



for development. The area of development was approximately 135 acres. The application for lease, was dated 3.2.2014 and made to the first Respondent to obtain lease. In order to obtain lease for the said land for development Plaintiff was required to obtain waiver of fishing rights in favour of Applicant. Considering nature of development an Environmental Impact Assessment (EIA) was requested on 23.09.2016. The Waiver of fishing rights, in favour of Applicant, in the area affected was endorsed by Chairman of third Respondent on 31.5.2015. EIA was completed in November, 2016 and submitted the same to the first Respondent for obtaining lease. Although both EIA and waiver of fishing rights were accepted without any objection, first Respondent on 29.8.2018 informed that waiver of fishing rights obtained in favour of the Applicant was withdrawn subsequently and it was awarded to forth respondent. The requirement for waiver of fishing rights, was requested in terms of a cabinet decision. Said cabinet decision also required '**guidelines**' and '**procedure**' regarding waiver of fishing rights, be made. There are no guidelines and or procedure, regarding revocation of waiver and or endorsement of the said waiver by third Respondent. A person such as Applicant who had complied with the requirements to obtain a lease cannot be suddenly informed that the waiver already obtained and endorsed, and submitted was withdrawn and that was the sole reason for first Respondent not to further 'consider' its application for state foreshore lease. The Applicant was not granted an opportunity to make representation before cancellation and or withdrawal of waiver of fishing rights that was waived in their favour. First Respondent had admitted that waiver of fishing rights were properly obtained and endorsed by third Respondent, in favour of Applicant. There was no intimation of purported withdrawal of waiver and or the reason for doing that by third Respondent, but on 18.11.2017 the same fishing rights were waived in favour of fourth Respondent and it was also endorsed by third Respondent. Neither purported cancellation nor the fresh endorsement of fishing rights to forth Respondent were informed to Applicant by third Respondent. First Respondent on 29.8.2018 informed the Applicant that its application for lease cannot be considered further due to said withdrawal of waiver of fishing rights. There is no documents that had cancelled or withdrawn waiver granted to Applicant, though subsequent grant to forth Respondent on 22.3.2017 stated that it was done. There needs to be procedural fairness, in purported withdrawal or cancellation of fishing rights. This did not happen as there were no guidelines or procedure followed though that was an essential requirement stated in the said cabinet decision. The endorsement of withdrawal of fishing rights granted to Applicant and subsequent endorsement of grant of the same to forth Respondent is unlawful and null and void. There needs to be proper procedure and guideline issued and followed in line with cabinet paper, before expectations of a developer such as the Applicant are dashed. The purported withdrawal and cancellation of fishing rights waived in favour of Applicant annexed to affidavit in opposition marked as 'C' is not endorsed by third Respondent, and it does not state Applicant's name and it is null and void. First Respondent's decision not to further 'consider' Application for state foreshore lease dated 3.2.2014 is quashed as withdrawal of waiver is null and void. First Respondent is directed to take further steps regarding approval of state foreshore lease.

## FACTS

2. Applicant made an application for State Foreshore Lease for approximately 135 acres to first Respondent on 3.2.2014 and after vetting it, fee for the Application was paid on 13.2.2014.
3. Applicant was informed on 29.8.2018 by first Respondent that application for State Foreshore Lease cannot be 'considered' further due to a subsequent withdrawal of fishing rights.
4. Applicant seeks judicial review based on letter of 29.8. 2018, which amounts to rejection of its application for a Foreshore Lease the Land.
5. Said letter stated as follow:

*"The Director  
Kaikuilau Holdings Ltd  
P O Box 3029  
Nadi*

*Dear Sir,*

### ***Re: FORESHORE LEASE APPLICATION REQUIREMENTS***

- 1. We refer to our e-mail of 1 November 2017 and your response of 2 November 2017 in regards to the above.*
- 2. Please be advised that the waiver of fishing rights endorsed by the Chairperson of the iTaukei Lands & Fisheries Commission ('TLFC') 31 March 2015 in favour of Kaikuilau Holdings Company Limited ('KHCL') was withdrawn by the resource owners on 22 March 2017.*
- 3. On 18 November 2017, the Chairperson of TLFC has endorsed the waiver of fishing rights to SVG Pacific Properties Group.*
- 4. Therefore we are unable to consider KHCL's application for a foreshore lease any further.*
- 5. Please contact the undersigned for any further queries.<sup>5</sup>*

6. According to said letter sole ground for rejecting the application for the state foreshore lease, was the waiver of fishing rights previously endorsed in favour of Applicant on 31.5. 2015 which were subsequently, withdrawn by the owners on 22.3. 2017.
7. There was no specific letter withdrawing or cancelling waiver of fishing rights, endorsed by third Respondent
8. There was no communication of the withdrawal of fishing rights either before or after purported withdrawal by third Respondent, though first Respondent was intimated about that and this information was communicated only through above letter dated 29.8.2018
9. The same fishing rights was waived and endorsed for the benefit of forth Respondent on 18 .10.2017, the third Respondent.
10. The withdrawal of waiver of fishing rights, was the sole reason for rejection of the application for state foreshore lease.
11. The requirement for waiver of fishing rights prior to grant of state foreshore lease was pursuant to a cabinet decision and this is annexed as A to affidavit in opposition filed on 6.5.2019. It states as follow;

*"CABINET DECISION*

*Extract from Minutes of Meeting held on 25th September, 1974*

*Fijian Customary Fishing Rights: CP(74) 204  
Cabinet decided :-*

1. *that Fijian customary fishing rights are not compensable rights;*
2. *that where Fijian customary fishing rights are interfered with, the owners should be recompensed in the form of capital sum by the lessee/licensee or the Crown, or whichever party carries out the development;*
3. *that where 2 occurs –*
  - (a) *the Native Fisheries Commission should determine precisely what rights exist over the area concerned and what division of the people enjoy these rights;*

- (b) *an independent arbitrator should then with the assistance of professional advice from Government departments assess the quantum of recompense; and*
  - (c) *payment of the independent arbitrator should be a charge against the developer;*
4. *that any recompense payable should be decided before the application for a foreshore lease is advertised or a licence granted;*
  5. *that no foreshore lease or lease of soil under Fiji waters should be advertised unless the developer has lodged the recompense in a public account. This amount is refundable in the event of the lease not being granted;*
  6. *that money paid in accordance with 2 should be paid to a trustee or trust for the owners of fishing rights;*
  7. *that guidelines should be established relating to method of assessment and procedure as to determination of recompense;*
  8. *that all mangrove reserved forest areas should be deproclaimed;*
  9. *that government-policy as agreed should be publicised and statements issued to the  
Fijian Affairs Board, Native Land Trust Board and all District Commissioners; and*
  10. *that the Minister for Lands be invited :-*
    - (a) *to suit proposals to Cabinet on the appointment of an independent arbitrator;*
    - (b) *To submit proposals on the guidelines relating to methods of assessment and procedure as to determination of recompense; and*
    - (c) *The appropriate trustee to hold any such funds on behalf of the owners of the fishing rights.*<sup>o</sup>
12. The affidavit in opposition states that there are procedure relating said cabinet decision regarding waiver of fishing rights. There are no guidelines submitted in this regard. (see paragraph 6 of the affidavit in opposition filed on 6.5.2019).
  13. Applicant in the amended motion seeks a declaration that cancellation of waiver of fishing rights endorsed by third Respondent and also cancellation of waiver of the same fishing rights and endorsement null and void.

14. Applicant is also seeking certiorari and mandamus against first Respondent regarding decision dated 29.8.2018 relating to its application for State Foreshore Lease dated 3.2.2014.

## ANALYSIS

15. On 13.2.2014 the Applicant had paid required fees for lodgement with the First Respondent an application for a State Foreshore Development Lease over the Land.
16. Applicant stated that upon initial lodgement of the Application the Applicant was initially required to provide to the First Respondent together with its Application, the following information namely-
  - (a) *A Site Map of the area subject of the Application.*
  - (b) *A Concept Plan setting out the proposed development.*
  - (c) *An Environment Impact Assessment Report. (EIA)*
  - (d) *A Waiver or Consent by the Owners of the Fishing Rights for the Foreshore area encompassing the proposed development lease area.*
17. Applicant had complied with the said requirements, and the sole reason for further, not 'considering' its application for State Foreshore Lease by first Respondent was subsequent withdrawal of fishing rights endorsed by third Respondent.
18. 31.3. 2015 Waiver of Fishing Rights, relating to State Foreshore Lease was obtained from the owners of fishing rights and it was endorsed by third Respondent. It is an admitted fact that Applicant had obtained waiver of fishing rights required for grant of State Foreshore Lease for development.
19. Annexed marked 'C' to the affidavit in opposition of first Respondent was a purported revocation of waiver to Ratu Joseva Vatunitu, who was only a director of the Applicant. It is to be noted that waiver that was endorsed by third Respondent 31.3.2015 in favour of Applicant which is a separate legal entity. It is trite law legal person has a separate status from its directors. So there was no cancellation of waiver endorsed by third Respondent according to evidence presented at the hearing.
20. The purported withdrawal of waiver endorsed by third Respondent cannot be used against Applicant which has separate legal status. So the purported cancellation/withdrawal of fishing rights is unlawful and null and void.

20. It is axiomatic that without proper cancellation of waiver of fishing rights the same cannot be granted forth Respondent subsequently. So the endorsement in favour of forth Respondent is void *ab initio*.
22. Without prejudice to above, there is no specific document that had cancelled or withdrawn waiver of fishing rights granted to the Applicant, though it was mentioned in the letter that granted waiver in favour of fourth Respondent that waiver granted to Ratu Joseva Vatunitu was revoked earlier. 22.3.2017 letter annexed as 'c' to the affidavit filed on 21.2.2019 relied as revocation and or withdrawal of waiver in favour of Applicant states:
- '.....following the revocation of waiver of out customary fishing rights from Ratu Joseva Vatunitu also known as Ratu Joseva Smudunatua Vatunitu for area described as Denarau South, we have collectively agreed and granted fishing waiver for Denarau South to SGV Pacific Properties Group'*
23. Said letter marked 'c' which is relied on first and third Respondent as withdrawal of fishing rights cannot be considered as a withdrawal firstly as there was no endorsement of that document dated 22.3.2017 (marked 'c') by third Respondent. Secondly, it was a letter that waived same fishing rights to forth Respondent, and not a revocation of earlier waiver to Applicant.
24. The waiver of fishing rights needs endorsement of third Respondent, so I can't see why this was not a requirement for withdrawal. There was no procedural fairness in the purported withdrawal of fishing rights granted to Applicant. This is due to lack of guidelines and or procedure as required by said cabinet decision.
25. Even if I am wrong on the above, it is an admitted fact that requirement to obtain waiver of fishing rights and the endorsement of the same by third Respondent was done in pursuant to a cabinet decision which was quoted earlier.
26. Cabinet decision had indicated that 'guidelines' and 'procedure' needs to be made in the implementation of the said decision. It is essential to have proper procedure after waiver of fishing rights in favour of a party and withdrawal and endorsement should be subjected to a fair procedure where the party who was granted fishing rights is informed before it being cancelled. Lack of endorsement of third Respondent also makes the purported withdrawal marked 'c' to affidavit filed on 21.2.2019 void.
27. Applicant who is a prospective developer of an area over 135 acres with Integrated Tourism and Real Estate Development along Denarau South at Nadi, should not be

*done without his being given an opportunity of being heard and of making representations on his own behalf. But in the case of aliens, it is rather different for they have no right to be here except by licence of the Crown. And it has been held that the Home Secretary is not bound to hear representations on their behalf, even in the case of a deportation order, though, in practice, he usually does so. It was so held in Rex v. Leman Street Police Station Inspector, ex parte Venicoff (1920 3 K.B. 72), which was followed by this Court in Sohlen's case (1963 2 Q.B. 243). Some of the judgments in those cases were based on the fact that the Home Secretary was exercising an administrative power and not doing a judicial act. But that distinction is no longer valid. The speeches in Ridge v. Baldwin (1964 AC 40) show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say..”*

35. Applicant had an interest in the withdrawal or cancellation of fishing rights that were waived in its favour and endorsement of the same by third Respondent as it was a prerequisite for its application for state foreshore lease.
36. It was partial implementation of cabinet decision without proper guidelines and procedure that resulted in purported withdrawal of fishing rights being endorsed and also being communicated to first Respondent. First respondent had taken a decision not to consider application submitted relying on the purported withdrawal of waiver of fishing rights in favour of Applicant.
37. Administrative Law (11<sup>th</sup> Edi) by H.W.R Wade, stated;

*“Substantive expectations are often protected procedurally, i.e by extending to the person affected an opportunity to make representation before the expectation is dashed”<sup>2</sup>.*

38. Partial implementation of waiver of fishing rights in terms of the cabinet decision had resulted deprivation of legitimate expectation of Applicant without informing it. Lack of guidelines and procedure in this regard denied rules of natural justice before first Respondent decided not to consider it, further. This amounts to rejection of application submitted.
39. Applicant had procedural legitimate expectation before its waiver of fishing rights endorsed by third Respondent was purportedly withdrawn. This is a recognized

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<sup>2</sup> Ibid p 458



Judicial Review first UK in *Schmidt v Home Secretary* [1969] 2 Cl 149<sup>3</sup>, (see also *R v Secretary of State for Transport ex p Richmond upon Thames LBC* [1994] 1 WLR 74 at 92).

40. Third Respondent as well as first Respondent had not followed any guide line or procedure in terms of the said cabinet decision that required both procedure and guidelines being made.
41. Legitimate expectation is recognized as a ground for consideration in the decision making in *R(Bibi) v Newham LBC* [2002] 1 WLR 7237 though finally court rejected the allocation of resources to be directed by the court.(see also *R(ABCIFER) V Secretary for Defence* [2003] EWCA Civ 473 [2003]QB 1397.
42. When fishing rights were waived to the Applicant there were no conditions attached to that and it was unconditional waiver by the owners and there was no time period stated and third Respondent had endorsed the same, So, Applicant had legitimate expectation of waiver to be effective when the application for state foreshore lease was considered by first Respondent. This was the purpose of the obtaining waiver and policy behind the said cabinet decision to obtain waiver was not to allow abuse of waiver of fishing rights to discourage development and investment, but to allow compensation to be paid.
43. All the stakeholders were aware the reason for the grant of waiver of fishing rights and that was for Integrated Tourism and Real Estate Development. The requirement for waiver of fishing rights had arisen from cabinet decision, and third Respondent is entrusted with determination of fishing rights. Third Respondent was taking actions with regard to waiver of fishing rights in terms of the said cabinet decision, hence obliged to follow guidelines and procedure in withdrawal of fishing rights.
44. First Respondent before deciding not to consider Application submitted on 3.2.2014 on 29.8.2018 must act fairly by informing Applicant of the purported withdrawal. The lack of procedural fairness also makes the purported withdrawal of fishing rights and also subsequent grant of the same to forth Respondent null and void.

## CONCLUSION

45. The purported withdrawal of waiver marked 'c' to affidavit filed on of fishing rights in favour of the Applicant is null and void of following grounds. This document was

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<sup>3</sup> ibid p459

subsequent waiver of same fishing rights to fourth Respondent and not a withdrawal of waiver in favour of Applicant. It was clear from the heading of the said letter. In the content it was stated that 'following the revocation of waiver' the same was granted to forth Respondent. Even if I am wrong on that, annexed marked 'c' had revoked waiver of fishing rights to Ratu Joseva Vatunitu, who was only a director. The waiver of fishing rights was to Applicant which was also endorsed by third Respondent. (see annexed B to same affidavit). So the waiver of fishing rights in favour of the Applicant was not affected. Document marked 'c' was not endorsed by third Respondent. Without prejudice to above waiver of fishing rights before state foreshore lease was pursuant to cabinet decision that also required guidelines and procedure to be followed. (see paragraph 6 of affidavit in opposition filed on 6.5.2019). It was also admitted there were no such procedures for cancellation. Absence of fair procedure in the cancellation and endorsement of the same makes purported withdrawal of waiver of fishing rights null and void. Without proper withdrawal of fishing rights the same cannot be waived to forth Respondent and subsequent waiver to fourth Respondent is also null and void. The only reason that resulted decision contained in letter of 29.8.2018 of first Respondent, for not to further consider Application for lease was the purported withdrawal of waiver of fishing rights, and nullification of the said withdrawal also result in quashing the said decision of first Respondent, and also issuing a direction by nature of Mandamus directing first Respondent to proceed further with consideration of the application for state foreshore lease dated 3.2.2014. Considering the circumstances of the case each party is to bear their own cost.

#### **FINAL ORDERS**

- a. Cancellation or withdrawal of waiver of fishing rights is unlawful and null and void.
- b. Subsequent grant of the same waiver of the same fishing rights is unlawful and null and void.
- c. The decision of 29.8.2018 of first Respondent not to consider further the application for state foreshore lease dated 3.2.2014 is quashed.
- d. An order of Mandamus is issued to first Respondent to further consider the application for state foreshore lease dated 3.2.2014.
- e. No order as to costs.

Dated at Suva this 23<sup>rd</sup> day of September, 2019.



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**Justice Deepthi Amaratunga**  
**High Court, Suva**