

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV2021/0199

IN THE MATTER OF Part 56 of The Civil Procedure Rules 2000 of
The Eastern Caribbean Supreme Court;

AND

IN THE MATTER OF the International Banking Act No 6 of 2016

AND

IN THE MATTER OF an Application to Review the Decision of the
Financial Services Regulatory Commission contained in a letter dated
the 16th day of April, 2021 and written by the Intended Defendant to
the Claimant whereby the Intended Defendant refused to grant the
Claimant a Class 1 Banking Licence (hereinafter called the
“Decision”).

Between:

JULIUS CAPITAL BANK INC

Claimant/Applicant

AND

THE FINANCIAL SERVICES REGULATORY COMMISSION

Defendant/Respondent

2021: November 4th

2022: March 1st

JUDGMENT

Appearances:

Ms. Leandra Smith appearing for the Claimant

Ms. Lauralee Riley appearing for the Defendant

- [1] **Robertson, J.** Julius Capital Bank Inc., the claimant, initiated these judicial review proceedings seeking, among other things, a declaration that the decision of the commission, as contained in the letter dated 16th April 2021 is null and void and of no effect, and an order of Certiorari to move this court to quash the decision of the commission. The correspondence in question advised that the claimant's application for a Class 1 International Banking License Banking license was declined.
- [2] **The Parties.** Julius Capital Bank Inc. is a company which was incorporated and registered under the International Business Corporation Act, CAP 224 of the Laws of Antigua and Barbuda [the Act] and later issued a certificate of revival under the provisions of section 315 of the Act. The commission is a statutory body which was continued under the authority of the provisions of Financial Services Regulatory Commission Act, 2013 (as amended) [herein after the FSRC Act]. The commission, among other things, regulates international banking business carried on from and within Antigua and Barbuda. Thus, the management of the international banks and non-banks fall within the ambit of the mandate of the commission. The FSRC Act indicates that the commission also has a collaborative function to provide assistance to overseas regulatory authorities.

The Claim and the Claimant's Reasons for Issuing these Proceedings.

- [3] Julius Capital Bank Inc., on the 18th day March 2021, unsuccessfully applied for a Class 1 International Banking License. The commission in its response to the application indicated that "*the application was declined in accordance with Section 9(4)(b) of the International Banking Act 2016, as amended*". Despite a request, no other information was given by the commission for having declined the application. Julius Capital Bank Inc. initiated these proceedings seeking a determination that the decision of the defendant as contained in the correspondence dated 16th April 2021 was null and void and of no effect, and that the decision be quashed and for cost of the proceedings to be paid by the commission.
- [4] Julius Capital Bank Inc has indicated the following as the reasons for having to refer the matter to the court to seek a review the decision of the commission:
- a. The commission failed to provide reasons or adequate reasons for its decision and as such the Julius Capital Bank Inc. contends that the decision of the commission was arbitrary or

unreasonable, irrational, or unfair or was made in bad faith or was made for an improper purpose.

- b. Julius Capital Bank Inc. also notes that the decision of the commission fails to state whether the decision was based upon (a) public interest or (b) that the criteria for approving the license were not met or both (a) and (b).
- c. Julius Capital Bank Inc. had a legitimate expectation that once it supplied the commission with an adequate response to the concerns raised by the commission during the application process, the requested license would be granted. Julius Capital Bank Inc was previously in possession of a Class 1 Banking License.

The Relevant Background

- [5] Dario Item was the sole shareholder of Julius Capital Bank Inc. During the month August 2018 an application was made by the Julius Capital Bank Inc to the commission for a Class 1 Banking License to enable Julius Capital to conduct international banking business in the state of Antigua and Barbuda. The commission, in accordance with section 9(4) of the International Banking Act granted a license on 15th May 2019.
- [6] Sometime after having granted the Class 1 Banking License, the commission became aware of a notice of administrative actions published on the Labuan Financial Services Authority's official website and as a consequence of having noted the information contained therein, the commission re-visited the banking license application of the claimant. The commission considered the application submitted by Mr. Item and noted the following question on the form and response made on behalf of Julius Capital Bank Inc: ***"Have any of the parties connected with this application ever applied either individually or in conjunction with others, for the authority to transact business in any other jurisdiction? If so, please give details"***, Mr. Item's response was ***"no"***.
- [7] The commission by letter dated 11th June 2019 wrote to Julius Capital Bank Inc and requested clarification on certain information which was published on the official website of the Labuan Financial Services Authority about Blue Investment Bank Inc. and Blue Wealth Management Ltd, companies in which Dario Item was a director. Specifically, the commission sought, among other things, information on the charges or allegations made by the authority in Malaysia, the defense to the

charges and allegations made by the authority on the disqualification of Dario Item as one of the directors and the principal officer of Blue Investment Bank Inc and Blue Wealth Management Ltd. in Malaysia. The commission also directed that the claimant was not to commence any international banking until written authorization is received from the commission.

- [8] In correspondence dated 13th June 2019 received from Europe Studio Legale Tributario, an attorney representing Blue Investment Bank Inc and Blue Wealth Management Ltd., the commission understood that the association between Dario Item, Blue Investment Bank Inc and Blue Wealth Management Ltd pre-dated the submission of the 2018 application for the banking license and that the association possibly continued to subsist. The commission also determined from the correspondence received that Mr. Item had “*at least constructive knowledge of administrative actions taken against his associated entities in Malaysia*”.
- [9] The commissioner on 14th October 2019 informed the representative of Julius Capital Bank Inc. that the commission intended to revoke the Class 1 Banking License which was granted to Julius Capital Bank Inc on 15th May 2019. The commission outlined the reason for the intended action and noted that Julius Capital Bank Inc. had until 25th November, 2019 to respond to the notice of intent to revoke the license. The commission later agreed to an extension of the time from 25th November 2019 to 9th December 2019 for the Julius Capital Bank Inc. to submit statement of objections in accordance with section 15(2) of the Act.
- [10] By correspondence dated 9th December 2019 the then attorneys at law for the Julius Capital Bank Inc. wrote to the commission and provided Julius Capital Inc.’s statement of objections in response to the Notice of Intent to revoke the license. In that correspondence the counsel indicated to the commission, among other things, that the position of Mr. Item on the matter and the status of the matter against Blue Wealth Management Ltd. and Blue Investment Bank Inc. and its directors in Malaysia and suggested alternate remedial action which could be adopted. The matter not being resolved the Julius Capital proposed that the commission permit Julius Capital Inc to voluntarily surrender its license number 17185.

[11] The evidence of the commission is that at a meeting subsequent to the issuance of the Notice of Intention to revoke the banking license the commission informed the representative for Julius Capital Inc. that the notice of intent to revoke the banking license was premised on the non-disclosure of material information which was known to the director of Julius Capital Inc. at the time of submission of the application for banking license and that the notice was not on the premise of fitness and propriety of the directors.

[12] On 30th December 2019 the attorney for Julius Capital Bank Inc. formally sought the commission's permission to permit Julius Capital Bank Inc. to immediately surrender the banking license and to commence voluntary liquidation. On 12th March 2020 the commission authorized the Julius Capital Bank Inc.'s liquidation with the subsequent cancellation of the International Banking License on 22nd April 2020. Julius Capital Bank Inc. the claimant, was therefore dissolved and ceased to exist on 8th July 2020.

[13] Julius Capital Bank Inc. was revived on 11th January 2021. On 24th November 2020 the representative for Julius Capital Bank Inc. submitted an application dated 1st October 2020 to the commission for issuance of a Class 1 Banking License. The commission requested certain information which, according to the commission was required for ***“amongst other things compliance with section 8(a) of the Act”***. Upon receipt of the information the commission indicated that it assessed the application along with other supporting documentation and informed the representative for Julius Capital Bank Inc. through correspondence dated 16th April 2021 that the application was unsuccessful.

[14] The correspondence of 16th April 2021 from the Director of International Banks and Non-Banks indicated that:

“Re: Application for Class 1 International Banking License (Julius Capital Bank Inc.)

The Financial Services Regulatory Commission (“the Commission”) refers to the revised application dated March 18, 2021 for a Class 1 International Banking License Banking license for Julius Capital Bank Inc. and advises that the application was declined in accordance with Section 9(4) (b) of the International Banking Act 2016, as amended.

The Commission thanks your client for the interest shown in the jurisdiction and extends best wishes for all future endeavours.”

[15] Upon receipt of the correspondent the representative of Julius Capital Bank Inc. sought, without success, the reasons for the decision of the commission. The commission contended and continues to contend that the duty of the commission under section 9(4) (b) of the Act is to inform an applicant of the lack of success of an application and that its obligations do not extend to reasons being provided for a refusal by the commission to grant a license. The counsel for Julius Capital Bank Inc. disputes the obligations and further contends that in light of the absence of reasons Julius Capital Bank Inc., as well as the Court, are open to conclude that the decision of the commission was arbitrary or unreasonable, irrational or unfair or was made in bad faith or was made for an improper purpose. The counsel for Julius Capital Bank Inc. also raised that their client had a legitimate expectation that the application would be successfully determined.

The Law

i. Judicial Review

[16] The court in the judicial review process is exercising a supervisory authority. The House of Lords in the case of **Brind and others v Secretary of State of the Home Department**¹ noted that:

“But it has to be expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a minister or other person or body a discretion, the court’s jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its view, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court, in the exercise of its supervisory role, will quash that decision. Such a decision is correctly, though unattractively, described as a ‘perverse’ decision. To seek the court’s intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made, is to invite the court to adjudicate as if

¹ [1991] 1 All ER 720.

Parliament had provided a right of appeal against the decision, that is to invite an abuse of power by the judiciary.”

[17] The above quotation sets the backdrop of the court in judicial review proceedings.

ii. The Provision of Reasons

[18] The importance of an applicant being provided with reasons for the decision of a decision-making body requires little justification. The justification includes the need to satisfy the requirement of fairness, the promotion of transparency in the decision-making process, the promotion of public confidence, the facilitation of the review or the appeal process. Despite the general importance and the many reasons for the provision of reasons there is no common law duty for the provision of reasons. The court in **R (JJ Management LLP v HMRC)**² noted that “*the law does not recognize a general duty to give reasons for an administrative decision*”. It is noted that as the common law evolves the law on the duty for the provision of reasons is likely to change so that the requirement for reasons operates as the rule subject to specific exceptions. In fact, as the law stands there is often an expectation that a duty falls upon a decision-making body to provide reasons. This obtains, at the very least, as a function of fairness and equality of treatment before the law. Other instances include, but are not limited to, matters relating to fundamental rights such as the liberty of person or legitimate expectation.

[19] However, on the matter of the provision of reasons the court is required to consider the relevant legislation.

iii. Relevant Legislation.

[20] There are several provisions of the Act which are relevant to these proceedings. Specific reference will be made to sections 8 and 9 of the Act. Section 8 makes provisions for applications to the commission for banking licenses. Section 9 treats with the granting or denial of licenses. Section 9 provides that:

² [2019] EWHC 2006 (Amin) [2020] QB 619 at 85. See also *R (D) v Parole Board* [2018] EWHC 694 (Admin) 2019 QB 285 at 183.

“(1) In considering an application for a license the Commission shall conduct any investigation it may consider necessary to ascertain that the criteria for approval of a licence are met.

(2) A licence shall not be granted by the Commission, unless it is satisfied:

- a) As to the validity of the documents submitted in accordance with section 8;
- (b) That the business plan and financial projections are based on sound analysis under reasonable assumptions and the business plan is feasible;
- (c) As to the financial condition and history of the applicant;
- (d) As to the character of the business of the applicant;
- (e) That the proposed directors and officers are fit and proper in accordance with the criteria under section 88;
- (f) As to the adequacy of the capital structure and compliance with the minimum capital requirement of section 31;
- (g) As to the earning prospects of the applicant;
- (h) As to the suitability of the significant shareholders;
- (i) as to the transparency of the ownership structure.
- (j) As to the acceptable sources of initial capital;
- (k) as to the adequacy of the applicant’s arrangements for governance, including but not limited to accounting, risk management, and internal control systems and records; and
- (l) that the proposed legal and managerial structures will not hinder effective supervision, including supervision on a consolidated basis.

(3) A licence shall not be granted by the Commission for a subsidiary or branch of a foreign financial institution to conduct international banking business unless the Commission is satisfied that in addition to the satisfaction of the requirements in subsection (2), the following requirements are satisfied:

- a) the foreign financial institution is subject to supervision and regulation that is satisfactory to the Commission, including supervision on a consolidated basis within its home country, and

(b) arrangements satisfactory to the Commission for cooperation, coordination, and information-sharing with the home country supervisor are in place.

(4) Within a reasonable time of its receipt of a completed application for a licence and on completion of full due diligence reports on the proposed shareholders, directors, and members of the senior management team, the Commissioner shall either:

(a) grant the licence and may place any restrictions as the Commission considers to be prudent in respect of the licence; or

(b) refuse to grant the licence, if the Commission is of the opinion that it would be undesirable in the public interest to grant the licence or the criteria for approving a license are not met. The Commission need not give any reason for so refusing but shall inform the applicant of the unsuccessful application.

(5) Upon payment of the initial licence fee specified in Schedule I, a licence granted by the Commission under this section is valid until revoked.

(6) A licence granted under this section is not transferable or assignable.

(7) No person making an application for a licence under this Act is entitled to be granted a licence and this shall apply in circumstances where the applicant meets the requirement set out in this Act, the Commission shall have and maintain an absolute right to require and consider additional information and any other reasonable requirements from the applicant before the application for a licence is considered.

(8) The Commission shall have and maintain, the sole, absolute and exclusive right and authority to determine the grant of a licence under the Act and, unless amended by an Act of Parliament, this right shall not be abridged, hindered or challenged or enquired into by any Court within Antigua and Barbuda except by way of judicial review.”

Analysis and the Application of the law

[21] In circumstances where the legislation speaks to the provision of reasons the court must first consider the provisions of that legislation and whether it relates to the circumstance before the court. Section 9 (4) (b) of the legislation provides that in circumstances where the commission refuses “*to grant the licence, if the Commission is of the opinion that it would be undesirable in the public interest to grant the licence or the criteria for approving a license are not met. The Commission need not give any reason for so refusing but shall inform the applicant of the unsuccessful application*”. In the circumstances of this case the commission was exercising a jurisdiction to which the provisions of section 9(4) (b) of the Act are relevant. It is accepted that enactments which seek to oust or restrict the jurisdiction of the court are given strict interpretations. Such enactments run contrary to the operation of the rule of law. Generally, provisions which limit the jurisdiction of the court are interpreted to preserve, at least, the right of judicial review for an aggrieved party.

[22] In the circumstances of this case judicial review is available to the aggrieved party through the provisions of the legislation. In order to ensure that judicial review is an effective remedy to an aggrieved person this court is of the view that the commission must indicate whether the refusal to grant the license arises from an applicant not having met the criteria or that the issuance of a license is undesirable in the public interest.

[23] Counsel for the commission contends, and this court accepts that the nature of the general duties of the commission and its collaborative duties with bodies external to Antigua and Barbuda may give rise to a need for confidential communication between the entities. This court also accepts that in the process of considering an application for a banking license and in the investigative process the commission will necessarily require communication. This communication can be confidential, or its confidentiality may be necessitated by public interest. On this specific matter this court notes that the law makes provisions for the assertion of public interest immunities by a public body to protect against the disclosure of documents which fall within this category³.

³ **Arawak Trust Company Limited v Michael Holding (The Inspector of Banks and Trust Companies)**, Civil Appeal No. 2 of 1994 Sir Vincent Floissac stated that:

“That public interest is a public interest of the nation or the public service that departments and organs of central and municipal governments, the police force and statutory boards, authorities and entities should be in positions adequately, efficiently and effectively to perform their statutory and public duties, functions and responsibilities. This means that information essential to such performance should be transmissible with immunity from disclosure of its source and destination and without fear or danger of harassment intimidation or involvement in litigation.”

[24] The evidence before this court does not indicate that the application was unsuccessful on the basis of their being public interest considerations.

Whether the Decision of the Commission ought to be Quashed

[25] The court faced with a request for such a remedy would consider the entire circumstances of the proceedings. The counsel for Julius Capital Bank Inc. contends that the commission, having failed to provide reasons or adequate reasons for its decision renders the decision arbitrary or unreasonable or unfair or made in bad faith or made for improper purpose. Counsel noted the dicta of the learned judge in the case of **Zenus Williams v Police Services Commission** 2013/0136 (at paragraph 23) where it was indicated that:

“While under common law there is no duty to give reasons, the giving of reasons is “one of the fundamentals of good administration”. The failure to give reasons for a decision that is subsequently challenged on judicial review may give rise to an inference by the court that the Authority had no good reasons for the decision. Lord Keith in **R v Trade Secretary ex parte Lonrho plc** stated: “...if all other known facts and circumstances appear to point overwhelmingly in favor of a different decision the decision maker who has given no reasons cannot complain if the court draws the inference that he has no rational reason for his decision.” Furthermore, the courts have held that a failure to give reasons amounts to arbitrariness. In **R v Secretary of State for the Home Department ex parte Al Fayed** the UK Court of Appeal ruled that the Home Secretary had a duty to indicate to the applicant the area(s) of concern on which he was basing his refusal to grant naturalization in order that the applicant may have an opportunity to allay the Home Secretary’s concern.”

[26] However, it is to be noted, that case is different from the matter at bar. In this matter legislative provisions specifically treat with the provision of reasons.

[27] This court has already indicated its view that the commission ought to provide to an aggrieved applicant the limb upon which the refusal was premised. If the court were to require reasons to be given the court would be imposing upon the decision-making body a duty to provide reasons when no such duty exists at common law and is excluded under the relevant legislation. However, an indication by the commission of which limb is applicable would better give effect to provisions which

grant an aggrieved party the right to pursue judicial review proceedings. In this regard such an indication by the commission could allow an aggrieved applicant to consider its position and exercise its right under section 9(7) to mount an application for judicial review.

[28] Before concluding the court would address the matter of whether Julius Capital Bank Inc had a legitimate expectation that it would be granted a license.

Legitimate Expectation.

[29] Julius Capital Bank Inc contends that it holds a legitimate expectation that they would be granted a license in light of the fact that a license was previously granted on 15th May 2019. The claimant also contends that once it supplied an adequate response to the concerns raised by the commission regarding the matters published on the Labuan International Business Financial Services website in respect of Blue Investment Bank Inc and Blue Wealth Management Ltd. then the banking license ought to have been issued.

[30] As stated by Lord Neuberger in the Privy Council case from Trinidad and Tobago of **United Policyholders Group v Attorney General of Trinidad and Tobago**⁴ a legitimate expectation arises where “a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be “clear, unambiguous and devoid of relevant qualification”, according to Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569, cited with approval by Lord Hoffman in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] AC 453, para 60.

Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body’s statutory duty- see e.g. *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629,636, per Lord Fraser Tullybelton. Thirdly, however as much as a person is entitled to say that a statement

⁴ [2016] UKPC 17.

by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement. This third point can often be elided with the second point, but it can go wider: for instance, if, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or fortiori should, reasonably decide not to comply with the statement”⁵. A legitimate expectation provides an interest which enables a person to seek the protection of the court in judicial review proceedings.

[31] An expectation may arise from a statement or a course of dealings by the public body. In these proceedings there is no evidence that the commission extended a promise. There is also no practice or course of dealings of any nature to the representatives of the Julius Capital Bank Inc or other persons which would give rise to an expectation. There is no evidence of an unambiguous, widespread, or recognized approach which would support a continued commitment by the commission⁶. Additionally, this court notes that in circumstances in the banking sector where real time information is necessary for the consideration of any application there is no basis for the assertion of a legitimate expectation because a previous application may have been granted. Further, the legislation itself indicates that the commission may impose conditions on the issuance of license such conditions may include the nature of activities that the financial institution may engage⁷. Still further, section 9(7) of the Act also provides that “*no person making an application for a licence under this Act is entitled to be granted a licence and this shall apply in circumstances where the applicant meets the requirements set out in this Act; the Commission shall have and maintain an absolute right to require and consider additional information and any other reasonable requirements from the applicant before the application for a licence is considered*”. Having considered these matters, this court is of the view an assertion of a legitimate expectation cannot be made by an applicant. Thus, the court has determined that the Julius Capital Bank Inc. does not have legitimate expectation that a Class 1 Banking license would be issued in its favour by the Commission.

[32] As a consequence of the foregoing this court orders that:

- a. The correspondence of 16th April 2021 be set aside.

⁵ [2016] UKPC 17 at para 37-38.

⁶ R (Davies) v HMRC [2011] UKSC 47.

⁷ Section 12.

- b. The commission to consider the application and provide information as herein determined to be required.
- c. Parties to be heard on costs on a date to be fixed.

Justice Marissa Robertson

High Court Judge

By The Court

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Registrar