

- (7) 'ISILELI PULU
of Nuku'alofa
MEMBER OF PARLIAMENT and former
MINISTER OF TOURISM
- (8) 'ULITI UATA
of Nuku'alofa
MEMBER OF PARLIAMENT and former
MINISTER OF HEALTH
- (9) 'ANA M. TAUFE'ULUNGAKI
of Nuku'alofa
MINISTER OF EDUCATION
- (10) VILIAMI U. LATU
of Nuku'alofa
MINISTER OF LABOUR, COMMERCE AND
TOURISM and former MINISTER OF POLICE,
PRISONS & FIRE SERVICES
- (11) FE'AO VAKATA
of Nuku'alofa
MINISTER OF REVENUE and former
MINISTER OF TRAINING, EMPLOYMENT,
YOUTH & SPORTS
- (12) WILLIAM CLIVE EDWARDS
of Nuku'alofa
MINISTER OF JUSTICE & PUBLIC
ENTERPRISES and former MINISTER OF
PUBLIC ENTERPRISES & REVENUE SERVICES

- First Respondents

GOVERNMENT OF THE KINGDOM OF TONGA

- Second Respondent

Applicant in person

'A. Kefu (Solicitor General) for the Respondents

DECISION

Introduction

- [1] This is an application for leave to move for judicial review filed pursuant to Order 39 Rule 2 of the Supreme Court Rules. Three distinct declarations are sought:
- (a) The "First Declaration" sought is that three decisions taken by the First Defendants on 23 March 2011 to approve a lump sum payment of T\$3.7 million to Lord Kalaniuvalu; to approve immediate payment of the sum of T\$3.7 million to Lord Kalaniuvalu and immediately to pay T\$119,500 to Prince Tungi were "wrong and unlawful";
 - (b) The "Second Declaration" sought is that payments made by the Second Defendants of T\$2 million to Lord Kalaniuvalu on 30 June 2011; of T\$119,500 to Prince Tungi on 16 June 2011 and of T\$1 million to Prince Tu'ipelehake on 10 February 2012 were "wrong and unlawful";
 - (c) The "Third Declaration" sought is that "the granting of two government quarters" by the First and Second Defendants [to Fotu] was "wrong and unlawful".

Each application for leave must be considered individually.

Background

- [2] The following undisputed facts emerge from the amended statement of claim and the amended application for leave filed on 8 February 2013, the undated affidavit in support filed on 14 January 2013 and a supplementary affidavit filed on 12 April 2013.
- [3] On about 17 February 2011 a document entitled "Airport Land Leases and the World Bank Tonga Aviation Infrastructure Improvement Project" (Exhibit J to the first affidavit) was presented to Hon. Samiu Vaipulu, Deputy Prime Minister and Minister of Transport. According to this document (the exhibited copy of which is not complete) the project was intended to finance investments at Tonga's three main airports. Two of these airports, Fua'amotu and Vava'u occupy land leased from several estate holders including

Prince Tungi, Prince Tu'ipelehake, Lord Kalaniuvalu and Fotu. The document proposed that expired leases be renewed, that the terms of existing leases be extended (ideally to 99 years) and that the rentals for the leases be substantially increased.

- [4] Two paragraphs appearing on page 4 of the document need to be set out:

"In order for the TAIP project to continue on its current timeline these issues must be resolved by Project Appraisal which is Scheduled to commence on 7 March 2011"

"As the financing of this Project is required to be prepared and approved by the [World Bank] Board during the current IDA funding allocation (expires in May 2011) there is little, if any room, for delay in any aspect. Accordingly, the lack of a timely resolution on these issues is likely to result in the opportunity for financing this large grant being lost".

- [5] In about April 2012 the Applicant obtained a copy of Cabinet Memorandum 205 dated 23 March 2011. This memorandum is marked "Confidential". It advises that Cabinet had approved the payments which are the subject of the First Declaration. It also advises that approval has been made to the subject of the Third Declaration. A copy of the Cabinet Memorandum is exhibit A to the first affidavit.
- [6] On 30 June 2011 two sums of T\$970,000 were paid by the Ministry of Transport to Lord Kalaniuvalu. Copies of the payment vouchers are exhibits C and D to the first affidavit. On 16 June 2011 T\$103,965 was paid to Prince Tungi. A copy of the payment voucher is exhibit F to the first affidavit. According to paragraph 3(c) of the same affidavit "about T\$1 million" was paid to Prince Tu'ipelehake on about 10 February 2012 "by the Second Respondent" but no copy of this voucher was exhibited.
- [7] According to paragraph 3(d) of the Applicant's first affidavit "some time after the Cabinet decision of 23 March 2011 two Government Quarters were granted to the Estate Holder Fotu and his two sons are currently occupying the said quarters situated at Fasimoeafi, Tongatapu".

Grounds for complaint

- [8] The Applicant claims that the decisions taken by Cabinet to approve the payments in question and to grant the two Government Quarters were "without legal basis as there was neither a lease application nor registered lease in place at the time" the decisions were made.

In the fourth paragraph of a copy of a Parliamentary Motion November 2 dated 1 May 2012 (Exhibit G and translation in the first affidavit) this claim is particularised by reference to the alleged failure to comply with Sections 124 and 126 of the Land Act (Cap 132).

- [9] The Applicant further claims that the payments made to the Estate Holders in June 2011 and February 2012 were unlawful because they were made in breach of Clause 19 of the Constitution, in breach of Section 9(1) of the Public Finance Management Act (27 of 2002) and did not comply with the Public Procurement Regulations 2010.

Objections by the Respondents

- [10] In his written submissions filed on 12 March 2013 the Solicitor General referred to Order 39 of the Supreme Court Rules. He conceded that the applications complied with Rules 1 and 3(2) but submitted that the applications had not been made promptly and in any event within three months from the date when grounds for the application first arose (O.39 r2(2)). He argued that no good reason for extending that period had been given.
- [11] The Solicitor General's second submission was that the declarations sought in respect of the Cabinet decisions should be dismissed on the ground that the principal, indeed sole, ground of complaint was that Sections 124 and 126 of the Land Act had not been complied with. This complaint, it was argued, was within the exclusive jurisdiction of the Land Court (see Section 149(1)(e) of the Land Act) and was beyond the jurisdiction of the Supreme Court.
- [12] As to the alleged breaches of the Constitution and the Public Finance Management Act, the Solicitor General pointed out that the vouchers exhibited by the Applicant revealed that the payments had been made out of the Government Operating Account after approval and apparently from the Ministry of Transport's budget. There was, according to the Solicitor General, nothing to show that the payments

did not comply with either Clause 19 of the Constitution or that public money had been expended beyond the limits imposed by the relevant Appropriation Acts.

- [13] A number of other objections were raised by the Solicitor General however I do not think they need individually to be addressed. The broad submission was that the Applicant had no arguable case in respect of any of the declarations sought and accordingly leave should be refused (see e.g. *R v Legal Aid Board Ex.p. Hughes* (1992) 5 Admin L.R. 623; *R v Secretary of State for the Home Department Ex.p. Begum and Begum* [1990] C.O.D 107).

Delay

- [14] The Applicant accepted that his application had not been made within three months of his becoming aware of Cabinet Decision 205/11 in April 2012. It was not in fact filed until January 2013, approximately five months out of time. His explanation for the delay set out in paragraphs 7 to 10 of his first affidavit is that rather than immediately apply for leave to move for judicial review, the Applicant first attempted to achieve a similar result by raising these matters in Parliament, of which he is a member. It was only when that course of action failed that the Applicant decided to approach the Court.
- [15] As explained in the White Book 2001 at 54.5.2:

"The time limit begins to run from the date when the grounds for the claim first arose. The time does not run from the date when the claimant first learnt of the decision or action under challenge nor from the date when the claimant considered that he had adequate information to bring the claim. Such matters may be relevant to the separate question whether an extension of the time limit should be granted".

At 54.5.4:

"The Courts have accepted that there was a good reason for the delay if the Applicant was unaware of the decision providing he applied expeditiously once he became aware of it".

"The fact that the claim raises issues of general public importance may be a reason for extending the time limit."

- [16] In paragraph 12 of his first affidavit and paragraph 4 of his application the Applicant suggested that it was of "fundamental importance that the Court make a ruling on whether or not the said decisions and payments were wrong and unlawful so that the Prime Minister of Tonga, Deputy Prime Minister, Members of Cabinet, Government of the Kingdom of Tonga and even Members of Parliament do adhere to the rule of law of this country because it is in the best interest of the people I represent".

Consideration of the issues

(a) The First Declaration

- [17] Clause 51(1) of the Constitution provides that:

"The executive authority of the Kingdom shall vest in the Cabinet which shall be collectively responsible to the Legislative Assembly for the executive functions of the Government".

This description of the main functions of the Cabinet is remarkably similar to the way in which the UK Cabinet's functions were described in 1918 [Cd.9230]: (a) the final determination of the policy to be submitted to Parliament (b) the supreme control of the national executive in accordance with the policy prescribed by Parliament and (c) the continuous co-ordination and delimitation in the interests of the several Departments of State.

- [18] In Tonga, unlike in the UK, some specific statutory functions are also conferred upon the Cabinet. Examples of these are the consent of Cabinet which is required by Sections 54(1) and 56(1) of the Land Act. In *C.O. Williams Construction v Blackman* [1994] 4 LRC 216, 222 the Privy Council [UK] said:

"When the Cabinet exercises a specific statutory function which, had it been conferred on a Minister instead of the Cabinet would unquestionably have been subject to Judicial Review, their Lordships can see no reason in principle why the Cabinet's exercise of the function should

not be subject to Judicial Review to the same extent and on the same grounds as the Minister's would have been".

- [19] The question, therefore, is whether, in approving the payments involved in the First Declaration, Cabinet was exercising a specific statutory function. The Applicant did not refer me to any statutory function in the decision to approve the payments except Sections 124 and 126 of the Land Act. Apart however from the formal requirement that all leases be signed by a Cabinet Minister, there is no involvement of Cabinet at all in this Division of the Act. Furthermore, as pointed out by the Solicitor General, had Cabinet in fact been exercising one of the powers conferred upon it by the Land Act, then any challenge to that exercise should go to the Land Court, not the Supreme Court.
- [20] In approaching the question whether to grant leave to move for this declaration I have also found it relevant that the source document for the Applicant's claim is a Cabinet Memorandum clearly marked "Confidential". By convention the proceeding of Cabinet are confidential. It appears that the document may have come into the Applicant's hands following a breach by a person unknown of Section 3(1)(a) of the Official Secrets Act (Cap 5). In my view, the Supreme Court should be extremely cautious about founding judicial review on a document of this kind. Apart from the document itself (which was apparently conceded to be genuine) little is known about the context in which it was generated.
- [21] In my opinion the decisions taken by the Cabinet to approve these payments were perfectly legitimate exercises of executive discretion. They were, in the words of Webster CJ in *Flyniu & Anr v Ata* [2006] To. L.R. 10, 21:
- "Matters of high policy involving political judgment – as distinct from administrative decisions – [which] are inherently unsuitable for review by the Court".
- [22] I am satisfied that the claim for the First Declaration is unarguable. I decline to extend the three month period for the application. Leave to move for the First Declaration is refused.

(b) The Third Declaration

[23] The circumstances surrounding the granting of two government quarters to Fotu are unknown to this Court. The terms of the grant were not revealed. It was said that Fotu's two sons were residing in these quarters but on what basis and for how long was not revealed. No breach of any specific statutory function accorded to the Cabinet is suggested apart, again, from an alleged breach of Sections 124 and 126 of the Land Act. For reasons already given, my view is that a complaint that the Land Act has not been complied with should be made to the Land Court, not to the Supreme Court.

[24] I do not consider that the allocation of these two quarters is a matter of "general importance" comparable with the alleged illegal tapping of telephones which justified extension of the application period in *R v Home Secretary Ex.p. Ruddock* [1987] 1 WLR 1482 and upon which the Applicant relies. Leave to move for the Third Declaration is refused.

(c) The Second Declaration

[25] It is obviously of general public importance that public moneys not be expended without lawful authority. The Solicitor General, as has already been seen, relied on the payment vouchers exhibited to the Applicant's supporting affidavit which, he submitted, clearly showed that the payments in question were met from funds previously appropriated, in all probability after transfers of funds under the provisions of Sections 10(1) or 12(1) or both of the Public Finance Management Act.

[26] The Applicant, on the other hand, relied heavily on an opinion of the Attorney General dated 6 August 2012 which, he submitted, provided an arguable case. This advice is Exhibit A to the Applicant's supplementary affidavit.

[27] The advice by the Attorney General must be very carefully read. Being dated 6 August 2012, it postdates the payments which the Applicant seeks to call into question. It contains the opinions in paragraphs 3.5 and 3.6 that payment out of moneys to Prince Tu'ipelehake and Lord Kalaniuvalu "would now be unconstitutional" (emphasis added). But at the same time, paragraph 43 refers to "past irregularities" while paragraph 3.3 suggests that "to shuffle

money about through the Contingency Fund ... is not allowed in a situation like this". Exhibit 1 appears to show that T\$1,700,000 was paid to Lord Kalaniuvalu out of the Contingency Fund.

- [28] Mr Kefu suggested that when the Attorney General submitted his advice (which in due course led to the passage of the 2012-2013 Supplementary Appropriation Act) he was not in full possession of the facts. No affidavit evidence, however, was offered in support of this submission.
- [29] Under Clause 31 A(1)(a) of the Constitution the Attorney-General is the "principal legal adviser to Cabinet and Government". Any advice given by the Attorney-General must be accorded great respect. Taking the Attorney-General's advice as a whole, it is clear that he had considerable doubts about the legality and propriety of what had taken place. At the same time, the advice (released to members of Parliament by a Minister, according to the Applicant) was given in reply to a request dated 1 August, a copy of which was not provided to the Court. Neither was the Court shown a copy of the information requested by the Attorney General and referred to in paragraph 4.2 of the advice.
- [30] An Applicant is under a duty to disclose all material facts known to him or discoverable by him after making reasonable enquiries. Non disclosure may be a reason for refusing leave (*R v Kensington General Commissioners Ex. p. Polignac* [1917] 1 KB 486. In the present case it is apparent that only part of what occurred has been placed before the Court.
- [31] In view of the importance of the matter and the fact of the Attorney General's reservations, I have concluded that time should be extended and leave granted. After such evidence has been filed by the Crown as is deemed appropriate (including, I would respectfully suggest, affidavits from the Attorney General and the CEO, Ministry of Finance) I expect that the issue will be substantially clarified. I am sure that I do not need to remind the Applicant that once this evidence has been received it will be his duty to reconsider the claim for judicial review and whether there is sufficient merit (in law, *not* for political purposes) to justify continuing with the judicial review procedure (see e.g. *R v Liverpool Justices Ex.p. P* [1998] C.O.D. 435; *R v Inland Revenue Commissioners Ex. p. Continental Shipping* [1996] C.O.D. 335).

Result

[32] The first and third applications for leave to move for judicial review are refused. Leave is granted in respect of the Second Declaration sought. The application is adjourned for further directions to be given on 26 June 2013 at 9:00am in chambers.

DATED: 21 June 2013.




CHIEF JUSTICE

N. Tu'uholoaki
21/6/2013.