

CITATION: *Nichaloff v NT Licensing Commission* [2009] NTMC 031

PARTIES: COLIN NICHALOFF
v
NT LICENSING COMMISSION

TITLE OF COURT: LOCAL COURT

JURISDICTION: Appellate Jurisdiction – Private Security Act

FILE NO(s): 20817419

DELIVERED ON: 22 July 2009

DELIVERED AT: Darwin

HEARING DATE(s): 10 July 2009

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Applicant: In person
Respondent: Mr Smythe

Solicitors:

Applicant: Self represented
Respondent: Solicitor for the Northern Territory

Judgment category classification: A
Judgment ID number: [2009] NTMC 031
Number of paragraphs: 27

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20817419

[2009] NTMC 031

BETWEEN:

COLIN NICHALOFF
Applicant

AND:

NT LICENSING COMMISSION
Respondent

REASONS FOR DECISION

(Delivered 22 July 2009)

Ms Sue Oliver SM:

1. Mr Colin Nichaloff has appealed the decision of the Northern Territory Licensing Commission refusing his application dated 15 May 2008 for both a security officer license and a crowd controller license. The Commission is the licensing authority for those licenses under the *Private Security Act*.
2. Section 15 of the *Private Security Act* requires the Licensing Commission to determine whether a person is “an appropriate person” to hold a license. The basis of the refusal for the licenses was that Mr Nichaloff was not an appropriate person because he has convictions for offences which are “disqualifying offences”. Section 15(7) of the Act provides that a person is not an appropriate person to hold a license if within 10 years of the application the person has been convicted of a disqualifying offence as prescribed in the relevant Regulation or has an equivalent interstate conviction. If the applicant has a disqualifying offence, the Licensing Commission has no discretion to consider the matter further and is required to refuse the license. However, section 30 of the Act allows for an applicant

to appeal against the licensing authority's decision to refuse to grant a license even where that refusal is a result of the identification of a disqualifying offence under section 15(7). In effect the determination of whether the applicant should be licensed is passed to the Local Court for determination. Section 34(4) allows the Local Court to grant a license to an appellant who has a conviction for a disqualifying offence if it is satisfied that the appellant is, on the balance of probabilities, "a suitable person" to be granted such a license.

Section 34 – Applicable Test – “a suitable person”

3. The Act uses different terminology between the determination by the licensing authority (that the applicant is an “appropriate person” to hold a license) and that to be applied by the Local Court on appeal (a “suitable person” to be granted a license). It is possible that different terminology may have been used simply because section 15(7) declares that a person who has convictions for disqualifying offences is **not** “an appropriate person” and the expression “suitable person” has therefore been substituted and is intended to have the same meaning.
4. Section 15(5) of the Act imposes a limitation on the matters that can be considered by the licensing authority in determining whether a person is not “an appropriate person”. The licensing authority may only consider those matters set out in sections 15(6) and 15(7). Section 15(7) provides for the disqualifying offences. Section 15(6) provides a list of matters for consideration “as indicating that the person may not be an appropriate person”. These are:
 - (a) that in dealings in which the person has been involved, the person has
 - (i) shown dishonesty or lack of integrity; or
 - (ii) used harassing tactics;
 - (b) that the person habitually consorts with reputed criminals;
 - (c) that the person has taken advantage, as a debtor, of the laws of bankruptcy;

- (d) that the person is suffering from an illness that makes them unfit to work in the security industry;
- (e) that the person has been found guilty of an offence;
- (f) information provided by a person or body responsible for the issue of licenses under an Act of the Territory, the Commonwealth or a State or another Territory of the Commonwealth;
- (g) evidence given in a court of the Territory, the Commonwealth or a State or another Territory of the Commonwealth or a commission of inquiry.

5. The expression “appropriate person” is not in my view the equivalent of the expression “fit and proper person” which is more commonly used in licensing legislation. Although the listed criteria for consideration encompass much of what might be considered under the latter phrase, it is clear from authorities that determining whether or not a person is “fit and proper” is an expression of broad compass defined by the context in which it appears. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 Toohey and Gaudron JJ at 380 said:

“The expression “fit and proper person”, standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of “fit and proper” cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question”.

6. Consequently, because the determination of whether a person is an “appropriate person” is limited to consideration of those matters set out in sections 15(6) and (7) it cannot be the equivalent of the expression “fit and proper person”. General reputation for example is not a matter that may be

considered though it may, as the passage from *Australian Broadcasting Tribunal v Bond* suggests, provide an indication of public perception relevant to a person's suitability for the qualification in question. Whilst a number of the matters in section 15(6) are ones that might be form the basis for an assessment of general character they are in effect couched in negative terms, that is, matters that would form evidence of bad character with no apparent ability of the licensing authority to have regard to matters that would support the contrary view, for example work record and references in that regard.

7. On the other hand, the expression "suitable person" has been said to have the same meaning as the expression "fit and proper". In *Forbes v Road Transport Authority* [2004] ACTAAT 38, the Tribunal observed that there was not a significant difference between the expression "not a suitable person" in the legislation under its consideration and the expression "not a fit and proper person" commonly found in licensing legislation which in *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 127 ALR 699 was said by the Federal Court to involve an evaluative judgement of wide scope.
8. In my view the proper interpretation of the expression "suitable person" as used in section 34 of the Act is that it provides the Court with the power to determine on a broad evaluative basis whether a license ought to be granted. In other words the court is to weigh up both the negative and positive features of the appellant and his or her background in the context of the license sought. The Court is not confined in that exercise either by the existence of a "disqualifying" offence nor in my view is it restricted to a consideration of only those matters set out in section 15(6). It requires consideration of the nature of the license and the nature of the work done pursuant to the license and whether there would be public confidence in the appellant performing the duties attached to the license. (*Pav and Commercial and Private Agents Board* (1987) 143 LFJS1 at 12). A variety

of matters must be considered such as the appellant's prior criminal history, including the nature and circumstances of the offending, general reputation in the community, any formal or other qualifications relevant to the performance of the duties and general character as disclosed in evidence before the Court. I would agree with the view expressed by the Chief Magistrate in *Johnson v Northern Territory Licensing Commission* [2006] NTMC 010 that a major purpose of this licensing regime is to ensure that people prone to violence are not placed in situations where they are likely to resort to it when carrying out their duties under the license, for example as a crowd controller. I would add that in relation to a security officer's licence the licensing regime is to ensure that persons tasked with the job of guarding or patrolling another person's property are not ones whose honesty with regard to other person's property is in question.

9. The onus is on the appellant to show on the balance of probabilities that he is a suitable person to be granted both a security license and a crowd controller's license. In this matter the appellant relied on both affidavit material and his oral evidence at the hearing. The respondent likewise filed an affidavit of material relevant to the appeal.

Is the Appellant a “suitable person”?

10. In summary, Mr Nichaloff's case is that, notwithstanding his past criminal convictions, he has with maturity, developed into a responsible family man and community member and that he requires a security license for the purpose of establishing his own business. He wishes to establish a unique service to members of the Palmerston community, both business and private. From his evidence, it is clear that he sees this as not simply as a business opportunity for himself but as a means of supporting his local community. The proposed business would act as a first response to control and protect and support clients prior to the arrival of police at an incident. It may involve some form of rescue or protection of client's children from gang

fight situations. It is an ambitious proposal but the question of its viability is not in my view a matter for consideration in terms of granting the licenses sought.

Work History

11. Mr Nichaloff said that he has now been employed at the NT Museum and Arts as a surveillance officer responsible for monitoring security cameras and securing the building. He has held that position for approximately four months. Prior to this he was running a fish and chip shop business which although initially successful was ultimately sold by him as a result of the business difficulties arising out of high operational costs and taking on too much in terms of new equipment and products. He has been left with an outstanding loan which he said he is currently negotiating with the lender. He has worked various positions including working for the Saville Hotel and for Pro Active Security.

License History

12. There is some relevant history of Mr Nichaloff's applications for security officer and crowd controller licenses. The history of the previous appeals is given in the affidavit of Jodi Lea Kirstenfeldt and form part of the evidence.
13. In 2003 Mr Nichaloff was refused a security license because he had a conviction for common assault in 1995. At that time, although not now, common assault was a disqualifying offence. Mr Nichaloff appealed the decision and was granted a license which he held from 2 January 2004 to 2 January 2005. He did not seek renewal at that time. On 10 January 2005 Mr Nichaloff was convicted of three offences under the *Misuse of Drugs Act* which constitute disqualifying offences. In November 2007 Mr Nichaloff made an application for a security officer and crowd controller license. He made that application for the purpose of allowing him to establish the business which he outlined in his evidence before me. He appealed the

refusal to grant a license. The appeal was dismissed on the basis that he had been dishonest in his application to the Commission about his criminal history. In his application, Mr Nichaloff had ticked 'no' to the question on the application form of whether in the last 10 years he had been convicted of a disqualifying offence. Mr Nichaloff's evidence before this Court was that he was fully aware that his drug convictions would be revealed on a criminal history check and that he had completed the form in haste.

14. I am not bound by either of the previous decisions, including any findings that were made and must determine his suitability based on the material before me on this appeal.
15. Having heard Mr Nichaloff, including subject to cross-examination, I have reached the conclusion that he is not a man of great sophistication nor does he seem to me to be a person possessing any artifice. I accept his explanation that when he completed the second application he knew that his criminal history would be produced and all offences would become apparent. He did not think that he needed to provide information of them as they would be produced. He had been through the process on a previous occasion and successfully appealed. He knew that a criminal history is required and there is no reason why he would expect that in ticking 'no' to the box indicating disqualifying offences that these would not be revealed and that he would be required to address them in due course. At its highest, I think he was careless but not acting to deceive the licensing authority.

Criminal History

16. The appellant is 35 years of age. In December 1993 when 18 years old he was fined \$50.00 in Wyndham for disorderly conduct. He has two Juvenile Court convictions in the NT that pre date this, one for riding a bike without a light in 1989 and the other for consuming liquor on licensed premises under the age of 18 in 1991 for both of which he was cautioned and discharged. Given the nature of these offences and his age at the time, I

consider that they have little relevance to suitability. In 1999 he was convicted of three traffic offences, driving without due care, driving unlicensed and what is now referred to as driving with a medium range blood alcohol level. He said he called police himself after his car slid in the wet and hit a fence. He received a small fine and the minimum disqualification period. There are no repeat offences of this nature and Mr Nichaloff's evidence of his drinking habits is of a very limited social nature. Taking that into account, I do not think that those offences affect his suitability.

17. In 1995 he was convicted of assault. This is the offence which disqualified him from obtaining a license in 2003. It has been noted that common assault is no longer a disqualifying offence and in any event, it would now be outside the 10 year period. That does not mean that it is not of relevance to his suitability. As noted above, propensity to acts of violence must be a major consideration in the granting of security and crowd controller licenses. Mr Nichaloff said that the circumstances of the assault were that he was walking home to his parents when a guy jumped a fence and asked for cigarettes and slashed his arm with a knife. He showed the scar in Court. He said he punched him. He reported the matter to police and was himself charged and pleaded guilty to an assault. He was given a one month sentence fully suspended on a good behaviour bond for nine months. There are no other offences of violence on his record.
18. In 2001 he was fined \$50.00 for giving a false name to police following an incident on the rugby field. He gave his uncle's first name and his own address. He said he gave the uncle's name because he didn't want to get involved, but when the police came to his house he admitted what he had done. The small fine appears to reflect that the level of offending was not considered to be high.

Disqualifying Offences

19. The “disqualifying offences” constitute the remainder of Mr Nichaloff’s criminal history. In January 2005 he was convicted in the Supreme Court of three offences under the *Misuse of Drugs Act*, namely, possessing a trafficable quantity of cannabis, supplying cannabis and receiving property from the commission of an offence. The offences were committed in April 2003.
20. Ms Kirstenfeldt’s affidavit annexes two documents said to be relevant to the offences, a police précis provided to the licensing authority by police and the remarks of Angel J in sentencing Mr Nichaloff for these crimes. The facts alleged in the police précis are not consistent with the facts found by His Honour in sentencing Mr Nichaloff. A police précis contains what is the earliest version of the allegations based on what is known at the time of charge. It may not be consistent with the facts ultimately put before a Court and agreed at the time of sentence. Those facts only are the ones relevant to considering the nature of the offending and degree of culpability and not any allegations that may have been made at some other time.
21. The appellant gave me his account of his involvement in the offences which is accordance with the facts found by Angel J in sentencing. Mr Nichaloff had travelled to Maningrida with two others in his vehicle for the purpose of hunting and fishing. The next day at Maningrida he became aware that the others were, with another person, selling cannabis. He then asked to receive a share of the profits from the sale because they had travelled to Maningrida in his car and over the next two days a quantity of cannabis was sold, making a total profit of \$6,980.00. This is the amount that was the subject of the charge of obtaining property knowing or believing it to be obtained from the commission of an offence against section 5 of the *Misuse of Drugs Act*. It is clear that not all of this was to go to Mr Nichaloff. Police received information and searched the vehicle and found 60 deal bags of cannabis hidden behind the glove box. In total, the cannabis weighed 56.7

grams, that is, a quantity just over the deemed trafficable quantity. The appellant assisted authorities both by giving information about the involvement of his co-offenders and subsequently gave additional assistance about the illegal drug trade in Maningrida and surrounding communities. As he said in his evidence before me he became an informant for police. In relation to the appellant's personal circumstances, His Honour accepted that he was not the principal offender and characterised him as a somewhat naïve man who had made an ill-considered judgement to be participate in the activity. His participation was in the nature of turning a blind eye to the activity of others in order to take a cut of the proceeds. He was found to be genuinely remorseful and unlikely to re-offend in the same way again. In sentencing, His Honour took into account the appellant's naivety, the delay in the prosecution (which was not attributable to the appellant), assistance to police, co-operation with the police from the outset, the unlikelihood of repeat offending and his personal background, including generally solid employment and that he was not a user of cannabis. The sentence of three years imposed as an aggregate penalty for the three offences was suspended immediately and an operative period of three years set for the suspended sentence order. It is noted that Mr Nichaloff successfully completed the term of the suspended sentence.

Other Relevant Behaviour

22. In cross-examination, Mr Nichaloff was asked about a recent incident which was said to have occurred in one of the Darwin nightclubs and may have resulted in a domestic violence or similar order. No court or police orders have been produced by the respondent. Mr Nichaloff said his mate's girlfriend spat at him and he kicked her or tapped her lightly on the shin, telling her not to do that to him. He said he didn't go to Court to fight it. I could not be satisfied on the basis of that evidence that any order in the nature of a domestic violence or personal violence order has been made against Mr Nichaloff. I note in particular, that given the relationship of the

persons said to be involved it could not have been a domestic violence order because the relevant legislation requires relationships of a particular kind to be in existence or to have been in existence between the parties before such an order can be made. It is not possible for me on that evidence to find that Mr Nichaloff has been made the subject of some form of apprehended violence order. At its highest, Mr Nichaloff is describing a response of a mild nature to an assault on him. Nothing in what he described would suggest that he has a propensity for violence.

23. Mr Nichaloff filed an affidavit to which he annexed various documents in the nature of references. He concedes that he has had not the best past but now wants to “give back to the community”. The annexures to the affidavit consist of a reference from the Assistant Manager at the Saville Hotel where Mr Nichaloff was employed prior to his embarking on a fish and chip shop business. It is a positive work reference, both as to his work ethic and the standard of his work. A reference from a Richard White who says that he is a member of the Northern Territory Police Force attests to Mr Nichaloff being a family oriented person who is well respected in his community. There was a further reference from the then member for Drysdale, Chris Natt MLA which likewise describes Mr Nichaloff as a community minded member of the Palmerston community. Mr Nichaloff produced a small album of photos to the court showing him engaged in various family and recreational activities as evidence of the life he now leads.

Conclusion

24. Mr Nichaloff has three convictions for offences, arising out of the same incident, that are disqualifying offences. Although the convictions were made in 2005, the offences themselves occurred in 2003. There has been no offending of any nature since 2003. Whilst these offences on their face, and the penalty imposed are of a serious nature, clearly Mr Nichaloff’s personal participation in the offences was at the lower end of the scale. This was not

drug offending by a person involved in the drug trade either as a user or for ongoing personal gain. Rather, they show an opportunistic lack of judgement on a single occasion. In my view, on a reading of His Honours sentencing remarks the substantial head sentence of three years was imposed for reasons of general deterrence, that is to show the community at large that drug dealing in communities will be met with serious penalties. It does not appear to have been set to reflect in any sense the need to personally deter Mr Nichaloff from further conduct of that nature. His co-operation with authorities including subsequent informing on other offending is indicative that he fully appreciated his error and sought to assist authorities in order to remedy his wrongdoing. This in itself provides evidence that he is most unlikely to repeat conduct of a similar nature and that, as he suggests, his life has gained a focus of giving back to the community.

25. The assault offence was committed some 14 – 15 years ago and there is no other record of violence. He has previously worked in security and crowd control and there are no allegations that he did not properly perform those duties. He is now a man in his mid thirties, he is married and he has children. I accept his evidence that he has matured into a responsible family man and wishes to make a positive contribution to his community. He is a man with a solid work record. His past convictions do indicate some disregard for the law, however, as I have noted, the last offending was in 2003 and since that time, his behaviour in the community has not been brought into question. I do not think that he has any indication of a propensity to violence which would be of concern in relation to the granting of the licenses that have been sought. I do not think that members of the community, knowing of the full circumstances of the drug convictions, his conduct since, including that he has worked as a security guard since committing those offences without incident and his present situation would not have confidence in his ability to perform the duties under the licenses that are sought.

26. In my view, Mr Nichaloff is a suitable person to hold both a security and crowd controller's license.

Order

27. I set aside the decision of the NT Licensing Commission and grant to Mr Nichaloff a security license and a crowd controller license, subject to his compliance with any other statutory requirements required by sections 48 and 53 that apply to those licenses.

Dated this 22nd day of July 2009.

Sue Oliver
STIPENDIARY MAGISTRATE