CASE NOTES

BANKS v. TRANSPORT REGULATION BOARD[1]

Administrative law—Judicial review of decisions approved by Governor in Council—Certiorari—Jurisdictional error—Error of law on the face of the record—Section 39 *Judiciary Act* 1903-1968 *(Cth)—Transport Regulation Act* 1958 (Vic.).

The above case is of importance from two points of view—from the point of view of the actual decision on the scope of the remedy of *certiorari* and from the point of view of the indication which it gives of the general attitude of the present High Court to questions of judicial review of the decisions of administrative tribunals.

The case arose from a decision of the Transport Regulation Board of Victoria under section 32 (1) of the Transport Regulation Act 1958 (Vic.), as amended, to revoke the appellant's metropolitan taxi-cab licence. This section provides that:

> A licence or permit may be revoked or suspended by the Board on the ground that any of the conditions of or attached to the licence or permit have not been complied with, but the Board shall not revoke or suspend a licence unless owing to the frequency of the breach of the conditions of or attached to the licence, or to the breach having been committed wilfully, or to the danger to the public involved in the breach, the Board is satisfied that the licence should be revoked or suspended.

Before the decision was made the appellant was given notice of the grounds on which the Board proposed to consider the revocation of the licence, and the reason given for its final decision was that "the Board was satisfied that the matters alleged in the show cause notice . . . had been sustained". The notice had alleged several matters:

(i) that the appellant had failed to notify the Board of his change of address, pursuant to regulation 19 (e), Part II, of the Transport Consolidated Regulations 1960;

(ii) that the appellant committed wilful and continued breaches of the conditions of the licence in that (a) he transferred the control, use and management of the vehicle to which the licence related to another person contrary to regulation 16, Part II, of the above regulations, and (b) that he had not himself driven the vehicle.

Pursuant to section 31 of the Act, the Board's decision had been forwarded to, and approved by, the Governor in Council. The critical provisions of this section are:

(1) No decision of the Board granting or refusing to grant any application for commercial passenger vehicle licence or revoking

[1] (1968) 42 A.L.J.R. 64; [1968] Argus L.R. 445. High Court of Australia; Barwick C.J., McTiernan, Kitto, Taylor and Owen JJ.

or suspending for a period exceeding thirty days any such licence shall have any force or effect until such decision is reviewed by the Governor in Council:

Provided that nothing in this sub-section shall apply to any decision of the Board granting a licence temporarily for a period not exceeding three months for any particular purpose of limited duration.

(2) In reviewing any decision as aforesaid the Governor in Council may by Order within six months of the Board giving a decision—

(a) approve the decision of the Board;

(b) disapprove the decision of the Board; or

(c) make any determination in the matter which the Board might have made—

and every such Order shall be given effect to as soon as may be by the Board.

When the appellant sought a writ of *certiorari* against the Board from the Victorian Supreme Court the Full Court refused his application on a preliminary point, namely that it was the Order in Council which in fact revoked his licence, and that such an order could not be the subject of *certiorari*.[2]

The appellant brought the present appeal to the High Court, claiming to do so as of right under section 35 (1) (a) (2) of the *Judiciary Act* 1903-1968 (Cth).[3] Thus the first question which arose for decision was whether a taxi-cab licence, granted under a statute, is "property". A licence granted under the Transport Regulation Act is to be for a period of between four and seven years, the licence is to be renewed unless sufficient reason is shown for refusing to do so, and, subject to the approval of the Board, it is transferable. The appellant swore that the market value of his licence before revocation was at least $9,000.

By reason of the seventeenth century case of *Thomas v. Sorrell*[4] a distinction has been drawn between a mere licence (which makes lawful an act which would otherwise be unlawful) and any interest in the property to which the licence may relate. This notion of a licence being nothing more than a permission has been extended to cover licences granted under statute to permit the licencees engaging in various occupations.[5] Barwick C.J., however, was of the opinion that the decision in *Thomas v. Sorrell* may be inappropriate to cover the

---

[2] [1968] V.R. 95. Winneke C.J., Adam and Gowans JJ.

[3] S. 35—(1.) provides for an appeal from a State Supreme Court in the case of, *inter alia*—

(a) Every judgment, whether final or interlocutory, which—

. . .

(2) involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of Three thousand dollars.

[4] (1673) Vaugh. 330, 351; 124 E.R. 1098.

[5] *R. v. Metropolitan Police Commissioner; Ex parte Parker* [1953] 1 W.L.R. 1150.

situation of a statutory licence on which a person's livelihood depends.[6] His Honour then went on to hold that such a statutory licence is clearly "property" for the purposes of statutes such as the Judiciary Act.[7] His reason for so deciding was that:

> Whilst that provision is on the one hand designed to limit by reason of the relatively small value of the property or right involved the cases in which appeals may be brought to this Court, it does on the other hand exhibit an intention to widen quite generously the range of decision or judgment which, if the stated value be present, will found a right of appeal: for it extends to judgments which indirectly involve any claim, demand or question to or respecting any property or civil right.[8]

Later in his judgment[9] Barwick C.J. did hold that a licence granted under statute can be property for the purpose of the administrative remedies.

McTiernan J. concurred with the Chief Justice in the view that an appeal lay under section 35 of the Judiciary Act and Kitto J. stated that he thought this was so without giving his reasons for so deciding. Neither Taylor J. nor Owen J. referred to the question.

Turning to the merits of the appeal, the Court had to determine whether *certiorari* was an appropriate remedy in this case. The most oft-quoted statement of the type of tribunal to which *certiorari* will lie is that by Atkin L.J. in *R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Company* (1920) *Limited:*[10]

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction . . . exercised in these writs.

On this issue the Chief Justice expressed his entire agreement with Lord Reid's judgment in the House of Lords' decision in *Ridge v. Baldwin*,[11] in which Lord Reid argued that Lord Atkin's statement in *R. v. Electricity Commissioners* had been misinterpreted. In his (Lord Reid's) view, the correct interpretation was that the duty to act judicially is to be inferred from the power to affect rights, and is not an additional requirement to be fulfilled before *certiorari* can issue. The Privy Council had adopted the latter view in *Nakkuda Ali v. Jayaratne*[12] and had also held that the withdrawal of a "privilege" previously granted will not found an application for *certiorari* as no right is affected.

However, as the Chief Justice pointed out, such an interpretation is inappropriate to "a statutory licence to which a fit and proper person

---

[6] This reasoning is in line with that of Lord Evershed in *Ridge v. Baldwin* [1964] A.C. 40.

[7] In this respect he followed the decision of Pollock B. in *Smelting Co. of Australia v. Commissioners of Inland Revenue* [1896] 2 Q.B. 179.

[8] (1968) 42 A.L.J.R. 64, 67.

[9] *Ibid.* 68.

[10] [1924] 1 K.B. 171, 205.

[11] [1964] A.C. 40.

[12] [1951] A.C. 66.

has a right and which relates to such an occupation as that of a cab-driver".[13] Consequently, he placed a very narrow interpretation on *Nakkuda Ali v. Jayaratne*,[14] restricting it to an interpretation of particular legislation in force at a particular time, that is, the Defence (Control of Textiles) Regulations 1945 (Ceylon):

> In my opinion, at most, this decision would bind this Court in the case of a statutory provision made in war time in like terms and with respect to a comparable subject matter . . . Consequently, I do not feel constrained by *Nakkuda Ali v. Jayaratne* . . . to hold either that certiorari is not available in this case or that the licence is a mere privilege and not property.[14]

Thus his Honour concluded from the nature of the Board's power and the consequences of its exercise, that the Board was bound to act judicially and that its proceedings were reviewable by the prerogative writs. He found further support for this conclusion in the fact that:

> the Parliament [has] not given any positive indication in the statute that the Board in deciding to revoke the licence, shall not be required to act judicially and be immune from supervision in the exercise of an absolute and unfettered administrative discretion but it has specified with some precision the specific matters of which the Board should be satisfied before exercising the granted power and has imposed upon the Board the obligation to give written reasons to the licensee for its decision to revoke his licence.[15]

It is surprising that Barwick C.J. made no mention of the Privy Council's most recent decision in this area—*Durayappah v. Fernando*[16]—in which the Privy Council adopted the view that the duty to act judicially is to be inferred from the power to affect rights, in preference to their own earlier decision in *Nakkuda Ali v. Jayaratne*. This does not mean, however, that it was unnecessary for Barwick C.J. to distinguish *Nakkuda Ali* for the Privy Council added that:

> it should not be assumed that their Lordships necessarily agree with Lord Reid's analysis of that case [that is *R. v. The Electricity Commissioners*] or with his criticism of *Nakkuda Ali v. Jayaratne*.[17]

Thus the Privy Council has not resiled from the view that a licence is a mere privilege and not a right, and, in distinguishing *Nakkuda Ali v. Jayaratne*, *Banks v. Transport Regulation Board* breaks new ground in this field. Kitto, Taylor and Owen JJ. agreed that the Board was under a duty to act judicially and so amenable to *certiorari*, but did not consider the matter in any detail.

Granted the fact that the Board had the power to affect rights and was under a duty to act judicially, before it could be said that the decision could be quashed by *certiorari* in this case, the effect of section

---

[13] (1968) 42 A.L.J.R. 64, 67.
[14] *Ibid.* 67-68.
[15] *Ibid.* 68.
[16] [1967] 2 A.C. 337.
[17] *Ibid.* 349.

31 (2) requiring the approval of the Governor in Council had to be considered. As already noted, the Supreme Court had held that *certiorari* would not go as the decision was that of the Governor in Council. However, the High Court, with McTiernan J. dissenting, interpreted the section as meaning that, on the approval of the Governor in Council, it is the Board's own decision which is put into effect, and not that the Order in Council supplants the Board's decision. Such an interpretation indicates a willingness on the part of the Court to overcome attempts to exclude judicial review by a reliance on such technicalities.

As this is one of the most important aspects of the decision it is worthwhile to note briefly the reasoning followed by the Victorian Supreme Court but rejected by the High Court. Basically, the difference was simply one of statutory interpretation—the interpretation of sub-section 31 (2). The Victorian Supreme Court took the view that the decision of the Board simply provides a basis on which the Order in Council can operate, and that once such an order is made it is this order to which the Board is to give effect. In support of this interpretation the Court gives the example of the Governor in Council reversing a Board's decision—it could not then be said that the order to which the Board is to give effect is its own. This is a strong argument against the High Court's interpretation if one views the matter simply as one of strict interpretation but on policy grounds the High Court's argument is, in the writer's opinion, clearly preferable. It was then argued that sub-section 31 (2) meant that the Board was to give effect to an Order in Council by making a new decision in accord with the Order. This was rejected by the Victorian Supreme Court as involving "a radical departure from the ordinary grammatical meaning of the words of the sub-section",[18] and it was not relied on, nor even mentioned by, the High Court.

The final step in reaching a decision in the case was the determination of whether or not there was in existence a ground for the issue of *certiorari*. Different members of the Court found two different grounds for the grant of the remedy sought.

Barwick C.J., Kitto and Owen JJ. held that *certiorari* should issue by reason of jurisdictional error. The courts have a wide discretion in determining what is a "preliminary matter" going to jurisdiction and what is a "matter as to the merits" and in the present case, consistently with its general approach, the Court held that the question of whether or not a particular provision in the licence was a "condition" of that licence within the meaning of section 32 was a jurisdictional question. In the words of the Chief Justice:

> what it [the Board] finds to have been breached must be in law and in fact a condition of or an addition to the licence. It cannot, in my opinion, upon any reasonable construction of s. 32, be said

[18] [1968] V.R. 95, 99.

> that the Board has been given power to decide for itself unexaminably what are the conditions of or attached to the licence. That, in my opinion, is a matter for decision by the courts.[19]

The interpretation of the particular Act involved is not of great importance for our purposes, but the very careful and strict interpretation of the statute and regulations adopted by the members of the Court indicates their concern to strengthen the law's machinery for judicial review. Barwick C.J. held that Parliament had determined what were to be "conditions" of the licence[20] and that two of the three provisions which the Board found the appellant to have breached and which formed the basis of the decision to revoke his licence were not such conditions at all. Consequently, the prerequisites in section 32 for the exercise by the Board of its jurisdiction had not been fulfilled:

> The Board's power under s. 32 to decide to revoke depends, in my opinion, at least upon a decision that an act which in law could amount to a breach of what is in law a condition of the licence has been committed by the licensee wilfully, or repeatedly, or with danger to the public. Here, upon my view of what the Board has purported to do, the Board merely decided that acts, all of which could not in law be held to be in breach of conditions of the licence, were committed by the appellant. That does not satisfy the condition of the exercise of the Board's power of revocation.[21]

Owen J., with whom Kitto J. agreed, followed the same line of reasoning as the Chief Justice, but he considered that none of the three matters alleged were conditions of the licence. Furthermore, both he and Barwick C.J. were of the opinion that, as the Board's decision was made on the finding that all the matters alleged were established, if any one of them could not be sustained the Board's decision could not be said to be made within jurisdiction. Here again the appellant was given the benefit of the doubt.

Taylor J., with whom Kitto J. also agreed, was of the opinion that *certiorari* should issue on the ground of an error of law on the face of the record. Taylor J. agreed that the conditions which the Board alleged the appellant had breached were not, in fact, conditions of the licence at all, but he chose to characterize this error as an error of law. Furthermore, he was of the view, although he does not give his reasons for his opinion, that such error appeared on the face of the record and consequently *certiorari* should issue. Clearly, therefore, Taylor J. considers that the reasons given by a tribunal for its decision are part of the record. In *Davies v. Price*[22] it was suggested that where there is no requirement of a reasoned decision, and some reasons are given, it cannot be presumed that the decision was not based on other reasons as well and that

---

[19] (1968) 42 A.L.J.R. 64, 68.

[20] S. 23 Transport Regulation Act 1958-1968 (Vic.).

[21] (1968) 42 A.L.J.R. 64, 70, *per* Barwick C.J.

[22] [1958] 1 W.L.R. 434.

consequently the error is not apparent on the face of the record. However, Taylor J. would agree with Lord Denning's exposition of the law in *Baldwin and Francis Ltd v. Patents Appeal Tribunal*:[23]

> . . . when a reason is assigned as the foundation of a judgment, all presumption or intendment that the court went upon better grounds is excluded.

J. W. CONSTANCE

NORTH SEA CONTINENTAL SHELF CASES[1]

Public international law—Delimitation of continental shelf between adjacent States—Whether Convention on the Continental Shelf applies to non-member States—Whether a rule of customary international law to the same effect as Article 6 (2)*—Method of delimitation—Equitable principles.*

On 20 February 1969 the International Court of Justice gave its judgment in these consolidated disputes. This was the thirtieth judgment of the Court since its formation in 1945 and the first since its decision in the *South West Africa Cases* (*Second Phase*) on 18 July 1966.

The litigation had commenced with the filing with the Court on 20 February 1967 of two Special Agreements between the Federal Republic and Denmark and between the Federal Republic and the Netherlands.[2] These Agreements requested the Court to decide what principles and rules of international law are applicable to the delimitations as between the Parties of the continental shelf in the North Sea beyond a partial boundary determined by earlier Conventions between the Parties.

Although both Denmark and the Netherlands have accepted the compulsory jurisdiction of the Court, the Federal Republic is neither a member of the United Nations Organization nor a party to the Statute of the Court. However, by virtue of Security Council Resolution 9 on 15 October 1946 which was based on Article 35 (2) of the Statute, it had been permitted to deposit a general declaration accepting the jurisdiction of the Court.

The basis of the disputes can be explained only in terms of the geographical position of the three States involved. Each has a coastline on the North Sea, with that of the Federal Republic lying between those of Denmark and the Netherlands. The North Sea is an area of relatively

---

[23] [1959] A.C. 663, 693. Lord Denning was quoting from *Burn's Justice of the Peace* (30th ed.) Vol. V, 374.

[1] *Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands.* International Court of Justice; President Bustamante *y* Rivero; Vice President Koretsky; Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Sir Muhammad Zafrulla Khan, Padilla Nervo, Forster, Gros, Ammoun, Bengzon, Petren, Lachs, Onyeama; Judges *ad hoc* Mosler, Sørensen. Page references are to a mimeographed report issued by the Registry of the Court. The judgment has been reproduced in (1969) 8 *International Legal Materials* 340.

[2] The full text of the Special Agreement between Denmark and the Federal Republic is reproduced in (1967) 6 *International Legal Materials* 391.