**THE REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE
Port of Spain

Claim No. CV2018-01550

**IN THE MATTER OF AN APPLICATION BY DWAYNE IFILL FOR AN ADMINISTRATIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES 1998**

AND

**IN THE MATTER OF SECTION 4 AND 5 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ACT 4 OF 1976**

AND

**IN THE MATTER OF THE FAILURE OF THE AIRPORTS AUTHORITY TO ISSUE AND OR RE-ISSUE HIS EMPLOYEE ACCESS SWIPE-CARD**

BETWEEN

**DWAYNE IFILL**

Claimant

AND

**THE AIRPORTS AUTHORITY OF TRINIDAD AND TOBAGO**

Defendant

**Before the Honourable Mr. Justice R. Rahim**

Date of delivery: October 31, 2018

Appearances:

Claimant: Mr. P. Carter instructed by Mr. D. Mitchell

Defendant: Mr. S. Fabian

**JUDGMENT**

1. This is a claim for judicial review. The facts alleged by the claimant, an employee of Swissport Ltd at the Piarco International Airport are as follows. On the 7th September 2017 he was stopped by police officers while driving and informed that he was being arrested in relation to inquiries into alleged drug exportation at the said airport. His home was searched and his Restricted Area Pass (RAP) (issued by the respondent) was confiscated. The claimant was eventually released but the pass was not returned to him. His attorney wrote several letters seeking the return of the pass. By response of the 15th November 2017 under the hand of the ACP North East, the police informed him that his pass was handed over to the Respondent on the 5th October 2017. To date the pass has not been returned and the claimant has been unable to return to his place of employment at the airport. The claim is therefore one to judicially review the decision of the respondent to revoke and/or to refuse to re-issue the pass to the claimant (the decision).

2. The sole remedy sought in this claim (after the court's previous ruling on an application to set aside leave) is a declaration that the decision of the Respondent made on the 29th January 2018 not to approve the reissuance of the claimant's airport pass is unlawful, illegal, irrational and unreasonable having been arrived at in circumstances which were procedurally unfair and/or in breach of the principles of natural justice. The essence of the submissions before the court is that of the breach of the principles of natural justice simpliciter.

3. Several affidavits were filed. The claimant filed an affidavit in support of the application for leave sworn to on the 30th April 2018 and filed on the 1st May 2018. He also filed an affidavit in support of his Fixed date claim form on the

16th May 2018 and one in reply of the 20th August 2018. The defendant filed one affidavit in opposition by Estate Superintendent Avril Daly-Brassy on the 30th July 2018. Both parties filed other affidavits in support and against an application brought by the defendant to set aside leave. That application was determined and written reasons delivered. The matters set out in those affidavits are no longer directly relevant to the issues the court must decide in the substantive claim save and except in some limited instances.

The issues for determination

4. These are as follows;
   a. Whether the defendant was duty bound to abide by the principles of natural justice in the exercise of its discretion to revoke and/or refuse to re-issue the pass.
   b. If it is found that the defendant was so bound, then did the defendant in fact breach the principles of natural justice.
   c. If the answer to b is yes, then are the actions of the defendant excusable on the basis of being in the interest of national security.

The evidence

5. It is accepted by both sides that the person who makes the application for the pass is the employer. In this case Swissport. Further it is not in issue that Swissport wrote to attorney for the claimant on the 5th October 2017, informing him, inter alia, that the issuance or reissuance of the pass is a matter that is out of their remit. That the pass was seized by the Trinidad and Tobago Police Service as part of the execution of a warrant on the claimant on the suspicion that he was involved in an attempt to traffic cocaine to the United States of America via a Caribbean Airlines flight.

Swissport also informed attorney for the claimant that it wrote to the defendant enquiring into the status of the badge. (*see exhibit "**DI2**", third letter, affidavit of the claimant of the 1st May 2018*).

6. It is also not in dispute that the claimant was not given an opportunity to be heard as to why the pass ought not to have been revoked. It is accepted that the claimant was never charged following the police investigation.

7. The evidence of the defendant by way of the affidavit of Avril Daly-Brassey is instructive in this regard. Her affidavit sets out the process surrounding the issuance and revocation of passes generally and the subject pass specifically. It is necessary to set out the process in some detail. She deposed as follows.

Issuance of the Restricted Area Pass generally

8. The Restricted Areas of both the Piarco International Airport (PIA) and the ANR Robinson International Airport on Tobago (ANRIA) are outlined in the first and second schedules of the *Airports (Restricted Areas) Order* and are subject to amendment, as determined by the Minister of National Security, on the advice of the Authority's Security Committee, pursuant to the Minister's powers to do so, under **section 31** of the **Airports Authority Act.**

9. The Authority's Security Committee, in accordance with **section 4** of the **Airports Authority Act**, consists of: 1) a Chairman to be appointed by the Chairman of the National Security Council, 2) the Chairman of the Authority, 3) the Chief of Defence Staff, 4) the Commanding Officer of the Regiment, 5) the Commissioner of Police, 6) the Chief Fire Officer and 7) a senior officer appointed by the Chairman of the National Security Council.

10. As it relates to applications for a Restricted Area Pass, all applications are made subject to the *Aerodrome Identification Media System ('AIMS') Policy Document*, which is approved by the Trinidad and Tobago Civil Aviation Authority ('TTCAA') and is designed to ensure the application of necessary security controls and measures in PIA, as between the restricted and unrestricted areas. AIMS also outlines the roles and responsibilities of the applicants, their employers and the Respondent. A copy of the policy is annexed to the affidavit of the deponent.

11. As outlined at clause 2.1.2, "*Airport restricted areas are categorized as areas where operations vital to the continued safety of civil aviation at PIA are carried out.*" Under the AIMS policy, the issuance of a pass is based on the requirements of:

    a. the **National Civil Aviation Security Programme**, 6.3.1;

    b. the **Trinidad and Tobago Civil Aviation [(No. 8) Aviation Security) Regulations 2004 (1), (2) and (3)**;

    c. the **International Civil Aviation Organization Annex 17** and other related documents

    **d. Regulation 7(b) of the Airports Authority of Trinidad and Tobago**

12. As outlined at page two of the AIMS policy document, the policy is meant to evolve and change, in accordance with new or amended national or international legislation or changes to the **National Civil Aviation Security Programme ('NCASP')**, as and when required. All such amendments are to be brought to the attention of the stakeholders upon completion. The version of the AIMS policy document presently in use was approved in 2008,

and is currently in the process of undergoing a review by the Authority's Security Department, in collaboration with the TTCAA, in order to meet the contemporary challenges and threats faced by international airports.

13. The validity of the Restricted Area Pass is one year, except in exceptional cases. The discretion to extend the validity of the pass is vested within the power of the Head of Security. The position of Head of Security was a temporary position at the Authority which was held by Earl Alfred (now retired.) The duties and responsibilities of the Head of Security as relates to approval, disapproval and revocation of RAPs are currently carried out by the Deputy General Manager Security and the deponent Ms. Daley-Brassey.

Application Process

14. The procedure for applying for the RAP is outlined at **section 6** of the **AIMS** policy document. The requirement is that the requesting company, organization or agency makes such an application in writing addressed to the Authority's Head of Security. That application must include:

a. A letter of request signed by a senior official of the requesting company/ organization on their letterhead.
b. The Authority's completed application form signed and stamped by a senior official of the requesting company/organization;
c. A police certificate of character (not exceeding three months prior to the date of application);
d. A background check of the individual in respect pf whom the pass is sought;
e. Proof of the individual's participation in the Authority's Security Awareness Programme conducted at its Aviation Security Training Centre in Mausica.

f. The requesting company, organization or agency must prove that there is a need to conduct business in the restricted area and must further satisfy the Authority of the need for access to the restricted area by the individual.

15. As outlined at clause **6.1.5** of the **AIMS** policy document, the Head of Security expressly reserves the right to approve or disapprove applications for a RAP.

16. In terms of the operation of the screening process, once all of the information is received by the Authority's Security Department, including the results of the background check and police certificate of character, the applicant then undergoes a secondary assessment by the Authority's Investigation Department. That Investigation Department comprises Estate Security Officers of the following ranks: one Inspector, one Sergeant; one Corporal and five Estate Constables. Once the report of the Investigation Department is completed, it is forwarded to Daly-Brassey who then reviews it and either recommends its approval or disapproval. The recommendation if then forwarded to the Deputy General Manager Security, where a decision is made and then the results of same are communicated to the requesting agency.

17. In circumstances where an omitted fact or security anomaly is identified by the independent background check or the Authority's Investigations Department, the Authority invites the applicant to whom the RAP is to be issued, to an interview in order to clarify and make representations and/or explain(s) the reason for the omitted fact or security anomaly. It is to be noted that by virtue of **clause 1.5.1** of the **AIMS** policy document, the RAP remains the property of the Airports Authority of Trinidad and Tobago and is for use only when the holder is on official duty.

18. It is therefore the position of the defendant that it issues the pass in keeping with the criteria set out in the AIMS policy. That the discretion is exercised at two stages. Firstly, by the Superintendent, after consideration of all of the matters contained in the application and security reports and secondly by the Deputy General Manager who it appears has the final say on the issue. According to the evidence of the Defendant, any anomalies or queries are sorted out by personal interviews with the applicants.

The claimant's RAP

19. According to the evidence of the defendant, between 2010 and 2014, applications by his employers were made to the Authority by Servisair; between 2015 and 2017, such applications were made by Swissport formerly known as Servisair. All such applications for an RAP by the claimant's employers were approved by the Authority, as the claimant satisfied the relevant criteria at those points in time. Copies of the applications were annexed to the affidavit of Ms. Daly-Brassey.

20. The defendant admits that a letter of the 29th January 2018 was dispatched by it to attorney for the claimant subsequent to the revocation of the RAP. There is on the evidence a dispute as to whether Daly-Brassey was made aware of the other correspondence sent by the claimant to the defendant over the months before January 2018 but the resolution of that dispute is wholly immaterial to the issues in this case. Suffice it to say that in addition to setting out that the discretion as to whether the RAP should be re-issued was one solely within the purview of the defendant, and that the re-issue of the RAP was not approved, no reason was provided in the said letter of the 29th January for the defendant's refusal to re-issue the pass.

21. The evidence relied on by the defendant further sets out the importance of the security component and concerns when issuing such passes. Ms. Daly-Brassey deposes as follows.

22. As one of the country's international airports, PIA facilitates multiple daily direct flights to international destinations, such as the United States of America which require ongoing assessments of those who are provided with unescorted access to security restricted areas. Trinidad and Tobago continues to work with its global partners to prevent acts of unlawful interference with civil aviation particularly with respect to crime, counter terrorism and counter narco-trafficking. Between 2017 and 2018, twelve persons were arrested and charged with narcotics offences arising out of their use of the privileged access via the RAPs. The Authority's security operations are frequently audited by its local regulator, TTCAA, the Transportation Security Administration ('TSA'), which is an agency of the United States of America's Department of Homeland Security, and the International Civil Aviation Organization ('ICAO'), a global civil aviation organization, of which Trinidad and Tobago is a member. During these audits, significant focus is placed on testing the security of the Authority's issuance of passes to security restricted areas at the nation's airports.

23. PIA and ANRRIA both being major ports of ingress and egress for Trinidad and Tobago, the Authority's Security Department continually liaises with national security agencies, such as the TTPS, as well as other specialized units within the TTPS, such as the Organized Crime and Intelligence Unit ('OCIU') formerly known as 'OCNFB' to ensure the security of its borders. Additionally, the Authority also liaises with the international equivalent of the OCIU, as well as law enforcement agents globally wherein sensitive

intelligence information is shared between organizations, to assist in the safety and security of airports internationally.

24. There have been circumstances in which persons whose employment was terminated by their employers, failed to return their assigned RAPs and the Authority's Security Department has had cause to liaise with Trinidad and Tobago Police Service ('TTPS'), to effect the recovery of the RAP from such persons. The RAP is such an extremely security sensitive item of media, subject to manipulation by those with criminal intentions, seeking to gain access to security restricted areas of the nation's airports, which could have serious effects on the security of the airports.

25. Further, clause 1.4 of the **AIMS** policy document sets out that the policy is designed to augment the existing security measures at the PIA, *"by exercising and implementing vigorous standards that would qualify individuals to obtain unescorted access to the security restricted areas.*"

Reasons for the not re-issuing the Pass

26. In this regard, as stated above no reason was given to the claimant by way of the letter of the 29th January 2018. Further, the evidence on the part of the defendant in so far as reasons for the exercise of the discretion are concerned are to be found in the last few paragraphs of the affidavit of the defendant to the extent that they purport to be reasons. They are as follows.

27. When decisions are made to revoke a RAP, those decisions are not made individually; neither are they made capriciously or in bad faith. The decision is arrived at, after a careful, operational and managerial assessment of the security risk, based on credible information that is acquired by the security

department. It is only then that a decision is made to revoke a RAP. In the instant case, the decision that was made to revoke the Claimant's RAP was based on credible information of a sensitive nature that in the circumstances are not disclosable, but which are referenced at *D.I.4* of the Applicant's Affidavit in Support of Application for Judicial Review filed on 16th May 2018, which states that as at November 2017 there was an ongoing investigation with respect to Mr. Ifill. Credible information of a sensitive nature remains undisclosed in order to maintain the operational and confidential integrity of the security operations at the nation's airports, as well as its ongoing relationship with local and international law enforcement partners.

28. That there are circumstances where there are real concerns about national security, that the obligations of fairness may have to be modified or excluded.

29. In the specific national security circumstances as outlined above, the defendant submitted that the decision to 'not approve' the reissuance of the Claimant's RAP was arrived at unlawfully, illegally, irrationally, unreasonably and was not arrived at in circumstances that were procedurally unfair and/or in breach in of the rules of Natural Justice.

30. In essence therefore the defendant has refused to give reasons for the exercise of its discretion to the High Court of Justice on the basis that it is in the interest of the national security of Trinidad and Tobago to withhold those reasons from the High Court of Justice, the third arm of the state. In essence it therefore has provided no basis for the decision to refuse to re-issue save and except that it is entitled to withhold relevant information.

The principles of natural justice

31. In ***Ceron Richards v The Public Service Commission and The Attorney General of Trinidad and Tobago***, CV2016-04291 this court summarized the principles of natural justice at paragraphs 70-71 as follows;

*"70. The rules of natural justice require that the decision maker approaches the decision making process with 'fairness'. What is fair in relation to a particular case may differ. As pointed out by Lord Steyn in Lloyd v McMahon [1987] AC 625, the rules of natural justice are not engraved on tablets of stone. The duty of fairness ought not to be restricted by artificial barriers or confined by inflexible categories. The duty admits of the following according to the authors of the Principles of Judicial Review by De Smith, Woolf and Jowell;*

*a) Whenever a public function is being performed there is an inference in the absence of an express requirement to the contrary, that the function is required to be performed fairly. Mahon v New Zealand Ltd (1984) A.C. 808.*
*b) The inference will be more compelling in the case of any decision which may adversely affect a person's rights or interests or when a person has a legitimate expectation of being fairly treated.*
*The requirement of a fair hearing will not apply to all situations of perceived or actual detriment. There are clearly some situations where the interest affected will be too insignificant, or too speculative or too remote to qualify for a fair hearing. This will depend on the circumstances.*

*71. In delivering the decision in Feroza Ramjohn v Patrick Manning [2011] UKPC 20 Their Lordships made it abundantly clear that what is fair in any given circumstance is entirely dependent of the facts of the particular case.*

*This is what the court said at paragraph 39. "As is trite law, the requirements of fairness in any given case depend crucially upon the particular circumstances – see, for example, R v Secretary of State for the Home Department Ex p Doody [1994] 1 AC 531, 560. Almost always, however, if a decision is to be taken against someone on the basis of an allegation such as that made here, fairness will demand that they be given an opportunity to meet it. A characteristically illuminating statement of the law appearing in Bingham LJ's judgment in R v Chief Constable of the Thames Valley Police Ex p Cotton [1990] IR LR 344 (para 60) deserves to be more widely known:*

*"While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:*

*Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance."*

32. In ***Ganga - Persad Kissoon v The Honourable Prime Minister Patrick Manning and Service Commission*** Civil Appeal 22 of 2006, Para 50

Mendonca J.A. stated as follows;

"*However even in some privilege cases the Courts have ruled that the principles of natural justice apply. As was pointed out in De Smith's Judicial Review (6th ed.) (paras. 7-005- 7-006) to exclude all such cases could lead to anomalies and injustice. The fact therefore that the Appellant is seeking a privilege in the form of an appointment to which he has no entitlement is not sufficient to say that the principles of justice should not apply. The principles of fairness may apply where there is any interest deserving of protection. As*

*the ex parte Fayed case demonstrates, it may apply where a person's reputation is at stake. So too in my judgment, the principles of fairness may apply where what is at risk is the person's career or livelihood. It is at risk not in the sense that it will come to an end…"*

33. The claimant has argued that the defendant being responsible for the performance of a public duty, it is duty bound to apply the principles of natural justice and in particular to hear the claimant prior to making an adverse finding against him in relation to the re-issue of the RAP. He relies on the dicta of Their Lordships of the Privy Council in ***Feroza Ramjohn v Patrick Manning*** [2011] UKPC 20 wherein the Board recited the general statement of principle of the duty to act fairly when their Lordships said at paragraph 39:

*" As is trite law, the requirements of fairness in any given case depend crucially upon the particular circumstances – see, for example, R v Secretary of State for the Home Department Ex p Doody [1994] 1 AC 531, 560. Almost always, however, if a decision is to be taken against someone on the basis of an allegation such as that made here, fairness will demand that they be given an opportunity to meet it. A characteristically illuminating statement of the law appearing in Bingham LJ's judgment in R v Chief Constable of the Thames Valley Police Ex p Cotton [1990] IR LR 344 (para 60) deserves to be more widely known.*

*While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:*

i. *Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.*

ii. *As memorably pointed out by Megarry J in John v Rees [1970] Ch 345 at p402, experience shows that that which is confidently expected is by no means always that which happens.*

iii. *It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.*

iv. *In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.*

v. *This is a field in which appearances are generally thought to matter.*

vi. *Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied.*"

34. The claimant also relied on the dicta of this court in ***The All Tobago Fisherfolk Association v The Tobago House of Assembly*** CV2014-01602 where at paragraph 56 this Court commented that:

"The duty of fairness ought not to be restricted by artificial barriers or confined by inflexible categories. The duty admits of the following

according to the authors of the Principles of Judicial Review by De Smith, Woolf and Jowell;

i. Whenever a public function is being performed there is an inference in the absence of an express requirement to the contrary, that the function is required to be performed fairly. ***Mahon v New Zealand Ltd*** (1984) A.C. 808.

ii. The inference will be more compelling in the case of any decision which may adversely affect a person's rights or interests or when a person has a legitimate expectation of being fairly treated.

iii. The requirement of a fair hearing will not apply to all situations of perceived or actual detriment. There are clearly some situations where the interest affected will be too insignificant, or too speculative or too remote to qualify for a fair hearing. This will depend on the circumstances."

35. His argument is that the following circumstances demanded that the applicant be given an opportunity to be heard before a decision was made to revoke his RAP.

a. The decision had the resultant effect of terminating the applicant's employment;

b. It was the respondent's policy to give notice of an intention to revoke or refuse to reissue a RAP and, moreover, to afford the passholder a hearing so that he could make representations in response to such an intention;

c. The virtually automatic renewal of the applicant's pass on previous occasions as well as its recent renewal lead to a legitimate expectation that he would be heard before a decision was taken to revoke it.

36. The defendant submits that the decision of the defendant is not amenable to judicial review as the defendant does not carry out a public law function. It relies in that regard on the learning and approach of Kangaloo J.A. in ***NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Limited and Hafeez Karamath Limited*** Civ App. No. 95 of 2005 where the learned Judge states at paragraph 18;

> "*In considering whether a decision can be judicially reviewed, it is critical to identify the decision and the nature of the attack on it. Unless there is a public law element in the decision, and unless the allegation involves suggested breaches of duties or obligations owed as a matter of public law, the decision will not be reviewable.*"
>
> and
>
> *"In order for the applicants to be entitled to any relief by way of judicial review, they must demonstrate that the above allegations involve infringement of rights to which they were entitled as a matter of public law."*

37. The defendant also relied on the case of the English Court of Appeal in ***R (on the Application of Tucker) v Director General of the National Crime*** *Squad* [2003 EWCA Civ 57]. In *Tucker*, the Appellant was a Detective Inspector in the Derbyshire Constabulary, which he joined in 1978. In 1996 he was seconded for five years to the Regional Crime Squad, which subsequently became The National Crime Squad ("NCS"). In January 2001 his secondment was extended until May 2002, but on 28 April 2001, it was terminated and he was summarily returned to his local force. This termination, followed a cover operation into drug related crime, which saw officers arrested for drug related sanctions and some facing disciplinary sanctions, whilst others did

not. The appellant did not receive any disciplinary sanctions when he returned to his local force. His claim for judicial review of that decision failed before the trial Judge, Harrison J, who held that the decision was amenable to judicial review but that the Director General of the NCS had acted fairly notwithstanding the absence of reasons for the decision and the lack of opportunity for the Appellant to make representations.

38. The substance of the dicta is set out in the submission of the defendant as follows. Baker LJ., at paragraphs 13-14 outlined:

*"13. The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative Court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met. There are some cases that fall at or near the boundary where the court rather than saying the claim is not amenable to judicial review has expressed a reluctance to intervene in the absence of very exceptional circumstances. See e.g. R v British Broadcasting Corporation ex parte Lavelle [1983] 1All ER 241.*

*14. The starting point, as it seems to me, is that there is no single test or criterion by which the question can be determined. Woolf L.J, as he then was, said in R v Derbyshire County Council ex parte Noble [1990] ICR 808, 814E:*

> *"Unfortunately in my view there is no universal test which will be applicable to all circumstances which will indicate clearly and beyond peradventure as to when judicial review is or is not available. It is a situation where the courts have, over the years, by decision in individual cases, indicated the approximate divide*

*between those cases which are appropriate to be dealt with judicial review and those cases which are suitable dealt with in ordinary civil proceedings."*

39. And at paragraph 16:

*"16. What are the crucial factors in the present case? In Leech v Deputy Governor of Parkhurst Prison [1988] AC 533 Lord Oliver of Aylmerton said that the susceptibility of a decision to the supervision of the courts must depend, in the ultimate analysis, upon the nature and consequences of the decision and not upon the personality or individual circumstances of the person called on to make the decision. I regard this as a particularly important matter to keep in mind in the present case."*

40. The *Tucker* Court of Appeal, went on to outline a helpful three stage test in *The Queen on the application of Hopley v Liverpool Health Authority & Others (unreported) 30 July 2002*, when considering whether a public body with statutory powers was exercising a public function amenable to judicial review, at paragraph 24: *These are:*

*i) Whether the defendant was a public body exercising statutory powers*

*ii) Whether the function being performed in the exercise of those powers was public or private*

*iii) Whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration. "*

41. *"25. Applying those criteria, with which I agree, to the present case it seems to me clear that the third criterion was not met. The Deputy Director General in sending the Appellant back to his force was not performing a public duty owed to him. The decision taken in relation to the Appellant was*

*specific to him. Other officers were dealt with differently. Some were arrested; some were sent back to be disciplined; one was retained with different duties. But the Appellant was simply sent back. It was a decision tailor-made to him…"*

Performance of a public duty

42. In the court's view, the starting point must be to examine the **nature of the decision**. In the present case, the decision is one not to re-issue a pass. The effect of that decision is at least two-fold. Firstly, the decision affects the claimant in that if the inevitable consequence is that he is unable to resume employment with his employer without a RAP. It in effect terminates him. But the decision has a much wider effect. Such a decision ultimately affects all employers that operate within the restricted area. So that the decision not to re-issue passes impacts on the ability of the service provider to deliver its services within the public space. That being said there is no doubt in the court's mind that the function being performed by the defendant could be any other than a public function being so performed by the defendant within its statutory remit to control access to the restricted areas. It certainly does not fall within the category of the performance of private law.

43. The **nature of the attack on the decision** is that the claimant was entitled to be heard as part of the process of fairness which the body was duty bound to employ when performing its public function. So that the attack is one against the adequate performance of the public function by the defendant and the breach of that duty as a matter of public law. It is the claim of the claimant that for the defendant to have deprived him of his employment by way of refusing him access to the restricted area, after he had been issued the RAP on several prior occasions and after he was not found to have been

liable for any offence or action, in the performance of its statutory obligation it ought to have given him the opportunity to be heard as to why his RAP should be re-issued prior to unilateral taking of the decision. In that regard, it is also clear to the court that the decision in this case was not only that of the deputy head but also of the defendant itself.

44. But in the court's view, the argument of the claimant is misconceived. The facts of ***Tucker*** illustrate the point succinctly. The duty must be one that is owed to *the claimant* in the particular circumstances. At its highest, the duty in this case is owed to users (the public at large) and operators of the facilities, including the state as a body responsible for international air transportation and to the service providers one of which is the employer of the claimant. The public duty is not owed to the claimant in these particular circumstances. Similarly in Tucker, it was clear that the decision of the Deputy Director General was tailored to specifically meet the circumstances of the Appellant in that case. In the present case, the refusal to reissue the pass applies on the evidence only to the claimant and the defendant was not preforming a public duty owed to the claimant. The argument is a much stronger one in favour of the defendant performing a public function and owning a public duty to the employer Swissport but Swissport has shown no interest in these proceedings and makes no such complaint. Access to the restricted areas is a privilege and not an entitlement held by the claimant.

45. Further, the claimant has attempted to raise the issue of legitimate expectation. This submission is unsustainable, having regard to the court's ruling. No promise was made to the claimant that his RAP would be re-issued and he had no reasonable basis to infer that this would be the case.

46. The court would therefore answer the question as to whether the defendant was duty bound to abide by the principles of natural justice in the exercise of its discretion to revoke and/or refuse to re-issue the pass in the negative, there being no public duty owed to the claimant in the circumstances of this case. That being said, it is not that the court must be seen to be saying that in no case could a public duty be owed by the defendant to an individual who is employed by a service provider and is afforded access to the restricted areas. However, in the circumstances of this case, the duty owed was not owed to the claimant and it does not lie within the remit of the claimant to complain of unfairness towards him in his personal capacity.

47. The court would therefore dismiss the claim on this issue and sees no reason to consider the other issues raised.

48. The claimant shall pay to the defendant the costs of the claim to be assessed by the Registrar in default of agreement.

Ricky Rahim

Judge