h) hand all ballot papers to the Police for safe keeping.
(i) publicize the results and advise the Director in accordance with section 12 of the principal Act.

Although a more formalized method of ascertaining voter entitlement and a regularized method of receiving and counting votes had been established there were still no provisions for special votes or votes in advance – perhaps an indication that absentees were not to have a say in the election of the local representative – arguably a valid exclusion in so much as residency remained the qualification, and a meeting on election day was still retained.

However that may be the amended procedure only applied for the 1980 election and for 1983 and 1986 matters reverted to the 1976 provisions.

The election was held by the C.A.O. on the appropriate date but he adopted an entirely different and unauthorized set of procedures. In particular he published, prior to the election, a list of entitled voters. No harm perhaps in that, but it would have no effect as it was not prescribed as the method of establishing qualifications – and he instituted a system of advance voting for prospective absentees – and other procedures not authorized by the Act.

Mr Ruatoe appears to have received the largest number of those votes which the C.A.O. accepted in accordance with his concept of his duties and he was declared elected.

Mr Samuel the present applicant was one of the unsuccessful candidates and he aired various grievances by lodging a dispute with the Director of Outer Islands in accordance with section 11 of the Act which reads as follows:

> 11. *Disputed elections* – Where there is any dispute of an election held under sections 9 or 10 of this Act the following provisions shall apply:
> (a) Notification of the dispute together with full details shall be given to the Chief Administration Officer within 14 days of the public notification of the election of the member or members:
> (b) The Chief Administration officer shall notify in writing the member so elected of the dispute to his election, and such member shall, if he wishes to reply, reply within 7 days of the notice:
> (c) The Chief Administration Officer shall after the 7 days prescribed in paragraph (b) hereof forward full details of the dispute to the Director;
> (d) The Director shall determine whether or not the dispute shall be upheld and, if upheld, shall declare void the election of the member or members

affected and shall duly notify the Chief Administration Officer of the same who shall cause a new election to be held within 14 days of the receipt of such notice as far as possible in accordance with the provisions of this Part of this Act as to the conduct of elections;

(e) The Director's decision shall be final in any dispute raised over any election.

In the papers before the Court is an affidavit by Mr Samuel to which he annexes a letter of complaint addressed to the C.A.O. but which was passed to the Director and apparently was treated as the "dispute". I was informed by counsel that this had been drafted in formal fashion by Mr Samuel's solicitors and that there was an earlier letter from Mr Samuel which was incorporated in the later one.

The burden of the first letter and most of the second letter consisted of details of allegations that the C.A.O. had acted with bias in his mode of conducting the special advanced voting system he had devised. In particular examples were given of persons, known to favour Mr Samuel, who had been fobbed off, refused access and in other ways denied an opportunity of casting special or advance votes. Other examples were cited of persons believed to favour the successful candidate who had been afforded such facilities and their votes were received and counted.

Mr Samuel's original complaint had been entirely directed at showing that if those denied had been afforded special voting procedures, or those who had received them had been denied the election results would have been different. At the hearing before this Court such evidence was presented and submissions were made touching the narrowness of the successful candidate's margin and the possibility/probability that if the C.A.O. had adhered to his own rules the result would have been different. I propose to make no pronouncement on those submissions except to say that it was a very arguable factual issue.

What we are concerned with is an additional sentence inserted by Mr Samuel's solicitors, in the second letter alleging that the election had not been conducted "in accordance with section 10". Quite clearly it was not. There is no legal sanction for the C.A.O. to receive votes from persons who are not present at the meeting of residents on election day. Perhaps he thought that his method would produce a fairer result – parallelling as it did some procedures in the Electoral Act governing a General Election. But that is not for him to say. There can be no legislative duty discharged by Parliament which is more important than that which requires it to define authoritatively and with precision how the franchise, whether General or local, is to be exercised. The draftsmanship of Electoral Acts in most democratic societies illustrates how Parliaments have turned their minds to defining a procedure, and particularly the qualification of a voter and insisting on adherence to the methods prescribed.

In the present instance one of the submissions on behalf of the respondent is that the provisions of section 10 are directory only and not mandatory and that there was substantial compliance. Counsel has correctly referred to a number of cases which discuss the test for determining such a question and I need not detail them. One must ascertain legislative intention by construing the whole of the instrument – and indeed other cognate pieces of legislation in the same field.

In some electoral cases minor informalities have been excused if they can be described as procedural irregularities which do not frustrate the perceived purpose of the Act and this on the basis that the requirement was directory only. But not so if

procedures which are at the heart of the electoral legislation have been ignored. *Woodward* v. *Sarsons* (1875) L.R. 10 C.P. 733 and *R.* v. *Liverpool City Council* [1975] 1 W.L.R. 701; [1975] 1 All E.R. 379.

In the present instance the C.A.O. in accepting votes in advance has recorded votes from persons who did not qualify by attending as prescribed. Further, by indicating in advance that he would receive such votes he may have influenced some voters (who unsuccessfully attempted to vote) to depart from the island, when otherwise they may have stayed on until election day. The 1976 Act is certainly economic in its outlined procedures, but one thing is at its heart – the only persons who are enfranchised are those residents present at a meeting on election day conducted in accordance with section 10. Such a provision is clearly mandatory.

That however is not the end of the matter. Section 11 provides the mode of challenge and the power to enquire appears to be entirely placed in the hands of the Director whose decision is said to be final – see section 11(e). This it is submitted is a privative clause, entrusting a quasi judicial decision to an administrative authority and ousts the Court's power of judicial review. It is to be remembered in this area that the Cook Islands does not have legislation equivalent to the New Zealand Judicature Amendment Acts of 1972 and 1977 so that some authorities from that source must be read with that reservation but I do not think there is any doubt as to applicable law. The argument is advanced on the basis that the Director is exercising quasi judicial functions which would be subject to review but for subsection 11(e) which it is submitted excludes such a power.

This takes one at once to consideration of a long line of authorities following the watershed decision of *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208. The prime concept is of a tribunal which has made jurisdictional error by failing to apply the legislation.

The submission here is that if the Director treated the provision of section 10 as directory only then it was a mistake of law within jurisdiction and hence not reviewable. The modern view on this topic flows from the dissenting view of Lord Lane in *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56; [1978] 3 W.L.R. 736; [1979] 1 All E.R. 365 – subsequently upheld in *In re Racal Communications* [1981] A.C. 374; [1980] 3 W.L.R. 181 [1980] 2 All E.R. 634 and other cases.

If power is conferred on a court to determine questions referred to it – and it acts within its jurisdiction (in the narrow or primary sense) then speaking generally it has power to err both as to fact and as to law and given a privative clause may be immune from review. Whether the protection extends to a tribunal as distinct from a court seems to be still a matter of debate. *Anisminic*, as is well known, prescribed a number of errors into which a tribunal can fall which are so grievous as to indicate it has gone beyond the bounds of the enquiry entrusted to it and hence has exceeded its jurisdiction – using that word in the wider sense discussed (but not adopted) by Lord Reid and Lord Wilberforce.

I think the well known passage in *Anisminic* [at pp. 171 (A.C.); p. 170 (W.L.R.); pp. 213-214 (All E.R.)] wherein examples of reviewable error are discussed can be reconciled with the *Pearlman- Racal* concept of liberty to go wrong by asking – as Lord Reid asked – how egregious was the error when the tribunal asked itself the wrong question – or took into account something it should not have taken into account. Lord Reid did not intend that list to be exhaustive.

It has been submitted to me that the Director may have considered the question of the vóter qualification which the C.A.O. used and decided that it was purely directory that the voters should attend on election day. That would in my view be so gross an error of law as to be beyond any error which Lord Lane or his successors would have contemplated as within the director's power – it would be a failure to consider a prime matter one is obliged to consider in all electoral disputes – voter qualification.

In *Pearlman* Lord Lane noted [at pp 75-76 (Q.B.); p. 749 (W.L.R.); p. 376 (All E.R.), in support of declining to interfere with a decision of a County Court Judge on a point of law:

> The question is not whether he made a wrong decision but whether he *enquired into* and decided a matter which he had no right to consider.

As already stated there is room for difference of opinion as to whether a review will look more closely at conclusions reached by a tribunal as against a court proper – see again the observations of Lord Lane in *Pearlman*.

See also Lord Diplock *In re Racal Communications Ltd.* [1981] A.C. 374, 382; [1980] 3 W.L.R. 181, 186; [1980] 2 All E.R. 634, 638 and in *O'Reilly* v. *Mackman* [1983] 2 A.C. 237, 279 [1982] 3 W.L.R. 1096, 1104; [1982] 3 All E.R. 1124, 1129 and comment by Sir Thaddeus McCarthy in *Bulk Gas Users* v. *Attorney-General* [1983] N.Z.L.R. 129, 139. But the grounds for unease here are far more fundamental than that. There is nothing to show that the Director even asked himself the relevant question at all; let alone what the answer might have been.

The situation of this applicant is really quite impossible.

This Court is entirely in the dark as to what means, if any, the Director had for refusing the objection.

There is nothing on the record to show and no decision to record what matters were even considered. It cannot be yet stated categorically that such a decision is bad for failure to give reasons – though advanced judicial opinion is tending in that direction – *R.* v. *Awatere* [1982] 1 N.Z.L.R. 644 (pace *Osmond* in the High Court of Australia) [*Public Service Board of New South Wales* v. *Osmond* (1986) 159 C.L.R. 656; [1987] L.R.C. (Const.) 681].

But this much at least must be said – in a case such as this the successful party cannot pray in aid of a challenged decision which is so capricious as to be absurd the hypothesis that an unqualified tribunal may have misdirected itself in law and is hence impervious to review when no reasons were given and there is nothing in the record to suggest that such a legal refinement was ever raised. The decision of the Director is quashed and the election declared invalid.

As a consequence it is now the duty of the Director to notify the C.A.O. that the election for the Tavaenga constituency is void and direct him to carry out a fresh election for that constituency pursuant to section 11(d) and complying with the directions implicit in this judgment.