IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

JUDICIAL REVIEW NO. 21 OF 2005

Between:

STATE

v

1. PUBLIC SERVICE APPEAL BOARD
2. MRS. LAITE MATADIGO

Respondents

CHIEF EXECUTIVE OFFICER JUSTICE

Interested Party

Ex-parte: DAMODARAN NAIR

Applicant

Mr. S. P. Sharma for the Applicant
Mr. E. Veretawatini for the 1st Respondent
Mr. T. Tuitoga for the 2nd Respondent
Ms. N. Karan for the Interested Party

Date of Judgment : 13th July 2006

JUDGMENT

This is a judicial review application by motion dated 7 April 2005 by **Damodaran Nair** (the '**applicant**').

The respondents are the **Public Service Appeal Board** (the **PSAB** - the 1st **Respondent**), **Mrs. Laite Matadigo** (the '2nd **Respondent-R2**') and the **Chief Executive Officer Justice** (the **Interested Party** – the **CEO**).

The application was opposed by the respondents. On 2 May 2005 upon hearing all counsel it was ordered by consent that 'leave be granted to apply for judicial review' and that 'the grant of leave to operate as stay of proceedings until further order of this Honourable Court'.

Decision impugned

The decision impugned is that of the PSAB dated **21 April 2005** which is in the following terms:

> ***"The Board has considered the appeal by Mrs. Laite Matadigo, EDP 14109, Senior Assistant Administrative Officer, SS02 against the decision to provisionally promote Mr. Damodar Nair, EDP 45608, Senior Administrative Officer, SS02 to be Principal Administrative Officer, SS01. The Board has decided to allow the appeal.***
>
> ***The reason is that the appellant has an edge over the provisional promotee in terms of seniority in service and qualification."***

The reliefs sought

The applicant seeks the following reliefs :

1. An order of **certiorari** to remove the said decision into this Court and be quashed.

2. A **declaration** that the said decision is '*in excess of jurisdiction, erroneous, irrational, irregular, unreasonable and unfair and null and void*'.

3. An order for **mandamas** directing the PSAB '*to rehear the appeal on merit*'.

Grounds for judicial review

Very briefly, the grounds for judicial review are as follows:-

(a) *that the said decision is in* ***excess of jurisdiction, erroneous, irrational, unreasonable, unfair*** *and* ***null and void****. The PSAB failed to consider the merits of the applicant's case.*

(b) that the PSAB committed an ***error of law*** *in failing to simply apply the mandatory provisions of* ***Section 140*** *of the 1997* ***Constitution*** *which required in sub-section (b) promotion be made on merit, (c) equal opportunity to be given for advancement and training and (d) racial parity be kept in accordance with the composition of population.*

The applicant says that the decision of the PSAB has contravened the promotion criteria as stated in **Regulation 5** of the **Public Service Regulations, 1999** which, inter alia, provides:-

Appointment and promotion based on merit

"5.–(1) The appointment or promotion of a person to an office pursuant to section 147(1) of the Constitution must be made on the basis of merit after an open, competitive selection process, and in accordance with section 140 of the Constitution. (underlining mine)

(2) An appointment or promotion may only be made if –

(a) the vacancy in the office, or a vacancy in an office with the same duties, was notified in a Public Service Official Circular within the last year as open to any citizen of the State;

(b) an assessment has been made of the relative suitability of the candidates for the duties, after interview or using another competitive selection process:

(c) the assessment was based on the relationship between the candidate's work-related qualities and the work-related qualities genuinely required for the duties.

(d) the assessment focussed on the relative capacity of the candidates to perform the duties.

(3) The following work-related qualities may be taken into account in making an assessment referred to in subregulation (2) –

(a) skills and abilities;
(b) qualifications, training and competencies;
(c) standard of work performance;
(d) capacity to perform at the level required;
(e) demonstrated potential for further development;
(f) ability to contribute to team performance."

Affidavits for consideration

In this application I have before me for my consideration the following affidavits:

(a) *the Applicant's Affidavit sworn and filed herein on 27 April 2005 ("**the Applicant's Affidavit**").*

(b) *the Applicant's Affidavit in Reply sworn and filed herein on 22 July 2005 ("**the Applicant's Second Affidavit**").*

(c) *Sakiusa Rabuka's Supplementary Affidavit sworn and filed herein on 22 July 2005 ("**CEO's Affidavit**").*

(d) *Josese Bisa's affidavit sworn and filed herein ("**Bisa's Affidavit**).*

(e) *Also affidavit of 2nd Respondent sworn 11 October 2005 and affidavit of applicant sworn 2 November 2005 in Response to the said affidavit of the 2nd Respondent.*

Submission of PSAB (1st Respondent)

The PSAB in its written submission whilst opposing the application says that it properly considered the grounds of appeal and merits of both the party in the deliberations in accordance with the relevant section of the Public Service Act.

It submits that it acted intra vires, and the decision is '*regular, proper, rational, fair and reasonable. The decision is not erroneous as contended by the applicant.*'

Submission of R2

Through her counsel R2 submitted that she met the MQR as her name was proposed along with the two others. Hence there is no issue as to her qualification.

She submits that the detailed deliberation of the PSAB is evidence that all aspects for the Applicant and R2's past records and achievements were considered.

She said that the Applicant is seeking to question the **merits** of the decision which he cannot do in judicial review proceedings.

Applicant's submission

The CEO appointed the applicant to the position of **Principal Administrative Officer** in SS01 grade in the Judicial Department at the Ministry of Justice.

The applicant submits that the decision is null and void as the PSAB acted in contravention of those provisions of the Public Service Appeal Board Regulations 1999 that it should **accord natural justice** to the parties to the appeal and to give reasons for the decision on the appeal.

The applicant says that the PSAB's decision was made in bad faith, was unreasonable and in breach of the applicant's legitimate expectations.

He further submits that PSAB failed to take into account the applicant's qualifications, experience and exposure as a Senior Administrative Officer and Acting Principal Administrative Officer in the relevant administrative areas.

Counsel submits that had PSAB considered these matters pertaining to the applicant, it would have favoured the applicant because of his qualifications and experience which satisfy all the requirements for the post in question.

It is submitted that the principles of **natural justice** must be applied and that the applicant be accorded a **fair hearing**.

It is further submitted that PSAB did not carry out its duties as stipulated in the 1999 Act and therefore acted ultra vires.

The applicant's further argument is that R2 does not meet the requirements of the post as advertised.

Determination of the issues

As ordered all parties filed their written submissions with the last of them on 1 February 2006.

The application is opposed by the second respondent **(R2)** and the **PSAB**. The Interested Party (Mr. Sakiusa Rabuka the Chief Executive Officer, Ministry of Justice) who is also the 'Commission Delegate' of the Public Service Commission defends his decision to promote the applicant.

In the Appeal by R2, the PSAB had before it, inter alia, the full qualifications and seniority of both the applicant and the R2.

The post in question was advertised in the Fiji Public Service Official Circular on 30 April 2004 and graded as 'SS01' and at the time attracted a salary in the range $32,459 - $41,400. The advertisement reads as follows:

> *"344/2004 PRINCIPAL ADMINISTRATIVE OFFICER*
> *(Judicial Department)*
>
> *Responsible to the Director Administration/Finance for the following: Assist Director Administration and Finance on current policy advise rendered to the Hon Chief Justice, Hon President, Fiji Court of Appeal, Hon Puisne Judges, Chief Magistrate, Resident Magistrates and to the Chief Registrar on matters relating to the Judicial Department. Assist Director administration and Finance on the drawing up and implementation of the* ***department's corporate, Business Plans, and the staff in Individual Work Plans****. Ensure that proper coordination is carried out with the relevant sections in matters relating to office equipment, furniture and office accommodations. The appointee is to assist the Senior Administrative Officer and Administrative Officer on*

disciplinary matters to ensure that the existing rules and regulation are adherent to.

Qualification: *An officer of high calibre. Qualifications required for appointment as* ***Senior Administrative Officer*** *and at least 2-3 years service in that grade or equivalent or relevant degreee or Post graduate qualification and/or relevant skills and experience in this particular field in any other organisation. Ability to manage staff and resources. Must have demonstrated intellectual capacity, drive determination and flair in existing grade and proven to be a meritorious performer.*

Salary: *SS01 $32,459 - $41,400"*

The Ministry of Justice Staff Board considered the applicants for the post. At a meeting held on 31 December 2004 the Staff Board recommended the applicant, the R2 and Mr. Sakeasi Cagica in that order as meeting the requirements for the Post. On 31 December the CEO appointed the applicant to the Post.

The R2 appealed to PSAB against this appointment. The PSAB heard the appeal on 19 April 2005 which was allowed for the reason "**that the appellant has an edge over the provisional promotee in terms of seniority and qualification**".

Principles pertaining to judicial review

In considering an application for judicial review there are certain basic concepts pertaining thereto which have to be borne in mind.

Judicial review is not an appeal from a decision but it is a review of the manner in which the decision was made. It is concerned, "**not with the decision but with decision-making process. Unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of the power, be itself guilty of usurping power**" (**Lord Brightman** in **Chief Constable of the North Wales Police v Evans** [1982] 1 WLR 1155 at 1173). Further in that case **Lord Hailsham** at 1160 commented on

the purpose of the remedy by way of judicial review under Order 53 as follows which is apt and should be kept in mind:

> ***"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner."(emphasis mine)***

Further, in a judicial review the Court is "***not as much concerned with the merits of the decision as with the way in which it was reached***" (**Evans**, supra at 1174 (my emphasis). Also, as put by **Lord Templeman** in **Reg. v Inland Revenue Commissioners, Ex parte Preston** (1985) A.C. 835 at 862:

> ***"Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers."***

The courts ensure that the administrative actions are intra vires and keep within the bounds of their authority. These actions will be ultra vires if they fail to comply with the requirements of certain statutes and by common law. It is important that administrative actions take into account all relevant considerations and ignore any irrelevant considerations. The decisions must be reasonable; they must not be biased or pre-determined; they must be exercised with the rights of natural justice in mind, unless a statute, expressly or by clear implication provides a contrary intention.

As was said by the Fiji Court of Appeal in **The Permanent Secretary for Public Service Commission** and **The Permanent Secretary for Education, Women & Culture ex p. Lepani Matea** Civil Appeal No. ABU0018 of 1998S at

12 that the Court: **"must not do is to determine the merits of the matter, or substitute its opinion for that of the body concerned upon the merits".**

Further one of the purposes of judicial review is to ensure that an applicant is given a **fair treatment** by the decision-making body in question. The judicial review jurisdiction is supervisory in nature. The Court confines itself to the question of **legality** when reviewing a decision.

Grounds for judicial review

I shall now consider the various grounds of review under some of the major heads in the light of the principles pertaining to judicial review of a decision. The modern heads of judicial review jurisdiction in respect of a decision are **"illegality", "irrationality", "procedural impropriety"** or abuse of power as summarised in 1984 in **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374]. **'Illegality'** is synonym for **'error of law'** which includes the taking into account of an irrelevant consideration or failure to take relevant consideration into account. **"Irrationality"** describes a decision **"which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (CCS Unions** (supra) at 951).

Mr. Sharma for the applicant has thrown in a number of grounds which overlap in my view. The proper method is for counsel to pick on the accepted grounds of review as stated hereabove and argue on the grounds applicable to this case.

I think it will be wise for a counsel to take note of the following comments in this connection in the judgment of Fiji Court of Appeal delivered 14 November 1997 in **Victor Jan Kaisiepo and The Minister for Immigration** (Civ. App. No. 54/96S) at p3 in the hope that what is stated therein will be borne in mind in future:

> *"The grounds of the application were numerous and included a denial of natural justice, on the grounds of not giving a fair hearing and bias, taking into consideration irrelevant matters failing to take into account relevant matters, acting unreasonably, not giving regard to or taking into account the legitimate expectations of the applicant and failing to give reasons for the decision. In effect, the appellant raised almost all imaginable grounds available in administrative law to challenge the decision but did not make clear what matters were relied upon to support the individual grounds. This is an unacceptable procedure when seeking judicial review. We add, that adopting this scatter-gun approach is inimical to the applicant's prospects of success for the Court is left unclear as to what are the important issues in the case."*

Was there procedural impropriety?

The head of '**procedural impropriety**' includes '**failure to observe basic rules of natural justice and failure to act with procedural fairness. The requirements of natural justice go to the procedure adopted by the decision taken and the need to allow each party an opportunity to put his case**'. (**Immigration Law & Practice by Jackson** at 19.13).

The applicant has raised the issue that there was **denial of natural justice** which he says contravenes the provisions of the Public Service Act 1999. Counsel raised this ground and I shall deal with it.

The Appeal before the Board is governed by the provisions of the **Public Service Act 1999** (the '**Act**'). **Sections 25** and **26** of the Act are relevant to the issues before me. One relevant section is **s26(6)** which provides:

> *"(6) At the hearing of an appeal –*
>
> *(a) the appellant is entitled to be present and may be represented by a legal practitioner or by any other persons; and*

(b) the officer or person against whose promotion or appointment the appeal has been lodged is entitled to be heard in such manner as the Appeal Board thinks fit and may be represented by a legal practitioner or by any other person."

Here the applicant was given every opportunity of being heard and make submissions and he availed himself of that right.

The other important section is **s26(9)** which provides:

"(9) In the conduct of an appeal, the Appeal Board is not bound by the procedures, legal forms and rules of evidence of a court of law but should –

(a) accord natural justice to the parties to the appeal;
(b) keep a written record of its proceedings; and
(c) give reasons for its decision on the appeal."

In this case this subsection has been complied with subject to what I say hereafter.

Principles governing 'merit' in judicial review

Is there any substance in 'merit' opposition by the Second Respondent?

The respondents have counteracted the applicant's argument by submitting that the review on the ground of **'merit'** cannot be allowed in judicial review proceedings.

The question is whether this is such a case.

The applicant's main contention in the whole of the evidence before the court is that he should have been promoted and not the **Second Respondent (R2).**

Counsel for the applicant has, inter alia, emphasized the point that the applicant, inter alia, is better qualified than the second respondent hence he should

have been promoted. Subject to what I say hereafter on **'merits'** this is not the function of the Court in a judicial review.

However, I shall now consider this ground of opposition by the R2 and to determine whether it is such a case.

An application for judicial review is not an appeal. **"It is a protection and not a weapon"** (**Lord Keith** in **Lonrho plc v Secretary of State for Trade and Industry** [1989] 2 All E.R. 609 at 617). In an **appeal** the court is concerned with the **merits** of the decision under appeal but not so in judicial review. In this regard in **Re Amin** [1983] 2 AC 818 at 829, **Lord Fraser** observed that:

> ***'Judicial review is concerned not with the merits of the decision but with the manner in which the decision was made... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.'*** (emphasis added)

On '**merit**' it is also worth bearing in mind the following remarks of the then **Chief Justice** (Sir Timoci Tuivaga) in **Bulou Eta Kacalaini v The Native Lands Commission and Ratu Sakiusa Kuruicivi Makutu and Native Land Trust Board** (High Court Civil Action No. 19 of 1988)

> ***"At this point it should be made clear that this Court has no jurisdiction to decide the merits of the Ka Levu dispute. The Court has no function in that regard. The Court's function is to ensure that the process by which the Commission arrived at its decision in the inquiry under Section 17(1) of the Act was done in accordance with the law. In other words, it is the decision making process of the Commission as a statutory tribunal which is under review by this Court and not the merits of the decision itself."*** (emphasis mine)

The instant case

The applicant is aggrieved by the decision of the PSAB based on the reasons given by it as stated hereabove.

His contention is that, among other grounds required under s5, he has the **'qualification'** and **'seniority'** superior to that of the second respondent.

Both parties were given the opportunity of being heard. After hearing, the Board came to the said decision which is now being impugned.

An applicant has to be given a fair hearing. On what is **'procedural fairness'**, the following passage from the judgment of **Fox J** in **Hart v Rossall and others** (1982) 62 F.L.R W2 at 108 is apt as the applicant has raised the question of '**natural justice**':

> ***"Certainly, what natural justice requires in one case may be quite different from what it requires in another. In Russel v. Duke of Norfolk [1949]1 All E.R. 109, at p.108, Tucker L.J. said: "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth." Kitto J. stated that situation in an often cited passage in Mobil Oil Australia Pty. Ltd. V. Federal Commissioner of Taxation (1963) 113 C.L.R 475, at p.504: "What the law requires in the discharge of a quasi-judicial function is judicial fairness. This is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances."*** (emphasis mine)

It is **'judicial fairness'** that is required, and to **hear** the parties in itself, in my opinion, is not enough; fairness will depend on the facts and circumstance of the case.

Pursuant to the advertisement referred to hereabove the applicant together with the R2 and another applied for the position.

The CEO (the 'Interested Party' herein) appointed the applicant to the position of Principal Administrative Officer in SS01 with Judicial Department in the Ministry of Justice. This the CEO did after the Ministry of Justice Staff Board had considered the applicants for the post and selected three in that order as meeting the MQR.

It is the applicant's argument that he has qualifications, experience and exposure as a Senior Administrative Officer and Acting Administrative Officer in the relevant administrative areas and these satisfy the requisite requirements for the post in SS01 grade as per the advertisement.

The R2 not being satisfied with the decision of the CEO had applied to PSAB and was successful in the Appeal for the reason the Board gave.

The applicant being aggrieved by the decision has instituted this judicial review proceedings.

I have before me for my consideration useful written submissions from the parties.

Let me now consider the matter of Appeal herein.

Pursuant to powers vested in him as the **Public Service Commission Delegate** and by virtue of his appointment as **Chief Executive Officer Justice,** the CEO exercised his powers of appointment and promotion etc. He is also the supervising officer of both the applicant and R2.

The CEO had before him the Staff Board Report and Recommendation.

The Staff Board acted on the material before it in so far the applicant and R2 are concerned and came to the said decision.

This decision was forwarded to the CEO who also considered it in the exercise of powers vested in him and made a decision appointing the applicant to the post.

Both the Staff Board and the CEO came to the same said decision after complying with the procedures required of them.

At the hearing of the appeal before the PSAB, it is the CEO's contention before this Court that his written and oral submission had been 'disregarded and ignored'. It also appears to this Court that the manner or process of handling the Appeal gives the impression that it is a slap in the face for CEO in the performance of his duties.

The CEO says that PSAB did not give any consideration to the ACR assessment report of the applicant which covers the duration of his acting on the post of Principal Administrative Officer with effect from 19 April 2004.

The other comment of CEO is that R2 did not meet the MQR of the advertised post of Principal Administrative Officer. The R2 has not served as Senior Administrative Officer but as Senior Assistant Registrar in the Births, Deaths and Marriages Section. These positions are listed separately under the Staff Establishment and the Civil List.

Going by the advertisement and Record of the PSAB hearing, I am inclined to agree with the CEO in his concerns.

There are many other points which the CEO raised in his affidavit in support of the application for judicial review and pointed out where the PSAB has erred.

I see a lot of merits in the CEO's contention, and the issues that he has raised have not been answered in all important aspects by the PSAB. The Board

does not appear to have either directed its mind to these matters or ignored them and merely concentrated on the aspect of 'qualification' and 'seniority'.

It can be seen that these two applicants for the Post appeared before the two 'bodies' and both the decision-makers made the same decision referred to hereabove.

The R2 has already had 'two bites' at the cherry so to say and then goes for a 'third bite' to the PSAB, but she is entitled to Appeal as the law provides for it.

The CEO by virtue of his position and in fulfilment of his duties and bearing in mind the Ministry's policies performed his duties in the appointment/promotion by complying with the procedure he is required to follow. His responsibilities are clearly set out in his affidavit herein sworn 22 July 2005 and he has fulfilled them.

The CEO emphasizes the point that the PSAB erred in principle when the applicant's proven record and assessed potential and capability whilst acting in the Principal Administrative Officer post from 19th April 2004 was not considered in the Appeal. He says that the PSAB came to a decision which no reasonable tribunal could have come to as it took irrelevant matters into consideration.

I am somewhat concerned with the **procedure** followed by the PSAB in the hearing of the Appeal when it went into the merits of the matter before it despite the fact that the Staff Board and CEO had done the same exercise before the Appeal. The Board merely looked at the 'qualifications' and 'seniority' of the applicant and R2 and ignored most other aspects of the requirements of s5 as I said hereabove.

I hold that it is the **process** by which the PSAB arrived at the decision which has been faulted.

No doubt the PSAB under the law is a body empowered to determine the matter placed before it but in carrying out its task it must **operate within the law** and comply with the rules of '**natural justice**' by following the proper procedure.

This I find is a case of '**procedural impropriety**'. The PSAB failed to act with procedural fairness. The Board did not direct its mind to the actions of the Staff Board and CEO in determining the issue apart from making some scanty comment.

I find in this case that the process by which the PSAB reached the decision is definitely wrong.

The powers given to the Tribunal should be lawfully exercised for it has been stated as follows by **Lord Mustill** in **R v Secretary of State for the Home Department, ex p Fire Brigades Union** [1995] 2 AC 513, 560H-561A:

> ***"The task of the courts is to ensure that powers are lawfully exercised by those to whom they are entrusted, not to take those powers into their own hands and exercise them afresh. A claim that a decision under challenge was wrong leads nowhere, except in the rare case where it can be characterised as so obviously and grossly wrong as to be irrational, in the lawyers' sense of the word, and hence a symptom that there must have been some failure in the decision-making process".*** (emphasis mine)

Further, the following statements are pertinent and should not be lost sight of from the judgment of **Lord Lane C.J.** in **Regina v Immigration Appeal Tribunal, ex parte Khan (Mohmud)** (1983) 2 W.L.R 759 at 762-3:

> ***"Where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis upon which they have reached their determination upon that issue, then that is a matter which will be very closely regarded by this court, and in normal circumstances will result in the decision of the tribunal being quashed. The reason is this. A***

> ***party appearing before a tribunal is entitled to know, either expressly stated by the tribunal or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not. Secondly, the appellant is entitled to know the basis of fact upon which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not".***

The applicant has to be accorded 'natural justice'. By not **fully analyzing** the evidence in this case on the part of PSAB, particularly in regard to the manner in which the Staff Board and the CEO reached their decision, has resulted in my opinion in the denial of 'natural justice'. There has not been so to say '**fair play**' in the process of reaching the decision when one looks at the 'concept of natural justice' on the facts and circumstances of this case as enunciated by **Lord Morris of Borth-Y-Gest** in the House of Lords case of **Wiseman v Borneman** (1971) A.C. 297 s308-309 when he said:

> ***"My Lords, that the conception of natural justice, should at all stages guide those who discharge judicial functions is not merely an acceptable but an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, as has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches: there may we find what Byles J. called the justice of the common law"*** (**Cooper v Wandsworth Board of Works** (1863) 14 C.B.N.S. 180, 194).

Here we have a situation where 'appointment and promotion' are based on 'merit' as required under the said **Regulation 5(1), (2) & (3)**. **Regulation 5(2)** and **(3)** set out the criteria and '**work-related qualities**' which have to be taken into account.

To comply with this requirement of s5 the most qualified person to decide is the CEO. That is why he is there.

In provisionally appointing the applicant the CEO must have complied with the requirement of s5. The PSAB does not say that he did not do so as it does not express any views on it.

The PSAB merely considered the 'qualifications' and 'seniority' of the two persons concerned but it did not consider the other aspects as required under s5(2) & (3) . Qualifications and experience are not the only two things to be considered in an appeal of this nature.

The PSAB merely duplicated part of the work that the Staff Board and the CEO were required to do and which CEO did.

What has the PSAB done?

The PSAB's decision is that the R2 '**has an edge**' over the applicant '**in terms of seniority in service and qualifications**'.

I consider that the Appeal Board acted ultra vires and took into account irrelevant considerations resulting in the applicant being denied fair play.

It can be seen that the applicant and R2 had made three appearances on their application. The issue on all three occasions were the same and all used the same facts in the selection but in the third attempt PSAB came to a different decision from the other two decision-makers by substantially ignoring the requirements of s5.

The PSAB is an appellate tribunal with certain powers vested in it under the **Public Service Act 1999** and **Public Service Regulations 1999** referred to hereabove.

For the purposes of determining an appeal **s26(3)** is relevant. It provides:

> **"(3) For the purpose of determining an appeal, the Appeal Board has the same powers and authority to summon witness and to obtain evidence as are conferred upon the commissioners of a Commission of Inquiry by section 9 of the Commissions of Inquiry Act, and section 14 and 17 of the Act apply, with necessary changes, in relation to the powers and authority vested in the Appeal Board by this Part."**

The PSAB considered the appeal and went through the application **afresh**. This shows that they disagreed with the Staff Board and the CEO's decisions which implies that they did not follow the law in s5.

The Board gave the said decision but they have not stated where the other two decision-makers went wrong and whether s5 has been complied with by them or either of them.

It is my view, after perusing the record of proceedings before PSAB, that it acted **ultra vires procedurally** as an Appeal Board.

The PSAB was critical of the Ministry of Justice Staff Board by saying that it failed to carry out an '**open, competitive selection process**' as required under **Regulations 5(1)** of the **Public Service Regulations 1999** which provides:

> **"5 – (1) The appointment or promotion of a person to an office pursuant to section 147 (1) of the Constitution must be made on the basis of merit after an open, competitive selection process, and in accordance with section 140 of the Constitution."**

The PSAB in its submission said that it questioned the process of selection adopted by the Ministry.

It is the PSAB's argument that R2 met the MQR as her post of Senior Assistant Registrar in the BDM office is equivalent to that of Senior Administrative Officer. It says both are on the same job classification i.e. common user posts in SS02 grade. But it admits that the duties of R2 in the BDM Office only slightly differ from the applicant and they carry out similar range of activities.

Conclusion

In the outcome upon the whole of the evidence before me and considering the written submissions of all the parties herein I hold that there has been an **'error of law'** on the part of the Public Service Appeal Board for the reasons given hereabove.

The process by which the PSAB reached its decision was clearly wrong. It is a disregard of the **rules of natural justice. Lord Diplock** in **Mahon v Air New Zealand Ltd** (1948) A.C. 808 at pp. 820-821 delivering the judgment of the Privy Council, said as follows in relation to a person making a finding in the exercise of its powers:

> ***"The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made ... The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."***

It has been held that **"judicial review is required to put right a situation where things have gone wrong and an injustice requires to be remedied"**

(**Woolf L.J.** in **R v Wolverhampton Coroner, ex p McCurbin** [1970] 1 WLR 719). This is such a case.

The PSAB ignored the requirements of s5 in its consideration of the appeal and did not conduct the inquiry properly in the Appeal.

The PSAB acted ultra vires as it failed to comply with the requirements of the law in s5 and by common law.

From the procedure adopted by the PSAB there clearly was an **error of law** and on this aspect **Lord Diplock** in In re **Racal Communications Ltd** [1981] AC 374 at 382-383 has succinctly summarised it as follows:

> ***"...where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so. The break-through made by Anisminic [1969] 2 A.C. 147 was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity."***
> (emphasis mine)

It has to be borne in mind that this decision does not govern what may be different circumstances in other cases. In other words a decision has to be on the facts of each case after interpreting the requirements of the law.

The reasons given in this case for the decision has been arrived at by the PSAB after taking into consideration the working of the said **section 5(1)** which states, inter alia, that **"promotion must be made on the basis of merit after an open, competitive selection process..."**.

In other words the PSAB took upon itself to consider on appeal the application **anew** or **afresh**. In actual fact the PSAB decided on Appeal to deal with the matter itself. It appears that in the eyes of PSAB, the lawyers in the Staff Board (chaired by the then Chief Magistrate) and the CEO (a legally qualified person and a former Magistrate) both went wrong in law when they considered the applicant's application and that of R2.

In my view if PSAB was strongly of the opinion that the other two decision makers did not comply with s5 then it should have referred the matter back to the CEO to reconsider the application in accordance with the provisions of s5 rather than taking upon itself the function of deciding on the issue of who of the two should be promoted in the manner it did. By dealing with the Appeal in the manner it did it **exceeded its jurisdiction** failed to consider matters which it was required to do under s5.

The procedure the PSAB adopted **did not meet the ends of justice**, for after all the parties have to be accorded natural justice and it is an important matter for these very senior officers at this stage of their career which spans over thirty years.

The applicant and the second Respondent should not have to suffer because of what I find is an error of law. The Court cannot allow procedural impropriety to exist in determining the issue.

For these reasons the application for judicial review succeeds.

Order

The question of what relief should be given in the circumstances on an application for judicial review is something which is always in the discretion of the Court.

In this case I consider that the decision was improper and unlawful and I therefore grant an **order of certiorari** removing the decision of the Public Service Appeal Board into this Court and it is quashed. Although **Order 53 r9(4)** of **The High Court Rules 1988** permits the Court to quash the decision, the '**Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court**', I do not propose to make any additional order in this case as it will not serve any purpose. It is ordered that each party bear its own **costs** in the circumstances of this case.

D. Pathik

Judge

At Suva

13 July 2006