STATE v PERMANENT SECRETARY, OFFICE OF THE PRIME MINISTER; Ex parte CHAUDHRY

HIGH COURT — REVISIONAL JURISDICTION

SCOTT J

19, 24 November 2003

[2003] FJHC 29

Administrative law — judicial review — application for leave to move for judicial review — by-election on single day — 1997 Constitution ss 78(1), 78(2), 79(1), 79(3), 169(a), 170(5), 170(6), 174 — Electoral Act 1998 Pt 7.

Applicant sought an application for leave to move for judicial review challenging the decision to hold the by-election on a single day. He also sought a declaration that the by-election should be held over a 3-day period. Respondent opposed that he had taken no decision in relation to the by-election at all and that he was not the decision-maker whose decisions the Applicant sought to impugn.

Held — There was nothing which directly requires the commission or the supervisor to give reasons for their decisions. It is the commission and the supervisor who was constitutionally empowered to decide the matters in question, provided the decisions taken were lawful when they were not reviewable. A mere disagreement was not, without proved procedural impropriety, a ground for judicial review. Applicant had failed to place any evidence of procedural impropriety let alone absurd unreasonableness on the part either of the commission or of the Supervisor before the court.

Application dismissed.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155; *Minister for Aboriginal Affairs v Peko-Walsend Ltd* (1986) 162 CLR 24; 66 ALR 299, cited.

Attorney-General v Director of Public Prosecutions [1982] 28 FLR 20, considered.

P. Maharaj for the Applicant.

J. Udit and *S. Sharma* for the Respondent.

Scott J. This is an application for leave to move for judicial review. On 19 November I refused the application. These are my reasons.

On 18 July 2003 the death occurred of the member of the House of Representatives for the Labasa Rural Indian Communal Constituency, Mohammed Lateef Subedar.

On 30 October, his Excellency the President issued a writ for a by-election to be held in the constituency (GN 1651/03).

On 19 August 2003, the supervisor of elections issued Circular 1/03 (Ex A to the supporting affidavit). In the first sentence of the third paragraph of this circular, all interested parties were advised that polling would take place on 6 December 2003.

Over the next few days and weeks, the Fiji Labour Party of whom the Applicant is the secretary general made several representations both to the supervisor and to the chairperson of the Electoral Commission calling for the polling period to be extended to 2 days. Copies of the letters exchanged are

exhibited to the supporting affidavit and to the affidavit of the supervisor filed on 12 November 2003. On 11 September 2003, the supervisor issued Circular 3/03 (Ex D to the supporting affidavit) which confirmed that polling for the by-election would be held upon the single day, Saturday 6 December 2003.

On 9 October, these proceedings for judicial review were commenced. The Applicant challenges the decision to hold the by-election on a single day. Additionally, and slightly oddly, he seeks a declaration that the by-election should be held over a 3-day period.

On 17 October 2003, the Respondent filed a notice of opposition. He pointed out that he had taken no decision in relation to the Labasa by-election at all and that he was not the decision maker whose decisions the Applicant was seeking to impugn.

In discussion with counsel, it emerged that the Applicant's legal advisers had decided to join the Permanent Secretary as the Respondent in view of the fact that the Office of the Supervisor of Elections is a department the responsibility for which is allocated to the Prime Minister (see LN 79/2001). In my view that was a mistaken approach.

As explained by the Privy Council in *Attorney-General v Director of Public Prosecutions* [1982] 28 FLR 20, the assignment of ministerial responsibility does not grant ascendancy to the assignee when the department assigned enjoys constitutional independence or protection from interference. This understanding of the law is reflected in the asterisk note to the Legal Notice which:

> Indicates the responsibility is subject to any provision as to the independence of the office.

The Office of the Supervisor of Elections was continued in existence by s 79 (1) of the 1997 Constitution. Under s 79(3):

> The Supervisor of Elections … must comply with any direction that the [Electoral] Commission gives him or her concerning the performance of his or her functions.

The Electoral Commission was continued in existence by s 78(1) of the 1997 Constitution. Under s 78(2) the commission:

> Has general responsibility for the registration of votes for election of members of the House of Representatives and the conduct of those elections.

As is clear from ss 169(a), 170(5) and 170(6) the Supervisor of Elections:

> Is not subject to direction or control by any person or authority.

Except the Electoral Commission.

Given these considerations and noting that the Respondent is not even mentioned in the supporting affidavit, I am of the opinion that the Respondent was wrongly joined. The first question was whether this alone was a sufficient ground to dismiss the application for leave.

Mr Udit pointed out that the Applicant had had plenty of time to amend his application by joining either the Supervisor or the Electoral Commission. He had not done so. Ordinarily, an action directed at the wrong person will fail but I decided not to dismiss the application on the ground that the wrong person had been made the Respondent. The supporting affidavit made it quite clear that the Applicant's grievances were against the supervisor and the commission. Furthermore, in matters of public importance and interest to the public curable technical errors should not stand in the way of resolution of the dispute brought before the court.

As will be seen from the application dated 7 October, the Applicant advances three general grounds in support of the application. In summary they are:

(i) that the commission failed adequately to explain the decision to hold the by-election over one day only; and

(ii) that the commission failed to give proper consideration to the following "facts":

(a) that one day would not be adequate;

(b) that holding the by-election on a Saturday would result in many voters being denied the opportunity to vote;

(c) that many voters would suffer financially by having to vote on that day; and

(d) that previous by-elections had been held over a 2–4-day period;

(iii) that the commission and the supervisor acted "against the spirit of the Constitution Amendment Act and the Electoral Act".

As to the first ground, I am not aware of anything which directly requires the commission or the supervisor to give reasons for each of their decisions reached. Section 174 of the 1997 Constitution should however not be forgotten.

In para 6.2 of his helpful written submission filed on 19 November, Mr Udit listed no less than six letters or circulars issued by the commission or the supervisor by way of explanation and in response to the representations made by the Fiji Labour Party. In para 6.3, Mr Udit suggested that the explanations offered were ample and adequate. I agree.

As will be seen from a detailed examination of the reasons and explanations given by the commission and the supervisor, in fact all the matters which the Applicant suggests were not given proper consideration was specifically taken into account.

Ms Maharaj did not advance any facts or matters other than those already canvassed in support of the unparticularised suggestion that the commission or the supervisor had somehow violated the spirit of the Constitution or the Electoral Act. I am not at all sure that an alleged violation of the spirit of the law is not altogether too vague to be a properly pleaded ground of complaint.

In considering this application two predominant considerations must be borne in mind. The first is that:

> It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of the purpose to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by law to decide the matter in question. (*Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 and see also *Minister for Aboriginal Affairs v Peko-Walsend Ltd* (1986) 162 CLR 24; 66 ALR 299).

In the present case, it is the commission and the supervisor who are constitutionally empowered to decide the matters in question. Provided the decisions taken are lawful then they are not reviewable.

The second important consideration is the radical difference between an appeal against a decision and an application for judicial review of the same decision. Appeals are concerned with the merits of the decision under appeal. Judicial review is solely concerned with legality.

Apart from Pt 7 of the Electoral Act 1998 which is of no relevance to the circumstances now before the court, there is no right of appeal against a decision by the supervisor. There is no right of appeal at all against the commission. While judicial review is available the court is not concerned with the merits of the

decision reached but with the propriety of the decision-making process. Even a finding that a decision is absurd and one which no sensible person could ever have arrived at (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229) is a finding that the process of arriving at the decision was so flawed as to render the result wholly unreasonable.

Stripped of legal niceties, the Applicant's case is that the supervisor or alternatively the commission was wrong in thinking that a by-election could be held in Labasa in 1 day. The Supervisor, whose affidavit in response sets out in admirable detail the impressive thoroughness with which this by-election has been approached, disagrees. A mere disagreement is not, without proved procedural impropriety, a ground for judicial review. At the conclusion of the hearing on 19 November, I was satisfied that the Applicant had failed to place any evidence of procedural impropriety let alone absurd unreasonableness on the part either of the commission or of the supervisor before the court. In my view the Applicant's case was wholly unarguable and it was for that reason that I refused leave to move for judicial review.

As previously indicated, I will hear counsel as to costs.

Application dismissed.