

IN THE SUPREME COURT OF SEYCHELLES

Exeter Trust Company Ltd

(Herein rep. by Mr. Paul Chow

Electing its legal domicile in the

Chambers of Mr. Frank Elizabeth of Suite

303, Premier Building, Victoria, Mahe)

Petitioner

Vs

Seychelles International Business Authority

(Rep. by its Managing Director

Mr. Steve Fanny, of Bois de Rose

Victoria, Mahe, Seychelles)

Respondent

-
Civil Side No: 253 of 2009

Mr. Frank Elizabeth for the Petitioner

Mr. F. Changsam for the Respondent

D. Karunakaran, J.

JUDGMENT

The petitioner, EXETER TRUST is a Limited Company engaged in the business of providing international corporate and trustees' services in the offshore sector. It was incorporated in Seychelles on the 13th April 1999, under the provisions of the Companies Act, 1972.

At all material times, one Mr. Paul Chow and Mrs. Lucy Chow were the directors of the Company-*vide* certificate of official search - on record - issued by the Registrar of Companies dated 13th March, 2009. During the same period, they were also directors in two other Companies namely, (i) First International Financial Co. Ltd Seychelles and (ii) "FIFCO (offshore) Services Ltd". These two companies were also engaged in a similar business. Be that as it may, after obtaining the necessary licences from the Respondent - Seychelles International Business Authority (SIBA), the petitioner-company started to carry on its business and was providing services to its clients. These licences are in the normal course of events, annually renewable, by the Authority under the provisions of the International Corporate Service Providers Act, 2003 read with the Regulations and the Guidelines issued by the Authority.

On the 19th May 2000 the Petitioner for the first time applied for and was granted by the Respondent (SIBA) an **International Trustees' License** to provide trust services in the offshore jurisdiction. This license was annually renewed by SIBA for subsequent years until 2008. On the 18th October 2007, the petitioner also applied for, and SIBA did grant an **International Corporate Service Providers Licence**. The petitioner's **International Trustees' Licence** expired on the 9th September 2008, whereas its **International Corporate Service Providers Licence** expired on the 17th October 2008. After the expiry dates the Respondent did not renew or rather decided not to renew those licences.

Being aggrieved by the said decision of the Respondent, the Petitioner has now come before this Court for a Judicial Review of the said decision, invoking the supervisory jurisdiction of this Court over adjudicating authorities, conferred by Article 125(1) (c) of the Constitution. The petitioner seeks herein a declaration from the Court that the decision of the Respondent not to renew those licences, is unlawful, illegal, irrational,

unreasonable, and so null and void; and consequently, the petitioner prays this Court for a writ of *certiorari* to quash the said decision and a writ of *Mandamus* ordering the Respondent to renew the licences of the Petitioner forthwith.

Basically, it is the case of the petitioner that before the expiry dates of those two licenses it applied to the respondent (SIBA) for their renewals. However, during the course of his submission Mr. Elizabeth, Learned Counsel for the petitioner conceded that the application for renewal in respect of the **International Trustees' Licence** was made only after its expiry date. However, for the **International Corporate Service Providers Licence**, the application for renewal was made a couple of weeks before the expiry date. According to the petitioner, although it complied with the necessary legal and other procedural requirements for renewal, the Respondent did not or rather refused to renew the licenses without any justification or valid reason. It is the contention of the Petitioner that the Respondent's refusal to renew those licences is illegal. It is contrary to Section 4(1) of the International Corporate Service Providers Act, which makes it mandatory that the respondent should renew the licences *automatically* upon payment of the prescribed fees and lodgement of the compliance certificate by the Petitioner. This Section reads thus:

4 (1) Subject to sections 17 and 18 a licence issued under this Act

(a) shall be valid for a period of one year from the date of issue:

(b) shall be renewed annually upon

(i) the payment of the prescribed fee; and

(ii) the lodgement with the Authority of the compliance certificate by the licensee in the form specified in Schedule I.

(2) A licence issued under this Act shall be displayed in the premises where the licensee carries on business under the licence.

Furthermore, Mr. Elizabeth submitted that since the petitioner had complied with all legal requirements for the renewal of the licences as stipulated under Section 4(1) above, SIBA is under a statutory obligation to renew it although it has power to revoke it at any time after such renewal, but for lawful reasons. The Respondent's refusal is not only unlawful but also unreasonable and irrational in the circumstances. According to counsel, the use of the word "shall" in Section 4 above clearly shows that it is not discretionary but mandatory for the Respondent to renew the licenses once these two conditions namely: (i) the payment of fees and (ii) lodgement of Compliance Certificate are satisfied by the petitioner. The SIBA is also obligated under Section 15(1) to give notice as to why the license should be revoked. But SIBA in the instant case did not revoke but refused to renew for no valid reason. Hence, the Petitioner seeks the reliefs hereinbefore mentioned.

On the other hand, the respondent denied all the allegations made by the petitioner in this matter. The essence of the respondent's case is that the petitioner did not apply for the renewal of the licenses before their respective expiry dates. According to Mr. Changsam, Learned Counsel for the respondent, the question of renewal would arise only when there is a valid license in existence. When there was no license, any belated application for renewal becomes infructuous and not valid for consideration. Besides, the competency certificate produced by the petitioner seeking belated renewal was defective in that the petitioner failed to comply with the rules and the regulations applicable to persons who were at the material time, holding the position of directors of the petitioner company. Therefore, Mr. Changsam submitted that the decision of SIBA is neither illegal nor unreasonable. The

SIBA has reached a reasonable decision within its powers and in accordance with law, which any other reasonable Tribunal could have reached in the given matrix of facts and circumstances surrounding the case on hand. Hence, the respondent seeks dismissal of the instant petition.

I meticulously perused the records received from SIBA in this matter. I gave careful thought to the arguments advanced by both counsel touching on points of law as well as on facts. Although both counsel argued at length on the peripheral issues, it all boils down to only two fundamental questions that arise for determination in this case. They are:

- (i) Is the decision of SIBA in refusing renewal of the petitioner's licences in the instant case, unlawful or illegal? and*
- (ii) Did SIBA act unreasonably or irrationally in its decision when it refused renewals, having regard to all the circumstances of the case?*

Before one proceeds to find answers to the above questions, it is important to understand the background facts of the case, which may be gathered from the exchange of the communications between the parties as evinced on record.

Upon a diligent examination of the entire records maintained by SIBA in respect of the petitioner-company and in relation to the issues on hand, it is abundantly clear that SIBA did not renew the licenses since the Petitioner-Company did not comply with the legal requirements and the Guidelines. Particularly, the petitioner failed to satisfy the conditions as to the "4 eyes-minimum criterion" and the "fit and proper person" test in respect of the directors of the petitioner-company to justify the renewal of the licenses for the relevant period.

It is evident from the documents on file that ever since 2006, there has been a continuous and repeated queries from SIBA, requesting the petitioner-company to clarify and provide information on issues pertaining to the status of certain individuals such as Mrs. Nicole Tirant-Gherardi, Ms. Jennifer Gontier, Ms. Patricia Rosette, *Mr. Thésée*, Mr. Paul Chow and Mrs. Lucy Chow vis-à-vis their respective positions as directors or officers of the petitioner-company. From a meticulous perusal of the records on file, it appears to me that there has been a perpetual delay on the part of the petitioner in providing accurate and updated information and clarifications to SIBA on those issues. The petitioner has obviously failed to comply with the legal and procedural requirements and particularly, the Guidelines in good time, or to say the least, did not provide the necessary information as and when sought by SIBA for clarification or rectification regarding the status of those individuals. In any event, the petitioner failed to comply with the requests of SIBA at least before the expiry dates of those licences. For instance, by a letter dated 17th October 2006 although SIBA had given its approval for Ms. Jennifer Gontier, Mrs. Nicole Tirant-Gherardi to hold positions as Directors of the petitioner-company, the changes were not made or updated in time to reflect in the Register/Records maintained by the Registrar of Companies. When the licenses fell due for renewal for the subsequent year, the non-compliance as indicated by SIBA during the preceding year had not been rectified by the petitioner. It is evident from the records that there has been a perpetual gap of inordinate delay *between* the due dates for renewal of the licenses and the compliance of legal requirements and guidelines by the petitioner. To my mind, the sequence of events that led to the instant grievance of the petitioner is encapsulated in the letter dated 28th May 2009 from SIBA addressed to the petitioner (Mr. Paul Chow) (vide records in the file). This letter in fact, shows the reasons as to why the licenses were not renewed by SIBA. This letter reads *in verbatim* thus:

Dear Sir,

Re: STATUS OF EXETER TRUST COMPANY LIMITED

We refer to your letter dated May 19, 2009 in reply to SIBA's letter dated May 13, 2009.

In your letter you have stated that Mrs. Chow and yourself "have taken over all responsibilities of the running of Exeter Trust assisted by Ms Patricia Rosette and Mrs. Christianne Albert".

Firstly we will like to reiterate what was stated in our letter dated May 13, 2009, in view of the fact that Mrs. Chow and yourself are already managing FIFCO (Offshore Services Ltd, you cannot be the two "Fit and Proper" persons satisfying the 4-Eyes Minimum Criterion for the office of EXETER TRUST COMPANY LIMITED.

We would like to remind EXETER TRUST COMPANY LIMITED that pursuant to Clause 4 of Schedule 3 of the International Corporate Service Providers Act, 2003, the provision of services under a license shall be conducted by at least two individuals who are directors or other members of managerial staff residing in Seychelles.

We are faced here with three licences, EXETER TRUST COMPANY LIMITED has two licences and FIFCO (Offshore) Services Ltd has got one licence, therefore you are proposing yourself and Mrs. Chow as the two "Fit and Proper" persons for the 3 Licences and you will appreciate that this was not the intention of the International Corporate Service Providers Act, 2003, especially since in your letter we are unable to clearly understand what is the exact role which will be played by Ms Rosette.

With regards to Mr. Thésée it is only now that SIBA is being informed that Mr. Thésée no longer works for EXETER TRUST COMPANY LIMITED. As was discussed during the meeting of May 8, 2009 and reiterated in our letter dated May 13, 2009, SIBA has continually tried to contact the office of EXETER TRUST COMPANY LIMITED through Mr. Thésée in order to get the status of the office in order; we have letters, which were delivered to the registered office of EXETER TRUST COMPANY LIMITED and e-mails which were forwarded, however it was only until recently which we managed to get some feedback.

You will appreciate that directors have fiduciary duties vis-à-vis the company, therefore Mr. Thésée and Mrs. Chow and yourself (as proved recently through submitted audited account) should have done the necessary that the company remains in compliance with the International Corporate Service Providers Act, 2003.

The above being said, it will be appreciated if you could advise SIBA when exactly and on what grounds Mr. Thésée ceased to be a Director in the office of EXETER TRUST COMPANY LIMITED.

Finally with regards to the submitted Compliance Certificate and Compliance Statement, at this point in time SIBA is unable to proceed with the renewal of the licences of EXETER TRUST COMPANY LIMITED until the outstanding matters are attended to and the status of the office of EXETER TRUST COMPANY LIMITED is made clear, especially with regards to the 2 "Fit and Proper" persons to manage the office of EXETER TRUST COMPANY LIMITED, we therefore expect that this mandatory requirement is satisfied.

We look forward to obtaining your response by Monday June 01, 2009.

Yours Sincerely,

Mr. Steve Fanny

Managing Director, Seychelles International Business Authority

Needless to say, the above letter speaks for itself. Under Section 3 (4) of the *International Corporate Service Providers Act, 2003*, SIBA is under a statutory obligation to ascertain *inter alia*, that the applicant is a fit and proper person and each director and manager of the applicant is fit and proper, before granting a license. Undoubtedly, the expression “before granting a license” used in this Section, by necessary implication means to include all and any act of granting a licence whether it is an act of issuing a license first time or an act of issuing renewals for subsequent years. I do not think that the intention of the legislature in this respect was to restrict the requirement of “fit and proper person” only to the first-time licensees and licenses. Obviously, this expression should be given a liberal interpretation, a purposive one, so as to include all licensees and licenses, whether issued first-time or issued on renewals. If any restrictive interpretation is given to that expression as canvassed by Mr. Elizabeth, it would undoubtedly qualify anyone for that matter - even if that person is not a “fit and proper” person, to hold a license of this nature. Therefore, it goes without saying that annual renewal of licenses by SIBA is not simply an automatic or a mechanical process under Section 4(1) of the Act as misconstrued by Mr. Elizabeth. Obviously, mere payment of the fees and lodgment of the certificate cannot lead to automatic renewal of the licenses unless the applicant satisfies the other requirements including the Guidelines.

In addition to these requirements, the petitioner has to satisfy SIBA that *each director and manager of the petitioner-company is a fit and proper person, before granting a renewed license*. The SIBA undoubtedly has a legal role to play by virtue of Section 3 (4) of the *International Corporate Service Providers Act, 2003*, to ascertain whether the applicant is a fit and proper

person and each director and manager of the applicant is a fit and proper person, before granting a renewed license. With due respect to Mr. Elizabeth, the word "shall" need not necessarily convey a mandatory sense in all provisions of the statutes. 'Shall'- in the normal sense imports command. However, it is well settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory. It depends upon the context in which the word 'shall' appears and the other circumstances. Unless an interpretation leads to some absurd or inconvenient consequences or contradicts with the intent of the legislature the court shall interpret the word 'shall' in mandatory sense.

Indeed, on the Interpretation Statues, Maxwell says "that it is impossible to lay down any general rule for determining whether a provision is mandatory or directory'. The Supreme Court of India is stressing time and again that the question whether a statute is mandatory or directory, is not capable of generalization and that in each case the court should try and get at the real intention of the legislature by analyzing the entire provisions of the enactment and the scheme underlying it. In other words it depends on the intent of the legislature and not upon the language in which the intent is clothed.

The intent of the legislature must be ascertained not only from the phraseology of the provision, but also from its nature, design and consequences which would follow from construing it in one form or another.

Having said that, I would like to restate herein what I have stated in ***Cousine Island Company Ltd Vs Mr. William Herminie, Minister for Employment and Social Affairs and Others - Civil Side No. 248 of 2000***. Whatever the issue factual or legal that may arise for determination following the arguments advanced by counsel, the fact remains that in matters of Judicial Review, the Court is not sitting on appeal to examine the facts and merits of the case heard by the administrative or adjudicating

authority. Indeed, the system of judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of the case under appeal. However, when subjecting some administrative decision or act or order to judicial review, the Court is concerned only with the “legality”, “rationality” (reasonableness) and “propriety” of the decision in question ***vide the landmark dictum of Lord Diplock in Council of Civil Service Union Vs Minister for the Civil Service (1985) AC 374***. On an appeal the question is “right or wrong”? - Whereas on a judicial review the question is “lawful or unlawful?” - Legal or Illegal? “Reasonable” or “Unreasonable”? - Rational or Irrational?

On the issue of legality, I note, the entity of law is always defined, certain, identifiable and directly applicable to the facts of the case under adjudication. Therefore, the court may without much ado determine the issue of “legality” of any administrative decision, which indeed, includes the issue whether the decision-maker had acted in accordance with law, by applying the *litmus test*, based on *an objective assessment* of the facts involved in the case. On the contrary, the entity of “reasonableness” cannot be defined, ascertained and brought within the parameters of law; there is no *litmus test* to apply, for it requires *a subjective assessment* of the entire facts and circumstances of the case under consideration and such assessment ought to be made applying the yardstick of human reasoning and rationale.

Having said that, for the reasons stated hereinbefore, I hold that the decision of SIBA in refusing the renewal of the petitioner’s licenses is legal. Thus, I find answer to the first fundamental question in the negative.

I will now, turn to the second issue as to “reasonableness” of the decision in question. What is the test the Court

should apply in determining the reasonableness of the impugned decision in matters of judicial review?

First of all, it is pertinent to note that in determining the reasonableness of a decision one has to invariably go into its merits, as formulated in ***Associated Provincial Picture Houses V Wednesbury Corporation [1948] 1 KB 223***. Where judicial review is sought on the ground of unreasonableness, the Court is required to make value judgments about the quality of the decision under review. The merits and legality of the decision in such cases are intertwined. Unreasonableness is a stringent test, which leaves the ultimate discretion with the judge hearing the review application. To be unreasonable, an act must be of such a nature that no reasonable person would entertain such a thing; it is one outside the limit of reason (Michael Molan, Administrative Law, 3 Edition, 2001). Applying this test, as I see it, the court has to examine whether the decision of SIBA in refusing the renewal is unreasonable having regard to all the circumstances of the case.

At the same time, one should be cautious in that, the “Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. Thus, the judicial review is made effective by the court quashing an administrative decision without substituting its own decision and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.” ***Per Lord Fraser Re Amin. [1983] ZAC 818 at 829, [1983] 2 All E R 864 at 868, HL.***

In determining the issue of reasonableness of the decision in the present case, the court has to make a *subjective assessment* of the entire facts and circumstances of the case and consider whether the decision of SIBA to refuse renewal of the licenses is reasonable or not. In considering reasonableness, the duty of the decision-maker is to take into account all

relevant circumstances as they exist at the date of the hearing that he must do, in what I venture to call, a broad commonsense way as a man of the world, and come to his conclusion giving such weight, as he thinks right to the various factors in the situation. Some factors may have little or no weight; others may be decisive but it is quite wrong for him to exclude from his consideration matters, which he ought to take into account ***per Lord Green in Cumming Vs. Jansen (1942) 2 All ELR at p656.***

In my considered view, SIBA has taken into consideration all relevant factors including non-compliance of the Guidelines by the petitioner - See, the **Guidelines for Fit and Proper Applicants** issued by SIBA, in accordance with section 13 of the International Corporate Service Providers Act, 2003 - which factor it ought to take into account and has rightly refused renewal for valid reasons as any other reasonable tribunal would and should do in identical circumstances.

For the reasons stated hereinbefore, I hold that that the decision of SIBA in refusing the renewal of the petitioner's license in this matter is neither *illegal* nor *unreasonable*. Therefore, I decline to grant the writ of *certiorari* or *mandamus* and dismiss the petition accordingly. I make no orders as to costs.

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D. Karunakaran

Judge

Dated this 20th day of March 2012

