

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No. 01 of 2016

IN THE MATTER of the Procurement Regulations 2010
issued under the Financial Management Act 2004 of Fiji

A N D

IN THE MATTER of a decision of the Solicitor-General
and Acting Permanent Secretary for Communications
dated 24 December 2015 to award and approve the Sun
(Fiji) News Limited – Fiji Sun as the Approved Print
Media – Newspaper Organisation for Publication of
Government Advertisements and Government Notices for
2016

BETWEEN : **THE FIJI TIMES LIMITED**, a limited liability company having its
registered office at 20 Gordon Street, Suva.

APPLICANT

A N D : **THE SOLICITOR-GENERAL AND ACTING PERMANENT**
SECRETARY FOR COMMUNICATIONS, Ministry of Communications,
Suva, Fiji.

RESPONDENT

A N : **SUN (FIJI) NEWS LIMITED**

INTERESTED PARTY

Date of Hearing: 13th May, 2016

Date of Decision: 17th June, 2016

Counsel : Mr. J. Apted for the Applicant
: Ms. R. Mani, Ms. S. Ali and Ms. P. Prasad for the Respondent
: Mr. E. Narayan and Ms. K. Singh for the Interested Party

DECISION

INTRODUCTION

1. The Applicant is a limited liability Company that is engaged inter alia in the business of publishing the daily news paper 'Fiji Times'. It had made submission to a call for Expression of Interest (EOI) for 'Advertising for the Fijian Government Newspapers and Magazines' published by the Ministry for Communication. Admittedly the Applicant and the Interested Party submitted their respective EOIs. The Applicant states that without proceeding to call tenders, the Interested Party was selected as the 'approved print media (News Paper) for Government Advertising' for year 2016. The selection of the Interested Party was communicated to the Applicant on or about 24th December, 2015. The Applicant seeks a declaration that the said decision was null and void and a certiorari to quash the said decision and mandamus to compel the Respondent to conduct a tender process. The Leave to Apply for Judicial Review (the Application for Leave) also seeks an order that selection of 'Print Media for advertising' be limited to ministries and departments of the government **excluding** statutory corporations and Companies owned and or controlled by the Government. The Applicant states that decision of 24th December, 2015 did not in conform to Procurement Regulation 2010.

FACTS AND LAW

2. The Application for Leave is against a decision made on or about 24 December 2015 and it was communicated to the Applicant on the said date, by the Acting Permanent Secretary for Communications, who is the Respondent. The said decision inter alia stated,
 - (a) Sun (Fiji) News Limited (The Interested Party) and its daily news paper *Fiji Sun* as the approved print media – newspaper organisation for the publication of Government advertisements and Government notices for 2016.
 - (b) Regretted that the Applicant had been “unsuccessful in its bid” and presumably the ‘bid’ referred to was the EOI, and also thanked the Applicant for their interest.
 - (c) The reason for the said selection according to the said communication dated 24th December, 2014 was, ‘as it (i.e. *Fiji Sun*) had offered much cheaper and competitive rates along with attractive packages in their EOI’.

3. A Public Notice was also published by the Respondent on 26th December, 2015 under the heading 'Approved Media Organizations for Publication/Broadcast of Government Advertisements and Government Notices'. The said Public Notice confirmed the selection of Interested Party as the 'Approved Print Media', and inter alia stated 'After thorough analysis of all EOIs received, including assessment of the rates quoted and services provided by the media organizations.' It also stated that 'Government advertisements and Government notices at Government discounted rates for the year 2016'.
4. The decision communicated to the Applicant on 24th December, 2015 followed a call for **EOIs**. Admittedly the Applicant and the Interested Party were the only two print media organisations which submitted EOIs for said call.
5. The Applicant sought a review of the decision communicated to the Applicant on 24th December, 2015 under regulation 49 of the Procurement Regulation 2010 (this is called 'Principal Regulation' from 2012 Amendment – Legal Notice 54) (the Regulations) **on 13th January, 2016**. Said application for review is to be made **within 20 days** of being aware of the decision, and the Permanent Secretary for Finance is required to make a decision **within 30 days**.
6. Regulation 51 of Principal Regulation, permits judicial review of the decision of the Permanent Secretary for finance.
7. No response was received from the Permanent Secretary within that time, and the Applicant filed its Application for Leave on 23 March 2016.
8. The Applicant's contentions are that following the EOI process, the Regulations required the Respondent to request the Director of the Fiji Procurement Office to conduct a tender process under regulation 35-37 of the Regulations. The Applicant seeks *certiorari* to quash the decision of 24th December, 2015 and an order of *mandamus* requiring the Respondent to take steps towards a tender process under the Regulations.

9. The Applicant also challenges the decision dated 24th December, 2015 or any decision made after a tender process and states that it is limited to government advertisements and notices published by government ministries and departments, though it extends to statutory corporations and government state-owned or controlled companies. It also seeks a declaration that any tender for government advertisements must be limited to Government ministries and departments.
10. The Notice of Opposition filed by the Respondent stated inter alia –
- (a) a preliminary objection that the office of Permanent Secretary for Communications was an established office; that the Decision was made in the Respondent's capacity as PS Communications; and the Respondent had been incorrectly named
 - (b) it was claimed that the Leave Application was "an abuse of process" because –
 - (i) under the Regulations, if the value of the work is below \$50,000, there was no requirement for tenders and the cost of each advertisement would invariably be under \$50,000
 - (ii) in any event to cover the possibility that the cost of one advertisement might exceed \$50,001, the Respondent sought and obtained a waiver of the tender procedures
 - (iii) accordingly "all due process was followed by the Respondent and a lawful decision was made accordingly"
 - (c) it stated in that the *Fiji Sun* had been selected as the approved Print Media (Newspaper) for Government advertising and notices as the *Fiji Sun* offered a more competitive rate along with an attractive package in its EOI
11. The Respondent in the written submission state that it was a standard practice of the Government to negotiate contracts **for a time period** so that there will be no fluctuations in the price for a particular good or service. This admits that the EOI was called for the year 2016 for Government Print Media.
12. The Respondent opposes an order that the grant of leave operate as a stay. The Notice claims –
- "Any grant of stay will prejudice the Respondent and hinder the administration of the publication of Government advertisements and notices, which is contrary to the public interest. Government advertisements and notices are necessary for the efficient and effective functioning of Government, and any grant of stay will obstruct such function."*

ANALYSIS

13. The factors to consider for the granting of leave for a judicial review is stated in Fiji Court of Appeal in **Proline Boating Co Ltd v Director of Lands** [2014] FJCA 159; ABU0020.2013 (decided 25 September 2014) (unreported).
 14. According to **Proline Boating Co Ltd** (supra), the 'mandatory statutory requirements' are those set out in High Court Order 53 rule 3(2) and 3(5) of the High Court Rules 1988.
 15. The High Court Order.53, rule 3(2)-(5) state –
 - “(2) *An application for leave must be made upon filing in the Registry:*
 - (a) *A notice in Form 32 in the Appendix hereunder containing a statement of*
 - (i) *the particulars of the judgment order, decision or other proceeding in respect of which judicial review is being sought;*
 - (ii) *the relief sought and the grounds upon which it is sought;*
 - (iii) *the name and description of the applicant;*
 - (iv) *the name and address of the applicant's Solicitors (if any); and*
 - (v) *the applicant's address for service;*
 - (b) *an affidavit which verifies the facts relied on.*
 - (3)(i) *Copies of the application for leave and the affidavit in support must be served on all persons directly affected by the application.*
 - (ii) *The Court may determine the application without hearing and where a hearing is considered necessary the Court shall hear and determine the application inter partes.*
 - (iii) *Notice of hearing of the application be notified in writing by the Registrar.*
 - (iv) *Where the Court determines the application without a hearing, the Registrar shall serve a copy of the order of the Court on the applicant.*
 - (4)
 - (5) *The Court shall not grant leave unless it considers that the applicant has sufficient interest in the matter to which the application relates.”*
16. The Application for Leave had fulfilled the requirements of O.53, r3(2) and (3) and (5) as –

- (a) it is in Form 32 of the Rules and contains a statement of the mandatory particulars stipulated in r 3(2)(a);
 - (b) the Affidavit in Support verified the facts relied on as required by r3(2)(b);
 - (c) the copies of the Leave Application together with the Affidavit in Support were served on all persons directly affected by the Leave Application. The Interested Party and the Respondent are the directly affected parties at the moment. (there is summons for amendment of the parties and this will be dealt later in this decision).
17. In my judgment the directly affected parties from the Application are made parties to this application. This is an important aspect that needs careful consideration at the stage of Application for Leave.
18. The High Court Order 53 rule 5 contains the requirement that the Applicant have a "sufficient interest in the matter to which the application relates". The Applicant should have an interest in the decision under review. The decision was communicated to the Applicant by the Respondent and admittedly it was the only rejected party who responded to call for EOIs.
19. In *Proline* (supra) it was held 'if the decision sought to be reviewed interferes directly with the applicant's personal rights then the applicant would have "sufficient interest".'
20. In *R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd* [1995] 1 All ER 611 at 620 held,
- 'For my part, I accept that standing (albeit decided in the exercise of the court's discretion, as Donaldson MR said) goes to jurisdiction, as Woolf LJ said. But I find nothing in IRC v National Federation of Self-Employed and Small Businesses Ltd to deny standing to these applicants. The authorities referred to seem to me to indicate an increasingly liberal approach to standing on the part of the courts during the last 12 years. It is also clear from IRC v National Federation of Self-Employed and Small Businesses Ltd that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case (see [1981] 2 All ER 93 at 96, 110, 113, [1982] AC 617 at 630, 649, 653 per Lord Wilberforce, Lord Fraser and Lord Scarman).*
- Furthermore, the merits of the challenge are an important, if not dominant, factor when considering standing. In Professor Sir William Wade's words in Administrative Law (7th edn, 1994) p 712:*

'... the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved.'

Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of law, as Lord Diplock emphasised in IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93 at 107, [1982] AC 617 at 644; the importance of the issue raised, as in Ex p Child Poverty Action Group; the likely absence of any other responsible challenger, as in Ex p Child Poverty Action Group and Ex p Greenpeace Ltd; the nature of the breach of duty against which relief is sought (see IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93 at 96, [1982] AC 617 at 630 per Lord Wilberforce); and the prominent role of these applicants in giving advice, guidance and assistance with regard to aid (see Ex p Child Poverty Action Group [1989] 1 All ER 1047 at 1048, [1990] 2 QB 540 at 546). All, in my judgment, point, in the present case, to the conclusion that the applicants here do have a sufficient interest in the matter to which the application relates within s 31(3) of the 1981 Act and Ord 53, r 3(7).

It seems pertinent to add this, that if the Divisional Court in Ex p Rees-Mogg eight years after Ex p Argyll Group was able to accept that the applicant in that case had standing in the light of his 'sincere concern for constitutional issues', a fortiori, it seems to me that the present applicants, with their national and international expertise and interest in promoting and protecting aid to underdeveloped nations, should have standing in the present application'

21. As stated in the above decision, the issue of 'sufficient interest' is more than a mandatory requirement in terms of Order 53 rule 3(5) of High Court Rules of 1988 and it involves with the jurisdiction of the court to in judicial review. The thinking of the courts in UK was to give liberal interpretation. These decisions were applied in Fiji Court of Appeal.
22. The "busy bodies" and those with "no interest at all" will be excluded. In *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 2 All ER 257, [1986] 1 WLR 763, Donaldson MR said at p. 265 –

"The first stage test, which is applied on the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be re-applied as a matter of discretion on the hearing of the substantive application. At this

second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance."

23. In **Proline Boating Co Ltd v Director of Lands Fiji** [2014] FJCA 159; ABU0020.2013 (decided 25 September 2014) the Fiji Court of Appeal cited **R v Edmundsbury BC, ex parte Investors in Industry Commercial Properties** [1985] 1 WLR 1168 of which it said

"In that case, 'X' had made an application for planning permission which was refused. The authority concerned granted permission to another developer 'Y'. The Court held that 'X' had standing to challenge the decision to grant permission to 'Y'."

24. The Applicant having received government notices and advertisements of both departments as well as other government entities prior to 2016 for more than 10 years, had shown sufficient financial interest for this Application for Leave, regarding the decision of 24th December, 2015. The Applicant had submitted the total sum it received from the government entities regarding advertisements, and notices. The Applicant had shown interest to submit an EOI for the call of EOIs and had shown much enthusiasm to secure the position of 'Government Approved Print Media'.

25. The Fiji Court of Appeal in **Proline Boating Co Ltd v Director of Lands Fiji** [2014] FJCA 159; ABU0020.2013 (decided 25 September 2014) further requirements for granting leave was considered, and they are

- "(1) Was there an inordinate delay in seeking Judicial review against the decision that is complained of by an applicant?*
- (2) Does that decision/emanate from the exercise of statutory power by a public body even if disputes involving private parties are involved?*
- (3) What reliefs have been sought by an applicant in his/her application for leave to apply for Judicial review and against whom?"*

26. The rules regarding delay are contained in O.53 r4 which says –

"Delay in applying for relief (O.53, r4)

4.-(1) Subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant –

- (a) leave for the making of the application, or*
- (b) any relief sought on the application, if, in the opinion of the Court, the granting of the relief sought would be likely to*

cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

- (2) *In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding.*
- (3) *Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."*

27. The Fiji Supreme Court in **Public Service Commission v Singh and Anor** [2010] FJSC 3; CBV 0011.2008 (27 August 2010), (Byrne J, Marshall J and Inoke J) (unreported) held,

"The starting point is the relevant rule itself. A close reading of Order 53 Rule 4(1) shows that two situations were envisaged by the provision –

- (a) *Where there is delay in making an application for judicial review the court may refuse to grant the relief ... if it thinks that granting it would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration...*
- (b) *Where there is an application for leave to issue judicial review where the relief sought is an order for certiorari, and the application is made after the 3 months has expired, in such a case, the trial judge is allowed to consider whether there was delay and whether the grant of relief is justified. The rule does not allow him to consider delay if the application was filed within 3 months period. It is the result of an application of the rule of statutory interpretation **expression unius est exclusion alterius**." (emphasis in original)*

28. The Application for Leave was filed on 23 March 2016. This was within 3 months of its receipt of notice of the decision of the selection of Interest Party, on 24th December, 2015. The Applicant had also made an application under the in-built review mechanism by seeking a review of the said decision in terms of Part 6 of the Regulations.
29. In terms of the regulation 50(2) such review by the Permanent Secretary for Finance should be made within 20 working days from the Applicant **became aware** of the **circumstances that he was complaining**.

30. Though neither party pointed out at the hearing, the said review by the Permanent Secretary was limited in the scope and the limitations are two fold
- (a) The time limit of 20 working days, from the party aggrieved being aware of the circumstances giving rise to the complaint.
 - (b) Limitations contained in regulation 49 (2)(i) to (iv) namely,
 - (i) The method of procurement selected.
 - (ii) The choice of selection criteria
 - (iii) The withdrawal of tender under Regulation 47
 - (iv) A decision taken to reject all tenders, proposals or quotations.
31. So, the first hurdle is the time limitation, and the circumstances complained should be relating to a thing that came to the knowledge, within 20 days of the complainant seeking review by the Permanent Secretary for Finance. The second requirement is the thing complaint may not fall in to any of the class stated in the Regulation 49(2) stated above, and there is a discretionary power regarding the restrictions contained therein being considered by the review of the Permanent Secretary for Finance.
32. Even if one passes the above two hurdles still the power of review of the Permanent Secretary for Finance, is restricted if a contract is already entered relating to the procurement in issue.
33. The Permanent Secretary for Finance is precluded from entertaining a complaint or to continue to entertain complaint of the 'procurement contract has entered into force'. In such a situation the aggrieved party should seek redress from a Judicial Review. (See Regulation 50(3) of the Procurement Regulation 2010 (after 2012 known as the "Principal Regulation").
34. There is no evidence before me at this stage as to when the 'Procurement Contract' was entered between the Respondent and the Interested Party. Since the award was for the year 2016 and the selection was communicated to the Applicant on 24th December, 2015 a 'Procurement Contract' would have been entered between the Respondent and the Interested Party. The written submission of the Respondent suggests the existence of such a contract. (see paragraph 24)

35. Such entering of 'Procurement Contract' expressly excludes the power to review by the Permanent Secretary to the Finance in terms of the Regulations, and the Applicant is expressly granted right to recourse to judicial review in such an instance.
36. The Applicant did not receive a reply to his request for review made on 13th January, 2016 and the present Application for Leave was made on 23rd March, 2016 and this was made within the 3 months time period of the decision of 24th December, 2015.
37. Though the Applicant had made the Application for Leave within 3 months from the communication of 24th December, 2015 the Application for Leave is seeking orders relating to criteria for selection which were published in the advertisement calling for EOI in August, 2015. These 'criteria' became known to the Applicant, and submitted its EOI.
38. Whether there was a delay relating to said orders and justification for delay on that was not argued at this hearing. These are matters for hearing. In any event the Applicant is challenging the decision communicated on 24th December, 2015 and I need not delve on this issue of delay more at this stage.

Does the impugned decision/emanate from the exercise of statutory power by a public functionary?

39. The Decision was made by the Acting Permanent Secretary for Communications in the exercise of statutory power under the Principal Regulations and also Financial Management Act 2004. There is no dispute as the exercise of the statutory power and Respondent being a public functionary.

The relief sought by the Appellant and against whom?

40. The Application for Leave is against public offices relating to decisions taken in the official capacity.

Arguable Case

41. In *Fiji Airline Pilots Association v Permanent Secretary for Labour and Industrial Relations* [1998] FJCA 14; FCA Civ App 59/97, the Court of Appeal (Casey JA, Kapi JA and Dillon JA) held ,

"The basic principle is that the judge is only required to be satisfied that the material available discloses what might, on further consideration, turn out to be an arguable case in favour of granting relief. If it does, he or she should grant the application – per Lord Diplock in Inland Revenue Commission v National Federation of Self Employed, [1982] AC 617 at 644. This principle was applied by this Court in National Farmers' Union v sugar Industry Tribunal and Others (CA 9/1990; 7 June 1990). In R v Secretary of State for the Home Department ex p. Rukshanda Begum (1990) COD 107 (referred to in 1 Supreme Court Practice 1997 at pp. 865 and 868) Lord Donaldson MR accepted that an intermediate category of cases existed where it was unclear on the papers whether or not leave should be granted, in which event a brief hearing might assist, but it should not become anything remotely like the hearing which should ensue if the parties were granted leave."(emphasis is mine)

42. In *State v Connors, ex parte Shah* [2008] FJHC 65 cited with approval by the Court of Appeal in *Maisamoa v Chief Executive Officer for Health* Civil Appeal No. ABU 0080/2007 at para 29, Scutt J observed at pp.22-23, para 11.2 that –

"At this stage a full review of the facts is unnecessary. Nonetheless, a court is obliged to sufficiently peruse the material provided to determine whether an applicant raises an issue arguably involving an error in law, a serious error in fact; a violation of natural justice or procedural fairness, or an excess of jurisdiction by the decision-maker the subject of the application." (emphasis is mine)

43. The threshold is not a high one. The Court must look at the application and affidavits to determine whether the issues warrant for more detailed consideration later in the substantive hearing.
44. The counsel for the Respondent argued that the Judicial Review against a decision relating to 'procurement' is only available when the Permanent Secretary for Finance has taken a decision regarding the review in terms of regulation 51. I do not accept this contention.

45. The regulation 51 of the 'Principal Regulation' states as follows
'If a supplier or contractor is dissatisfied with the decision of the Permanent Secretary for Finance or the procurement contract has being entered into force, the supplier or contractor has the right to instigate court proceedings'
46. So, even without a decision from the Permanent Secretary for Finance if 'procurement contract' is entered there is a right conferred in the said regulation.
47. Apart from the above, regulations 50(3) and 50(6) expressly confer right to redress to courts conferred in regulation 51 when there is no decision of Permanent Secretary for Finance, forthcoming or when there is already a 'Procurement Contract' that preclude review by him.
48. The Respondent contended that there is no requirement for tender the procurement in issue as each advertisement or notice in print media is below the threshold value of \$50,000. Admittedly 'it is a standard practice of Government to negotiate contracts for certain duration, so that the prices for the supply of goods or services are locked in for that particular duration. This is to avoid the changes in prices due to market fluctuation. This is a standard practice that government uses not only for this contract.'(see para 24 of the Respondent's submission).
49. From the above submission it can be deduced that already a contract had been entered with the Interested Party for the procurement of advertising and notices for the year 2016 and the said contract also stipulate the 'discounted price' for the entire year in print media. If such an award was made it was not for each and individual advertisement or notice that was 'negotiated' but the whole of advertisements and notices for the year 2016 and there was no evidence that such a bulk would be less than \$50,000 for year 2016. In contrast the Applicant had submitted the costs for the advertising that they were engaged in the category that called for EOI and it exceeded \$50,000 on historical values.
50. So the selection of the 'Print Media' for the government was not for a single notice or advertisement, but for the bulk for the year 2016 and the undisputed facts presented to

me at the hearing were that the value exceeds the limit stipulate in regulation 30(1) where there is a mandatory requirement to call tenders.

51. The 'delegated procurement authorities' in terms of regulation 27(1) of the Principal Regulation is limits the monitary value of \$50,000 and less. So it is not an individual advertisement but the value of intended bulk of the services for the year 2016 that should be below the stipulated value in terms of the said regulation.
52. The Applicant had contended that in terms of regulation 39, EOI must necessarily be followed with a tender. The Respondent states that the word used in the said regulation is 'may' and there is no mandatory requirement to follow a tender. Even if said argument is taken this confirms that there is a discretion vested with the Ministry for Communication, hence the decision not to call for tenders after the EOI can be challenged in a judicial review.
53. The Respondent in the submissions stated that the 'overarching intent' of the Act (Financial Management Act 2004) and Regulation (Principal Regulation) is to apply economical and cost effective methods in the expenditure of the public funds in transparent manner. (See paragraph 4 of the Respondent's submission).
54. I could not agree more, with the above submission contained in the paragraph 4 of the Respondent's submission and in the light of said submission, there is an arguable issue as for not seeking a tender after the receipt of EOIs.
55. At this stage I need not decide these issues finally, but from the undisputed facts presented to this hearing there is an arguable ground whether there is a requirement for call the tenders in terms of regulation 27 and also 30 after calling for EOIs considering the nature of the 'procurement' in terms of relevant law.
56. The Respondent also contended that the regulation 29(3) of 'Principal Regulation' which is specifically designed for procurement of goods, services or works below \$50,000 and

application of said provision to the 'procurement' in issue, in my mind also raises an arguable case that needs to be considered fully at hearing.

57. The Respondent state that the Permanent Secretary could waive (in terms of regulation 29(3)(iv) of the Principal Regulation) the requirement to obtain competitive quotes, for values less than \$50,000 for expeditious supply of specialized , technical services from a supplier who has provided services to the Government and has through the engagement created or used its intellectual property or working knowledge to deliver the services procured . In my judgment this cannot be applied unless the special circumstances stated in the said provision are fulfilled. Before the application of said regulation 29(3)(iv) it is for the 'expeditious supply of specialised, technical services' and advertising and or publishing notices cannot be considered as 'specialized technical service' from the affidavit evidence submitted on behalf of the Respondent.
58. Even if I am wrong on that, there is an additional requirement of prior 'usage of intellectual property or working knowledge to deliver the service' and these cannot be considered in the absence of facts at this stage. The affidavit in opposition filed on behalf of the Respondent does not support such a contention. This would also support that the grant of leave as these can be fully ventilated at the hearing provided sufficient materials are adduced though affidavits at the hearing.
59. The Respondent contends that the selection criteria is not subject to review in terms of regulation 49(2) of the Principal Regulation. The word used in said regulation 49(2) is 'may' and this grants a discretion to the Permanent Secretary to reject a complaint regarding 'selection criteria' but this exercise of the discretion needs to be done reasonably and if not it can be subject to judicial review. I have no evidence at this stage that the Permanent Secretary had rejected the complaint of the Applicant made on 13th January, 2016 on the said ground.
60. The regulation 49(2) applies to 'right to review' under Part 6 of the Regulation. In my judgment the judicial review of the court is not restricted by said Part 6 of the Regulation

and it only applies to the review by the Permanent Secretary for Finance. The High Court rules guide the court's jurisdiction with common law developed by cases.

61. Even if I am wrong on the above, since the word used in the regulation 49(2) is 'may' and the review of selection criteria is not absolutely excluded hence leave for judicial review can be granted for the proper exercise of the discretion under said regulation to consider the issue fully.
62. The Respondent states that since the Applicant had initiated the internal review process by making a complaint to the Permanent Secretary for Finance it should await the decision and if it is not forthcoming it should compel the Permanent Secretary for Finance to make a decision. (see paragraph 50 of the Respondent's written submission).
63. The regulation 49(6) of the Principal Regulation state that if the Permanent Secretary for Finance does not issue a decision within stipulated time the complainant is 'entitled **immediately thereafter to institute proceedings**' for judicial review. So the position regarding a decision against the Applicant and failure to give a decision within time allocate, is judicial review and not compel the Permanent Secretary for Finance as argued by the Respondent.
64. Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 949¹, HL. held

'Judicial review, now regulated by RSC Ord 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision-maker' or else a refusal by him to make a decision.

*To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by **altering rights or obligations of that person which are enforceable by or against him in private law** or (b) by **depriving him of some benefit or advantage which either (i) he has in***

¹ [1985] AC 374, [1984] 3 WLR 1174,

the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment

65. At this juncture I am required to consider the grant or refusal of the Application for Leave to Judicial Review, and there are undisputed facts, that the Applicant had published the government advertisements and notices of substantial value for more than 10 years, hence existence of 'a legitimate expectation' until it is withdrawn upon a 'rational ground'. The Applicant as well as general public through Public Notice, were notified that the selection was based on EOIs, submitted, but this is under consideration in the presumptive judicial review application. The Application for leave is preliminary hearing and the Applicant had shown a 'reasonable' and or 'legitimate' expectation, in order to obtain leave.
66. Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at p 954 held,
- 'The introduction of the phrase 'reasonable expectation' into this branch of our administrative law appears to owe its origin to Lord Denning MR in Schmidt v Secretary of State for Home Affairs [1969] 1 All ER 904 at 909, [1969] 2 Ch 149 at 170 (when he used the phrase 'legitimate expectation'). Its judicial evolution is traced in the opinion of the Judicial Committee delivered by Lord Fraser in A-G of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 at 350-351, [1983] 2 AC 629 at 636-638. Though the two phrases can, I think, now safely be treated as synonymous for the reasons there given by my noble and learned friend, I prefer the use of the adjective 'legitimate' in this context and use it in this speech even though in argument it was the adjective 'reasonable' which was generally used. The principle may now said to be firmly entrenched in this branch of the law...'*
67. *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 was applied in UK Supreme Court in the recent decisions of *Braganza v BP Shipping Ltd and another* [2015] 4 All ER 639 and *Pham v Secretary of State for the Home Department* [2015] 3 All ER 1015.

68. The Respondent in the written submission at paragraph 32 quoted a text “Judicial Review- A Practical Guide”² which stated

*‘When deciding what factors is relevant to a decision, and what factors are irrelevant to a decision, the Administrative Court will look first at the terms of the legislation providing for decision-making power. The court will seek to determine whether the statute provides any indication of the relevant factors to be taken into account by the decision-maker.’*³

69. The relevant statutory provision that is subject to the decision of 24th December, 2015 are Financial Management Act 2004 and the Regulations made in pursuant to Section 81 of the said Act. The main contention of the Applicant is that selection of the Interested Party as the approved government ‘Print Media’ for government advertising and notices through EOI followed by an interview. The Applicant argues that calling of tender was required and the Respondent does not accept this position.
70. The Respondent submitted that the guiding principles contained the regulation 3 of the Principal Regulation are only guide lines and the selection criteria advertised in the call for EOI are based on the principles under the said guide lines.
71. On the other hand the Applicant state that the selection criteria was ‘subjective’ and cannot be quantified, hence the selection process was flawed. I do not wish to consider these issues as it had raised ‘arguable case’. I do admit that when a Print Media organization for the government is selected there will be qualitative criteria that need consideration. In any procurement for that matter there will be qualitative considerations and this may be the rationale behind the internal review of the decision by Permanent Secretary for Finance under Part 6 of the Regulations, prior to judicial review.
72. The arguments submitted by each party were analysed above for the purposes of this Application for Leave on the material before me. There is an arguable case for the Applicant. The Applicant is granted leave for judicial review.

² Judicial Review-A Practical Guide by H. Suthey, A. Watson and J. Bunting, (2nd Edi) 2012 p 83-84

³ *Re Findlay* [1985] AC 318, per Lord Scarman, at 333H

The Application for Stay

73. When the court is satisfied of granting leave, the court could grant a stay of the decision. This is discretionary remedy and all cases where leave is granted a stay would not be warranted. The Applicant had filed this application challenging the criteria for selection that were published in August, 2015. The Applicant had made an EOI under said criteria and had also participated in an interview. If the criteria is to be challenged the Applicant had ample time from August, 2015 when that was published in the local news papers, including their own news paper. So there was a delay on the part of the Applicant. The decision of selection of Interest Party was conveyed to the Applicant on 24th December, 2015 and after seeking review of the said decision from the Permanent Secretary for Finance on 13th January, 2016 this application courts for judicial review was made on 23rd March, 2016. The conduct of the Applicant does not support the grant of stay. Apart from this the arguable case does not, result in a stay. The selection of a 'Procurement' is a complex issue that needs full hearing of judicial review to arrive at a decision. The authorities submitted by the parties do not help me in the exercise of my discretion. There is no evidence of irreparable loss to the Applicant and the loss is the revenue from government advertising it received previously. The historical values are not an indication of the future and since there are only two players in the market the loss to the Applicant cannot be considered irreparable.
74. At the argument the counsel for the Respondent stated that the Government Corporations and Government Companies and other entities that are under government control are not bound to advertise in the Interested Party. If so there is clearly no loss to the Applicant from the decision conveyed to them on 24th December 2015 from such entities. It was argued that the 'discounted rate' was available for such entities and they are free to select the print media they prefer.
75. In *Hoffmann-La Roche v Sec of State* [1974] 2 All ER 1128 at 1134 (per Lord Reid)
'It must be borne in mind that an order made under statutory authority is as much the law of the land as an Act of Parliament unless and until it has been found to be ultra vires.'
76. In *Hoffman* (supra) Lord Morris at p 1143 held that the 'court must consider whether it is just or expedient to accede to the application' for stay. All 'considerations appertaining

to the justice of the matter become within the purview of the court. All the circumstances of the case must be weighed and held, p 1143g

'But where the situation is that the applicant can point to a definite law in definite terms which prima facie should be enforced, and where the defendant asserts that that which bears all the indicia of authentic law should be declared to be no law at all, the issue is very much narrowed and concentrated. Clearly the defendant must of necessity say why he so asserts. When he does, the court cannot avoid forming some view or estimate in regard to the strength and merits of his assertion. Herein lies a situation of difficulty. The court cannot then decide the points which are to be raised at the trial. Neither will the court restrict the full freedom of decision of the trial judge. But, on the other hand, the court will not refrain from enforcing a law merely because a challenge to it can in terms be formulated or expressed. In the decision cited above, Lindley LJ ([1896] 2 Ch at 703) spoke of situations where the case for an injunction was 'doubtful' or 'very near the line'. In such a case as the present, where enforcement of an affirmed statutory instrument is being sought, the measure of the strength of the attack on the statutory instrument must inevitably call for some consideration.'

77. Lord Wilberforce in Hoffman (supra) at p 1147 e held,

'Regard must be had to the nature of the dispute and the position of the disputants. In a case such as the present, the fact that the effective plaintiff is a government department, acting in the public interest and responsible for public money, is important. The real issue is how far this difference is to be carried'

78. The Plaintiff has not submitted the statistics of the revenue it received from government Corporations since the decision of 24th December, 2015. The Respondent had published Public Notices and the decision was implemented for nearly three months before this application. In such a circumstance the balance of convenience lies in favour of the Respondent. There is no evidence of irreparable loss to the Applicant that warrant stay of the decision conveyed on 24th December, 2015 by the Respondent.

Summons seeking amendment

79. The Applicant had filed summons seeking separation of the two respondents named in the Application for Leave to Apply for Judicial Review on 29th April, 2016 after the notice of opposition was filed on 29th March, 2016 where a preliminary issue was raised regarding the naming of the Respondent.


80. So the summons was filed to rectify the separation of the two named respondents. The parties that are directly affected needs to be before the court and that had been already fulfilled. The amendment seeks to separate the two entities named together as Respondents.
81. I can't see any reason for not allowing the said amendment. So the amendment sought in the summons filed on 29th April, 2016 is granted.

FINAL ORDERS

- a. The Leave to Apply for judicial review is granted.
- b. Order in terms for the summons for amendment to separate two entities named as Respondents.
- c. Cost of these applications will be cost in the cause.

Dated at Suva this 17th day of June, 2016




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Justice Deepthi Amaratunga
High Court, Suva