Full Court — Application for Orders of Certiorari and Mandamus — Seizure and detention of goods by Commissioner of Customs and Excise — Preliminary objection whether hearsay evidence used to support findings of Commissioner — whether affidavit violated s.408 of Judicature Civil Procedure Code — Substantive Issue — Whether seizure and detention of goods fell within ambit of Customs Act — whether decision irrational and — whether procedure improper by which applicant given opportunity to be heard

IN THE SUPREME COURT OF JAMAICA

IN FULL COURT

APPLICATION REFUSED (Cases referred to p 13 (end.)

SUIT NO. M.47 OF 1993

BEFORE: THE HON. MR. JUSTICE MALCOLM

THE HON. MR. JUSTICE THEOBALDS

THE HON. MR. JUSTICE LANGRIN

R.V. Commissioner of Customs and Excise
Exparte A & F Farm Produce Co. Ltd.
and Andre Chin.

Application for Orders of Certiorari
and Mandamus

Mr. Enos Grant and Mrs. Samuels-Brown for applicants instructed by Scott-Bhoorasingh, Bonnick & Samuels-Brown.

Mr. Andrew Irving for the Respondent instructed by Director of State Proceedings.

Heard: May 31, June 2, 3, 4, 18, 1993
& October 20, 1993

LANGRIN, J.

This is an application by A & F Farm Produce Company Limited and Andre Chin for judicial review of the decision of the Commissioner of Customs and Excise which was communicated to the applicants by Notices of Detention and Seizure dated 9th and 15th March 1993 respectively.

The application for judicial review is brought by leave granted by Cooke J. on April 7, 1993. The applicants seek an order of certiorari to quash the decision of the Commissioner of Customs and Excise to issue the said Notices and/or an order of Mandamus directed to the Commissioner to release the goods and container detained and seized under the said Notices, subject to payment of the proper custom duty.

With this introduction I must now turn to the events which led to the institution of these proceedings.

The first applicant is registered and incorporated under the Companies Act of Jamaica and carries on a business as importers

and dealers; while the second applicant is its Managing Director.

On or about the 17th February, 1993 the first applicant purchased from Sunlight Foods Inc., Miami, Florida, 900 cases of margarine being 45,000 lbs in weight at the normal price of US. $10,800 for sale to its customers in the baking industry. The margarine was imported specifically for Clients who wished to satisfy the increased demand for buns in the approaching Easter season. On arrival of the margarine the applicants through its Custom broker made all the necessary declarations. On the 8th March, 1993 the proper officer at the Valuation Branch of the Respondent valued the goods based on the price purportedly paid by the applicant.

When the second applicant went to collect the goods on the 10th March, 1993 he was informed that they were detained on the orders of the Revenue Protection Division. On the 11th March, 1993 the Second applicant attended the office of the Revenue Protection Division with his Attorney-at-Law when they were handed a Notice of Detention.

Finally March 16, 1993 a Notice of Seizure was delivered to the first applicant. The stated grounds were that the container and goods were liable under Section 210 and/or 211 because the entry and supporting documents showed an incorrect value for the goods.

The central issue raised by Mr. Grant on a preliminary point is whether hearsay evidence adduced by the Respondent in the motion which must be regarded as final proceedings may be used to support the decision of the Commissioner. The applicants sought to move the Court that the affidavits of the Respondents should be struck out. Mr. Grant submitted in the main that the respondent had raised the issue of fraud and had not adduced any evidence to support it. Additionally, the affidavits contain hearsay evidence which violates Section 408 of the Judicature Civil Procedure Code since the Court is not dealing with interlocutory Proceedings.

Furthermore, the exhibits relied on by the respondent in making her decision were inadmissible hearsay evidence because there was no proof that at the time of making the decision the respondent had the exhibits in her possession.

Application for certiorari and Mandamus are not designed to raise issues of fact for the Supreme Court to determine de novo. The usual course is that the inferior body would have made a preliminary inquiry itself and the superior court is generally content to act upon the materials disclosed at that inquiry and to review in the light of them the decision to assume jurisdiction.

Needless to say that allegations of fraud and deception being involved, the Court should review the facts with care. The sole question is as to the nature of this review.

How far can, or should, the court find the facts for itself, how far should it accept or consider itself bound or entitled to accept the findings of the administrative body? On principle one would expect that, on the one hand the Court exercising its powers of review would not act as a court of appeal or attempt to try or retry the issue. However, since the critical conclusion of fact is one reached by the administrative body as opposed to a judicial body the Court would think it proper to review it in order to see whether it was properly reached within the stated legal framework.

The Court should quash the decision where evidence was not such as the authority should have relied on or where the evidence received does not justify the decision reached, or of course any serious procedural irregularity.

The standard of proof required in cases of administrative law is the civil standard and this is regarded as satisfactory since the degree of probability required to tip the balance will vary according to the nature and gravity of the issue.

Section 3 of the Customs Act provides as follows:

> "For the purpose of carrying out the provisions of the customs laws all officers shall have the same powers, authorities and privileges as are given by

law to officers of the
Constabulary Force'.

Section 4 of the Act in effect provides inter alia that:

> "Every Act required to be done by the Customs laws shall be deemed acts of the Collector General if performed by any officer assigned by him".

Basically, the police act on reasonable suspicion.

It follows therefore that the officer who carried out the investigations which gave rise to the Notices of Detention and Seizure purported to have done so on the basis of reasonable suspicion of there being evasions of the customs laws regarding imported goods.

What then may be regarded as reasonable suspicion? In order to demonstrate that there was reasonable suspicion for the detention and seizure of the goods, Mr. Robert Farr. Investigator in the Revenue Protection Division, the alter ego of the Commissioner of Customs, sought to adduce inter alia evidence of what was disclosed to him as investigating officer in the course of the investigations. This evidence including the exhibits was admissible not as proof of the truth of the contents but to explain his state of mind. It was necessary in this motion for the decision maker to show that she had reasonable suspicion for the detention and seizure. See Subramaniam v. Public Prosecution (1956) 1 WLR 965 for the general proposition which was applied in Supreme Court Civil Appeal No. 63/85 Flemming v. Myers & Attorney General delivered December 18, 1989. The Court of Appeal in a judgment delivered by Carey P.(Ag.) made this comment at p.13 of the judgment:

> "In an endeavour to show that the police had reasonable and probable cause for the arrest, learned counsel for the respondents sought to adduce hearsay evidence of what the investigating officer told the witness .... in the course of investigation. But upon objection being taken the learned judge disallowed the question. We think the judge was wrong. The hearsay evidence

> was admissible not as proof of the truth of the contents but to explain his state of mind. It was necessary in that case for the officer to show that he had resaonable and probable cause for the arrest".

It may be useful to restate the following paragraph in the affidavit of Robert Farr:

> "8. I discovered also that the duty payable by the first applicant had been based on under-invoicing and/or fraudulent valuations and consequently the proper duties were not assessed. During the course of my investigations I liased with the U.S. Customs Department and obtained from them a copy of the Exporters' Declaration made by Sunlight Foods Inc., the suppliers of the aforementioned margarine to the applicant, Exhibited hereto and marked "RF-3" is a copy of the said Exporters Declaration. The aforesaid Declaration shows a value of US. $15,750. Had this true value of the margarine been declared the first applicant would have been liable to pay additional duties of $49,950.50".

It is therefore wholly erroneous for the applicant to submit that the Respondent seeks to prove the issue of fraud through the affidavit of Robert Farr. Indeed, no charge is as yet being dealt with which requires any proof.

It is the decision of the Commissioner to issue Notices of Detention and Seizure which is required to be justified before this Court. There is absolutely no legal requirement at this stage to provide the proof demanded by the applicant.

The cases cited on behalf of the applicants on the preliminary point are not relevant to the issue before the Court. In any event the affidavit evidence adduced by the Respondent in my view falls within the ambit of Section 408 of the Civil Procedure Code. Such notices must of necessity be preliminary acts leading to proceedings which may or may not culminate in forfeiture. Any strict evidential proof to which the applicant is concerned must await those proceedings contemplated by Section 215 of the Customs Act.

In my view, and I so find, that the evidence adduced in the Respondents' affidavit is relevant and admissible to show the basis on which her decision was founded. The point in limine therefore falls.

I now turn to the substantive issue on which the application was made. The law relating to Judicial Review of Administrative Action in Jamaica can be better understood within the context of a brief comparison between the law relating to judicial review in the United Kingdom and that in Jamaica. The Rules of the Supreme Court in the United Kingdom dealing with the Prerogative Orders of Mandamus Prohibition and Certiorari were amended in 1977. In 1978 the new Rules of Court were brought into force. Order 53 introduced a Comprehensive System of judicial review. By its Rules it enables an application to cover, under one umbrella, all the remedies of certiorari, mandamus and prohibition as well as any of the private law remedies of declaration, injunction and even damages.

The Jamaican Rules dealing with Prerogative Orders of Mandamus Certiorari and Prohibition and often referred to as the McGregor Rules are to be found in Judicial Civil Procedure Code (Title 44) and reflect the Common law remedies in the United Kingdom prior to 1977 which can only enable the applicant to ask for the wrong to be put right.

In the 1982 White Book a useful statement is made in relation to Order 53:

> "This Order entirely replaced the former Order 53 and it introduced a most beneficent reform in the practice and procedure relating to administrative law. It created a uniform, flexible and comprehensive Code of procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other bodies of persons charged with the performance of public acts and duties".

This Court cannot, unlike the United Kingdom, while dealing with these Motions make orders relating to declarations, injunctions

and damages.

A fundamental principle of public law as enshrined in constitution is the principle of separation of powers of the Legislature, Executive and the Judiciary. Consistent with the principle the exercise of powers entrusted to the Executive are matters for the Executive and the Judiciary cannot in the exercise of its supervisory jurisdiction in matters falling under judicial review substitute its view for those of the Executive.

The law relating to judicial review of administrative action has now developed to the stage at which it is necessary to establish one or more of three grounds in order to succeed on an application. See. CCSU v. Minister for the Public Service: (1985) AC.374, 410.

(1) Illegality: Where the decision maker has failed to understand correctly the law that regulates his decision making power e.g. ultra vires.

(2) Irrationality: The Wednesbury principle derived from Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1948) 1KB 223. The decision must be so outrageously unreasonable that no sensible person who had applied his mind to the question to be decided could have arrived at that decision.

(3) Procedural impropriety: Failure to observe the basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.

The Commissioner of Customs and Excise deponed in her affidavit at paragraph 5 that:

> "Having reviewed the information received from Robert Farr she believed that there were serious irregularities on the part of the Applicants in declaring the true value of the goods imported by them and so I directed that the consignment of margarine imported by the Applicant be seized and disposed of .... . pursuant to Sections 210/211 and 214 of the Customs Act respectively".

Section 210 of the Act establishes inter alia the offence and penalty for evading customs laws regarding imported goods, and provides that the goods in question shall be forfeited.

Section 211 so far as is relevant provides:

> "If any person shall import .... any goods concealed in any way, or packed in any package or parcel .... in a manner calculated to deceive the officers of customs, or any package containing goods not corresponding with the entry thereof, such package and the goods therein shall be forfeited, and such person shall incur a penalty ....".

Section 214 provides that the forfeiture of any goods shall be deemed to include the package in which the same are found and all the contents thereof.

It follows that the detention and seizure of the 40' container fall within the ambit of the provision.

In his submission, Mr. Grant was bold and he opened his attack on the Respondent for misdirecting herself in law in misinterpreting Sections 15 & 17, of the Customs Act. On the evidence before the Court, he said the applicants have shown that they have complied with the relevant laws and are entitled to have their goods cleared on the payment of the assessed duties.

Section 15 so far as is relevant provides:

(1) "Where by entry, ... any obligation has been incurred for the payment of duties of customs, such obligation shall be deemed to be an obligation to pay all duties of customs which may become legally payable, or which are made payable or recoverable under the customs laws, and to pay the same as the same become payable.

(2) When any duty has been short levied ..... the person who should have paid the amount short levied ....., shall pay the amount ..... on demand being made by the Collector General".

Section 17 provides inter alia that in case of any dispute the importer or his agent should deposit in the hands of the Collector General the duty demanded by her. A procedure is provided under

the section for the importers within three months after the deposit to require the Commissioner to review the assessment of the duty on the goods.

The effect of Sections 15 is to impose an obligation on the taxpayer to pay duty which becomes legally payable and in the case of dispute the taxpayer must deposit the duty demanded. Since there was a failure of the Commissioner to follow this procedure in the instant case, Mr. Grant submits, there was clearly a misdirection in law.

Mr. Irving in his submission for the Respondent replied that the Commissioner reasonably believed that on the material before her sufficient evidence existed against the applicants implicating them in fraud. The force of this submission is readily apparent.

The contention advanced by Mr. Grant that Sections 15 and 17, should be acted on by the Respondent is without merit. These sections are premised on the fact that the dispute which has arisen is based upon a genuine error on the part of the taxpayer. The House of Lords case of Commissioner of Customs and Excise v. Tan and Another (1977) 2 WLR. 181 makes it abundantly clear that Sections 15 and 17 do not apply where there is fraud, misrepresentation and concealment.

The next question which arises in this application concerns the question whether the decision maker had founded her decision on irrationality.

It was contended on behalf of the applicant that no reasonable authority would have adopted such a course of conduct in the face of the evidence before the Respondent.

The vital items of evidence disclosed in the Respondents' affidavit are as follows:-

(a) The second applicant used other names such as Irving Chin to do other related transactions.

(b) Andre Chin attended a meeting on 11th March, 1993 with the Respondent but remained silent when he was questioned about relevant information concerning

his company.

(c) The description of the brand of margarine on invoice submitted by applicants as 'Delmar' did not correspond with description actually found in the cases on the wharf which was 'Sunnyland Suntex Baker's vegetable margarine'.

(d) The United States Export declaration form from the Suppliers - Sunlight Corporation, showed a significantly higher value than that on the Invoice submitted by the applicants to the respondents.

(e) The quotation of value of the margarine from the actual manufacturer of margarine imported by the applicant was significantly higher than the value declared by the applicants even without adding such necessary and unavoidable expenses such as transportation, storage costs overheads and margins. The normal price of goods must include all those costs.

The applicants in an affidavit filed during the hearing of the application denied any knowledge of these stated irregularities.

An examination of the affidavit evidence did not disclose any omission to consider matters which ought to be taken into account by the Respondent and there was no indication that she considered any irrelevant matters.

The arguments advanced together with cases cited by Mr. Grant on this ground amounted to an ingenious invitation to the Court to substitute its own views for those of the Commissioner of Customs and Excise. This we will not do.

The primary facts, as they are sometimes called, do in my view justify the inference or conclusion which the Commissioner has drawn. Not only do they justify it but they lead irresistibly to that conclusion. It is therefore a case in which it cannot be sustained that the Commissioner's finding is perverse or that she misdirected herself in law, in that she acted on insufficient evidence.

I find that the decision was made in good faith and as a result of a concientious consideration of the whole matter. Any failure to deal with the many cases cited by Mr. Grant is not due to any lack of deference to his arguments but rather to a want of relevance in the cases.

I have had considerable difficulty in reconciling cases cited by the applicant since they deal with charges before a Court where strict proof is required and the instant case which deals with a preliminary decision to issue Notices of Detention and Seizure of goods by the Commissioner of Customs and Excise. Regina v. West London Coroner, Exparte Gray and others. Regina v. West London Coroner, Exparte Duncan and Others (1987) Queens Bench Division 1020, R.v. Bolton Justices, exparte Scully (1991) 2 AER 619 and Niel v. North Antrim Magistrates' Court and Another (1992)4 AER 846 are to the like effect. These cases show that where a person is charged there must be sufficient admissible evidence to ground the charge.

Can it be said that the respondent Commissioner acted with procedural impropriety? As indicated earlier the proof of such conduct would be a ground for relief.

Section 215(1) sets out the procedure on forfeiture which states in so far as relevant as follows:

> "Whenever any seizure shall be made ..... the seizing officer shall give notice in writing of such seizure and of the grounds thereof to the owner of the ..... goods, animals or things seized, if known ..... and all seixures made under the customs law or any other law by which officers are empowered to make seizures shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the Minister may direct, unless the person from whom such seizure shall have been made ..... or some person authorised by her shall within one calender month from the day of seizure given notice in writing to the Collector General that he claims the same,whereupon proceedings shall be taken for the forfeiture and condemnation thereof;

> Provided that if animals or perishable goods are seized, they may by direction of the Collector General be sold forthwith by public auction, and the proceeds thereof retained to abide the result of any claim that may legally be made in respect thereof."
>
> (underlining mine)

The Commissioner in issuing Notices of Detention and Seizure was making a preliminary decision which was only a first step in a process which may culminate in an act of forfeiture. That process entitles the applicant within one calender month from the date of seizure to make written representation after which proceedings shall be taken for forfeiture and condemnation.

In the light of the above I reject Mr. Grant's contention that he was not given an opportunity to be heard. The Notices of Detention and Seizure were issued on the 9th and 15th March, 1993 respectively while it appears that the Suit was filed on the 5th April, 1993 prior to the pending proceedings for forfeiture.

The rules of natural justice did not render a decision invalid where that decision is only the first step in a sequence which may culminate in a decision detrimental to that person's interest, bearing in mind that the law lays down the procedure for a hearing at a later stage.

In any event the more breach of a procedural requirement in reaching an administrative decision will not necessarily result in it being quashed. Even if the affidavit evidence shows that a procedural irregularity has occurred the burden remains on the applicant to show that substantial prejudice has been suffered.

The procedure adopted by the Commissioner as laid down in Section 215 is admirably suitable for dealing with the instant case. It is that procedure which the applicants failed to follow.

The Commissioner directed herself properly in law and called her own attention to the matters she should consider. She took relevant matters into consideration. Consequently, the decision which she came to is one which a reasonable person might reasonably

have reached. The burden of proving abuse of power is not lightly discharged.

Accordingly, the ground of procedural impropriety also fails.

In conclusion the application fails on the substantive issue as well as on the preliminary point.

For all these reasons I would refuse the application.

Theobalds, J.

I have read the judgment of my learned brother Langrin J. It conforms completely with our deliberations and views expressed on the law and the evidence. There is nothing that I can usefully add.

Malcolm, J.

I have read the judgment of my brother Langrin J. and I am satisfied that his treatment of the submissions herein are correct and adequate. I agree with the conclusion reached by him.

The Order of the Court is that the Motion is dismissed. There shall be costs to the Respondent to be agreed or taxed.

Cases referred to

(1) Subramaniam v Public Prosecutor (1956) 1 WLR 965

(2) Fleming v Mycarr & Attorney General S CCA 63/85 18/10/89

(3) Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223

(4) Commissioner of Customs and Excise v Tam and another (1977) 2 WLR 181.

(5) Regina v West London Coroner, Ex Parte Gray and others (?) NV citation

(6) Regina v West London Coroner, Ex Parte Duncan and others (1987) Q B D 1026

(7) R v Boaten Justices, ex parte Scully (1991) 2 All ER 609

(8) Nicl v North Antrim Magistrates' Court and another (1992) 4 All ER 846.