Privy Council Appeal No. 47 of 1983

Yeap Seok Pen *Appellant*

v.

The Government of the State of Kelantan *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH FEBRUARY 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD GRIFFITHS
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Griffiths**]*

The appellant is a Malaysian of Chinese origin. In October 1979 the appellant entered into an agreement to buy the land and shophouse in which her father had run a goldsmiths business as tenant for some 45 years. The land is known as Lot 715, Jalan To'Hakim in the town of Kota Bharu, State of Kelantan; it is situate outside a Malay Reservation area and it may be transferred between natives of Kelantan without the prior approval of the Ruler in Council. Both the appellant and her vendor are natives of Kelantan.

On 8th October 1979 the appellant and the vendor executed a memorandum of transfer of the land. On 3rd March 1980 the appellant's solicitor presented the memorandum of transfer and the issue document of title in respect of the land to the Registry of Titles for registration. On 16th March 1980 the appellant attended an Inquiry before the Deputy Registrar, the purpose of which was to satisfy the Deputy Registrar that both the vendor and the purchaser were natives of Kelantan. It is apparent from the record of that Inquiry that it was not concluded that day as the appellant had not brought her birth certificate with her which she undertook to bring the following week. The transfer was registered on 26th July 1980.

[13]

Before the registration was completed the first steps were taken by the respondent that led to the compulsory acquisition of the premises by the respondent on behalf of the Kelantan Foundation. On 17th July 1980 a draft Form C was prepared containing particulars of the property and on 24th July 1980 a plan was prepared.

On 23rd October 1980 the respondent published in the Gazette a declaration of intended acquisition in Form D ("G.N. 707") under section 8 of the Land Acquisition Act 34 of 1960 specifying that the land was needed for "office and commercial space for the Kelantan Foundation".

The Kelantan Foundation is an educational foundation established by the Kelantan Foundation Enactment No. 1 of 1974. It is not in issue in this appeal that the respondent may use the statutory powers of compulsory acquisition to acquire land on behalf of the Foundation.

The appellant, however, is convinced that she has been the victim of an abuse of power and that her land has been compulsorily acquired in order to prevent her becoming the owner of land because she is of Chinese or non-Malay origin. Accordingly, she moved the High Court in Malaysia for an order that the compulsory acquisition of her land be declared null and void. The appellant attacked the compulsory acquisition on three grounds.

(1) That the acquisition was not for a public purpose as required under section 3(a) of the Land Acquisition Act 1960.

(2) That the acquisition was made in bad faith.

(3) That the acquisition proceedings were illegal as the Notice of Enquiry issued by the Collector of Land Revenue in Form E was not served on the appellant.

The appellant failed on each of these grounds and her application was dismissed. On appeal to the Federal Court, the appellant did not pursue the third of her grounds, and failed on the other two grounds.

In presenting her appeal to this Board, the appellant has confined herself to the second of her original grounds namely, that the compulsory acquisition of her land was made in bad faith in that her land was selected for compulsory acquisition because she is not of Malay origin, and that the Government used their compulsory purchase powers as a device to prevent her as a Chinese Malay, from becoming the owner of land. If the appellant could prove that this was the disgraceful purpose for which

the compulsory purchase power was used, it would be a clear case of abuse of power entitling her to have the compulsory purchase order quashed. There is no dispute about this principle of law and it was recognised by both the judge and the Federal Court. But as the trial judge rightly observed, bad faith of this order is an exceedingly serious allegation to make and she who makes it, has a heavy burden to discharge the onus of proving it.

The appellant produced no direct evidence of bias against non-Malays on the part of the various Government officials involved in the transaction, nor on the part of any officer of the Foundation. However, she invited the courts to draw the inference of improper purpose from various surrounding circumstances. Firstly, she complained of the delay in registering her title from 3rd March 1980 when she first applied for registration to 26th July 1980 when the title was registered. She has submitted that there is a sinister significance in this delay, witnessed by the fact that shortly before registration the first steps towards compulsory acquisition were commenced on 17th and 24th July 1980, namely the preparation of the draft Form C and the plan of the property. Their Lordships have difficulty in seeing how any sinister significance is to be attached to the time interval between application for registration and the date upon which compulsory acquisition procedures started, and it is to be observed that there was before the court an affidavit, on behalf of the respondent, that denied that there was undue delay in registration. However, if there is any sinister significance in these events the judges in Malaysia are far better fitted to perceive it than their Lordships.

The appellant also relied upon the fact that the Foundation owned other land that it was developing in Kota Bharu and also that the Government owned and was developing land in the town. It was said that the Foundation could have obtained premises at either of these sites, so why should they pick on this one shophouse out of a row of ten such shophouses.

All these matters were set out in the judgment of the Federal Court and the court says it gave anxious consideration to them. But the court did not consider that they provided sufficient material from which to draw an inference of bad faith on the part of the respondent.

On behalf of the appellant, it is submitted that the Federal Court fell into error in their approach to the evaluation of the evidence because certain authorities were not cited to them. If these authorities had been cited, it is submitted that the Federal Court would have attached far more

significance to the failure of the respondent to give any evidence explaining the circumstances in which the Foundation had decided that they wished to acquire the appellant's land. In these circumstances, it is submitted that the appeal should be allowed and the compulsory order quashed or, alternatively, that a re-hearing should be ordered at which the respondent, if so advised, might tender further evidence.

Their Lordships do not believe that the Federal Court fell into any error in their evaluation of the evidence of this case or that they would have been in any way assisted by the authorities cited by the appellant in this appeal.

The first authority relied upon is *Padfield v. Minister of Agriculture Fisheries and Food* [1968] A.C. 997. This is one of the leading post-war authorities in the field of English administrative law. The question at issue was the nature and extent of the Minister's duty under section 19(3)(b) of the Agricultural Marketing Act 1958 in deciding whether to refer to a committee of investigation a complaint from milk producers who alleged they were being unfairly treated by the Milk Marketing Board. There was no suggestion that the Minister had acted in bad faith in refusing to exercise his discretion to refer the complaint to the committee of investigation. The case turned upon whether the reasons the Minister gave for refusing to refer the complaint revealed that he had misconceived the nature of the discretion with which he was endowed by the Act. Their Lordships were referred to certain passages in their Lordships' speeches and the judgment of Lord Denning in the Court of Appeal that indicate that if the facts and circumstances *prima facie* point towards the need for the complaint to be referred to the committee, the failure to give any reasons for not referring it may give rise to the inference that there were no good reasons. This approach is perhaps most clearly expressed in the following passage from the speech of Lord Pearce at page 1053:-

> "I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the court's surveillance. If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions. In the present case, however, the Minister has given reasons which show that he was not exercising his discretion in accordance with the intentions of the Act."

Their Lordships were also referred to passages in the judgments of Lord Denning and Roskill LJ. in *Secretary of State for Employment v. Associated Society of Locomotive Engineers and Fireman and Others* (No. 2) [1972] 2 Q.B. 455, which are to the like effect.

These authorities illustrate an approach to the evaluation of evidence with which all judges are familiar. If there is a legitimate adverse inference to be drawn from certain facts, a failure to take advantage of the opportunity to answer it may go to strengthen that adverse inference. But this is an elementary principle which their Lordships can be confident was familiar to the trial judge and to the Federal Court.

Finally, the appellant relied upon a passage in the judgment of Donovan LJ. in *Regina v. Governor of Brixton Prison ex parte Soblen* [1963] 2 Q.B. 243. In that case the Home Secretary had made a deportation order to remove Soblen from the United Kingdom. The order was challenged on a number of grounds including the allegation that the order was being used for the unlawful purpose of extraditing a political fugitive convicted of a non-extradictable offence and that the order was a sham and was not made *bona fide*. In the course of his judgment, Donovan LJ. said at page 307:-

> " Mr. Solomon asserted that the order was invalid for a different reason, namely, because it was a sham. The Home Secretary had not genuinely formed the opinion that it was conducive to the public good to deport the applicant; he simply wanted to comply with a United States request to surrender the applicant to them notwithstanding that the offences occurred as far back as 1944 and 1945, and had resorted to the device of a deportation order simply to give the look of legality to that compliance.
>
> The task of the subject who seeks to establish such an allegation as this is indeed heavy. On the face of it the order which he wishes the court to quash will look perfectly valid, and to get behind it and to demonstrate its alleged true character he will need to have revealed to him the communications, oral and written, which have passed between the home and the foreign authorities. But if the appropriate Minister here certifies, as he has done in this case, that such disclosure will be contrary to the public interest, then as a general rule the subject will not obtain it. He will be left to do his best without such assistance, and in the nature of things, therefore, he will seldom be able to do more than raise a *prima facie* case, or

> alternatively to sow such substantial and disquieting doubts in the mind of the court about the *bona fides* of the order he is challenging that the court will consider that some answer is called for. If that answer is withheld, or, being furnished, is found unsatisfactory, then, in my view, the order challenged ought not to be upheld, for otherwise there would be virtually no protection for the subject against some illegal order which had been clothed with the garments of legality simply for the sake of appearances and where discovery was resisted on the ground of privilege."

Founding upon this passage, it was submitted on behalf of the appellant that as the circumstances of the present case raised a suspicion of bad faith, then even if they fell short of establishing a *prima facie* case the court should draw the inference of bad faith from the failure of the respondent to set out the reasons that led the Foundation to select the appellant's property.

There are a number of answers to this submission. In the first place, the facts in *Soblen*'s case were special and different to the present case in that discovery had been refused upon the grounds of Crown privilege. Their Lordships' doubt if Donovan LJ. intended to draw a distinction between suspicion and a *prima facie* case. An examination of the remainder of his judgment shows that after reviewing all the facts he said:-

> " I reach the conclusion, therefore, that there is no evidence which would justify the court forming even a provisional opinion that the Home Secretary has not genuinely deemed it to be conducive to the public good that the applicant should be deported. I have gone into the matter in this detail because I think that when such an allegation of bad faith is made and the liberty of the subject is involved, the court should examine the grounds of the allegation with the help of such material as is before it, and drawing any reasonable inferences of fact therefrom. The alternative would be to say that the claim for privilege made by the Crown precludes a really satisfactory inquiry and therefore none should be attempted. This, I think, would be wrong."

This passage puts his earlier observations in context and shows that the Lord Justice did not intend to cast doubt upon the burden that lay upon him who asserted bad faith to at least establish a *prima facie* case. This is the correct approach. He who asserts bad faith has the burden of proving it, mere suspicion is not enough. In deciding whether the

burden is discharged, the court will consider all the evidence before it, including any explanation given by the Minister and any inference to be drawn from the failure to give an explanation. Their Lordships can see no reason to suppose that this was not the approach adopted in the Federal Court.

Secondly, there is no reason to suppose that the courts below did consider that the material placed before them by the appellant raised the suspicion of bad faith. They rehearsed the appellant's arguments in the judgments but did not say that they were suspicious of the respondent's motives.

Thirdly, unlike the case of *Soblen* in which discovery had been refused, no attempt was made by the appellant, either through a request for discovery or to cross-examine upon the respondent's affidavits, to probe into the Foundation's reasons for requesting the compulsory acquisition of her property.

This was an allegation of bad faith founded on scanty evidence. Their Lordships are not surprised that that evidence was held to be insufficient to discharge the burden of proof upon the appellant and can find no fault in the judgment of the Federal Court.

For these reasons their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed with costs.