IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 9 of 1984

Between : AKBAR BUSES LIMITED

Appellant

- and -

TRANSPORT CONTROL BOARD
FIJI TRANSPORT COMPANY

Respondents

Mr. G. P. Shankar for the Appellant.
Mr. A. Singh for the First Respondent.
Mr. K. Govind and Mr. A. Narayan for Second Respondent.

Date of Hearing : 24th July, 1984

Delivery of Judgment : 27th July, 1984

JUDGMENT OF THE COURT

Speight, V.P.

This appeal is against part of a judgment given in the Supreme Court at Lautoka on 13th January, 1984 in which a Motion for Judicial Review (No. 357 of 1982 Western Division) was dismissed.

The motion was related to a decision of the Transport Control Board arising out of applications by Akbar Buses (to be here referred to as Akbar) and by Fiji Transport Company (to be referred to as Fiji) for an express carriage Road Service License to operate between Ra and Lautoka and return.

At the conclusion of a hearing at Raki Raki on 7th May, 1982 the Board had refused the application by Akbar Buses Limited and had granted a license for the route to Fiji Transport Company but pursuant to its powers under Section 65(5) of the Traffic Act (Cap 152) had imposed restrictions by prohibiting Fiji from stopping en route at either Tavua or Ba.

Subsequently on 27th April, 1983 the Board, of its own motion, and without application from Fiji and without giving Akbar or any other operator an opportunity to oppose, removed the Tavua - Ba - stopping restriction. In so doing it purported to act under Section 72 of the Act, which allows the Board to amend licenses from time to time, but it did not, as Section 72(4) requires, advertise and give interested parties the opportunity to object. This later action of the Board was also the subject of a separate motion for Review (No. 368/83). Both motions were heard together and dealt with in the same judgment delivered by Dyke J. on 13th January, 1984. As has already been stated the first motion concerning the original grant was dismissed, but the second was granted and the Board's decision of 27th April, 1983 uplifting the stopping restrictions was set aside. There has been no cross appeal against the second part of the judgment so that decision is not challenged, but the facts and significance of the stopping restriction have some relevance in the matter presently under appeal. Certain statutory provisions need to be considered:-

Section 64 and 65(1) provides for applications in written form to be made to the Board for the grant, renewal, transfer or amendment of Road Service Licenses, and for the advertising of the same.

Provision for hearing, in the case of opposition or cross application is made in section 65(3)(4) and (5) in the following terms:-

> " (3) If any written representations against granting of the licence or, in a case where other applications may be received, any other application in respect of the proposed service are received by the Board within the time specified in the notice the Board shall by public notice specify the name of any applicant for the proposed service and appoint a day, not less than fourteen days after the date of the notice, and place for the purpose of receiving in public evidence for or against any application in respect

of the proposed service and shall give notice of such time and place to any applicant in respect of the proposed service. Every representation against the granting of the service or other application in respect of such service shall state the grounds in support thereof and in the case of any other application the conditions desired to be attached to the proposed licence shall be specified. The Board shall when giving notice to the applicant as hereinbefore required furnish the applicant with a copy of the written representations received by the Board.

(4) After receiving any evidence and any representations for or against any application in respect of the proposed service the Board may, subject to the provisions of this Ordinance and in its discretion, grant or refuse any application in respect of the proposed licence.

(5) The Board may in granting an application under this section make such variations in the route, time-table and fare-table applied for as to it seem desirable:

Provided that -

(a) the Board shall not make such variations in the route as would in the opinion of the Board make it a substantially different route; and

(b) the Board shall not make any substantial alteration in the time-table unless the existing licensees on the route applied for have had an opportunity of making representations in respect of the proposed alterations.

Matters to be considered by the Board are prescribed in Section 66:-

"66.(1) The Board shall not grant a road service licence or make an amendment to a road service licence in respect of any route if it appears to it from the particulars furnished in pursuance of section 64 of this Ordinance

that any provision restricting the speed of any motor vehicle or class of motor vehicle or of all motor vehicles in any are made under this Ordinance or under the regulations is likely to be contravened.

(2) In exercising its discretion to grant or refuse a road service licence in respect of any route and its discretion to attach any conditions to any such licence the Board shall have regard to the following matters:-

(a) the extent to which the proposed service is necessary or desirable in the public interest;

(b) the extent to which the needs of the area through which the proposed route will pass are already met;

(c) the desirability of encouraging the provision of adequate and efficient services and eliminating unnecessary and unremunerative services;

(d) the applicant's reliability, financial stability and the facilities at his disposal for carrying out the proposed services;

(e) the number, type and design of vehicles which the applicant proposes to use under the licence;

(f) any evidence and representation received by it at any public sitting held in accordance with the provisions of the last preceding section and any representations otherwise made by local authorities public bodies or any persons carrying on transport services ofany kind likely to be affected.

Section 67 empowers the Board to attach conditions to a License when granted, including requiring or prohibiting designated places for taking up and setting down passengers [Section 67(b)] :

67. Subject to the provisions of any regulation made by the Authority, the Board may attach to a road service licence such conditions as it thinks fit with respect to the matters to which it is

required to have regard under the last preceding section and in particular conditions -

(a) for securing that copies of time-tables and fare-tables shall be carried in the vehicle in a position easily available to passengers in that vehicle;

(b) for securing that passengers shall not be taken up or set down except at specified points or shall not be taken up or set down between specified points;

(c) prescribing -

(i) in the case of regular service, the time-tables and fare-tables of the services which it is proposed to provide under the licence. "

Akbar was an existing Licensee with various routes between Raki Raki and Ba. On 23rd July 1981 it applied for a daily express Service Licence from Raki Raki to Lautoka and return. It proposed a time-table, departing Vaileka (Raki Raki) at 6.30a.m., with 5 intermediate stops, arriving at Lautoka at 9.00a.m. For the return trip time alternative times were put forward. One departing Lautoka at 12.35p.m., arriving at Vaileka at 3.05p.m. - the other to depart 2.05p.m., arriving at 4.45p.m.

Consequent upon the advertising, written objections were received from six other bus operators, including Fiji. As is also not uncommon a large number of letters were received by the Board supporting the proposed service - some 70 in all, and some of the writers were later called as supporting witness at the hearing before the Board.

Because of subsequent developments it is of interest to note some of the matters referred to in Fiji's written objection:-

" If the application is approved, no doubt it will seriously affect my Ba to Lautoka route. My bus departs Lautoka for Ba at 12.30p.m. and the present application by the said Company is to depart Lautoka at 12.35p.m. Being express service no doubt the passengers will prefer to

travel by that instead of a stage carrier although it would depart 5 minutes earlier."

AND:-

" A further point we would like to raise is that the time-table for the said trip is not definite - particularly that departing Lautoka for Vaileka. It states depart Lautoka 12.35p.m. or 2.05p.m. and so on.

We regard this as two applications and the applicant must be certain as to which particular time-table they chose."

In addition to filing this objection, Fiji contemporaneously filed an application of its own for an identical daily express service Raki Raki, Lautoka and return, and it proposed an identical time-table, and making the same stops as in the Akbar application. In particular it too, like Akbar, had two alternative sets of departure and stopping times, again proposing 12.35p.m. or 2.05p.m. as departure times from Lautoka on the return trip. Again there were notices of opposition from six other operators - including Akbar, who pointed to 40 years experience with "the best buses".

The hearing took place at Raki Raki on 7th May, 1982.

Akbar's application was item 1 and it was heard with cross application by Fiji for the same service and by Sunbeam Transport for Raki Raki/Ba Express, and by Tara Singh Transport for Ba/Lautoka Express.

Counsel appear for 5 operators, including the above named companies. Mr. Arjun, counsel for Akbar addressed the Board in support of the application, and called five supporting witnesses, being some of the letter writers already referred to.

these were cross-examined by various counsel including Mr. Govind for Fiji, and all counsel made representation to the Board. From the detailed minutes, which form part of the case on appeal, it appears that all the evidence, and all the submissions related to either the existing services and the need for further services being criteria the board was required to consider under Section 66(2)(a) and (b) or the effect on existing operators (2) (f).

Nothing was raised concerning any applicant's competence (2) (d) and the only enquiry concerning equipment (2) (e) was met by Mr. Arjun's descriptions of his client company's fleet of buses, which apparently is a large one.

During the course of the hearing, however, there were several significant developments which are of particular relevance to this appeal.

First, Mr. Govind speaking for Fiji, after Akbar had called its evidence, said that "the need of the area had been proved".

Secondly Mr. G. P. Shankar was appearing on behalf of "the public" - apparently being a direct representative for various persons who had written letters. He submitted that the service was needed as people in the interiors were not catered for, but he criticised the time-tables of Sunbeam Transport and Tara Singh Transport as not suitable for the public.

Thirdly, and most importantly at some stage during the hearing Mr. Govind withdrew Fiji's application for a 2.05p.m. departure from Lautoka (affidavit of Devendra Singh para. 5 Judgment 148) and Akbar withdrew its application for a 12.35p.m. departure from Lautoka (affidavit of Mohammed Razak. para. 20).

In summary therefore, when the Board reserved its decision at midday it had had:-

(a) an application from Akbar for an express service Vaileka - Lautoka 6.30a.m. to 9.00a.m. Return from Lautoka departing 2.05p.m.

(b) an application from Fiji for an express Vaileka - Lautoka 6.30a.m. to 9.00a.m. Return from Lautoka departing 12.35p.m.

(c) A great deal of public support to the effect that the proposed service or services were necessary or desirable. (Section 66(2) (a) and that the needs of the area were not already met [Section 66(2)(b)].

(d) Evidence that both applicants were existing operators over some parts of the route.

(e) There had been no challenge to the reliability or financial stability of any applicant (Section 66(2)(d) or of the ability of either to service the route (section 66(2)(e). Akbar had 26 buses, over Fiji 9.

After the luncheon adjournment the Board announced its decision:-

The applications by Akbar, Sunbeam and Tara Singh were refused.

The application by Fiji was granted, but deleting stops at Tavua and Ba and adjusting its departure time from Lautoka to 2.05p.m.

Put quite bluntly this was a grant to Fiji of a license in respect of an application which it had withdrawn and a refusal of the application which Akbar had made for that service.

No reason was given for the preference of Fiji over Akbar, nor had any evidence or submission been given to suggest there were factors favourable to Fiji over Akbar; nor any opportunity given to Akbar to object to a 2.05 license to Fiji; nor any reason for giving a 2.05 license to the company which had withdrawn such an application.

The primary complaint made on behalf of the appellant is that in this crucial area, it was not given a proper opportunity to be heard.

The right to a hearing is of course provided for in various processes which the Board is required to follow in the discharge of its duties. The mode of the conduct of such hearings and the right of parties to be heard have been the subject of many decisions relating to administrative tribunals since the water-shed decision of Ridge v. Baldwin (1966) AC 40. It is as applicable in the transport field as in others. See R. v. Liverpool Corporation ex-parte Liverpool Taxi Fleet Operators (1972) 2QB 299 (C.A.) where Lord Denning said at page 299:-

> " First I would say this : when the corporation consider applications for licences under the Town Police Clauses Act 1847, they are under a duty to act fairly. This means that they should be ready to hear not only the particular applicant but also any other persons or bodies whose interests are affected. "

The first submission advanced on behalf of the appellant is that it was not given a hearing in respect of the change of time-table which was made by the Board when it granted Fiji a license to operate a 2.05p.m. service from Lautoka. In the decision under appeal, the Judge had referred to the provisions of section 65 subsection (5), already quoted, and held quite correctly that the Board had power to make such a variation from Fiji's application for a 12.35p.m. service. He went on

to say that the applicant Akbar was not an existing licensee and accordingly was not entitled to be heard in opposition to that change. He went on to say:-

> " no representations are necessary in other circumstances or from other parties. It might have been wiser and fairer for the Board to have been given an indication of what it was proposing to do and to have given the other applicants an opportunity of making oral submissions, but there was no obligation on it to have done so, and its omission to do so is no ground for setting aside its decision..."

With respect, we do not agree that the need to advise Akbar of the proposal and to give it a hearing was a discretionary one resting only on "wisdom and fairness". Despite Mr. Govind's submission to the contrary it is, in our view, clear that section 65(5)(b) which requires "existing licensees on the route" to be given an opportunity of making representations, applies in respect of licensees who operate an existing service on any part of the route applied for. Mr. Govind's submission that before one is entitled to such a hearing one must hold a license over the identical route, meaning in this case from Lautoka to Raki Raki, is unsustainable.

Not only is it obviously the purpose of this part of the Act that the Board must consider the welfare of other operators but the wording of section 66 spells out that requirement. Section 66(2) says :-

> " In exercising its discretion to grant or refuse a road service license in respect of any route and its discretion to attach any conditions to any such license (emphasis added) the Board shall have regard to the following matters:-...(f) any evidence and representation received by it...made by any persons carrying on transport services of any kind likely to be affected. "

To construe the matter in the way submitted by Mr. Govind would be in contravention of this requirement and would run contrary to the declared intention of this portion of the Act to consider the welfare of existing operators whose services would be affected by a new license impinging upon their existing license.

Having so concluded, we examined a subsidiary submission by Mr. Govind, who claimed that, in any event, Akbar's objections had been heard. He referred to the written objections filed by Akbar on 24.9.81 in opposition to Fiji's applications. These written objections are to be found on page 71 of the record, listing six matters of complaint. Objection numbers 1 and 2 related to the morning trip from Raki Raki. Objections 3 and 4 related to the proposed departure by Fiji from Lautoka at 12.35p.m. Objections 5 and 6 complained of interference to certain of Akbar's existing services if the Fiji application was granted for a 2.05p.m. departure. Mr. Govind drew attention to a passage at the bottom of page 6 of the minutes of the Board's meeting on the 7th May, 1982 (page 82 of the record) wherein it is noted that after Mr. Govind had appeared in support of the Fiji application:-

> " all the objectors to the above, referred to their objections as appeared on the precis. "

This certainly indicates that there was passing reference to the fact that objections had been made to the precis and were in the record. However this ignores the fact that at that very moment, or immediately before, Mr. Govind had specifically withdrawn Fiji's application for a 2.05p.m. service, and this would have had the effect of minimising if not eliminating any attention being paid to Akbar's objections numbers 5 and 6 already referred to relating to the 2.05p.m. service. As the only application then before the

Board by Fiji related to a 6.30a.m. departure from Vaileka and the 12.35p.m. departure from Lautoka, it would be only natural that attention would be concentrated on Akbar's objections 1 to 4 which related to those proposals. In any event the opportunity which the statute grants to an objector is provided in section 66 subsection 2, namely that "the Board shall have regard to...(f) evidence and representations received". We accept the validity of Mr. Shankar's submission that, had Akbar not been misled at the hearing by the withdrawal of Fiji application, it could well have called evidence and made submissions against a 2.05p.m. service being granted to Fiji.

The second major point which gives concern has already been referred to when it was noted that no evidence was called or suggestions made that Akbar was not as competent as Fiji to conduct this proposed service. No reasons were given by the Board for ignoring the only application which was before it, by an apparently competent and experienced operator, for a 2.05p.m. service and for taking the unusual step of granting such a service to an operator who had specifically withdrawn his application; a decision which even Mr. Govind in submissions before this Court acknowledged had "astounded him".

It is true that there is no statutory requirement in the Traffic Act, as there is sometimes found elsewhere, for the Board to give reasons for its decisions. In de Smith's Judicial Review of Administrative Action (4th Edition) (1980) page 148, that proposition is so stated, and the learned author goes on to say:

> " If moreover no reasons for an administrative decision are proferred at all, it does not follow that the courts are powerless to intervene. For if a person seeking to impugn such a decision establishes a prima facie case of misuse of power by the administrative authority, failure by that authority to answer

any allegation may justify an interference that its reasons were bad in law or that it had exercised its powers for an inadmissible purpose. "

It appears to us that in the absence of reasons the "astounding" decision of the Board to deal with the application in the way just referred to, and in the face of the applications which were before it, prima facie suggests a misuse of power. Particularly is this so where it is apparent that a case for the granting of a license to some applicant for a 2.05p.m. service had been made out, and only one bona fide and unchallenged application was before it. Lord Morris's action that "natural justice is merely fair play in action" has become a trite observation in this field. One can ask the rhetorical question. What would Akbar think could have been the reason for the Board favouring Fiji, when nothing had been in evidence or submission to suggest such a course? When this question was asked of Mr. Govind the only suggestion he could make was that Akbar had apparently applied previously for this route and been refused so that the Board apparently disapproved of Akbar. If that was the case then it is clear beyond argument that reasons for its disapproval should have been put before Akbar on this occasion. If it had had shortcomings in the past, it should have given the opportunity to explain whether or not it had remedied those shortcomings.

It is true that such a tribunal is appointed for its expert or local knowledge in a specialist field. Such a body is entitled to bring that knowledge to its assistance in reaching its decisions. But if that specialist knowledge includes something to the detriment of a given applicant that applicant is entitled to be informed of the alleged shortcoming. See : Shareef v. The Commissioner of Registration of Indian and Pakistani Residents (1966) AC 47 per Lord Guest p. 61 A-D; in Re Pergamon Press Ltd (1971) 1 Ch. 388 at 407, C; R. v. Industrial Injuries Commissioner Ex-p. Moore (1965) 1QB 456.

In this case Willmer L.J. said at 476:-

> " Where so much is left to the discretion of the Commissioner the only real limitation as I see it is that the procedure must be in accordance with natural justice. This involves that any information on which the Commissioner acts whatever its source must be atleast of some probative value. It also involves that the Commissioner must be prepared to hear both sides... and that on such hearing he must allow both sides to comment on or contradict any information that he has obtained. "

See too the observations of Diplock L.J. at p. 490 paragraph D to E in the same case. One can also note observation in Kalil v. Bray (1977) 1 NSWLR 256 at 265 :-

> " in any event it is best that the subject matter of expert information considered relevant by the expert tribunal be clearly brought to the attention of the parties at the appropriate time. "

There are three matters which incline us to the view that the Board acted capriciously, and did not determine the matter in accordance with established principles.

1. There was no evidence or apparent reason for prefering Fiji to Akbar.

2. The Board adopted the quite extraordinary procedure of granting a service to an applicant who had not sought it.

3. It failed to give reasons.

Although, as been said, there is no statutory requirement for reasons to be given, it appears to us that this Board should do so, albeit in brief terms, especially if the

decision is one which, in the absence of stated reasons, appears as inexplicable as that under review.

In a different context this Court, at the present sittings, commented at length on recent pronouncements in various Commonwealth jurisdictions stressing the desirability of Courts and administrative tribunals giving reasons for their decisions. We refer to Rajendra Nath v. Madhur Lata Civil Appeal No. 11 of 1984 Judgment 13th July 1984, particularly at pages 5 - 9 and the many authorities there recited. That was, it will be noted, a case where there was a right of appeal, and the existence of that right figured largely in the ratio decidendi of the cases. There is no such right in the case of decisions under section 65 of the Traffic Act, but with the ever increasing use of the Motion for Judicial Review, the same principle applies - the unsuccessful party should know the reason for having list - particularly where, as here, failure to give reasons leads to a very justifiable complaint that there has been a breach of natural justice, and may lead to a Motion for Review.

Finally we wish to mention a comment which was made as to the role of the Attorney General or his counsel in such proceedings. There is much authority to support the view that the tribunal under review should take a neutral stance in these matters and counsel appearing on its behalf should not urge the views of one party or another. That was the position which was taken here, and in our view quite properly; for both opposing interests were fully represented. It may be otherwise where only one party is contesting the correctness of a tribunal's decision, and the reviewing court asks for assistance as from the amicus curiae - that was not the case here and in our view the Attorney General's approach was the correct one.

The decision of the Supreme Court, in so far as it dismissed the Motion for Review No. 357 of 1982 is quashed, and the matters referred back to the Board for rehearing.

Costs to the appellant, to be taxed if necessary.

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Vice-President

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Judge of Appeal

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Judge of Appeal