AURUKUN SHIRE COUNCIL V CHIEF EXECUTIVE, OFFICE OF LIQUOR, GAMING AND RACING IN THE DEPARTMENT OF TREASURY

Supreme Court of Queensland (Jones J)
27 November 2008
[2008] QSC 305

Administrative law – judicial review – decision to revoke liquor license under s 106 of the *Liquor Act 1992* (Qld) – consideration of s 10 of the *Racial Discrimination Act 1975* (Cth) – whether amendments made in 2008 to the *Liquor Act 1992* (Qld) are invalid due to inconsistency with provisions of the *Racial Discrimination Act 1975* (Cth) – obligation to consider health and social impacts of cessation of liquor license – whether the respondent had the power under s 111 of the *Liquor Act 1992* (Qld) to amend the terms of the license – whether the respondent had the power to amend the first decision under s 24AA of the *Acts Interpretation Act 1954* (Qld) to allow an extension of the license

Facts:

The application in this case was for a challenge to the validity of two decisions made by the Chief Executive of the Office of Liquor, Gaming and Racing in the Department of Treasury under the *Liquor Act 1992* (Qld) ('*Liquor Act*') affecting the general liquor license held by the applicant. The applicant, the Aurukun Shire Council, was an elected body pursuant to the *Local Government Act 1993* (Qld) and managed the Aurukun Aboriginal community, south of Weipa in Far North Queensland.

The Council held a general Liquor Licence, issued by the respondent, under which the only place where alcohol could be legally sold and consumed was a tavern under the Council's control. The license was also subject to stringent restrictions in the type and alcohol content of liquor sold. In early 2008 there was a change of Queensland government policy in relation to liquor licences. The *Aboriginal and Torres Strait Island Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008* (Qld) amended s 106 of the *Liquor Act* to provide that a local government, corporatised corporation or relevant public sector entity may not apply for or hold a general liquor licence. It came into force on 1 July 2008. Previously, the general licences in a community area could only be held by a board or entity prescribed by regulation.

Transitional provisions governed the effect of the 2008 amendments on existing liquor licence holders, including the Aurukun Shire Council. Pursuant to ss 278 and 279 of the transitional provisions the Council made a submission in writing for a continuance of its general license till 31 December 2008, and on 23 June 2008 was granted an extension till 1 November 2008. Following this, on 19 September 2008 the Council sought a further extension of the continuance of the license beyond 1 November 2008 until 30 December 2008. In its reasoning for the continuance, the Council highlighted the need in the community for a controlled supplier of alcohol and the importance of finding a suitable replacement. The Chief Executive refused the application on the basis that it was not within his power, under the transitional provision s 279(1), to grant a second extension and alter the duration of the continuance of the license after 1 July 2008.

The applicant challenged the validity of the initial decision of the continuance of the license to 1 November 2008 and the second refusal to make a decision based on a perception of lack of power. The Queensland Supreme Court had to decide three main issues. First, the Court had to decide whether the amendments to the *Liquor Act* were invalid due to inconsistency with provisions of the *Racial Discrimination Act 1975* (Cth) ('RDA') and the RDA's adoption of the *International Convention on the Elimination of All Forms of Racial Discrimination*. Second, due to the fact that the application for judicial review of the first decision was made out of time (ie, it was not made within three months of

the decision), the Court had to decide whether an extension should be granted. The third issue was whether the decisions were reviewable on the grounds of an error on the part of the decision-maker, in that in relation to the first decision the Chief Executive failed to take into account the health and social impact on the community required by s 279(2), and in relation to the second decision the Chief Executive failed to make a decision at all.

The second applicant, the Kowanyama Aboriginal Shire Council, had not had an operative liquor license since 30 July 2008 and pursued its application only for the purpose of determining whether it could lawfully retain the stocks of liquor in its possession.

Held, refusing the application for a declaration and dismissing the applications for judicial review:

(i) in relation to the validity of the legislative provisions:

1. The test of whether s 10 of the RDA has been contravened is whether the legislation has the operation or effect of impairing the equal enjoyment of rights: [20], [24]; *Western Australia v Ward* [2002] HCA 28 cited.

2. The applicant is a non-natural person without any characteristics of race and, therefore, is not directly the target of racial discrimination. However, it does not matter that s 106(4) of the *Liquor Act* and the associated transitional provisions relate to a corporate entity if the effect is to discriminate against individuals on racial grounds: [21]; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 cited.

3. There is no inconsistency between the terms or effect of the legislative provisions and the RDA. The right that has been denied by the legislation is the right to purchase alcohol at the tavern. The provision takes the form of a blanket ban, as it applies equally to Aboriginal people frequenting the tavern and to non-Aboriginal people.The prohibition does not, therefore, result in a person of a particular race being able to enjoy a right that is denied to persons of another race: [22]–[27].

4. The regulatory provisions of the legislation are distinct from the specific rights identified in art 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, namely the rights to freedom of assembly (art 5(d)(ix)) and participation in cultural activities (art 5(e)(vi)). Also, the right to access any place or service intended for the general public (art 5(f)) does not apply as the tavern was closed to the general public. However, art 5 of the Convention is not exhaustive in laying out the rights protected by the RDA. Nevertheless, neither the facts nor the legislative provisions give rise to any inconsistency with human rights of the nature protected by the RDA: [26]–[28]; *Gerhardy v Brown* [1985] HCA 11considered.

(ii) in relation to whether the first decision is reviewable:

5. Section 279 of the transitional provisions required the Chief Executive to take into account the health and social impact on the community and the availability of health and social services. The Chief Executive considered a wide range of evidence about the impacts of his decision to cease the license for the tavern, including having various stakeholders make assessment reports of the impacts. The decision to extend the license to 1 November 2008 instead of 31 December 2008 was not tainted by error and was not unreasonable in the *Wednesbury* sense: [31]–[35].

(iii) in relation to the applicant's request for extension:

6. The power under s 111 of the *Liquor Act* to amend the terms of the license would not be appropriate to use in this case to extend the term of the license as the question here is whether or not the license continues to exist: [39].

7. The legislative scheme was directed distinctly to the prohibition of Aboriginal councils holding a general liquor licence. The Chief Executive's power to grant a continuance of the licence was constrained in its scope and timing by s 279 of the *Liquor Act*: [44].

8. The amendment of the first decision under s 24AA of the *Acts Interpretation Act 1954* (Qld) to allow an extension of the license would not be appropriate in the circumstances. The availability of a s 24AA amendment is limited as the intention of the legislation, to prohibit Aboriginal councils from holding general liquor licenses, is contrary to allowing arbitrary extensions of licenses. As to the provision mandating the making of a decision before 1 July 2008 about whether the license is to continue, that provision's purpose is to achieve certainty in the date of

lapse of the licenses: [44]–[46]; *Minister of Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 211 cited.

9. The Chief Executive did not have the power to respond to the request for another extension of the license and, therefore, there is no basis for judicial review of his decision: [45].