IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0039 OF 1998S
(High Court Civil Action No.JR7 of 1998)

BETWEEN:

RICHARD KRISHNAN NAIDU

Appellant

AND:

THE ATTORNEY GENERAL OF FIJI

Respondent

Coram: **The Hon. Justice I.R.Thompson, Justice of Appeal**
The Hon. Justice Gordon Ward, Justice of Appeal
The Hon. Justice Sir David Tompkins Justice of Appeal

Hearing: **Friday, 20 August 1999, Suva**

Counsel: **Appellant in Person**
Mr. S. Banuve for the Respondent

Date of Judgment: **Friday, 27 August 1999**

JUDGMENT OF THE COURT

The appellant applied to the High Court for leave to issue an application for judicial review of a decision of the Minister for Communications, Works & Energy ("the Minister") directing Fiji Television Limited to change the time at which it was proposing to broadcast a programme. In a judgment delivered on 1 May 1998 Scott J. dismissed the application for leave. On 10 July 1998 he granted the appellant's application for leave to appeal against that decision.

Factual Background

The Hong Kong Rugby Sevens competition was to be held between 27 and 29 March 1998. Fiji Television intended to broadcast the competition live on its Sky channel, for

which subscribers pay, and to broadcast a ninety minute delayed coverage on the free to air channel, Fiji One.

The Minister apparently considered this course to be inappropriate. By letter dated 16 March 1998, addressed to the Chief Executive of Fiji Television, he gave the following Ministerial direction.

MINISTERIAL DIRECTION

> *After having considered the correspondence exchanged between my Ministry and Fiji TV on the matter about the broadcast of the live coverage of Hong Kong 7s on 27th to 29th March, 1998 and the apparent reluctance on the part of the company to enable a live broadcast of this event on Fiji One, the free to air channel in the interest of the general viewing public, I wish to issue the following direction to Fiji TV.*
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> > *"Having taken into account all relevant issues, I am of the view that in the interest of viewing public of Fiji, The Hong Kong 7s is an event which is watched very extensively by all communities in Fiji. I am therefore directing Fiji Television to air the Hong Kong 7s live on Fiji One. Such direction is given pursuant to powers vested in me by section 10(1) and (3) of the Television Decree, 1992."*

On 20 March 1998 the appellant filed his application for leave to apply for judicial review. On 24 March 1998 he filed an amended application. The relief sought in the substantive application was a declaration that the decision was *ultra vires,* void and of no effect, or alternatively an order of *certiorari* to move into the High Court and quash the direction. The grounds on which the relief was to be sought were:

(a) the direction is ultra vires the Television Decree;
(b) further or alternatively that the direction was made for improper purposes;

(c) further or alternatively that the Minister failed to take into account relevant considerations and/or disregarded relevant ones;

(d) further or alternatively that the direction is so unreasonable no reasonable Minister in the position of the Minister would have made it.

Fiji Television broadcast the 1998 Hong Kong Rugby Sevens competition live on Fiji One. According to the Minister in his affidavit it did so in compliance with his directive. According to the appellant as recorded in a letter that he wrote, published in the Fiji Daily Post of 24 March 1998 exhibited to the Minister's affidavit, Fiji Television told the appellant that even if his application were successful, it would broadcast Sevens live on Fiji One that weekend. As the appellant put it in his letter "...the legal proceedings will not ...have a practical effect on the Minister's direction...The issue is accordingly academic."

By the time of the hearing in the High Court, the appellant no longer sought an order of *certiorari*. But he submitted that leave should be granted to enable the court to make the declaration sought.

The decision in the High Court

The application for leave was not dealt with without a hearing. The respondent was represented by counsel, and it appears that the matter was fully argued. Counsel for the respondent conceded that there was at least an arguable case that the Minister in issuing the directive had exceeded his powers. He did not of course concede that he had. The granting of leave was therefore not opposed on that ground. Counsel for the respondent submitted, first that the appellant had no standing to bring the proceedings, and secondly that the proceedings must fail since they served no useful purposes.

The Judge, after considering authorities relating to standing and to the effect that there must be a genuine dispute between the parties, concluded that, in the circumstances in the present case, there was no scope for judicial review. He held that the applicant was unable to point to any legal right of his that had been infringed, and there was no dispute between the appellant and the respondent based on existing facts where a declaration would have a practical effect. The removal and quashing of an expired direction would be pointless. Accordingly any application to review the direction of 16 March 1998 was doomed to failure. The application for leave to apply for judicial review was dismissed.

The application for leave

The High Court Rules in O.53, r.3 required the application for leave to make an application for judicial review to be made *ex parte*. That rule was amended by the High Court (Amendment) Rules 1994 by deleting the reference to the application being made *ex parte*. Instead, the rule now provides that the court may determine the application without a hearing, and where a hearing is considered necessary the court shall hear and determine the application *inter partes*.

The nature of an application for leave was considered by Lord Diplock in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 643:

> *"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter at any depth at that stage. If, on a quick perusal of the material then*

> *available, the court thinks that it discloses what might on further consideration, turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."*

This approach is appropriate when the application for leave is considered with or without a hearing. Although the rules now provide that the application is not required to be dealt with *ex parte,* we consider that an opposed determination *inter partes* should still be the exception rather than the rule. In the normal course, the application for leave should be dealt with on the papers. Otherwise there is a risk that there will in effect be two hearings (and possibly two appeals), a process which will delay the final resolution, increase the costs, and occupy additional court time. Also, there is an understandable temptation for the Judge to determine the central issue at a stage when all the evidence may not be before the court, and that issue may not have been full argued. Indeed for these reasons, good arguments can be advanced in support of the proposition that leave should not be required at all. It is not in New Zealand, in Scotland, nor in at least some if not all States in Australia. If an application is brought that is frivolous, vexatious, or irresponsible, or by a person who cannot possibly have the slightest interest, an opposing party can always move to have the application struck out.

O.53, r.3 (5), in both the original and the amended rule, provides that the court shall not grant leave unless the applicant "has a sufficient interest in the matter to which the application relates." This rule derives from a corresponding provision in the English legislation. It is apparent therefore that issues of standing can properly be considered at the threshold stage. But save in exceptional or obvious cases, standing cannot be considered in

isolation. In the *National Federation* case, the High Court had granted leave *ex parte*. When the substantive action came on for hearing, the Divisional Court decided to determine the issue of standing as a preliminary point. The House of Lords was critical of that course. Lord Wilberforce said at 630.

> ***"There may be simple cases in which it can be seen at an earlier stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at that threshold to refuse him leave to apply. The right to do so is an important safeguard against the court being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point; it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates." (The emphasis is Lord Wilberforce's).***

Thus save in obvious cases, it will not be appropriate to determine a leave application solely on the grounds of standing at the threshold leave stage. That is because standing cannot be considered in isolation, and it is not appropriate at the leave stage to consider the substantive issue without all the evidence and full argument on the merits.

Should a declaration be made?

The principal ground upon which the Judge dismissed the application was that the making of a declaration would have no practical effect.

There are ample authorities for the proposition that the courts will not give advisory opinions nor will they resolve an issue where that resolution will have no practical

337

consequence or utility. In *Turner v Pickering* [1976] 1 NZLR 129, 141 Casey J. sitting in what was then the Supreme Court, adopting the reasoning of Karminski LJ in *Mellstrom v Garner* [1970] 1 WLR 603, 606, said that it was clearly established that the power of the court to make a declaratory order is discretionary and this discretion will not be exercised in a plaintiff's favour "unless the declaration may be of some utility." In *Fowler and Roderique Ltd v Attorney General* [1987] 2 NZLR 56, 78 the same Judge then sitting in the Court of Appeal said:

> *"... events have overtaken this application, rendering any order that the Court may now make of academic interest only. Remedies under [the New Zealand Act] are discretionary and whether or not it would ever have been appropriate to make a declaration of invalidity in respect of the 1979 notice, it cannot be justified now."*

In *Madever v Umawera School Board of Trustees* [1993] 2 NZLR 478 Williams J. after referring to that passage from Casey J's judgment in *Fowler and Roderique* said:

> *"This case can also be approached on the basis of the related doctrine of mootness. The mootness doctrine is really the doctrine of standing set in a time frame; the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness). Thus because an actual controversy must exist at all stages of the proceedings a case is moot when the issues presented are no longer live."*

The issue therefore becomes whether there was, at the time of the determination of the application for leave, a sufficiently arguable case that the issue raised in the proceedings was alive, or to use Casey J's phrase in *Turner*, whether there was an arguable case that the making of a declaration may be of some utility. It was not for the High Court on the

application for leave, nor for this court on the hearing of the appeal, to determine those issues. They can only be properly determined when the court is considering the substantive grounds upon which the direction is sought to be challenged.

Mr. Naidu referred to several cases where the court determined an issue although the practical need in the individual case to do so had passed. In *R v The Birmingham City Juvenile Court, ex parte Birmingham City Council* [1988] 1 WLR 337, justices determining an interim care order refused to hear evidence. The correctness of that decision was challenged by an application for judicial review. By the time the application came on for hearing, a final order had been made, so the issue in that particular case had lost its relevance. The court observed that the particular problem posed in respect of that child was no longer outstanding. But in the interest of clarifying the law, the court considered the issue and came to a decision. In *R v Leicester Crown Court, ex parte Director of Public Prosecutions* [1987] 1 WLR 1371 the police had applied for an order granting access to an accused's bank account. The Judge ruled that the application should be made *inter partes*. The Director of Public Prosecutions sought judicial review of that ruling. By the time the case came on for hearing the accused had been convicted, so the ruling could have no relevance to that case. But because of the concern of the police and the Crown Prosecutor that if an application of the similar kind were made to the same Judge, he would adhere to that view, the court made a declaration as to the proper construction of the relevant provision.

These are but illustrations of the general principle that even though the actual issue between the parties may no longer be outstanding, the courts will nevertheless make a

decision where there is a practical advantage in doing so, or where the issue is one of general public interest.

In the present case there clearly is. As the Judge accepted, the extent and legality of the Minister's powers in the field of broadcasting are matters of great public importance. Later he observed that the proceedings may have had some peripheral value in highlighting a number of important issues to which s.10 of the Decree may give rise.

We agree that the extent to which a Minister can, under clause 10 of the Decree, issue directions to Fiji Television, the nature of the directions he is empowered to issue, and the proper interpretation of clause 10, are all matters of significant public importance. In this case, the Minister directed the re-scheduling of a programme that Fiji Television was going to broadcast in any event. But if the Minister can direct Fiji Television *when* a programme can be broadcast, can he also direct that a programme *should* be broadcast which otherwise would not be? If so, on what grounds? Issues such as these ought, in the interest of the wider public as well as the appellant's, to be resolved. As Mr. Naidu submitted, it is possible that the provision in the Constitution guaranteeing freedom of expression may also have a bearing on the extent to which the Minister can issue directions under the Decree.

There is a further aspect. It is likely that directions under the decree will be made at relatively short notice. The time for challenging the decision may be so short as to make a challenge impractical. Also, in Fiji, there are not the independant bodies that there are in other jurisdictions, available to mount a challenge. For these reasons also, a definition of

the Minister's powers under the Decree is desirable, judged in the factual context of the present case.

Standing

It is apparent from what we have already said that standing cannot be finally determined until the court is considering the substantive application, and in particular the challenge to the Minister's actions on the merits.

It is now widely accepted that the court's attitude to standing has undergone a significant shift in recent years. The starting point was the judgments of the House of Lords in the *National Federation* case, and in particular the observation of Lord Diplock at 644:

> *"It would in my view be a grave lacuna in our system of public law if a pressure group like the federation or even a single public spirited taxpayer were prevented by out-dated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."*

Commenting on this passage, the learned authors of Wade and Forsyth *Administrative Law* 7th Ed (1994), in the context of the speeches in *National Federation,* said at 712:

> *"Although Lord Diplock's speech was the most far reaching in its terms, it is fully consistent with the majority view that the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved."*

This comment was adopted with approval by Rose LJ in *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1

WLR 386, who added that the merits of the challenge are an important if not dominant factor when considering standing. He also noted at 395 the increasingly liberal approach to standing on the part of the courts during the last 12 years. An illustration of this approach in a context close to the present is *R v Independent Broadcasting Authority, ex parte Whitehouse* [1984] The Times 14 April, which held that every holder of a television licence has an interest in the quality of the programmes, so that a breach by the Independent Broadcasting Authority of its duty to monitor controversial programmes effectively was remedied by a declaration at the instance of a lady offended by the film *Scum.*

For these reasons, we are satisfied that, in the circumstances of the present case, having regard to the nature of the issues raised, the appellant has a sufficient interest in the subject matter. Accordingly, no consideration of standing should, at this threshold leave stage, inhibit the grant of leave.

Conclusion

Leave to bring the application for judicial review should have been granted. We add two comments.

First, in our view this application for leave ought to have been granted on the papers. It was obvious from the statement of claim that an issue of significant public interest was involved. Whether the plaintiff had sufficient standing, and whether the court should exercise its discretion to grant relief, are matters to be determined finally on the hearing of the application for review.

Secondly, we emphasise that this decision is only that leave should have been granted. This is on the basis that the plaintiff has established an arguable case in favour of the court making the declaration sought. It will be for the court hearing the substantive action to determine whether the Minister acted outside his powers, and whether in those circumstances and having regard to the interests of the plaintiff in the proceedings, any relief should or should not be granted. On those issues we have expressed no concluded view.

The Result

The appeal is allowed. The order dismissing the application for leave to move for judicial review is quashed. In lieu thereof, leave is granted to the plaintiff to move for judicial review on the terms set out in his amended application, excluding the order for *certiorari* sought.

The plaintiff appearing in person, there will be no order for costs: O.62 r.26 (4).

I.R. Thompson
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Justice I.R.Thompson
Justice of Appeal

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Justice Gordon Ward
Justice of Appeal

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Sir David Tompkins
Justice of Appeal

FIJI COURT OF APPEAL

Solicitors:

Appellant in Person
Office of the Attorney-General Chambers, Suva for the Respondent

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