Michaelmas Term

[2016] UKPC 30

Privy Council Appeal No 0006 of 2016

JUDGMENT

Madhewoo (Appellant) v The State of Mauritius and another (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Mance

Lord Clarke

Lord Wilson

Lord Sumption

Lord Hodge

JUDGMENT GIVEN ON

31 October 2016

Heard on 20 July 2016

Appellant	Respondents
Sanjeev Teeluckdharry	James Guthrie QC
Erickson Mooneapillay	Kamlesh Domah
(Instructed by Blake Morgan LLP)	(Instructed by Royds Withy King)

LORD HODGE:

1.
The National Identity Card Act 1985 ("the 1985 Act") provides for adult citizens of Mauritius to carry identity cards which bear their names and signatures. More recently, the government proposed to introduce a new smart identity card, which incorporates on a chip the citizen's fingerprints and other biometric information relating to his or her external characteristics. The National Identity Card (Miscellaneous Provisions) Act 2013 ("the 2013 Act") is the legislative vehicle which was enacted for this scheme, which it effected by amending the 1985 Act.

2.

Mr Maharajah Madhewoo ("the appellant"), a citizen of the Republic of Mauritius, has not applied for a biometric identity card. He challenges the constitutionality of the 2013 Act by seeking redress under section 17 of the Constitution, which allows a person to apply to the Supreme Court for redress if he alleges that any of sections 3 to 16 of the Constitution, which set out the individual's fundamental rights and freedoms, "has been, is being or is likely to be contravened in relation to him".

The 1985 Act as amended by the 2013 Act

3.
Section 3 of the 1985 Act (as amended) provides for the Registrar of Civil Status to keep a register in electronic or other form in which the particulars of every citizen would be recorded. Section 3(2) provides that the particulars to be recorded on the register shall be the sex and names of the person and such reasonable or necessary information as may be prescribed regarding the identity of the person. The particulars which were prescribed for recording on the register included both fingerprints and encoded minutiae of fingerprints: the National Identity Card (Particulars in Register) Regulations 2013, regulation 3 ("the 2013 Regulations"). As explained in para 11 below, these Regulations were later repealed.

4.
Section 4 of the 1985 Act (as amended) provides that every citizen within six months of attaining the age of 18 must apply for an identity card at an office designated by the registrar. Section 4(2) provides:

"Every person who applies for an identity card shall -

(a) produce his birth certificate or his certificate of registration or naturalisation as a citizen of Mauritius, as the case may be;

(b) produce such other documents as the Registrar may require;

(c) allow his fingerprints, and other biometric information about himself, to be taken and recorded; and

(d) allow himself to be photographed,

for the purpose of the identity card."

Section 5 provides that the identity card shall bear the person's names, date of birth, gender, photograph, signature or thumbprint, and NIC number and also the date of issue and (in section 5(2)(h)) "such other information as may be prescribed". The appellant has expressed concern that the latter provision could result in the inclusion of medical and health data on the chip in the identity card, but the Government has not prescribed the inclusion of such data and one of its witnesses, Mr Ramah, the project director of the Mauritius National Identity Scheme ("MNIS"), gave evidence that no such data has been recorded on the cards.

5.
Section 7 of the 1985 Act (as amended) provides:

"(1) Every person may -

(a) in reasonable circumstances and for the purpose of ascertaining the identity of another person; or

(b) where he is empowered by law to ascertain the identity of another person,

request that other person to produce his identity card where that person is a citizen of Mauritius.

(1A) Where a person is required to produce his identity card in accordance with subsection (1)(b), he shall -

(a) forthwith produce his identity card to the person making the request; or

(b) where he is not in possession of his identity card, produce his identity card within such reasonable period, to such person and at such place as may be directed by the person making the request.

(2) Where any person is required to produce evidence of his identity, it shall be sufficient for that purpose if he produces his identity card."

6.
Section 9(2) of the 1985 Act (as amended) provides that it is an offence to contravene the Act or any regulations made under it; and section 9(3) provides that the maximum penalties for an offence are a fine of 100,000 rupees and imprisonment for a term of five years. Section 12 provides that the collection and processing of personal data, including biometric information, under the Act shall be subject to the Data Protection Act.

7.
In this appeal the appellant challenges the constitutionality of (a) the obligation to provide fingerprints and other biometric information under section 4, (b) the storage of that material on the identity card under section 5, (c) the compulsory production of an identity card to a policeman under section 7(1A) in response to a request under section 7(1)(b), and (d) the gravity of the potential penalties under section 9(3) for non-compliance. He claims, first, that the implementation of the new biometric identity card is in breach of sections 1, 2, 3, 4, 5, 7, 9, 15, 16 and 45 of the Constitution coupled with article 22 of the Civil Code (which provides that everyone has the right to respect for his private life and empowers courts with competent jurisdiction to prevent or end a violation of privacy) and, secondly, that the collection and permanent storage of personal biometric data, including fingerprints, on the identity card are in breach of those sections of the Constitution and that article of the Civil Code.

The judgment of the Supreme Court

8.
In an impressive judgment dated 29 May 2015 the Supreme Court (Balancy SPJ, Chui Yew Cheong and Caunhye JJ) upheld part of the appellant's challenge under section 9(1) of the Constitution, which provides:

"Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."

The Court stated that the Constitution must be given a generous and purposive interpretation and held that

"The protection under section 9(1) would clearly be against any form of undue interference by way of a search of any part of the body of a person without his consent. The coercive taking of fingerprints from the fingers of a person and the extracting of its minutiae would thus clearly fall within the scope of the protection afforded to the integrity and privacy of the person under section 9(1) of the Constitution."

The Court therefore held that the provisions of the 1985 Act (as amended) which enforce the compulsory taking and recording of fingerprints of a citizen disclosed an interference with the appellant's rights guaranteed under section 9(1) of the Constitution. The Court rejected the submissions that the other provisions of the Constitution and the article of the Civil Code had been breached.

9.
Having held that there was interference with a right guaranteed by section 9(1) of the Constitution, the Supreme Court went on to consider whether that interference was justified under section 9(2) which provides:

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) in the interests of … public order …

(b) for the purpose of protecting the rights and freedoms of other persons; …

except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society."

10.
The Supreme Court held that the provisions of the 2013 Act which provided for the taking and recording of fingerprints for the purposes of a national identity card were a permissible derogation under section 9(2) as the creation of the card was in the interests of public order and it had not been shown that the provisions were not reasonably justifiable in a democratic society.

11.
The appellant enjoyed more success in his challenge to the storage and retention of the fingerprints. The Supreme Court held that the storage and retention of the fingerprints were not reasonably justifiable in a democratic society under section 9(2). It held that the storage of the data was not sufficiently secure because the safeguards of the Data Protection Act were not sufficient and the storage of the data was not subject to judicial scrutiny and control. The respondents have accepted the Supreme Court's decision on this matter and have altered this part of the statutory scheme, in response to the court's ruling, by repealing the 2013 Regulations and replacing them with the National Identity Card (Civil Identity Register) Regulations 2015 which do not prescribe the recording of fingerprints and encoded minutiae of fingerprints on the register. Counsel for the respondents informed the Board that the encoded fingerprint minutiae were included only on the chip on the biometric identity card and not on the register, that a person's fingerprints were destroyed after he or she was issued with the biometric card, and that the Government had not issued card-readers which would give access to the minutiae on the chip. This was, he said, a "holding position" to comply with the Supreme Court's ruling. When the Supreme Court heard the challenge in September 2014, over 850,000 citizens had applied for identity cards. The Government's current position is that citizens can still use their identity cards issued under the 1985 Act until 31 March 2017.

12.
The Supreme Court has granted the appellant leave to appeal to the Board.

The various challenges

13.

It is not in dispute that the Constitution is given a generous and purposive interpretation and in particular the provisions that enshrine fundamental rights should receive a generous and not literalist interpretation: Olivier v Buttigieg [1967] 1 AC 115, p 139; Minister of Home Affairs v Fisher [1980] AC 319, pp 328-329; Ong Ah Chuan v Public Prosecutor [1981] AC 648, pp 669-670. But, giving full weight to that well-established principle of constitutional interpretation, the Board is satisfied that, of the fundamental rights and freedoms protected by the Constitution, only section 9 is engaged by the challenged provisions of the 2013 Act. The Board reminds itself of what it said in Matadeen v Pointu [1999] 1 AC 98, pp 117-118, that the rejection of a narrow or legalistic interpretation cannot mean that section 3 and later sections of the Constitution "can be construed as creating rights which they do not contain".

14.
As the Supreme Court has addressed the other provisions of the Constitution very satisfactorily, the Board can state its views briefly. Section 4, which protects the right to life, is not engaged as it is concerned with the deprivation of life and not with any suggested diminution in the quality of life resulting from having to provide fingerprints and biometric information. Indeed, counsel for the appellant did not press this claim in his written case and oral submissions.

15.
Instead, he argued that section 7 of the 1985 Act (as amended by the 2013 Act), by requiring the citizen to produce his or her identity card, breached the protections, in sections 5 and 15, of the rights to personal liberty and freedom of movement. In the Board's view, this is misconceived. The obligation to produce the identity card in section 7(1A) applies only in the context of section 7(1)(b), where the person requesting its production is a person otherwise empowered by law to ascertain the identity of another person. The 2013 Act imposes no obligation to respond to a request by anyone else to produce an identity card under section 7(1)(a). It was not disputed that section 7(1)(b) referred to the power of a policeman to request proof of identity, for example, in the context where he could stop a person when he had reasonable grounds to suspect the commission of a crime. An interference with liberty and freedom of movement, if any, would arise by the exercise of this police power and not as a result of the obligation to respond to the requirement to produce the identity card. Further, section 7(1A)(b) allows the person, who is required to produce his identity card but who does not have it to hand, to produce it within a reasonable period. The section does not authorise any form of detention.

16.
Similarly, the Board is satisfied that the 2013 Act does not engage section 7 of the Constitution, which protects against torture and inhuman or degrading treatment. Counsel for the appellant submitted that the coercive act of taking a citizen's fingerprints and storing the minutiae on a microchip on the identity card without his consent and when he had not been the subject of any criminal investigation or conviction amounted to the treatment which section 7 prohibited. But the appellant's subjective fear of degradation and stigmatisation because he saw himself as being treated in the same way as a criminal has to be balanced by a recognition that every citizen over 18 years of age in Mauritius is required to provide his or her fingerprints for the purpose of the identity card. Many people may resent having to provide their fingerprints, but the compulsory provision of fingerprints in section 4 of the 1985 Act (as amended) does not come close to the treatment prohibited by section 7 of the Constitution. The only case which the appellant's counsel cited, Raninen v Finland (1997) 26 EHRR 563, provides no support for his proposition; the European Court of Human Rights held that the unjustified public handcuffing in that case did not come up to minimum level of severity of treatment needed to engage the equivalent provision of the European Convention on Human Rights ("ECHR").

17.
The Board agrees with the Supreme Court that the compulsory taking of fingerprints and the extraction of minutiae involved an interference with the appellant's section 9 rights which required to be justified under section 9(2). The appellant argued that he also had rights under section 3(c) of the Constitution, which provides:

"It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination … but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms -

… (c) the right of the individual to protection for the privacy of his home and other property …

and the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

18.
Section 3 of the Constitution is not a mere preamble but is a freestanding enacting section which must be given effect in accordance with its terms: Société United Docks v Government of Mauritius [1985] AC 585, 600 D-G; Campbell-Rodriques v Attorney General of Jamaica [2007] UKPC 65; [2008] RVR 144, paras 8-12; Newbold v Commissioner of Police [2014] UKPC 12, para 32. But the terms of section 3(c) do not give wider protection than that provided by section 9(1). In particular, the Board sees no basis for the submission by the appellant's counsel that the combination of sections 3(c) and 9 creates a more general right requiring respect for private life similar to that in the differently worded article 8 of the ECHR. Thus the Supreme Court was, in the Board's view, correct to look to the terms of section 9(2) of the Constitution in its assessment whether the interference was justified.

19.
Before turning to section 9(2), the Board notes that the appellant seeks to argue that the requirement to provide fingerprints in order to obtain an identity card was discriminatory, contrary to section 16 of the Constitution, because no such requirement was imposed on foreign residents and tourists. The Board was informed that this was not argued in submissions before the Supreme Court. It cannot be raised now. In any event, foreigners in Mauritius have passports to establish their identity and there was no evidence that there was a problem of identity theft in relation to their passports. Prima facie therefore the difference in treatment was not the result of their different race or place of origin but because they were outside the mischief that the 2013 Act addressed.

20.
The Board turns to the appellant's reliance on other provisions. Section 1 of the Constitution, which declares Mauritius to be a sovereign democratic State, and section 2, which declares the Constitution to be the supreme law of Mauritius, are important provisions. Section 1, which is entrenched by section 47(3), is a bastion to protect the rule of law and the separation of powers, including a judiciary independent of both the executive and legislature: State of Mauritius v Khoyratty [2007] 1 AC 80. Section 2 limits the law-making powers of any branch of government. The two sections provide the backdrop to the appellant's constitutional challenge but do not enhance the scope of that challenge, which depends on the wording of the relevant sections in Chapter II of the Constitution. Section 45 provides that, subject to the Constitution, Parliament may make laws for the peace, order and good government of Mauritius. It confirms Parliament's subjection to the Constitution and does not make arguments on such matters as the prioritizing of the use of public funds, the adequacy of

parliamentary scrutiny of the legislation, and the absence of procurement exercises into constitutional challenges. Finally, article 22 of the Civil Code does not create rights which a citizen can enforce directly under section 17 of the Constitution.

Justification of the interference under section 9(2)

21.
The Supreme Court recognised, correctly, that the right under section 9(1) was not an absolute right and interference with that right could be permitted under section 9(2). The Court held, under reference to Leela Förderkreis EV v Germany (2009) 49 EHRR 5 at para 86, that the relevant provision of the 1985 Act (as amended), section 4(2)(c), was under the authority of law because it was enacted in a domestic statute and was formulated with sufficient precision to enable citizens to regulate their conduct. The Court then considered and accepted the evidence of Mr Ramah and also Mr Pavaday, who was project manager and head of operations of the MNIS, that the use of fingerprints enabled the cards to be issued to the correct person and avoided the serious flaws of the previous identity card system which failed to protect against identity fraud. The Court concluded that the section and the Regulations implementing it were made in the interests of public order under section 9(2)(a).

22.
In addressing the question whether section 4(2)(c) of the 1985 Act (as amended) was reasonably justifiable in a democratic society the Supreme Court drew on jurisprudence of the European Court of Human Rights in S v The United Kingdom (2009) 48 EHRR 50, para 101, and Şahịn v Turkey (2005) 41 EHRR 108, para 103. In substance the Court asked whether the measure pursued a legitimate aim, whether the reasons given by the national authorities for the interference in pursuit of that aim were relevant and sufficient, and whether the measure was proportionate to the aim pursued. This evaluation is essentially the same as that adopted by the courts in the United Kingdom in relation to article 8(2) of the ECHR, in which the courts ask themselves (a) whether the measure is in accordance with the law, (ii) whether it pursues a legitimate aim, and (iii) whether the measure will give rise to interferences with fundamental rights which are disproportionate, having regard to the legitimate aim pursued. In relation to (iii), the courts ask themselves: (a) whether the objective is sufficiently important to justify a limitation of the protected right, (b) whether the measure is rationally connected to the objective, (c) whether a less intrusive measure could have been used without compromising the achievement of the objective (in other words, whether the limitation on the fundamental right was one which it was reasonable for the legislature to impose), and (d) whether the impact of the infringement of the protected rights is disproportionate to the likely benefit of the measure: R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2012] 1 AC 621, para 45; Bank Mellat v HM Treasury (No 2) [2014] AC 700, 790-791, para 74; and R (Bibi) v Secretary of State for the Home Department (Liberty intervening) [2015] 1 WLR 5055, para 29.

23.
The Supreme Court concluded:

“we find that it can hardly be disputed that the taking of fingerprints within the applicable legal framework pursues the legitimate purpose of establishing a sound and secure identity protection system for the nation and thus answers a pressing social need affording indispensable protection against identity fraud. Such a purpose, as has been amply demonstrated, is vital for proper law enforcement in Mauritius.

Furthermore, taking into consideration the appropriate safeguards in the taking of fingerprints for their insertion in the cards, and the relatively limited degree of interference involved, we are led to conclude that such interference is proportionate to the legitimate aim pursued."

24.
The Board in performance of its duty will scrutinise the justification of an interference with a fundamental right but it will be slow to interfere with an evaluation of this nature performed by a local court which is more familiar with the circumstances in its society than the Board can be.

25.
The appellant challenges the Supreme Court's evaluation because, he submits, the creation of a reliable identity card system does not justify the interference with his fundamental rights. He submits that the obligation to provide his fingerprints interferes with his right to be presumed innocent and also that an innocuous failure to comply with section 4(2)(c) could give rise to draconian penalties under section 9(3) of the Act (para 6 above). He also points out that in India a proposal for a biometric identity card was held to be unconstitutional, and, in the United Kingdom, libertarian political opposition resulted in the repeal of legislation to introduce biometric identity cards. The interference, he submits, is disproportionate.

26.
In the Board's view, these challenges do not undermine the Supreme Court's assessment. First, the requirement to provide fingerprints for an identity card does not give rise to any inference of criminality as it is a requirement imposed on all adult citizens. It is true that, if circumstances arose in which a police officer was empowered to require the appellant to produce his identity card and the government had issued card readers, the authorities would have access to his fingerprint minutiae which they could use for the purposes of identification in a criminal investigation. But that does not alter the presumption of innocence. Secondly, the penalties in section 9(3) are maxima for offences, including those in section 9(1), which cover serious offences such as forgery and fraudulent behaviour in relation to identity cards. The subsection does not mandate the imposition of the maximum sentence for any behaviour. Thirdly, while judicial rulings on international instruments and the constitutions of other countries can often provide assistance to a court in interpreting the provisions protecting fundamental rights and freedoms in its own constitution, the degree of such assistance will depend on the extent to which the documents are similarly worded.

27.
The Board notes that the Government's holding position pending this judgment, which it discussed in para 11 above, involves the placing of fingerprints and minutiae on the register only while the identity card is produced and issued to the applicant. What is placed on the identity card are fingerprint minutiae which, according to the evidence of Mr Pavaday, cannot be used to recreate the image of the fingerprint but can be matched with a person's fingerprint. The fingerprints on the register are used to make sure that the card is issued to the correct person. Thereafter, the fingerprints are expunged from the register. Questions may arise in future. The absence of the fingerprints and minutiae from the register after an identity card is issued may affect adversely the Government's ability to prevent identity fraud, for example, if someone were to apply more than once for an identity card using different names and documentation. The extent to which an interference with a fundamental right can achieve a legitimate aim is a consideration in any assessment of its justification. But the Board has not been informed of the Government's proposals for the future of the MNIS and such proposals were not before the Supreme Court and are not an issue in this appeal.

28.
Similarly, the proportionality of an interference with fundamental rights may be affected by the use which is made in the future of the power in section 5(2)(h) of the 1985 Act (as amended) to prescribe other information to be included on the chip of an identity card. But on the evidence currently available, the chip on the card has no capacity to accommodate the sensitive medical and health data, about which the appellant has expressed concern. Accordingly, it is not likely that such data could be placed on the identity cards and therefore the power to prescribe the inclusion of other information cannot support a challenge under section 17 of the Constitution.

A fair hearing?

29.
Finally, the appellant asserts that the Supreme Court did not give him a fair hearing. But his counsel did not develop the arguments in his oral submissions and the materials which he has placed before the Board, including the transcript of the appellant's evidence in chief, do not substantiate this claim.

30.
The appellant's challenge to the judgment of the Supreme Court for failing to assess the evidence (a) conflates evidential and legal findings and (b) criticises the court for failing to assess the evidence of his expert, Mr Sookun, and to record parts of the evidence on cross-examination of Mr Pavaday. But it was Mr Sookun's evidence which caused the court to uphold his challenge to the storage and retention of the fingerprints and biometric data on the register or database. While the court might have summarised that evidence, so far as it accepted the evidence as relevant, that would not have assisted in this appeal. Nor would the evidence on cross-examination of Mr Pavaday, which the Board has also considered, have affected the outcome of this appeal. The Government has not cross-appealed and the issue of the storage and retention of the data is not before the Board.

The Supreme Court's order

31.
There is an inconsistency between paras 5 and 6 of the Supreme Court's order in that para 5 states that the law providing for the storage and retention of fingerprints and other biometric data constitutes a permissible derogation under section 9(2) of the Constitution while para 6 holds the same provisions to be unconstitutional. The Board considers that the paragraphs can be reconciled if para 5 were amended to read:

"a law providing for the storage and retention of fingerprints and other personal biometric data regarding the identity of a person in principle constitutes a permissible derogation, in the interests of public order, under section 9(2) of the Constitution."

(emphasis added to show amendments)

Conclusion

32.
Subject to the alteration of para 5 of the Supreme Court's order in accordance with para 31 above, the Board dismisses the appeal. Prima facie, the respondents should be entitled to the costs of this appeal but the Board gives the appellant 21 days from the promulgation of this judgment, and the respondents 14 days thereafter, to make submissions as to costs, if they so wish.