

IN THE HIGH COURT OF FIJI
AT SUVA



CIVIL JURISDICTION

JUDICIAL REVIEW NO. HBJ 38J OF 2005S

IN THE MATTER for an Application for Judicial Review
by HARESH CHAND under Order 53 of the High Court
Rules 1988.

and

IN THE MATTER of the Decision of the CENTRAL
LIQUOR BOARD made or about the 29th day of June
2005

BETWEEN : STATE V. CENTRAL LIQUOR BOARD

1st Respondent

THE ATTORNEY-GENERAL OF FIJI

2nd Respondent

EX-PARTE: HARESH CHAND

Applicant

Counsel for the Applicant : V. Kapadia : Sherani & Co.
Counsel for the Respondents : S. Sharma) Attorney-General's
: C. Tuberi) Chambers
Date of Judgment : 24 August, 2006
Time of Judgment : 9.30 a.m.

JUDGMENT

This is the Applicant's claim for judicial review against the decision of the Central Liquor Board, the First Respondent ("**the Board**") of 29 June, 2005 denying the Applicant a licence to operate a night club in Nausori Town.

The First Respondent is a statutory body established under section 3 of the Liquor Act (Cap 192) (*"the Act"*) section 4 of the Act sets out the functions of the Board, which inter alia, shall be:

"(a) to consider and if it thinks fit, grant provisional approval of applications for the grant of new publicans' licences, new off licences, new private hotel licences and new restaurant licences..."

In particular, Section 64 of the Act permits the Board to approve two (2) separate types of restaurant licences, namely, a night club licence and an ordinary restaurant licence. Both licences, for the purpose of Sections 64 and 65, are collectively known as a restaurant licence.

In assessing whether to grant a restaurant licence, the Board is required under Section 65, in the first instance, to give provisional approval of a licence. It is important that I set out the section in full.

"65 – (1) Application for the provisional approval of the grant of a restaurant licence shall be made in writing to the Board, enclosing a plan for the premises intended to be licenced.

(2) In considering an application for the provisional approval of the grant of a restaurant licence, the grant of such a licence or the renewal thereof, the Board or Tribunal, as the case may be, shall have regard among other considerations to the likelihood of the grant of such licence being in the interests of the tourist industry of Fiji. The numbers of each separate type of restaurant licence, namely night club licences and ordinary restaurant licences, in force in Fiji at one time shall not exceed such number of each such separate type of licence as shall be specified from time to time by the Minister in the Gazette."

The reason why provision approval by the Board is given in the first instance, is to allow the district administration, through the Divisional Liquor Tribunal responsible for the area, to inspect the facilities (Section 66) and hear objections from members of the public (Section 67).

The Applicant on 18 January, 2005 applied to the Board for an approval of a night club licence. Accompanying the letter was the plan of the premises which the Applicant had in the meantime acquired through a lease agreement with M. Razak & Company Limited, the owner of property situated at N.G. Patel Road, Nausori. On 11 February, 2005, the Board responded as follows:

"Your application will be considered by the Board once we have received the three reports from the authorities concerned, i.e. the Police, Health and the Commissioner of the Division in which the premises are situated.

You may liaise directly with the three authorities to expedite your reports..."

Presumably in anticipation of a favourable reply from the Board, the Applicant went ahead and sought the endorsement and/or approval of the appropriate authorities to its application. On 17th January, the applicant wrote to the Health Inspector of the Nausori Town Council; on 19th January, he wrote to the Commissioner of Police, and the Commissioner Central; on 3 March he wrote to the National Fire Authority; and on 10 March, he requested inspection by the Ministry of Labour to certify that the premises was OHS compliance.

The reports and responses from all the authorities to the Applicant's application were positive, except for the Police report. In the case of the police, the Nausori Police had inspected the premises and had recommended its approval to Police headquarters. However, in a memorandum to the Secretary of the Board of 30 March, 2005, the Director Operations Support, Murli Lal says,

“There are 3 night clubs in operation (licenced) in Nausori Town. These are noted to cater for the patrons for Nausori and the areas surrounding.

Any increase in Night Clubs in Nausori Town would be a sure increase in crime, financial loss to family members, an increase in domestic, social and environment.

Furthermore it is noted that liquor is the cause of all the evil to all illegal acts.

The application is not recommended.”

On 29 June 2005 the Board met to consider, amongst other matters, the Applicant's night club licence. Its decision was conveyed to the Applicant on 1 July in the following terms:

“The Board has taken into consideration all reports from the three authorities concerned and decided to reject the applications in view of the fact that 2 night club licences already exist in Nausori Town. For a town the size of Nausori, 2 licences are considered sufficient so far as policing and provision of entertainment is concerned. The existence of fifteen (15) other types of liquor licences in Nausori Town also fortify our reasons in this matter.”

In her affidavit in opposition, Mereoni Kalokalodrau, the Secretary of the Board, conceded, that its meeting of 29 June 2005, the Board had also taken into consideration the objection made by the Director of Police Operation as conveyed in the memorandum of 30 March.

It is worth noting that the Applicant, upon learning of the Director of Police Operations Support unfavourable memorandum to the Board, had on 5 May 2005

written directly to the Director explaining why he believed the report was not fair and further, the Applicant's solicitors on 3 June, also wrote to the Board requesting that it disregard the Director's views on the ground that they are vague and unsubstantiated.

In this claim, the Applicant seeks the following Orders and Declaration:

- (a) ***AN ORDER OF CERTIORARI to remove the said decision of the CENTRAL LIQUOR BOARD made on or about the 29th day of June 2005 into this Honourable Court and the same to be quashed.***
- (b) ***AN ORDER FOR MANDAMUS directing the CENTRAL LIQUOR BOARD to grant provisional approval for a night club license to the Applicant, under the provisions of Section 65 of the Liquor Act (Cap 192).***
- (c) ***A DECLARATION in any event that the CENTRAL LIQUOR BOARD has acted in making the decision unfairly and/or abused its discretion and/or arbitrarily and/or unreasonably and/or irrationally and/or acted in breach of the Applicant's legitimate expectations.***
- (d) ***Damages.***
- (e) ***Further declarations or other relief as to this Honourable Court may deem just.***
- (f) ***Costs of this action."***

The grounds upon which the Applicant bases his case are set out in details at paragraph 2 of his Application as follows:

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- (a) That the CENTRAL LIQUOR BOARD has acted unfairly and/or unreasonably in making the decision to reject the Applicant's application dated 18th January 2005 without taking into account the relevant facts as stated by the Applicant in its letter dated 3rd June 2005.
- (b) That the Central Liquor Board has abused its discretion and powers under Section 65 of the Liquor Act Cap 192 (the Act) in that it did not take into consideration the following relevant matters.
- (i) That there were only two existing night clubs of poor quality premises in Nausori Town and the granting of a new night club license to the Applicant who will provide a much higher standard and quality of premises would be in the interest of the public as well as the tourist who come to Nausori.
 - (ii) The need for a high class night club in Nausori Town considering that it is a growing town with more than 30,000 people as well as the increase in visitor arrivals at the Nausori Airport.
 - (iii) That the Applicant followed all the required procedures and made a written application for a night club license enclosing an approved plan of the premises to be licensed to the Central Liquor Board.
 - (iv) That approval had been given to the Applicant to operate a night club from the Nausori Police Station, Nausori Town Council, the Ministry of Labour, and Industrial Relations and he had also obtained a

Certificate of Compliance from the National Fire Authority.

- (v) *That the Applicant objected to and stressed the generalized and vague objections given by the Director Operations Support of the Police Department to the Central Liquor Board in the Applicant's letter dated 3rd June 2005 to the Central Liquor Board. The Applicant also thoroughly explained why the Central Liquor Board need not consider these objections when considering the application as they were completely irrelevant and not in accordance with the Liquor Act and that the objections made had no specific relevance to the Application.*

- (c) *That the Central Liquor Board took into account irrelevant considerations after it received the report from the Director Operations Support of the Police Department and in rejecting the application for a night club license by the Applicant based on this letter from the Director Operations Support of the Police Department.*

- (d) *That the Central Liquor Board acted unreasonably and/or irrationally in citing the general social implication of liquor licenses and night clubs on the public when under Section 65 of the Liquor Act, it was required to consider the likelihood of the grant of such a license being in the interests of the public and the tourist industry, amongst other considerations and also that the particular type of license need not exceed the required number of such license to be in existence as specified from time to time by the Minister in the Gazette.*

This limitation was not relevant to this application made by the Applicant.

- (e) *The Central Liquor Board in rejecting the Applicant's application dated 18th January 2005 acted in bad faith in that its decision was made pursuant to the report of the Director Operations Support of the Police Department only and it failed to take into account and consideration the favourable reports of other bodies and/or authorities as well as the considerable expenses incurred by the Applicant made in reliance of his legitimate expectation that provisional approval for a liquor license ought to be granted to the Applicant.*

- (f) *That the Central Liquor Board has acted contrary to the legitimate expectations of the Applicant in purporting to reject the application when the Applicant had already written to the Central Liquor Board in his letter dated 3rd June 2005 explaining why the generalized and vague objections by the Director Operations Support of the Police Department should not be considered by the Central Liquor Board. As such there was a breach of the legitimate expectations of the Applicant that his application would be considered expeditiously and independently by the Central Liquor Board.*

- (g) *That the reasons given by the Central Liquor Board in its letter dated 1st July 2005 for rejecting the application made by the Applicant for the approval of a night club license in Nausori Town is "wednesbury unreasonableness". The Central Liquor Board took into account the existence of two night club licenses in Nausori Town and considered that those two licenses were sufficient for the residents and the public*

of Nausori Town. It also fortified its reasons by stipulating the existence of fifteen other types of liquor licenses in Nausori Town which was completely irrelevant to the Application.”

Leave for Judicial Review

The Respondents opposed to the grant of leave. The Court ordered expedited hearing pursuant to Order 53 rule 9 of the High Court Rules, allowing the issue of leave to be decided together with the claim.

The determining factors for the Court to consider whether to grant leave or not are set out in the Court of Appeal's decisions of Fiji Airline Pilots Association v Permanent Secretary for Labour and Industrial Relations (CA 59/1997), and Nivis Motors and Machinery Ltd. v. Minister for Lands and Mineral Resources (CA 17/98). The Court in the first instance has to be satisfied that the Applicant has sufficient interest in the matter. Second the Court is also satisfied that on the evidence available, there is an arguable case in favour of granting the relief.

The Court in this instance, is more than satisfied that the Applicant has fulfilled the *threshold requirements*. He has a *direct personal interest in the relief* which he is seeking to grant him **“sufficient interest”** status. There is also enough evidence before the Court to suggest that the Applicant has an arguable case.

Leave is therefore granted.

Court's Consideration

The Applicant's challenge to the Board's decision and which are set out as grounds for appeal above, can be adequately summarised in the leading case of Council of Civil Service Unions & Ors. v. Minister for the Civil Service [1984] 3 All ER 935. There the Court identified that judicial review is available in situations where there

is illegality, irrationality and procedural impropriety alleged against the decision-making authority. Lord Diplock, elaborating on these situations stated at pp.950 – 1:

“By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercised.

By ‘irrationality’ I mean what can be succinctly referred to as ‘Wednesbury unreasonableness’ (see Associated Provincial Picture Houses Ltd. V. Wednesbury Corp. [194] 2 All ER 680, {1948} 1 KB 223). It applies to decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

The three situations above are by no means exhaustive, but they encapsulate the essential principles of public law that are there to ensure that public bodies do not exceed or abuse their powers. I will take each in turn as they relate to the Applicant's arguments.

Was there Illegality

The Board's powers to give or refuse approval for a night club licence are contained in Section 63 of the Act and set out above. The two (2) requirements specifically stated are:

- a) the likelihood of the grant of such licence being in the interests of the tourist industry in Fiji; and
- b) the need to contain the number of such a licence within the existing limit as is prescribed by the Minister responsible.

There are other considerations that although not specifically identified by Section 63, the Board may nevertheless also take into account when deciding on an application for a nightclub licence. What maybe are these additional considerations? This Court had discussed fully the nature and types of considerations in State v. Minister for Lands and Mineral Resources Ex.p Nivis Motors HBJ 33:97 PP.11 & 12. The presumption, in the Court's view, in this case, must be those factors that are directly related to the issuance of a night club licence and/or those that may arise as necessary consequences of such an act. It would certainly be, in my view, valid for the Board to consider whether two (2) nightclubs were adequate for Nausori town. This is because Section 54 only speaks so it appears, of the limit of a particular licence "*in force in Fiji at one time.*" The Board on the other hand, had considered and was satisfied, as is apparent from the Minutes of its meeting of 29 June 2005, not only that 2 nightclubs were adequate for Nausori town, but in addition there were 15 other types of liquor licences existing in Nausori town. All these licences, according to the Board, were adequate for the needs of the Nausori town citizens. In the Court's view, while the Board may have acted appropriately in considering the number of night club licences that would be adequate for the town, it was irrelevant and unnecessary for it to also consider the number of all other liquor licences that existed. The number and types of other licences, including publicans, taverns and off-licences, and

which presumably, members of the public can purchase alcoholic beverages, are not relevant to the Board's consideration of an application for a night club licence under Section 65 of the Act. The Board's primary consideration is first that there were adequate night clubs in Nausori town to cater for tourists and its citizenry and that secondly, the addition of another was still within the limit as to the total number of such licences, set by the Minister. As the latter requirement would not have been breached, if the Board had approved the Applicant's licence, then the Board should have necessarily confined its deliberation on the adequacy of the existing number of night club licences to the tourists to, and the members of the Nausori town.

The question at the end of the day is whether the irrelevant consideration of the 15 other liquor licences by the Board made its decision ultra vires. The Respondents contend, relying on the case of R v. Inner London Education Authority ex p. Westminster City Council {1986} 1 WLR 28, that the Board's consideration of irrelevant invalid factor did not "**demonstrably exert a substantial influence**" on its decision and that the decision was still lawful since the intra vires purpose, namely the adequacy of the numbers of night club licences in Nausori town, was the dominant reason for the Board's determination to reject the application. I disagree. It is very clear from the evidence before this Court, including the letters from and the affidavits of the Secretary of the Board, that the issue of the total number of licences to sell liquor already existing in Nausori town played an equally prominent factor that substantially influenced the decision to reject the Applicant.

In the Court's view, the Board in deciding to reject the Applicant's application for a night club licence, had not confined the reasons for its decisions to only those matters that are contained under Section 65 and had therefore acted in excess of its powers. To the extent that it has done so, the Board had in fact acted illegally.

Was there irrationality

This describes the situation where there is allegation that the decision-making authority had acted in a way that is so unreasonable that no reasonable public body would act in that way. It is also often referred to as the "**Wednesbury principles.**"

According to the Applicant, the Board had unfairly in making its decision, especially after having received favourable reports from all except one agency or authority. In addition, the Applicant contends that he had incurred great expenses and as well as time on the renting and renovating of suitable premises for the purpose and which the Board was made aware. There were therefore legitimate expectations that the application would be favourably considered.

"Legitimate expectation" normally is closely connected with **"a right to be heard,"** such as expectation of prior consultation or for time to make representation. As this Court emphasised in State v. Minister for Lands and Mineral Resources ex.p Nivis Motors (HBJ 33,1997) at p. 22

"The doctrine of legitimate expectation at the end is simply a means of testing whether a person has been denied his legitimate expectation of a procedural protection or legitimate expectation to substantive benefit."

In this instance the Applicant seems to be arguing that it was reasonable as indeed it was legitimate for him to expect a favourable outcome of his application, given not only the favourable reports but also the financial commitments he had undertaken and expenses incurred in starting a night club licence. I do not believe the principle of legitimate expectation was intended to be interpreted in this manner. To do so would amount to a substantial departure from the right to be heard or to make representation, which are normally connected with it. In any case, the decision by the Applicant to expend money in the leasing and renovation of suitable premises to be used as the night club, as well as other acts taken in anticipation of a favourable

reply, without awaiting the approval of the Board, can only be gratuitous. He alone acted in the manner which he did, pre-empting the Board's decision. That the unfavourable decision of the Board may result in financial losses to the Applicant is his alone to bear and take responsibility for.

As to unreasonableness of the decision, I do not believe that the Board was guilty of it. It did nothing to infer that the Applicant would succeed in its application. The fact that the majority of the views of the appropriate authorities, were favourably disposed to the granting of the Applicant's licence does not of itself mean that the Board was bound to follow the majority. It was still required to exercise its discretions and powers as provided under section 65. The Board's decision was not irrational.

Was there procedural impropriety

Under this head, the question to be asked is whether the decision-making authority has failed in its duty to act fairly that is, whether in arriving at the decision it did, the Board had failed to observe statutory procedural requirements and the common law principles of natural justice or procedural fairness.

The parties concede that the Board's powers including the exercise of its discretion to give provisional approval to an applicant for a night club licence, are limited to those provided under Section 65 of the Act. The Court has already found that the Board, in taking into consideration irrelevant matters in refusing to grant provisional approval, had acted ultra vires its powers under Section 65.

The Applicant argues that the Board had not only abused its powers under Section 65 in not taking into account relevant considerations, but by taking into account the views of the Director Operations Support, Police, which were generalised and unsubstantiated, the Board had acted unfairly and failed to observe the principles of natural justice. To support this contention, the Applicant argues that the Board can only have regard to all and only legally relevant consideration.

To understand the Applicant's arguments, one should have an appreciation of the processes and especially the administrative scheme for the granting of restaurant licences, of which night club licence comes under, envisaged under the Act. First, there is the Board established under Section 3. It is the principal licensing authority. Its functions are set out at Section 4. It is clear from one's reading of the Board's functions, that its main concern is general policy matters dealing with the control of the sale and supply of liquor and its consumption. The Board in addition, shall (Section 4

“(a) consider, and if it thinks fit, grant provisional approval of applications for the grant of new publican licences, new off-licences, new private hotel licences and new restaurant licences;”

(emphasis added).

It is in Section 65 of the Act, which this function of the Board is manifested.

Upon conditional approval by the Board of a restaurant/night club licence, the application is referred to the Divisional Liquor Tribunal. The Tribunal is established under Section 5, and its powers are prescribed in Section 7 and specifically relevant is section 7(a):

“to consider and determine applications for the granting of conditional certificates or for the granting of renewal of publicans' licences, private hotel licences, restaurant licences, and off-licences, to accept the surrender of such licences, to cancel off-licences and restaurant licences and to perform all functions imposed upon it under the provisions of this Act.”

Sections 66, 67 and 68 set out in greater details the powers vested in the Divisional Liquor Tribunal for dealing with a provisional night club licence referred to it by the Applicant after the Central Liquor Board's approval. The Tribunal is required to advertise the application and inspect and approve the premises is structurally

suitable (Section 66); hear objections from the members of the public (Section 67) and is empowered to cancel the licence if the licensee is not complying with the licence's requirements (Section 68).

In the general scheme of how an application of a night club licence is to be processed, as envisaged and set out under the Act, the following are steps that should be followed. First, an interested party, the Applicant in this instance, writes to the Central Liquor Board for approval to operate a night club. Second, the Board deliberates under its Section 65 mandate and grants or refuses to grant a provisional licence certificate. Third, if a provisional licence/certificate is granted, application is then referred to the Divisional Liquor Tribunal. Fourth the Tribunal advertises the application, inspect and certify the premises and hear public objections. Finally, the Tribunal grants or refuses the "**permanent**" licence sought by the applicant.

It is in my view, very obvious from how an application for a night club licence or for that matter a restaurant licence is processed, under Part XIII of the Act, that given the detailed and deliberate role and powers of the Divisional Liquor Tribunal to deal with and supervise the finer details of the application, and then finally decide whether to grant or to refuse a licence, that the Board is necessarily confined to only those considerations that are deemed relevant and legitimate under Section 65, in deciding in favour or against the granting of a provisional licence.

The Applicant in this case, argued that the Board took into consideration irrelevant matters, including the report from the Director, Operations Support of the Police, and as well as the information that there are 15 other liquor licencees in Nausori. The Board should have confined itself only to those considerations expressly identified under Section 65 to which regard must be had, and those other considerations which deemed relevant to the type of decision the Board was expected to make under the law.

I am in agreement with the Applicant. The Board's discretionary powers under Section 65, are limited to giving provisional approval of grant of night club licence,

The final approval to the grant is held by the Divisional Liquor Tribunal, after carrying out its own investigations including inspection of the premises and hearing public objections. It is not for the Board to indulge in a detailed examination and consideration of all issues relating to sale and access of liquor to the public of Nausori town. Nor is it appropriate in my view for the Board to take into consideration those matters raised by the Police Director Operations Support. While such matters may have been properly considered at a hearing before the Tribunal, it should not have formed part of those considerations before the Board, at its meeting of 29 June, 2005. The Board, in considering whether to give its provisional approval for an application under Section 65, must have regard to the interests of the tourist industry in the area and the overall number of such licences in the country. The Board cannot delve into a detailed analysis of the merit or otherwise of another liquor outlet accessible to the public of Nausori especially when the issue before it is whether to grant a night club licence. To do so would result in the Board acting outside its powers and, in the process, usurping the Tribunal's authority. If it so wishes, it is at liberty to inform or pass on views and/or objections it may have received to the Divisional Liquor Tribunal.

In the end, I am satisfied that the Board is guilty of procedural impropriety, by taking into consideration matters outside its authority and in the process failed to observe the common law principles of natural justice.

Courts Orders and Declaration

Orders and declarations are made as follows:

1. An Order of Certiorari removing the 1st Respondent's decision of 29 June, 2005 refusing the grant of a provisional night club licence to the Applicant, into this Court and for the same to be and is hereby quashed;

- (2) An Order for Mandamus directing that the 1st Respondent provisional approval of grant of night club licence to Applicant pursuant to Section 65 of the Act.
- (3) A Declaration that the 1st Respondent had acted ultra vires powers in making its decision on 29 June, 2005.

Costs is summarily assessed at \$400.00 against the Respondent.



F. Jitoko
JUDGE

Suva

August 2006