

6/2/06

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN - Civil

CAUSE NO. 557 OF 2005

7 BETWEEN: ANDREA THOMPSON T/A PEPPA'S PRODUCTION PLAINTIFF
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12 AND: THE CHIEF IMMIGRATION OFFICER DEFENDANT
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16 Appearances: Stephen Hall-Jones instructed by Marlene Smith of
17 Associated Advocates both for the Plaintiff
18 Reshma Sharma of the Legal Department for the
19 Defendant
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23 Before: Hon. Justice Henderson
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27 Heard: February 6, 2006
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30 JUDGMENT
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33 Andrea Thompson, trading as Peppa's Production, brings this judicial review application to
34 challenge a decision of the Chief Immigration Officer, Mr. Franz Manderson, refusing to issue
35 temporary work permits to a band.
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37 Her counsel has argued that the decision is flawed fatally in a number of different respects: the
38 decision was not informed by any "immigration purpose" and is therefore beyond the jurisdiction
39 of the Chief Immigration Officer ("the C.I.O."); the C.I.O. took an irrelevant matter into account,

1 i.e., the opinion of the Cayman Musical and Entertainment Association ("CMEA"); the applicant
2 was wrongfully denied a further opportunity to be heard after certain encouraging things were said
3 to her and then the permit was refused; the decision does not meet the test of Wednesbury
4 reasonableness in that it is one which no reasonable decision-maker, having taking all relevant
5 factors into account and no irrelevant factors, could reasonably have reached; the reasons given for
6 the decision were inadequate in law; and a legitimate expectation arose that Ms. Thompson would
7 have had a further opportunity to present her case.

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9 I have before me two affidavits of Andrea Thompson and one of the C.I.O. which set out the
10 circumstances.

11

12 Ms. Thompson is in the business of producing concerts in the Cayman Islands. In September 2005,
13 she made some preliminary arrangements for a rap group known as "Bounty Killer" to perform in
14 the Cayman Islands. It had performed here on one previous occasion without incident.

15

16 She spoke to the manager of the group and was informed that the leader of Bounty Killer, a Mr.
17 Price, had a clean police record. Not yet having contacted the Immigration Department, she then
18 made contact with potential sponsors and paid to Bounty Killer's managers some \$11,000 US as a
19 deposit to secure the band's attendance at a concert.

20

21 Ms. Thompson had been informed by an immigration officer, correctly, that she was expected to
22 obtain the views of the CMEA on the proposed concert. She made contact with Mrs. Barrie
23 Quappe of that organisation and asked for the approval of the Association. She forwarded police

1 clearance certificates for the members of the band to Mrs. Quappe. Sometime later she received an
2 e-mail saying that the Association would be recommending against the granting of permits.

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4 Ms. Thompson says that around October 24th, 2005 she submitted completed application forms at
5 the Immigration Department for temporary work permits for Bounty Killer and paid the required
6 fees of some \$3,000 C.I. She had an appointment with Mr. Manderson in the first week of
7 November 2005. By that time, he would have had in hand the letter from the Association to which
8 I will refer in a minute.

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10 Mr. Manderson indicated to Ms. Thompson that he saw no reason why he would not grant the
11 permits "unless something new came up". He said that the permits would have restrictions on
12 them.

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14 Acting on this relatively positive indication, Ms. Thompson had a CD prepared with art work for
15 banners, posters and tickets, thus incurring some further expense.

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17 As it happened, Mr. Manderson was on vacation the following week and his Deputy dealt with the
18 application. Ms. Thompson was informed that the application had been denied. Subsequently, she
19 received a letter setting out the reasons for that (to which I will refer in due course).

20

21 That was not the end of the matter. On November 28th, 2005, Ms. Thompson's attorneys wrote to
22 the C.I.O. providing him with further information and, in effect, re-arguing her case. The C.I.O.
23 considered the matters set out in that letter but determined not to alter his decision.

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2 In her second affidavit, Ms. Thompson asserts that the CMEA is not an independent, unbiased
3 organisation. She characterises it as the musicians' union for the Cayman Islands.

4

5 The published goals of the Association do not indicate that it is a union. However, it is true that the
6 members of the Association would include entertainers seeking to obtain bookings locally and,
7 indeed, Mrs. Quappe herself had been engaged to perform at a concert on the same night as the
8 proposed performance of Bounty Killer. I was advised by counsel that this was to be a jazz concert
9 and thus unlikely to attract the same patrons as Bounty Killer would draw.

10

11 Mr. Manderson's account is not markedly different from that of Ms. Thompson. He says that in the
12 past complaints have been received from the Cayman public about inappropriate behaviour by
13 visiting artists. Consequently, a decision was taken some time ago to refer these sorts of temporary
14 work permit applications to the CMEA for its advice and recommendations. He goes on to say that
15 the Association is in a far better position than the Immigration Department to investigate the
16 background of visiting artists. The CMEA, unlike the Immigration Department, would be familiar
17 with the content of the artists' lyrics and performance.

18

19 Mr. Manderson emphasises, rightly, in his affidavit that the granting or refusal to grant work
20 permits remains at his sole discretion. The Association is merely what he calls an "advisory body"
21 in the process. Their recommendations, he says, can be ignored.

22

1 I turn to the material provided by the CMEA to the C.I.O. It came by way of a letter dated 18th
2 October 2005. The letter says that the CMEA would not recommend that the show be permitted.
3 The Association, under the signature of its president, Mrs. Quappe, goes on to say:

4 "At a time when the Cayman Islands are fighting hard to thwart
5 further crime and associated violence in the Country, shows of
6 this type of lyrics that outwardly promote violence [sic]. Attached
7 are samples of violent and obscene lyrics from this artist as well
8 as foreign newspaper reports on shows being banned and the artist
9 actually being arrested for obscene language onstage. Promises
10 that the artist will not use obscene language will not suffice as these
11 types of artists thrive on controversy."
12

13 Included with that letter was material on some of Bounty Killer's past concerts. One inclusion
14 appears to have been taken from the internet and is a news report of two concerts in Birmingham
15 and London. It says in part:

16 "Acting on a request from OutRage!, police warned the concert
17 venues, the White Pearl Club in Birmingham, and the Stratford
18 Rex in London, that they may be guilty of aiding and abetting
19 criminal offences if Bounty Killer performed his hit songs calling
20 for gay people to be burned, drowned, stoned, wiped out and
21 murdered."
22

23 Attached to the letter were sample lyrics from two of Bounty Killer's songs. I am aware that these
24 are likely not a representative sample because these two particular songs were probably chosen as
25 extreme examples of that to which Mrs. Quappe was objecting. One is called "Gun Down" and the
26 other "Tempt Mi". In both cases, if one can penetrate the Jamaican patois, one discerns a very
27 substantial emphasis on guns, shootings, violence, killing and homophobia.
28

29 Also included with the letter was what appears to have been an internet press report of a concert in
30 Trinidad.

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"Chaos and hysteria reigned..." [says the author of that report] "
...when police officers escorted Jamaican dancehall artiste
Bounty Killer off the stage. Patrons started throwing bottles and
other missiles at the policemen, leaving two constables assigned
to the Guard and Emergency Branch with injuries to their faces."

8 A little later the article says:

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"[The police] were forced to fire shots in the air after they came
under attack." ... "The incident caused the authorities to deploy
a large contingent of police officers and soldiers on Independence
Square and surrounding areas to monitor people making their way
from the concert."

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The article goes on to note that Bounty Killer was due to appear before a Port-of-Spain Magistrate
charged with using obscene language on stage. He was subsequently escorted off stage by three
police officers. It was that and the impending cancellation of the concert which prompted the irate
crowd to begin throwing bottles and committing other violent acts.

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When Mr. Price, the leader of the Bounty Killer band, applied for his temporary work permit, he
filled out a form and signed it personally. The form represents that he has no criminal record. It
asks, "Do you have a criminal record?" Beside that seemingly simple question are two boxes. He
has checked the box labelled "no".

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In fact, Mr. Price pleaded guilty at Port of Spain to the offence of using obscene language and was
fined \$400, according to an Interpol report. There was some debate about whether the guilty plea
resulted in what truly could be called a "criminal record". That question would be judged by the

1 law of Trinidad, and the evidence is unclear as to whether Trinidad treats such a result as a criminal
2 "conviction" or not.

3
4 An oral communication from Jamaican authorities to an immigration officer was to the effect that
5 Mr. Price also had a conviction for possession of ganja in Jamaica in 1998. It asserts that he was
6 fined \$100 for that and paid the fine. That information may well be incorrect as a Jamaican police
7 clearance certificate was filed with the C.I.O. which made no mention of it.

8
9 Mr. Manderson says that he was troubled by the information he received and proceeded to review
10 the file carefully. He also decided to speak to Ms. Thompson about the concerns raised by the
11 CMEA. He met with her on November 1st, 2005. She said that she had seen the information
12 supplied by the Association but that Mr. Price had "cleaned up" his act. Mr. Manderson asked her
13 directly about the reported conviction for using obscene language in Trinidad, and she replied that
14 Mr. Price did not have a conviction and that the case had been "thrown out". She also said that Mr.
15 Price had performed in Trinidad since the incident.

16
17 After that conversation, Mr. Manderson said to Ms. Thompson that once he was satisfied that the
18 information she had given him was true and correct, he would have no reason to refuse the work
19 permit. He also advised her that he would conduct an independent inquiry and advise her of the
20 decision. "At no time," says Mr. Manderson, "did I assure the Plaintiff or give her any undertaking
21 that the work permit would be definitely granted."

22

1 It was at that point that he instructed one of his officers to investigate the matter further and then
2 learned, after the interview with Ms. Thompson, that Mr. Price had been fined \$400 in Trinidad
3 after pleading guilty to the offence of using obscene language.

4
5 Having considered the matter, Mr. Manderson determined to refuse the application. He wrote to
6 the plaintiff on November 8th, 2005, providing his reasons for doing that. The letter says in part:

7 "…I am satisfied that it would be contrary to the requirements of the
8 community as a whole to grant a temporary work permit to allow him
9 [Mr. Price] to perform in the Cayman Islands. Your application has
10 therefore been refused. In reaching this decision I have taken into
11 account the controversial nature of the artist's song lyrics and stage
12 act and the fact that Cayman Musical and Entertainment Association
13 refused to recommend that this artist be allowed to perform in the
14 Cayman Islands. I note also that Mr. Price has a conviction for
15 profanity."
16

17 Finally, as I have indicated, Mr. Manderson received and considered a letter from Associated
18 Advocates Chambers on behalf of Miss Thompson in which they re-argue her case. He determined
19 not to change his decision.

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21 He concludes his affidavit by saying:

22 "…I am of the opinion that the underlying concerns, that is,
23 Mr. Price's propensity for anti-social behaviour was a relevant
24 consideration for me to take into account."
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26 Much of the argument was devoted to the proposition that Mr. Manderson was not, in
27 taking the decision which he did, acting for what was termed an "immigration purpose". There
28 were suggestions (although they are not, in my view, substantiated by the evidence) that Mr.

1 Manderson was motivated by questions of public taste and public morality rather than by any
2 narrower concern.

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4 In determining what is a valid immigration purpose for the granting or refusal of a work permit,
5 one must have reference to the Immigration Law 2003. Section 51 provides that the C.I.O., or
6 certain of his designates, may, on application by or on behalf of a business visitor, grant a
7 temporary work permit. Section 51(3) requires that in making the determination the C.I.O., or his
8 deputy, shall have regard to the criteria enumerated in sections 42(2)(a), 42(3), 42(4) and 46(9),
9 "with the necessary modifications".

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11 Modifications are indeed necessary because the criteria have been drawn up on the implicit
12 assumption that the person applying for the work permit will be coming to the Cayman Islands for
13 some significant period of time to work at regular employment. There are no specific guidelines in
14 the law directed solely to foreign entertainers.

15

16 For example, section 42(2)(a) directs the C.I.O. to consider whether the prospective employer has
17 demonstrated a "genuine need to engage the services of the prospective worker". That can have no
18 application to the proposal to bring a foreign entertainer into the Islands for a few hours to present a
19 concert.

20

21 Section 42(3) contains some broader concerns. The C.I.O. is required to consider the character and
22 reputation of the worker and to consider the economic and social benefit which he may bring to the
23 Islands. (There are other criteria which do not appear to have any application here.)

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2 Section 42(4) is another broad and general section. It requires the C.I.O. to consider "generally",
3 (a) the protection of local interests and in particular of Caymanians; (b) the availability of the
4 services of a suitable person already legally and ordinarily resident in the Islands; and (c) the
5 requirements of the community as a whole and such other matters as may arise from the
6 application.

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8 Finally, I make reference to section 46(9), as the C.I.O. was required to do. That section provides
9 that an application may be refused on "any of the following grounds". There then follows a list, not
10 all of which are relevant to the present proceeding. Item (b) says that a refusal would be justified if
11 there are reasonable grounds for suspecting that the applicant uses or is involved in illegal drugs.
12 Item (c) permits a refusal if the applicant has a background of subversive political activity,
13 racialism or any other illegal activity. Item (e) permits a refusal if the applicant has been convicted
14 of "an" offence. (One should note the singular in that phrase.)

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16 The scope of the C.I.O.'s mandate is set by law, and that law is found in the passages I have quoted.
17 The law confers upon him a broad and general discretion to consider such things as the economic
18 and social benefit to the Islands of granting or refusing a permit, the protection of local interests
19 and the requirements of the community as a whole. It directs him to consider whether the applicant
20 has a background of subversive political activity or racialism or has been convicted of an offence.

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22 The letter of refusal, the evidence of the C.I.O. and the nature of the material placed before him
23 demonstrate that he was basing his decision on three factors. First, Bounty Killer's lyrics glorify

1 guns, violence and killing; second, Bounty Killer's lyrics are homophobic and express hatred and
2 contempt for gay people; third, Bounty Killer's willingness to use obscene language on stage.

3
4 I am satisfied the C.I.O. was well within his jurisdiction in deciding, as he did, that issuance of the
5 permit would not serve the requirements of the Cayman Islands' community as a whole. His
6 primary concern was not for public morals or good taste but public order. He feared, on reasonable
7 grounds, that the proposed concert would promote and encourage violence, gun crimes and
8 homophobic attacks on gays. Those were subjects which the legislation requires him to consider.
9 (See generally *Immigration Board v. Streeter, et al.* (1999) CILR 486, Court of Appeal.)

10
11 The applicant says the decision under attack was unreasonable.

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13 The decision must be judged according to the well-known standard expressed clearly and
14 succinctly by Lord Diplock in *Council of Civil Service Unions v. Minister for Civil Service* [1985]
15 1 A.C. 410. His Lordship said:

16 "By 'irrationality' I mean what can by now be succinctly referred
17 to as Wednesbury unreasonableness. It applies to a decision which
18 is so outrageous in its defiance of logic, or of accepted moral standards,
19 that no sensible person who had applied his mind to the question to be
20 decided could have arrived at it. Whether a decision falls within this
21 category is a question that judges, by their training and experience,
22 should be well equipped to answer or else there would be something
23 badly wrong with our judicial system."

24
25 It is this relatively narrow scope of Wednesbury reasonableness which distinguishes judicial review
26 from an appeal. The decision-maker (in the vernacular) "has the right to be wrong" as long as the

1 decision is not one which no sensible person acting reasonably could have made. This impugned
2 decision is well within the bounds of reasonableness.

3
4 It is said that Mr. Manderson took an irrelevant matter into account. I find this the most troubling
5 aspect of the application. The C.I.O. is permitted, and indeed encouraged, to seek out factual
6 information from a variety of sources. In so far as the CMEA provided him with factual
7 information, it was useful and appropriate for him to consider that.

8
9 The opinion of the CMEA is, I think, in a different category. It comes from people who are, in
10 effect, competitors with the proposed work permit holder. In addition, there is always the prospect
11 of a conflict of interest, although it is hard to see Mrs. Quappe's jazz concert on the night of the
12 proposed Bounty Killer as posing a direct conflict of interest for her.

13
14 In any event, I am persuaded that the opinion of the CMEA, as opposed to the factual information it
15 provides, is not something to which the C.I.O. should give a great deal of weight in making his
16 determinations. There is no evidence here that Mr. Manderson did give it much weight. He has set
17 out clearly and correctly the fact that it is nothing more than a recommendation and the final
18 decision rests with him. More significantly, perhaps, he has also described in some detail the
19 extent of the investigation he conducted before reaching his own opinion.

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21 I cannot say that Mr. Manderson took an irrelevant matter into account. I think the letter from the
22 CMEA contained material which he was entitled to take into account, although it would not be
23 appropriate to give the opinion any significant amount of weight.

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2 Mr. Hall-Jones attacked the adequacy of the written reasons contained in the refusal letter. The
3 letter is terse and may not contain all of the reasons which the C.I.O. had in mind. However, I do
4 not see it as falling below what the law requires a decision-maker to communicate after having
5 reached a decision. In the two final sentences of the letter, Mr. Manderson sets out specific reasons
6 why the permit is not to be issued, particularly the nature of the song lyrics and stage act and the
7 previous conviction for profanity. He also says earlier that he is satisfied it would be contrary to
8 the requirements of the community as a whole, thus echoing language in the Immigration Law. I
9 view that as an adequate set of reasons for a refusal of temporary work permit.

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11 Mr. Hall-Jones has argued that Ms. Thompson was denied a further opportunity to be heard. The
12 short answer to that is she did get a further opportunity when her lawyers wrote to the C.I.O. and he
13 considered again whether he should grant or refuse the work permit. He took the additional
14 arguments presented by the attorneys into account.

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16 Finally, there was an argument that Mr. Manderson's concluding remarks at the personal interview
17 gave rise to a legitimate expectation that Ms. Thompson would be permitted to argue her case a
18 second time before there could be a refusal of a permit.

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20 One has to consider the context. Mr. Manderson was given some oral information by Ms.
21 Thompson which contradicted things the CMEA had said to him. He promised to check them out.
22 He made his concluding remarks on his present understanding he would be inclined to issue the

1 permit unless something new comes up. I take that to mean that he would be inclined to issue the
2 permit if what Ms. Thompson told him was correct.

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4 What Ms. Thompson told him was not correct. His investigation showed that the case was not
5 "thrown out" of court, and there was certainly no evidence presented to him at any point that
6 Bounty Killer had "cleaned up" his act. In any event, one suspects that it would be commercially
7 unwise for Bounty Killer to clean up his act given that the band's reputation appears to be built on
8 the sort of act it has traditionally presented.

9
10 Mr. Manderson's reference to the prospect of something new coming up takes this out of the class
11 of case where a legitimate expectation can arise. There must be a clear and unambiguous
12 representation upon which it is reasonable to rely in order for the doctrine of legitimate expectation
13 to operate. Mr. Manderson's comments are equivocal. They leave his options open and were
14 clearly meant to do so. They do not amount to a de facto decision on the application. It was not
15 reasonable for the applicant to take them, as she appears to have done, as a promise to issue a
16 permit. In any event, some of the information given to Mr. Manderson by Ms. Thompson was
17 incorrect. That circumstance alone would justify a reconsideration of the question after all
18 inquiries had been made.

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1 In the result, I am not persuaded that any of the arguments advanced against the decision can
2 prevail. The application is dismissed.

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5 Dated this 6th day of February, 2006

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Henderson, J.

10 Henderson, J.
11 Judge of the Grand Court

