

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FULL COURT

SUIT NO. M.1996/042

BEFORE: THE HON. MR. JUSTICE ELLIS
THE HON. MR. JUSTICE LANGRIN
THE HON. MR. JUSTICE K. HARRISON

IN THE MATTER OF AN APPLICATION BY
TROPICAL AIRLINES LIMITED for leave
to apply for Orders of Certiorari
and Mandamus.

AND

IN THE MATTER OF AN APPLICATION
BY TROPICAL AIRLINES LIMITED
under the Civil Aviation Act and
the Civil Aviation (Air Transport
Licensing) Regulations, 1966 for
Scheduled Domestic and International
Air Transport Licences.

Mr. Paul Beswick & Mr. Ballantyne instructed by Ballantyne, Beswick
& Company for the Applicant.

Mr. Lackston Robinson, Assistant Attorney General instructed by the
Director of State Proceedings for the Respondent.

Heard: September 16, 17, 18, 19, 20 &
October 2, 1996.

LANGRIN, J.

This is an application by Tropical Airlines Limited for
Judicial Review of the decision of the Air Transport Licensing
Board Communicated to the applicant by letter dated June 5, 1996.

The motion for Judicial Review is brought by leave granted
by Panton J. on June 7, 1996. The relevant reliefs sought are:

1. Order of Certiorari to quash the decision of the
Air Transport Licensing Board in refusing to issue
an Air Transport Licence to operate scheduled
Domestic and International Air Transport Services.
2. An Order of Mandamus directed to the Air Transport
Licensing Board or to its successor in law the

Civil Aviation Authority to grant to the applicant the Air Transport Licences applied for or alternatively for the said Board to reconsider and determine the applicant's application for Air Transport Licences according to Law on the merit of the application.

The factual matrix on which the application is based is briefly summarised as follows:-

On the 4th March, 1996 the applicant submitted documents of application to the Air Transport Licensing Board (hereinafter called 'the Board') in respect of the grant of licences to operate domestic and international scheduled air service. The Secretary to the Board by a letter dated 4th March, 1996 acknowledged receipt of the application and advised that the Board was unable to consider the application for domestic service because "Government's policy on air transport at this point in time does not allow for the grant to individuals or companies of route rights domestically. It may be that Government policy might be revised and in that eventuality you will be advised. We will however process your application for scheduled international service." The letter was dispatched without the knowledge of the Board.

On the 5th March 1996 the applicant responded to the Secretary's letter and made reference to the fact that they are in possession of reliable information that Government has an exclusive agreement with Air Jamaica Express to operate domestic scheduled service on a monopolistic basis for 15 years. A further letter was sent to the secretary of the Board requesting a hearing and stating the basis in law for such a hearing.

The applicant on March 7, 1996 formally applied for an Air Operator's Certificate as required by the relevant regulations. The secretary was instructed to send the said application to the Director of Civil Aviation who has the responsibility for dealing with application.

On the 5th March, 1996 Tropical Airlines Limited filed an objection to the application filed by Air Jamaica Express Limited. It is instructive to set out in full the relevant part of the objection;

"Objection to Airline Filing

<u>Filing Entity:</u>	Air Jamaica Express Limited.
<u>Filing Date:</u>	February 27, 1996.
<u>Application:</u>	To provide scheduled Domestic Air Transportation Services between Aerodromes in Jamaica.
<u>Objecting Entity:</u>	Tropical Airlines Limited.
<u>Objecting Date:</u>	March 5, 1996.
<u>Grounds for Objection:</u>	<u>Government has an agreement with Jamaica Express to provide Exclusive domestic scheduled airline services in Jamaica for a period of fifteen (15) years."</u>

Air Jamaica Express wrote to the Board on the 18th March, 1996 submitting their objection to the granting of a licence to the applicant. Accordingly, the secretary on 20th March, 1996 wrote to the applicant's Attorney informing them of the objection and enclosed a copy of the letter from Air Jamaica Express. The relevant section from this letter is stated as under:

"Further, the Board should be aware that in order to enable the sound economic development of TJ services the Government of Jamaica granted a 'concession period' to TJ during which it would enjoy exclusive traffic rights on the said routes. For easy reference the relevant section of the Purchase Agreement paragraph 8(a) and 8(b) are quoted hereunder:-

The Government and/or the Accountant General undertakes that, for a period of fifteen (15) years after the Take-over Date (the "Concession Period"), the Government will not grant to any air carrier other than Trans Jamaica any rights to operate air services on the routes which Trans Jamaica, as of the Take-over Date, enjoys route rights, permits, licences, memoranda of understanding or any other type or authorisation. The Government permits Air Jamaica Limited, or any other Company or entity controlled by Air Jamaica Limited or under common control with Air Jamaica Limited, to enter into "code-sharing" arrangements with Trans Jamaica."

On the 22nd March 1996 the applicant's Attorneys wrote to the Board pointing out that consistent with Regulation 9 of the Air Transport Licensing Regulations both objections must fail on technical grounds if brought before the Board.

The Board on the 10th April, 1996 heard the application of both Air Jamaica Express Limited and Tropical Airline Limited. Submissions were made by both parties' Attorneys-at-Law in respect of their applications.

Consequent on the hearing conducted by the Board a provisional licence was granted to Air Jamaica Express Limited for a period of six months pending its considerations of certain recommendations to the Board.

The Minister of Public Utilities and Transport on May 30, 1996 wrote to the Chairman of the Board as follows:

"Re: Application for licence by
Air Jamaica Express Limited
and Tropical Airlines Limited

In accordance with Regulation 34 of the Civil Aviation (Air Transport Licence) Regulation 1966, made pursuant to Section 8, subsection 1B of the Civil Aviation Amendment Act, I wrote to inform you that the Government of Jamaica has entered into an Agreement for the sale of Trans Jamaica Limited now called Air Jamaica Express Limited.

As a condition of that Agreement, the Government of Jamaica has undertaken to give the new airline exclusive route rights to operate a scheduled domestic service for a minimum period of 15 years.

I am therefore, in keeping with the law, using this opportunity to so inform you. (underlining mine)

A copy of the Agreement is attached for your information."

The Chairman of the Board advised the applicant's Attorneys on the 30th May, 1996 that there will be a meeting of the Board on the 3rd June, 1996. On that date the Board met and refused the application by Tropical Airlines Limited for the grant of a licence.

On the 5th June, 1996 the Secretary to the Board wrote to the applicant informing them of the decision of the Board to refuse

their application. It is this decision which the applicant is seeking to impugn and so it is set out in full as under.

"I am directed to advise that the Air Transport Licensing Board, pursuant to the provisions of Regulations 6(1) of the Civil Aviation (Air Transport Licensing) Regulations 1966, has decided not to grant a licence for you to operate a domestic schedule air service within Jamaica.

This decision was taken after due consideration of the material and evidence adduced at the hearing conducted by the Board, and further, having regard to the Heads of Agreement dated October 31, 1995 between the Government of Jamaica, the Accountant General of the one part and Air Jamaica Acquisition Group Limited and General Management Company Limited of the other part of which the Board has been notified by the Minister."

The main grounds upon which the reliefs were sought are set out as follows:-

- (1) That the Air Transport Licensing Board being a public body or authority established in accordance with Section 6 of the Civil Aviation Act, has failed to comply with its functions and duties under Section 7(1) of the aforesaid Act, being inter alia, to deal with applications for Air Transport Licenses in accordance with the regulations in that behalf made by the Minister under Section 8 of the aforesaid Act.
- (2) That the Air Transport Licensing Board has failed to comply with the Statutory directions set out in Section 7(1) of the Civil Aviation Act, whereby in considering applications for air transport licenses it is directed to have regard to the several matters therein set out, and has instead accepted the dictation of the relevant Minister or government policy in relation to the exercise of its functions under the Act.

- (3) That the ATLB has erred in law by acting under the effective dictation of the relevant Minister in relation to the applicant's application the said dictation arising out of an agreement entered into by the Government of Jamaica and not being one affecting Civil Aviation generally.
- (4) That the decision of the ATLB is in breach of the principles of Natural Justice in that the Board has permitted a private agreement between the Government of Jamaica and a private citizen to supersede the rights of the applicant to a fair hearing of its application within a reasonable time, and to a determination of the said application for a licence on the basis of the application's merit and the permitted considerations set out in the Civil Aviation Act and Regulations made thereunder.

Needless to say that this Court in exercising its power of review will not arrogate unto itself the special jurisdiction of a Court of Appeal or attempt to try or retry the issue. However, since the critical conclusion of fact is one reached by the administrative body as opposed to a judicial body the Court regard it proper to review that decision in order to see whether the decision was properly reached within the stated legal framework.

The Court should quash the decision where evidence was not such as the public authority should have relied on or where the evidence received does not justify the decision reached, or of course, any serious procedural irregularity.

The standard of proof required in cases of administrative law is the civil standard of 'balance of probability' and this is regarded as satisfactory since the degree of probability required to tip the balance will vary according to the nature and gravity

of the issue.

The first question which the Court must answer is this:-

Did the Board act illegally when it gave consideration to the 'heads of Agreement' and disregarded the provisions of the Fair Competition Act?

In examining this question the Court had to interpret the provisions of Sections 7 and 8 of the Civil Aviation Act and Regulation 34 of The Civil Aviation (Air Transport Licensing) Regulations, 1996 which are conveniently set out as under:-

"Sec.7-(1): It shall be the function of the Board to deal with applications for air transport licences in accordance with the regulations in that behalf made by the Minister under Section 8 and to approve the tariffs to be charged for the transportation by air of passengers and cargo.

(2) The Board in considering applications for air transport licences shall have regard to any matter which may be prescribed under Section 8 and to the following matters -

- (i) the existence of other air transport services in the area through which the proposed services are to be operated;
- (ii) the existing or potential need or demand for any services proposed;
- (iii) the degree of efficiency and regularity of the air transport services, if any, already provided in that area, whether by the applicant or by other operators;
- (iv) the period for which air transport services have been operated by the applicant or by other operators;
- (v) whether the applicant will be able to provide a satisfactory service in respect of safety, continuity, regularity of operation, frequency, punctuality, reasonableness of charges and general efficiency;
- (vi) the financial resources of the applicant and any capital or other expenditure reasonably incurred, or any financial commitment or commercial agreement reasonably entered into, in connection with the operation of aircraft on air transport services by any person (including the applicant) who is the holder of any air service licence already granted.

- (vii) the type of aircraft to be used;
- (viii)
- (ix) any objections or representations
duly made in accordance with any
relevant regulations under this act:

8-(1) The minister may make regulations -

- (a)
- (b) As to the circumstances in which a
licence may or shall be granted,
refused revoked or suspended, and
subject to subsection (2) of Sec.7,
as to any matter to which the
Board is to have regard in deciding
whether to grant or refuse a licence;

Regulation "34. In considering any applica-
tion for the grant of a licence or a permit
the Board shall have regard to the require-
ments and provisions of every Agreement
relating to or affecting civil aviation
which has been entered into by the Government
and of which it has been notified in writing
by the Minister."

It should be noted that in the marginal note of regulation
34 it is stated as follows: 'Board to have regard to International
agreements'.

Mr. Beswick, learned Counsel for the applicant, submitted
with some force that the 'Heads of Agreement' entered into by the
Minister does not relate to civil aviation and further, Regulation
34 in keeping with the marginal note only permits the Board to
have regard to International Agreements which are outside the
scope of Regulation 34.

Section 3(1) of the Civil Aviation Act gives force to the
Chicago Convention on civil aviation of which Jamaica is a signatory.
Section 3(2) of the Act encompasses 'air transport services' which
forms an integral part of civil aviation. Further Sec.7(2)(vi) of
the Civil Aviation Act imposes a duty on the Board to have regard
to "Commercial Agreements reasonably entered into in connection
with the operation of air transport services by any person"

In regulation 34 the word 'agreement' is not governed by
the word 'international' and so despite the presence of the word
international in the marginal note the plain meaning of the enact-
ing words cannot be restricted. Lord Reid took the view in
Chandler v. DPP 1964 AC. 736 at 789 that side notes cannot be used

as an aid to construction. However, the better view appears to be that if the side note contradicts the text this puts the interpreter on enquiry and he then applies the plain meaning of the enacting words in the text.

We accept the submission of Mr. Robinson, learned counsel for the respondent that it may be necessary for government in order to meet its obligations under the Chicago Convention to ensure the minimum standards of safety, continuity and sustainability in the Air Transport Industry to enter into agreements other than International Agreement.

In light of the above and on a proper construction of the provisions of Section 34 we reject the arguments of Mr. Beswick that Regulation 34 is confined to International Agreements and that the Heads of Agreement is not one which relates to Civil Aviation.

Mr. Beswick submitted that Section 17(1) of the Fair Competition Act renders the Heads of Agreement void and it was therefore illegal for the Board to have considered it in arriving at their decision to refuse the application for the licence. This contention cannot withstand any reasonable objective analysis. The relevant parts of the section are set out as follows:-

"17-(1) This section applies to agreements which contains provisions that have as their purpose the substantial lessening of competition or have or are likely to have the effect of substantially lessening competition in a market.

(2)

(3) Subject to subsection (4) no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.

(4) Subsection (3) does not apply to any agreement or category of agreements the entry into which has been authorised under Part v or which the commission is satisfied -

(a) Contributes to -

- (i) the improvement of production or distribution of goods and services;
 - (ii) the promotion of technical or economic progress;
- while allowing consumers a fair share of the resulting benefit;

(b)

Mr. Robinson argues that notwithstanding the exclusive nature of the agreement it does not lessen competition since the routes that exist do not constitute a market. Besides there is nothing to prevent anyone from operating other routes. Consequently, the agreement should not be construed as lessening competition.

Apart from accepting the submission that the existing routes do not constitute the market, the applicant has not satisfied the Court that the agreement does not fall within subsection 4(a)(i) of Section 17 of the Act and so cannot be rendered void.

Accordingly, the Heads of Agreement falls within the matters which the Board ought to take into consideration in dealing with the application for the licence.

However, even if the Court is wrong in law in holding that the Board did not act erroneously in taking the Agreement into consideration, there is authority for the proposition that such an error would not vitiate the decision in question. This approach was taken in the case of Regina v. Broadcasting Complaints Commission ex parte Owen 1985 2 WLR 1025.

In our view where the reasons given by a statutory body for taking or not taking a particular course of action are not mixed and can be separated and where the Court is satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached the same decision on the other valid reasons, then the Court will not interfere by way of judicial review.

We are satisfied that in this case all the material before the Court points to the fact that the Board would have come to the same decision on the other valid reasons stated by the Board and

consistent with the functions of the Board as stated in Section 7 of the Civil Aviation Act.

The next question which arises in this application concerns the question of whether the decision maker exercised its discretion under the dictation of another body or person?

In answering this question it would be enough to show that a decision which ought to have been based on the exercise of independent judgment was dictated by those not entrusted with the power to decide. However, it remains a question of fact whether the repository of the discretion abdicated its discretion in the face of external pressure. The letter dated 30th May, 1996 written by the Minister to the Board (*supra*) is helpful in throwing some light on the question.

While Mr. Beswick places great reliance on letter of the 4th March 1996 which referred to the inability of the Board to consider the application for domestic service because of Government Policy on air transport at this time - the Board in its affidavit states categorically that it was unaware of the letter which the secretary sent to the applicant.

It is therefore wholly erroneous for the applicant to submit that the Minister dictated to the Board the very decision which the Board made. Indeed there is not one scintilla of evidence to show that the Board acted as a result of any dictation of the Minister. The fact that the provisions of the Agreement co-incided with matters which the Board took into account in accordance with Section 7 of the Civil Aviation Act is not evidence of any dictation by the Minister.

The next question which arises for consideration is whether the decision maker acted unreasonably in refusing the licence sought by the applicant.

The arguments advanced by Mr. Beswick together with the cases cited by him on this ground amounted to an ingenious invitation to the Court to substitute its own views for those of the Board. This we will refrain from doing. The Board's delay of two weeks in dealing with the applicant's application is not unreasonable in

light of the request by the Board for further information. The absence of the Air Operators Certificate is also some justification for the delay. We find that the Board considered each application individually on its own merits, in good faith and as a result of a conscientious consideration of the whole matter. Any failure to deal with the many cases cited by Mr. Beswick is not due to any lack of deference to his arguments but instead to a want of relevance in the cases.

Can it be said that the Board acted with procedural impropriety when it considered the Minister's Notice of the Heads of Agreement without giving the applicant a chance to be heard?

The evidence before the Court clearly establishes that the applicant was aware of the Heads of Agreement between the Government and Air Jamaica Express as indicated in the 'Notice of Objections' filed before the Board. The applicant had every opportunity to argue its objection before the Board but ironically was instrumental in having the objections removed from the Board's consideration. The applicant must be taken to have waved his right to so argue the very question which gave rise to the objection.

In light of the above, Mr. Beswick's contention that he was not given an opportunity to be heard is rejected.

In any event, the mere breach of a procedural requirement in reaching an administrative decision will not necessarily result in it being quashed. The burden remains on the applicant to show that substantial prejudice has been suffered, as a consequence of the loss of this opportunity. This burden has not been discharged.

The Board directed itself properly in law and called its own attention to the various matters it should consider and took all relevant matters into consideration. Consequently, the decision which was arrived at is one which a reasonable Board might reasonably have reached. Accordingly it is the unanimous view of the Court that the application for the Orders of certiorari and mandamus is dismissed with costs to the respondents to be agreed or taxed.

(1)..... Ellis

(2)..... Langrin

(3)..... R.son