In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 81

BETWEEN: (1) SERGIO BULHOES

(2) LAURA SOUZA-BULHOES

Applicants

-v-

(1) TRUCKS ADVISORY COMMITTEE

(2) MINISTER OF TRANSPORT

Respondents

JUDGMENT

Date of Hearing: November 15, 2010
Date of Judgment: November 30, 2010

Ms. Arisha Flood, AAF & Associates,
for the Applicants

Mr. Melvin Douglas, Deputy Solicitor-General,
for the Respondents

Introductory

1. By Notice dated March 8, 2010, the Applicants sought leave to seek judicial review of the 1st Respondent's decisions on October 14, 2009 and in December, 2009 refusing the grant of an intermediate truck permit. I granted leave on March 12, 2010, without a hearing, on the basis that the operative decision-maker under the relevant statutory provisions appeared to be the Minister of Transport. The Minister was joined by way of amendment on May 6, 2010. The Applicants sought the following relief:

    1) An Order of Mandamus requiring the Respondents to issue the truck permit;
    2) A Declaration that the Applicants having satisfied the statutory criteria under sections 40(2)(a)-(b) of the Motor Car Act 1951 ("the Act"), are legally entitled to have the permit issued;
    3) Damages for lost business.

2. At the hearing it was common ground that the Committee simply advises the Minister although its recommendations are ordinarily followed by him. Nevertheless the impugned decisions were both decisions of the Committee to recommend to the Minister that the Applicants' application be refused and there appeared to me to be no evidence that the Minister had yet acted upon either of these recommendations. This perhaps explains why the Applicants' attorney did not join the Minister at the outset. The history of the matter can be summarised quite briefly.

3. By letter dated June 16, 2009, the Applicants applied for an intermediate truck permit. The Department of Transport Control's Trucks Clerk quite properly informed them that a formal application was required. The primary applicant for the permit was Mr. Bulhoes, who (counsel informed the Court) is not a native English speaker. Ms. Flood was retained by the Applicants to apply for the relevant permit, no doubt because they lacked the confidence to do so themselves. The application process did not run smoothly after this.

4. The Department firstly declined to accept the application form as signed by the Applicants' attorney, although there appears to be no legal basis for insisting that a truck permit applicant sign personally as opposed to through an authorised agent. The application signed by the Applicants personally was forwarded to the Department under cover of a letter dated September 8, 2009 sent by their attorneys, which letter concluded as follows: "*Please contact the undersigned pertaining to this matter and for any additional queries. Thank you for your kind assistance.*" This polite entreaty was either ignored or unnoticed. The application was promptly considered on October 8, 2008. The Director by letter dated October 14, 2009 addressed to the Applicants personally advised them that (a) the 1st Respondent had recommended to the 2nd Respondent that their

application should be refused due to "lack of information"; and (b) that an appeal could be made to the 1st Respondent within 14 days in writing. It was conceded that the reference to an "appeal" had no legal basis; it appeared to me to be in effect an invitation to submit further information before the Committee forwarded their recommendation to the Minister.

5. On October 22, 2009, the 2nd Applicant telephoned the Department and subsequently gave notification of an appeal by email later the same day. It is unclear why she did not leave her lawyer to respond to the October 14, 2009 decision letter; in any event, her lawyer supplemented the emailed appeal with a more substantial letter setting out legal grounds of appeal on November 2, 2009 accompanied by a letter complaining about the prior failure of the Department to communicate with the Applicants' attorneys. Counsel asserted from the Bar that her November 2, 2009 correspondence was delivered by courier on November 2, 2009 to the Department. Both of her letters are stamped as received on November 4, 2009. Perhaps purely coincidentally, and with the Applicants anticipating a mid-November appeal hearing, on November 3, 2009 they were requested to attend a meeting of the Committee the following day, November 4.

6. The Applicants attended the hearing/meeting without their lawyer, failed to ask for an adjournment so that she could attend and failed to satisfy the Committee of the merits of their application. The result was a letter from the Director dated November 9, 2009 (again addressed to the Applicants personally) advising: (a) that the Committee had recommended to the Minister that the application be refused "*due to the lack of work*"; and (b) that an appeal to the Committee should be sent in writing within 14 days. This second rebuff to the Applicants' attorney appears to have prompted the present application. It appears (from the final paragraph of the Director's Affidavit) that on a date uncertain (presumably in or about November 2009) the Minister accepted the Committee's recommendation that the application be refused.

7. The principal issues which fall to be determined are the following: (a) whether the applicable statutory rules render irrelevant any consideration of the extent of the Applicants' existing business as a matter of law; (b) whether the Applicants have factually demonstrated that they are entitled to a permit so that the Respondents may be compelled by mandamus to issue a permit; and/or (c) whether the Applicants have made out a case for damages.

Is the extent of a truck license applicant's existing clientele legally irrelevant to the exercise of the discretion to grant a permit?

8. The crucial statutory rules are the following provisions of the Act:

> **"*General restrictions on use of trucks***
> *40 (1) No person shall use or cause or allow any other person to use a truck except under the authority and in accordance with the terms and conditions of a permit granted by the Minister.*
>
> *(2) Concerning permits authorizing persons to use trucks—*
>
> *(a) any person engaged in a trade or business involving the carriage of goods, substances, animals or other loads, or involving the operation of a public utility service, may apply to the Minister for a permit to use a truck for the purpose of his trade or business; or in the case of a private light truck, for purpose of his trade or business and as a private motor car;*
>
> *(b) the Minister shall consider every application and may, if he is satisfied that the applicant is engaged in a trade or business as aforesaid, in his discretion either grant or refuse to grant a permit accordingly;*
>
> *(c) the Minister, in determining any application for the grant of a permit to use a truck shall take into consideration the nature and scope of the applicant's trade or business and the number of trucks already at the time of the application authorized to be used by him;*
>
> *(d) the Minister, in determining any application for the grant of a permit for the use of a heavy truck —*
>
> *(i) shall take into consideration the number of heavy trucks already at the time of the application authorized to be used by holders of permits, the reasonable needs of the public for transport facilities, the character and condition of the highways, the amenities of Bermuda and the safety, comfort and convenience of the community; and*
>
> *(ii) shall not grant a permit unless he is satisfied that the applicant's trade or business is such that it habitually involves the carriage of loads so heavy or bulky that to require the applicant to use a light or intermediate truck only would be unreasonable;*
>
> *(e) if the Minister is satisfied that the circumstances by reason of which a permit is granted under this subsection have ceased to exist or have been materially modified, then the Minister may by notice to the holder of the permit revoke or vary the permit..."*

9. Ms. Flood submitted that on a true construction of these provisions, all the Applicants had to satisfy the Minister of to qualify for the grant of the permit under section 40(2)(b)

of the Act was that they were engaged in a trade falling within section 40(2)(a). Mr. Douglas countered that the Minister was entitled to take into account the extent of business enjoyed by the Applicants under section 40(2)(c). I agree that the extent of a permit applicant's business operations is a legally relevant matter to be taken into account, having regard to subsection (d)(ii) as well.

10. What quality of evidence may reasonably be required is a different matter altogether, and will depend on all the circumstances of the relevant application. The Act ought not to be applied in such a manner as to achieve a "catch 22" effect. If applicants with new businesses can only qualify for a permit if they demonstrate a volume of business which can only be developed if they have a heavy truck permit, no first time applications would ever (or often) be granted. As Ms. Flood astutely pointed out, the permit application form itself contemplates that information about work in hand and pending work will not be required in all cases.

Are the Applicants entitled to the grant of a permit and to an order of mandamus compelling the Minister to issue a permit?

11. Mr. Douglas rightly cautioned the Court against usurping the role of the Executive as prescribed by the Legislature by compelling the Minister to grant a permit in circumstances where it was unclear that the Applicants were legally entitled to its issue. The Applicants' case for an order of mandamus was based on the legal premise that the only reasonable option open to the Minister in light of the material before him and the Committee was to issue a permit. This premise was crucially dependent on this Court accepting the argument that section 40 of the Act did not entitle the Minister to seek further information about the extent of the Applicants' business at all. This interpretation of section 40 is rejected.

12. It follows that the Applicants have not demonstrated that they are entitled to the grant of a truck permit and so the application for an order of mandamus must be refused.

Are the Applicants entitled to the award of damages?

13. Damages may only be awarded under Order 53 rule 7 where the Court is satisfied that "*if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages"(Order 53 rule 7(1)(b)* . The present application did not make it clear that an action for damages could have been commenced and articulated no cause of action which would support the award of damages in the present context.

Are the Applicants entitled to any other relief on the grounds that the impugned decisions were reached in breach of the requirements of fairness?

14. The Applicants clearly demonstrated that the impugned decisions were liable to be quashed on the grounds of procedural unfairness, having regard to the fact that the Applicants were effectively denied the benefit of having their lawyer represent them in relation to the application. I was unable to accept the suggestion that the Committee acted in bad faith. Indeed, the Committee offered the Applicants two opportunities to submit further information although it is entirely understandable that they chose not to take up the second offer and sought relief instead from this Court.

15. Mr. Douglas suggested that the fairness bar ought to be lower for the Committee as it was a lay tribunal[1]. In my judgment, fairness cannot be diluted, even if some tribunals may proceed less formally than others. The present permit application was a significant one for the Applicants' economic interests as it appears that the 1st Applicant is self-employed. They specifically engaged a lawyer to ensure that the application process went more smoothly than it might otherwise have done; the failure on the Respondents' part to deal with the Applicants' lawyer from the outset not only gives rise to an appearance of unfairness; it resulted in the application being refused on information deficiency grounds in circumstances which might not have arisen had the lawyer been involved and afforded an opportunity to respond to the Committee's queries in an unemotional manner.

16. The most substantial response to the unfairness complaints which the Deputy Solicitor-General could muster was to point out that the application contained no prayer for the grant of an order of certiorari and that Order 53 rule 6(1) provides that "*no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement.*" Although Order 53 rule 6(2) permits amendments to be made at the hearing, where an applicant proposes to make an amendment notice must be given. Trial by ambush has no place in the judicial review context. Yet in the present case, the grounds of unfairness had been fully articulated in the application from the outset; all that was missing from the notice was a prayer for an order of certiorari. Mr. Douglas submitted, in addressing the issue of costs, that if the only relief sought had been an order of certiorari, a contested hearing might not have taken place.

17. My understanding of the evidence at the hearing was that the Minister had not yet made a decision, because no decision letter was referred to. It appeared to me that certiorari was very arguably not available because the Applicants had an alternative remedy of going back to the Committee on "appeal". In fact the true position is that the Minister did refuse

[1] It is unclear whether the Committee is a statutory or ad hoc tribunal; no reference was made to its precise legal status in argument.

the application (accepting the Committee's recommendation), so that if a prayer for certiorari had been included this relief could have been granted. Accordingly, when the Applicants' counsel failed to apply to amend the application to seek further relief, I failed to invite her to make an application, or to amend the application of the Court's own motion under Order 20 rule 8(1) which provides as follows:

> "*(1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*"

18. Under Order 20 rule 8(1), I amend the Applicant's application to add a prayer for an order of certiorari in support of the grounds set out in support of the application, addressed in evidence on both sides and fully argued at the hearing.

19. The Applicants are entitled to an order of certiorari removing their truck permit application to this Court, quashing the decision of the Minister made in or about November, 2009 refusing their application for a truck permit and remitting the application back to the Minister to be dealt with according to law.

Conclusion

20. The Applicants' application for an order of mandamus and for damages for lost business flowing from the refusal of their truck permit application is refused. The implied application in the alternative for an order of certiorari quashing the refusal decision, made explicit in this Judgment in the exercise of the Court's powers of amendment under Order 20 rule 8 of the Rules, is granted.

21. Having heard counsel as to costs at the end of the hearing, and taking into account the fact that the Applicants have succeeded only in obtaining relief which was not explicitly included in their application, I make no order as to the costs of the present application.

Dated this 3rd day of December, 2010 _____

KAWALEY J