

In the matter between:

SCAN AIR CHARTER LTD

Applicant

and

THE SECRETARY FOR CUSTOMS
THE ATTORNEY-GENERAL

1st Defendant
2nd Defendant

CORAM :

HANNAH, CJ.

FOR THE PLAINTIFF :
FOR THE DEFENDANT :

MR. FLYNN
MR. WIMALARATNE

JUDGMENT

(2/5/89)

Hannah, CJ.

On 19th February, 1988 an aircraft belonging to the applicant departed from Matsapha airport without first obtaining clearance from the customs authorities and in so doing the pilot contravened certain provisions of the Customs, Fiscal, Excise and Sales Duties Act, 1971 as well as certain regulations made under that Act. On its return to Matsapha the customs authorities detained the aircraft as they were entitled to do but upon the pilot signing an admission of guilt form and upon provisional payment being made of E3,000 the aircraft was released. The payment of E3,000 was made under protest, the applicant taking the view that such a sum was far too high having regard to the maximum fine for which the pilot had made himself liable, and by notice of motion the applicant now seeks to have the decision of the customs authority to require payment of such a sum set aside.

It is convenient at this stage to set out certain parts of Section 91 of the Act which deals with an admission of guilt. Section 91(1) provides:

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"If any person -

- (a) admits to the secretary that he has contravened this Act, or that he has failed to comply with a provision thereof with which it was his duty to comply;
 - (b) agrees to abide by the secretary's decision and;
 - (c) deposits with the secretary such sum as the secretary may require of him but not exceeding the maximum fine which may be imposed upon a conviction for the contravention or failure in question or makes such arrangement or complies with such conditions with regard to securing the payment of such sum as the secretary may require, the secretary may, after such enquiry as he deems necessary, determine the matter summarily and without legal proceedings order forfeiture by way of penalty of the whole or a part of the amount so deposited or secured.
- (3) There shall be a right of appeal to the Minister from any determination or order of the secretary under subsection (1) whereby a penalty exceeding two hundred rand is imposed,

and the Minister's decision on any such appeal shall be final."

Mr. Wimalaratne argued as a preliminary point that as a general rule an applicant for review must first exhaust all statutory remedies available to him before making such application and, it being accepted that the applicant has not appealed to the Minister against the first respondent's determination, Mr. Wimalaratne contends that the application should not be entertained. The exclusion of the Court's powers to entertain a review immediately following upon an alleged irregularity must flow from the express

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words of the relevant statute or by necessary implication from all the relevant terms. *Welkom Village Management Board v Leteno S.A.* 1958 (1) 490 (A) at 503, cited by Mr. Flynn, but, as Mr. Flynn submits, as a general rule the Courts are reluctant to hold that ordinary remedies are implicitly excluded, particularly where the statutory remedy is in the hands of an administrative body. Reading subsection (1) of section 91 together with subsection (3) it seems to me abundantly clear that what the statute is providing is a channel of appeal to the Minister on the merits of the secretary's summary determination and order resulting in a penalty being imposed. It does not provide a channel of complaint against an invalid or illegal requirement made by the secretary that a deposit in excess of the maximum fine should be made and where that is the essence of the complaint, as it is in the instant case, the Court's jurisdiction is not ousted or restricted in any way.

The question, therefore, which this Court has before it is whether the Secretary had the power to require a deposit of E3,000 having regard to the contravention or contraventions which had taken place and in determining that question regard must be had to the allegations which were being made against the applicant and its pilot. According to the detention notice issued on the 19th February, the aircraft was detained because of a contravention of section 6 (6) of the Act. This subsection requires the pilot of an aircraft destined for a place outside the common customs area not to cause the aircraft to depart without first obtaining a certificate of clearance and it seems to me that that was the primary contravention alleged. The admission of guilt form repeated this contravention but in addition also alleged contravention of "Section 5 (2), 6(4) and regulations 67, 8(2) 8(8) etc." The "et cetera" in my view has no proper place in a document such as this and should be ignored as being too vague to have any real meaning. Certainly it is far too imprecise an expression to visit legal liability for the purposes of an admission of guilt. As for section 5(2) it would appear that the.

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contravention complained of concerned the hour at which the aircraft left the airport and the failure of the pilot to request a customs officer to attend him at a time which fell outside normal working hours.

This is also dealt with by Regulation 67 but as I read that regulation it is more in the nature of an administrative regulation than a regulation which imposes criminal liability. Section 6(4) is akin to section 6(6) and requires the pilot to appear before the controller at the airport and to deliver a report to him before departure and regulation 8(2) overlaps completely with this subsection. Regulation 8(8) prescribes the circumstances in which a customs officer may refuse clearance for the departure of an aircraft and cannot, by any stretch of the imagination, be described as a penal provision .

As I have already indicated the real substance of the Customs Authority's complaint against the pilot was his failure to obtain clearance before departing from the airport in contravention of section 6(6) of the Act and in ordinary circumstances it may be thought that they would have been content with an admission of guilt of that offence. But even assuming that in doing so the pilot also contravened section 6(4) and regulation 8(2) and section 5(2) it is impossible to see how a deposit of E3,000 can be justified. The maximum fine for contravening each of these provisions was at the time E400

making a total of E1,600 for the four offences referred to and in my view requiring a deposit in excess of that amount, the first respondent must be held to have exceeded the power conferred upon him by section 91 of the Act. The situation would be different today as the penalty was increased by an amending Act in October 1988 but we are concerned with the position as it was in February, 1988.

Accordingly, in my view, the applicant has made out a case on the relief sought and there will be an order in terms of prayer one of the Notice of Motion.

N.R. Hannah

CHIEF JUSTICE