[1988–90 Gib LR 301]

TRAFFIC COMMISSION v. GILLINGWATER

COURT OF APPEAL (Spry, P., Fieldsend and Huggins, JJ.A.):
September 21st, 1990

Jurisprudence—justice—natural justice—no specific guidelines as to application of rules of natural justice—each case to be decided on merits—administrators/tribunals under general duty to act fairly in exercise of powers—"fairness" always entails acting without bias/caprice—often requires more, e.g. informing applicant of considerations weighing against grant of application and giving opportunity to be heard

Road Traffic—Traffic Commission—appeals—appropriate procedure for appeal from Traffic Commission that for appeal from Court of First Instance or from Magistrates' Court—secretary to Commission to prepare record of appeal to comply with Supreme Court Rules, r.19

Road Traffic—Traffic Commission—duty to act judicially—Traffic Commission to act judicially when conducting proceedings relating to road service licences—consequent obligation to obey rules of natural justice—to inform applicant for transfer of road service licence of considerations weighing against grant of application and give applicant opportunity to be heard—provision of appeals procedure in Traffic Ordinance, s.73 requires Commission to give reasons to be tested on appeal

The respondent appealed to the Supreme Court against the decision of the appellant Commission to refuse his application to transfer a road service licence to a third party.

The respondent held a licence in respect of a private hire car, issued by the Commission pursuant to the requirements of the Traffic Ordinance, s.61. He applied to the Commission, under s.71 of the Ordinance, to transfer the licence to Mr. Paul Campello, but the Commission refused. His lawyers wrote asking the Commission for its reasons for refusing the transfer; having received no reply, they wrote again, asking the Commission to treat the letter as a re-submission of the respondent's application, and again the next day, asking to be represented at any meeting of the Commission. The Commission agreed to reconsider the application, but failed to provide any reasons for its earlier refusal; it later wrote again, saying that it agreed to treat the lawyers' earlier letter as a resubmission of the application, and also that it had given the application further consideration at its meeting on November 10th, and had again refused it. The

Commission later provided the respondent with a copy of the minutes of the meeting of November 10th, in which the chairman had stated that Mr. Campello would be unable to operate the licence satisfactorily. The respondent appealed to the Supreme Court, which set aside the decision of the Commission on the ground that the Commission had not acted as it should have done in its quasi-judicial capacity and according to the principles of natural justice, as the respondent (then the appellant) had not been told what had led it to believe that the proposed transferee would not be satisfactory as a licence-holder, and so had not had an opportunity to disabuse the Commission of its impression.

On appeal, the Commission submitted that (a) it was exercising an administrative, not a quasi-judicial function; (b) it had no duty to inform the applicant that it knew of facts indicating that the proposed transferee would not be able to operate the licence satisfactorily; (c) the Traffic Ordinance, s.71(3) gave it an unfettered discretion to refuse an application to transfer a licence, but required it to be satisfied that the potential transferee would be able to operate the licence satisfactorily; and (d) while it did have an obligation to observe certain rules of natural justice, this obligation was limited to a duty to determine the application in good faith and without bias or caprice.

The respondent submitted in reply that (a) the Commission was exercising a judicial—or at the very least a quasi-judicial—function, and so was under a duty to inform the respondent of any facts or circumstances that it considered might militate against the grant of the application; (b) the provision of an appeals procedure in s.73 of the Ordinance required the Commission to give reasons for a refusal of a licence, so that they might be tested on appeal; (c) in failing to allow him to appear in the proceedings, the Commission had offended against the provisions of s.55A(4) of the Ordinance; and (d) in failing to inform him of any considerations weighing against the transfer of the licence, the Commission had breached its obligation to follow the rules of natural justice.

Held, dismissing the appeal:

(1) The Commission was at the very least a quasi-judicial body. The provision in the Traffic Ordinance, s.55, that any person could appear in proceedings before the Commission (together with the reference in the proviso to that section of the Commission's duty to act "judicially") and the provision in s.73 of an appeals procedure (which itself required the Commission to give reasons for its decisions, so that they could be tested on appeal) all pointed towards the Traffic Commission's duty being to act judicially when conducting proceedings relating to road service licences, with the obligation to obey the rules of natural justice that this entailed (paras. 19–20; paras. 26–28).

(2) The court would not lay down specific guidelines as to the application of the rules of natural justice, as each case should be decided on its merits; administrators and tribunals were under a general duty to act

fairly in the exercise of their powers, and the meaning of this was dependent on the facts of the situation. Acting fairly always entailed acting without bias or caprice, and often required more than this: it might (as in the present case) require that they inform an applicant of considerations weighing against the grant of his application and give him an opportunity to challenge their accuracy and make representations about them (paras. 22–23).

(3) The Commission was under an obligation to inform an applicant of any facts or circumstances which it considered might militate against the grant of his application, and its failure to do so in the present case offended against a basic principle of natural justice. At the very least, the Commission should have indicated to the applicant in general terms its doubts as to the ability of the potential transferee to operate the licence satisfactorily, and given him a chance to disabuse it of these doubts (*per* Fieldsend, J.A., at para. 20).

(4) The appropriate procedure to be followed for an appeal from a tribunal was either that for an appeal from the Court of First Instance or that for an appeal from the Magistrates' Court, with appropriate modifications if necessary. In the present case, the court had been correct to follow the procedure for an appeal from the Court of First Instance, though it was unclear whether the record of appeal had been prepared by the Secretary to the Commission as it should have been, in compliance with the Supreme Court Rules, r.19 (*per* Spry, P., at para. 31).

Cases cited:

(1) *McInnes* v. *Onslow Fane*, [1978] 1 W.L.R. 1520; [1978] 3 All E.R. 211; (1978), 122 Sol. Jo. 844, observations of Megarry, V.-C. applied.
(2) *R.* v. *Captain of Port*, *ex p. Schiller*, 1988 Misc. Civ. App. No. 113 of 1988, unreported, distinguished.
(3) *R.* v. *Gaming Bd. for G.B.*, *ex p. Benaim*, [1970] 2 Q.B. 417; [1970] 2 All E.R. 528, *dicta* of Lord Denning, M.R. applied.

Legislation construed:

Traffic Ordinance (1984 Edition), s.55A(4): The relevant terms of this sub-section are set out at para. 15
s.71: The relevant terms of this section are set out at para. 8.
s.73: "Any person . . . whose application for transfer or amendment of his road service licence has been refused . . . and who considers himself aggrieved thereby may within twenty-one days appeal to the Supreme Court against the decision of the Commission praying such relief as the case may require."

K.W. Harris, *Senior Crown Counsel*, for the appellant;
C. Finch for the respondent.

1 **FIELDSEND, J.A.:** The respondent in this appeal is the holder of a

road service licence in respect of a private hire car issued by the Traffic Commission under the Traffic Ordinance, s.61.

2 On August 22nd, 1988, he applied under s.71 on Form 12, as prescribed by the regulations, to transfer the licence to a Mr. Paul Campello. He completed all the details required by the form which called for no information about the proposed transferee. The secretary of the Commission wrote to the respondent on August 26th, 1988, informing him that at a meeting on the previous day the Commission had not approved the transfer.

3 On September 7th, the respondent's lawyers sought reasons for the refusal of the transfer. Receiving no reply, the lawyers wrote again on September 21st, asking the Commission to treat the letter as a re-submission of the application and, on September 22nd, asking to be represented at any meeting of the Commission. The Commission wrote on September 22nd, apparently agreeing to reconsider the application, and on September 29th, the lawyers wrote, drawing attention to the Commission's refusal to supply any reasons for the original refusal, their letter of September 22nd already having indicated that they would have liked to have been represented at the meeting.

4 On November 14th, the Commission wrote to say that it had agreed to treat the letter of September 21st as a re-submission of the application but that on November 10th the Commission had, after further consideration, refused the application for transfer. No reasons were given, and on November 23rd the respondent appealed to the Supreme Court under s.73(c) of the Ordinance.

5 At some later date, the respondent was provided with a copy of the minutes of the Commission's meeting of November 10th. So far as is relevant, these minutes record that the Chairman said that enquiries had been made as to the suitability of Mr. Paul Campello to be the holder of a private hire licence and that the results were discussed:

> "The Chairman expressed the view that he considered that if the transfer were granted Mr. Campello would not be able to operate the licence satisfactorily. The Chairman recommended that the application should be refused, and after further discussion all members present agreed. The Chairman directed that it should be recorded that the Commission had unanimously decided that Mr. Gillingwater's application for transfer of his licence to Mr. Paul Campello should be refused."

6 On appeal, the Supreme Court set aside the decision of the Commission, ordered that the application be dealt with by the Commission according to law, and awarded the costs of appeal to the appellant. The basis of the judgment was that—

> "the Commission, in good faith but erroneously, did not tell the appellant in outline what it was that led its members to believe that the proposed transferee was not able to carry on this service and [was] not likely to carry it on satisfactorily. This meant that the appellant [now the respondent] was unable to disabuse the members of their first impression or at least try to do so. Thus . . . the Traffic Commission did not act as it should have done in its quasi-judicial capacity and according to the principles of natural justice."

7 It is against this decision that the Traffic Commission now appeals, contending that—

(a) it was not exercising a quasi-judicial, but only an administrative function;

(b) it had no duty no inform the applicant of the fact that it knew of facts or circumstances which indicated that the proposed transferee would not be able to operate the licence; and

(c) it had no duty to do more than determine the application without bias or caprice.

8 Section 71(1) provides that "subject to the provisions of [the] section, any road service licence may be transferred to any person" and sub-s. (2) requires an application to be made on a prescribed form and to be accompanied by a fee. Sub-section (3) reads:

> "Subject to the provisions of this Ordinance, the Commission may refuse the transfer of the licence or may grant the transfer of the licence either unconditionally or upon or subject to such conditions as it thinks fit but it shall not in any case grant a transfer unless it is satisfied that the proposed transferee is able to carry on the service and is likely to carry it on satisfactorily."

9 Mr. Harris for the appellant submitted that this sub-section gave the Commission an unfettered discretion to refuse an application to transfer a licence but empowered it to grant such an application only if satisfied that the proposed transferee was able and was likely to carry on the service satisfactorily. He conceded that the Commission was obliged to observe certain rules of natural justice, but only to the extent that it had to act in good faith and not capriciously. It followed, he argued, that the Commission was not obliged to give any reasons for its decision, that it was not obliged to give an applicant any opportunity of meeting any facts or circumstances that it might take into account in refusing a transfer, and that it was not obliged to give an applicant any opportunity to be heard.

10 He contrasted s.71 with s.63, which deals with applications for road service licences; with s.68, which deals with the revocation of such a licence where the applicant or holder is specifically given an opportunity

to be heard; and with s.72, which deals with the Commission's power to amend the conditions of a licence of its own motion, where notice of its intention must be given to the licensee.

11 He relied in particular on two cases: *McInnes* v. *Onslow Fane* (1) and *R.* v. *Captain of Port*, *ex p. Schiller* (2). The first of these cases related to a decision made by the British Boxing Board of Control, which refused an applicant a manager's licence without giving him any reasons for refusing or proposing to refuse the application, or giving him an oral hearing. The court (in a judgment given by Megarry, V.-C.) held that the board was entitled to do so, provided that it acted honestly and without bias. Megarry, V.-C. suggested three categories of cases (not necessarily exhaustive) which might give rise to cases of this nature. These were—

(a) forfeiture cases, where a decision takes away an existing right, where the person affected should have notice of what is said against him and a right to be heard in answer;

(b) expectation cases, where an applicant has a legitimate expectation that his application will be granted; and

(c) simple application cases (such as he held *McInnes* to be), where the person need not be given any notice of any facts or circumstances weighing against him, nor need he be given any hearing.

12 The second case—the *Schiller* case—concerned a refusal by the Captain of the Port of an application for a licence to use a fast launch under the Fast Launches (Control) Ordinance 1987. There, without giving reasons or any opportunity to be heard, the Captain of the Port refused the application, and on these grounds proceedings for orders of mandamus and certiorari were sought. The remedies were refused on the ground that the applicant was not entitled to reasons for the refusal.

13 The relevance of these cases depends upon their applicability to instances in which the Traffic Commission was obliged to exercise its powers. As Lord Denning, M.R. said in *R.* v. *Gaming Bd. for G.B.*, *ex p. Benaim* (3) ([1970] 2 Q.B. at 430), "it is not possible to lay down rigid rules as to when the principles of natural justice apply: nor as to their scope and extent. Everything depends on the subject-matter."

14 The Traffic Ordinance, ss. 53 and 54 (as amended by Ordinance 22 of 1985) established the Traffic Commission, *inter alia*, to consider and deal with applications for road service licences and to consider and determine any matters which might be referred to it under the provisions of the Ordinance.

15 Section 55 requires the Commission to comply with any directions given to it by the Governor pursuant to the general policy of the Government in relation to traffic. A proviso to that section precludes the

Governor from giving any direction in respect of a particular matter that would derogate from the duty of the Commission to act judicially. Section 55A(4) provides that "in proceedings before the Commission, any person may appear in person or be represented by counsel, solicitor or agent."

16 Sections 60–64 deal with the making, consideration, and granting or refusal of applications for road service licences. Section 68 deals with the Commission's power to revoke a licence, and s.72 with its power to amend conditions. Section 73 gives a right of appeal to any person whose application for a road service licence has been refused, suspended or revoked, whose application for transfer or amendment has been refused, or whose licence has been amended on the motion of the Commission.

17 The briefest consideration of these provisions shows that the two cases so heavily relied upon by Mr. Harris are not applicable in the present case. In *McInnes* (1) there were no provisions of any statute or contract either conferring a right to the licence in certain circumstances or laying down the procedure to be observed, and the applicant was seeking from an unofficial body the grant of a type of licence that he had never held before, and, though hoping to obtain it, had no legitimate expectation of receiving it ([1978] 3 All E.R. at 218–219, *per* Megarry, V.-C.). There was no provision for any appeal from the decision. In addition, on the facts, the applicant had over the previous four years made five similar applications unsuccessfully, and some three years previously had declined an invitation to attend a meeting of the Board to put his case.

18 Under the Fast Launches (Control) Ordinance considered in *Schiller's case* (2), there is no indication that the Captain of the Port is obliged to act judicially. Indeed, even if he himself were minded to grant a licence, he could not do so without the approval of the Governor. There is no provision allowing the appearance of an applicant before him, and there is no provision for an appeal.

19 In my view these provisions of the Ordinance point quite clearly to the Traffic Commission being at the very least a quasi-judicial body in the exercise of decision-making powers with regard to road service licences. Section 55 presupposes that in the discharge of these duties it is obliged to act judicially; this is reinforced by the provision in s.55A(4) providing without limitation that in any proceedings before the Commission any person may appear. There can be no doubt that in considering an application under s.71 the Commission is conducting "proceedings." If any further indication is required of the obligation to act judicially, it is to be found in the provision of an appeal even in the case of a refusal to grant an application made under s.71. Such a provision presupposes that the Commission must give reasons so that its decision can be tested on the appeal.

20 This leads to only one conclusion. An applicant is entitled to be told

of any facts or circumstances which the Commission considers might militate against the grant of his application. Failure to do this offends against one of the basic rules of natural justice applicable in such a case, as enunciated in the *Gaming Board* case (3). This opportunity was not afforded to the respondent in this case, and on that basis alone he was entitled to the order made by the learned Chief Justice. In addition, the respondent, despite his request, was not in the face of s.55A(4) permitted to appear in the proceedings.

21 In my view the appeal must be dismissed and the order of the Supreme Court upheld.

22 **HUGGINS, J.A.:** I agree. The Attorney-General has invited us to lay down guidelines for administrators and tribunals as to the application of the rules of natural justice, but I think that we should decline this invitation. They must act fairly. In every case, that requires that they shall act without bias or caprice. Often it will require something more: that they do not decide adversely to the subject in reliance upon information which has come into their hands without giving the subject an opportunity to challenge the accuracy or suggested effect of that information, or that they give the subject an opportunity to appear before them to give evidence and make representations, or that they should give reasons for their decision. Each case must be decided upon its own facts, and, in particular, with reference to the objects and provisions of any relevant legislation. I make no apology for quoting at length the judgment of Lord Denning, M.R. in *R.* v. *Gaming Bd. for G.B.*, *ex p. Benaim* (2) ([1970] 2 Q.B. at 430):

> "It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter: see what Tucker, L.J. said in *Russell* v. *Norfolk (Duke of)* ([1949] 1 All E.R. at 118) and Lord Upjohn in *Durayappah* v. *Fernando* ([1967] 2 A.C. at 349). At one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge* v. *Baldwin.* At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong. *Reg.* v. *Metropolitan Police Commissioner*, *Ex parte Parker* and *Nakkuda Ali* v. *Jayaratne* are no longer authority for any such proposition. See what Lord Reid and Lord Hodson said about them in *Ridge* v. *Baldwin* ([1964] A.C. at 77–79, and at 133).
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> So let us sheer away from those distinctions and consider the task of this Gaming Board and what they should do. The best guidance is, I think, to be found by reference to the cases of immigrants. They have no right to come in, but they have a right to be heard. The principle in that regard was well laid down by Lord Parker, C.J. in *In re H. K. (An Infant)*. He said ([1967] 2 Q.B. at 630):

> '. . . even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly.'
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> Those words seem to me to apply to the Gaming Board. The statute says in terms that in determining whether to grant a certificate, the board 'shall have regard only' to the matters specified. It follows, I think, that the board have a duty to act fairly. They must give the applicant an opportunity of satisfying them of the matters specified in the subsection. They must let him know what their impressions are so that he can disabuse them. But I do not think that they need quote chapter and verse against him as if they were dismissing him from an office, as in *Ridge* v. *Baldwin*, or depriving him of his property, as in *Cooper* v. *Wandsworth Board of Works*."

23 I deprecate attempts to compartmentalize these cases, because that involves drawing boundaries which cannot safely be drawn. In the present case the Commission had, under s.71(3) of the Road Traffic Ordinance, a discretion to refuse or grant the transfer of the road traffic licence (either conditionally or unconditionally) but had first to be satisfied that the proposed transferee was able to carry on the service and was likely to carry it on satisfactorily. It was at this first stage that the application foundered.

24 Without reference to the other provisions of the Ordinance, it seems to me that, at the very least, the Commission should have indicated in general terms its doubts as to Mr. Campello's ability to carry on the service satisfactorily so that an attempt could be made to disabuse the Commission of those doubts. When the other provisions are examined, it becomes apparent that the right of appeal conferred by s.73(c) might be nullified if the Commission did not also give its reasons, although I hasten to add that, if the Commission had reached the stage of exercising its discretion and had done so properly, the Supreme Court would not have been justified in substituting its own discretion.

25 **SPRY, P.:** I agree that this appeal should be dismissed. I shall not repeat the facts, which have already been given in the judgment of Fieldsend, J.A.

26 Mr. Harris argued that the decision appealed against was of an administrative character and that there was only a minimal obligation on the Traffic Commission to observe the rules of natural justice: the only duty on them was to act fairly and without bias. With respect, I think that

this ignores the significance of s.73 of the Traffic Ordinance, which gives any person who considers himself aggrieved by the refusal of the Commission to transfer his road service licence the right to appeal to the Supreme Court against the decision of the Commission, praying such relief as the case may require. This, in my opinion, puts the matter on an entirely different footing from cases where persons aggrieved by decisions of tribunals have no right of appeal and can only seek judicial review by the Supreme Court.

27 If that right of appeal is not to be illusory, the Commission, when refusing the transfer of a licence, must give reasons for its refusal. If it does not, and the aggrieved person appeals, the Supreme Court must have power to order the Commission to give its reasons, otherwise the court will find itself unable to say whether the decision was right or wrong. Moreover, the Secretary to the Traffic Commission, when forwarding the record of appeal to the Supreme Court, must include in it all information which was considered by the Commission in arriving at its decision.

28 Any possible doubt as to this is, in my opinion, removed by s.55 of the Ordinance which, after saying that the Commission is to have regard to the general policy of the Government in relation to traffic in Gibraltar, goes on, in a proviso, to say that nothing in the section is to be construed as authorizing the Governor to give any direction that would derogate from the duty of the Commission to act "judicially." I think that that must apply to all decisions which the Commission has to reach affecting private rights.

29 Mr. Harris, relying on decisions in applications for judicial review, drew attention to the differing standards applied when dealing with—

(a) the refusal of an application for a licence, where all the applicant had was hope;

(b) the refusal to transfer a licence, where, at most, the applicant had expectation; and

(c) the revocation of a licence, where the holder has suffered deprivation.

30 These factors do not, in my opinion, apply in the present appeal, because they were clearly not in the mind of the legislature when the Ordinance was enacted, because equal rights of appeal are given to all in s.73, and also in s.81, which does not concern us now.

31 I think that I should add a few words on procedure. Under r.35 of the Supreme Court Rules, the procedure on appeal from a tribunal is either to be that for an appeal from the Court of First Instance or that for an appeal from the Magistrates' Court, whichever may be appropriate, with such modifications as may be necessary. In these proceedings, the rules

governing appeal from the Court of First Instance were followed, in my opinion rightly. It is not clear, however, whether the record of appeal was prepared by the Secretary to the Commission, as it should have been, and if so whether there was strict compliance with the requirements of r.19.

32 As Fieldsend, J.A. also agrees, the appeal is dismissed.

Appeal dismissed.