

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

No. 004 of 2017

BETWEEN:

ASERI VAKALOLOMA

Applicant

AND:

CHIEF REGISTRAR

Respondent

Coram: Dr. T.V. Hickie, Commissioner

Applicant: Mr. T. Kilakila

Respondent: Ms. B. Malimali

Date of Hearing: 13th June 2017

Date of Judgment: 14th June 2017

EX TEMPORE RULING
ON
RESPONDENT'S ORAL INTERLOCUTORY APPLICATION
FOR
ISSUING OF INTERIM PRACTISING CERTIFICATE
BY THE CHIEF REGISTRAR'S OFFICE

1. The Application

- [1] On 23rd May 2017, an Application was filed by the Chief Registrar setting out four allegations of Professional Misconduct against the Respondent legal practitioner.
- [2] When the parties appeared before me on Monday, 5th June 2017 (being the first day of the June 2017 Sittings of the Commission), the matter was adjourned until last Friday, 9th June 2017, to allow Counsel for the Respondent to make written representations to the Chief Registrar.
- [3] On 9th June 2017, Counsel for the Applicant confirmed that representations were made to the Chief Registrar that morning, however, he was instructed to proceed with the four counts. In response, Counsel for the Respondent indicated that her client would be defending the four counts. As both Counsel suggested a time estimate of two days for a defended hearing of

the four counts, they were advised by the Commission that the matter would not be able to be heard in these Sittings. Counsel for the Respondent then made an oral application for an interim practising certificate. The parties were ordered to file brief written submissions and the application set down for a hearing before me yesterday.

[4] This then is my ex tempore ruling on the Respondent's Interlocutory Application to be issued with an interim practising certificate.

[5] I wish to thank Counsel for the Respondent Chief Registrar for indirectly drawing my attention during his oral submissions to (as I noted his reference) "*Singh* from Australia", in relation to the applicability or otherwise of disciplinary proceedings from one jurisdiction being applicable in another. My own research has revealed the case to be *Singh v Legal Services Commissioner* [2013] QCA 384; AustLII: <<https://applications.lsc.qld.gov.au/documents/SINGHQCA13-384.pdf>> 17 December 2013, concerning previous disciplinary proceedings that had been heard in Fiji. In fact, it was the first case heard before this Commission being *Chief Registrar v Abhay Singh* (Unreported, Independent Legal Services Commission, No. 001 of 2009, 25 January 2010, Commissioner Connors; PacLII: [2010] FJILSC 1, <<http://www.pacii.org/fj/cases/FJILSC/2010/1.html>>.

[6] What occurred in *Singh* can be summarised as follows:

(1) On the 25th of October 2006, the legal practitioner had been '*convicted in the High Court of Fiji for attempting to pervert the course of justice*' by advising a witness to change his evidence and sentenced to 12 months' imprisonment. This conviction was confirmed by the Fiji Court of Appeal on 9th of March 2007 and then by the Supreme Court of Fiji on 18th of December 2008.

(2) While the appeal process was taking place in Fiji, the legal practitioner '*applied to the Fiji Law Society for a renewal of practising certificate in about February 2007 and it was declined*'. The legal practitioner then applied to the High Court of Fiji for restoration of his practising certificate and that was granted by Byrne J on 24th July 2007. Following the

judgment of the Supreme Court of Fiji in December 2008, however, confirming his conviction, a complaint was lodged with the Fiji Law Society in January 2009 highlighting the confirmation of the conviction of the legal practitioner. That complaint was heard before the new Independent Legal Services Commission in Fiji in late 2009.

(3) When the matter came before the Independent Legal Services Commission, it was alleged *'that the Respondent breached S.83(1)(d)(i) of the Legal Practitioners Decree 2009 ... and is therefore guilty of unsatisfactory professional conduct or professional misconduct'* pursuant to section 82 of the Legal Practitioners Decree 2009. Sections 83(1)(d)(i) and 82(1) state:

'83.—(1) Without limiting sections 81 and 82, the following conduct is capable of being "unsatisfactory professional conduct" or "professional misconduct" for the purposes of this Decree:

...

(d) conduct in respect of which there is a finding of guilt or conviction for:

*(i) a criminal offence (excluding traffic offences)'.
[My emphasis]*

82.—(1) For the purposes of this Decree, 'professional misconduct' includes –

(a) unsatisfactory professional conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; or

(b) conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law, that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice, or that the law firm is not fit and proper to operate as a law firm.

(4) Following the finding of professional misconduct, Commissioner Connors ordered that the legal practitioner's name be struck from the Roll in Fiji. This sanction was reduced to 10 years by the Fiji Court of Appeal and then to six years by the Supreme Court of Fiji.

(5) Meanwhile, the legal practitioner moved to Queensland in Australia where he was initially granted a practising certificate. Later the Queensland Law Society refused to renew his practising certificate and that

decision was confirmed by the Queensland Civil and Administrative Tribunal and then by the Queensland Court of Appeal (as the judgment from the Queensland Civil and Administrative Tribunal at [1]-[2] and [4] cited by the Queensland Court of Appeal at [4] has explained):

[1] *Mr Singh ... was admitted in Queensland in 2002 but actually commenced practice here in, it appears, some time in 2006 and continued to do so until the Queensland Law Society ('Society') refused to renew his practising certificate from 1 July 2008.*

[2] *That refusal was occasioned when the Society discovered that Mr Singh had been convicted in Fiji, on 25 October 2006, of the offence of attempting to pervert the course of justice. The Society then declined to authorise the renewal of his practising certificate as from 1 July 2008 and referred the matter to the Legal Services Commissioner.*

...
[4] *The Legal Services Commissioner takes the view that his conviction in Fiji (and two associated technical offences – failing to give notice of it to the Queensland Law Society within seven days, and not disclosing it to the Society when he applied for renewal of his 2007-8 practising certificate) means that he is not a fit and proper person to remain on the local roll, and his name should be removed.'*

(6) Thus, it is my understanding that in *Singh*, the refusal for the renewal of his practising certificate in Queensland was not because he had been struck from the Roll in Fiji, rather it was based upon the discovery that the legal practitioner had been convicted of the offence of attempting to pervert the course of justice in Fiji together with his 'two associated technical offences' in Queensland of failing to give notice of the conviction in Fiji and to disclose it when seeking to renew his practising certificate in Queensland.

[7] Therefore, on a preliminary view and without hearing full argument by both Counsel which can only take place at a defended hearing, I am not sure as to the relevance of *Singh* to the present matter before this Commission.

[8] I note that in the present matter the Applicant legal practitioner has not been convicted of a criminal offence in Nauru nor is one of the four counts that he is facing before this Commission alleging any failure on his part to disclose the finding of two counts of professional misconduct for which he

was struck off the Roll of Barristers and Solicitors in Nauru.

- [9] If I have understood the submissions of Counsel for the parties correctly the disciplinary hearing took place in Nauru on 18th August 2015 and judgment was handed down on 19th November 2015 when the legal practitioner had left the jurisdiction. Neither the practitioner nor the Legal Practitioners Unit (LPU) in Fiji was aware that the practitioner had been struck off the Roll in Nauru until the LPU was advised on an unrecorded date by a Nauruan practitioner. The LPU, in turn, advised the practitioner in February of this year who disclosed the sanction on his '*Application for a Practising Certificate ... For the Period 1st March 2017 to 28th February 2018*'. (See '*Application*', dated 23rd May 2017, Tab B, Doc.6, 'Copy of Respondent's application for a practising certificate for the period 1st March 2017 to 28th February 2018 lodged on 2nd March 2017', p. 122).
- [10] I have now had the opportunity to read overnight the judgment from Nauru in *Vakaloloma, In re Legal Practitioners (Admission) Rules 1973* (Unreported, Supreme Court of Nauru, Misc.Cause No. 59 of 2015, 19 November 2015, Madraiwiwi CJ; PacLII: [2015] NRSC 27, <<http://www.pacii.org/nr/cases/NRSC/2015/27.html>>, a copy of which was included in the '*Application*' filed by the LPU in these proceedings. (See '*Application*', dated 23rd May 2017, Tab A, Doc.1, 'Ruling of the Nauru Supreme Court vide Miscellaneous Proceedings No.59 of 2015 dated 19th November 2015', pp. 1-15).
- [11] The ruling in *Vakaloloma* involved a single justice of the Supreme Court of Nauru (Madraiwiwi CJ) 'sitting as a Disciplinary Tribunal' considering two counts of professional misconduct. It was alleged that the legal practitioner had improper dealings with a prosecution witness while engaged as defence counsel without informing the Director of Public Prosecutions, that is, that the legal practitioner spoke privately with a prosecution witness who came to see him in his motel room with another person and further that the legal practitioner had been 'importuning' a prosecution witness to swear an affidavit incriminating herself. Madraiwiwi CJ was satisfied that the two counts of professional

misconduct were established, following which, in the same judgment, he ordered that the legal practitioner's *'name be struck of the Roll and that there be no order as to costs'*. I note that there is no explanation in the judgment as to what criteria was applied in arriving at that sanction and whether or not there had been an opportunity for the legal practitioner to address the court as to what sanctions might be imposed if such a finding was made. Further, there is also no indication in the judgment as to how and when the legal practitioner could appeal and to where (i.e Nauru or Australia). Similarly, Counsel for both parties before me could not advise as to the appeal process in Nauru in relation to disciplinary proceedings for the legal profession.

[12] In support of the application that the legal practitioner be granted an interim practising certificate, Counsel for the Applicant legal practitioner has argued for the application of the test raised by her and applied by me in *Chief Registrar v Vosarogo*. That is: *'that the matter should, be treated in the similar vein as a bail application and the Commission should consider:*

(1) The likelihood of the person attending ...;

(2) The interests of the Respondent ...;

(3) The public interest ...'

(See Chief Registrar v Vilimone Vosarogo (AKA Filimoni WR Vosarogo, Unreported, Independent Legal Services Commission, No. 002 of 2016, 6 February 2017, at [20].) I note that similar criteria are set out in section 19(1) of the *Bail Act 2000*.

[13] Applying the same criteria, Counsel for the Applicant legal practitioner submitted:

(1) The likelihood of the person attending – the Applicant legal practitioner will be vigorously contesting the allegations;

(2) The interests of the legal practitioner – Mr Vakaloloma is 61 years of age and in poor health, however, he has a spouse to support and a mortgage. In addition, he has two adult children as well as two adult nephews to support whilst each of the four complete their studies;

(3) The public interest – this could be protected as it was in *Vosarogo* by imposing stringent conditions such as a fortnightly written report submitted

to the LPU listing the cases that the Applicant legal practitioner is handling.

- [14] When I raised with Counsel for the Applicant legal practitioner as to whether the strength of the prosecution case should perhaps be part of the above criteria, Counsel for the Applicant legal practitioner replied that was not part of the test (something that I will return to shortly), however, she then went on to explain as to why the Applicant legal practitioner will be vigorously contesting the allegations. I have summarised below both her oral submissions as well as those of Counsel for the Respondent Chief Registrar (as I understood each of them).
- [15] In relation to *Count 1*, the submission of Counsel for the Applicant legal practitioner is that there is a major question as to whether this Count is even in the right jurisdiction of the Commission and whether, having been alerted to the Nauru judgment, the Chief Registrar should have formally refused the Applicant's practising certificate so he could have made an application to a judge of the High Court in accordance with section 46 of the *Legal Practitioners Act 2009*. Instead, the practitioner was granted three interim practising certificates between 2 March and 14 May 2017 to enable the practitioner to continue to appear on behalf of four co-accused in a lengthy criminal trial in the High Court in HAC 56 of 2014. According to Counsel for the Applicant legal practitioner, if it was good enough for the LPU to issue an interim practising certificate to the Applicant legal practitioner between 2 March and 14 May 2017 (some two and a half months) and there was no question raised at that time about the overriding protection of the public, then surely an interim practising certificate can now be issued between today (mid-June) and the September 2017 Sittings (just on three months).
- [16] Counsel for the Applicant legal practitioner has also raised in relation to Count 1, that, arguably, the Count in its present form may well either be struck out or dismissed at a final hearing because it has confused the offence of professional misconduct with a contravention of section 44(1)(b) and 82(2). I note that section 44(1)(b) states:

'Refusal or cancellation of certificate

44.—(1) *The Registrar may refuse to issue a practising certificate, ... pursuant to this Part if the applicant ... of such certificate ...*

...

(b) has been convicted in the Fiji Islands or elsewhere of an offence which involves moral turpitude or fraud on his or her part'.

[My emphasis]

I note that section 82(2) states:

'Professional Misconduct

82.—(1) *For the purposes of this Decree, 'professional misconduct' includes –*

...

(b) conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law, that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice, or that the law firm is not fit and proper to operate as a law firm.

(2) For the purpose of finding that a legal practitioner is not a fit and proper person to engage in legal practice ... regard may be had to the matters that would be considered if the practitioner were an application for admission or for the grant or renewal of practising certificate, including those matters contained in section 44 (a) to (j) of this Decree.

[My emphasis]

[17] I further note that in Count 1, apart from relying upon sections 44(1)(b), 82(2) and 82(1)(b) comprising the offence of professional misconduct, the Respondent is also relying upon section 83(1)(a) which states:

*'83.—(1) Without limiting sections 81 and 82, the following conduct is capable of being "unsatisfactory professional conduct" or "professional misconduct" for the purposes of this Decree:
(a) conduct consisting of a contravention of this Decree, the regulations and rules made under this Decree, or the Rules of Professional Conduct'.*

[18] The submission of Counsel for the Applicant legal practitioner, without going into detail as to the merits of the matter, is that the Applicant legal practitioner has **not** *'been convicted in the Fiji Islands or elsewhere of an offence'*. I raised in passing with Counsel for the Applicant legal

practitioner that surely the Chief Registrar must be able to reject an application for the issuing or cancellation of a practising certificate in his role as protecting the public? Counsel for the Applicant legal practitioner's oral submission was that this was then a matter for the High Court once the Chief Registrar has made a formal decision and is not for disciplinary proceedings before the Commission.

[19] The submission of Counsel for the Chief Registrar in reply in relation to *Count 1* was that:

(1) The representations had been made by the Fiji Independent Commission Against Corruption (FICAC), there was a public interest that the trial (of some six weeks proceeded) and the trial judge had refused the withdrawal of the Applicant legal practitioner as Counsel;

(2) Further, at that time, the LPU was still investigating the matters from Nauru and had only just become aware that the practitioner had been struck off the Roll there;

(3) A reading of both section 44(1)(b) and 82(2) includes a civil offence that would cover the disciplinary proceedings from Nauru. It was applicable as had been in "*Singh from Australia*";

(4) The Applicant does not need a formal refusal letter from the Chief Registrar as this is a disciplinary matter, hence, the Commission in Fiji is the correct forum;

(5) Due to the gravity of the charge, the public interest must be protected.

[20] In relation to *Count 2*, the submission of Counsel for the Applicant legal practitioner is that the legal practitioner made a formal application to withdraw before the High Court which was refused by the trial judge.

[21] It is my limited understanding at this stage from a reading of the judgment filed as part of disciplinary proceedings before this Commission that the application to withdraw was based upon non-payment of fees and deteriorating health. That formal application was then refused in a Ruling dated 8th February 2017.

- [22] The submission of Counsel for the Respondent Chief Registrar in reply in relation to *Count 2* is a different matter from Count 1 and it will be for a later determination by this Commission whether the Applicant legal practitioner made a timely application for renewal of his a practising certificate.
- [23] I did note to Counsel for the Respondent Chief Registrar that if this count was found to be established, then (without, obviously, having heard any submissions on the appropriate sanctions to be imposed at this stage) that the penalty may well be in the range that I imposed yesterday in *Chief Registrar v Vakaloloma* (Unreported, ILSC Case No. 001/2017, 13 June 2017) and the table that I included in the judgment of previous sanctions imposed by the Commission in such matters. My understanding is that this this preliminary view was not disputed.
- [24] In relation to *Counts 3 and 4*, the submission of Counsel for the Applicant legal practitioner is that the Applicant legal practitioner made a formal application to withdraw that was recorded and he did not abandon his client.
- [25] The submission of Counsel for the Respondent Chief Registrar in reply in relation to *Counts 3 and 4*, was included in the submission he made on Count 2, that is, these are different matters to Count 1 and thus with the number of charges there is a public interest in an interim practising certificate being refused.
- [26] Obviously, as to the merits of the four counts, these are all matters for a final hearing and I make no formal findings at this stage. I am satisfied, however, that the four counts are going to be vigorously defended and that there is a reasonable basis to what is going to be argued.
- [27] My major concern, as I raised with Counsel for the Applicant legal practitioner, is that the Applicant has been struck off the Roll in Nauru. I take her point that it may well be that I find this is not as disciplinary matter for the Commission but a separate matter for the Chief Registrar.

however, as the LPU have chosen to charge it as a count before the Commission, it will need to be dealt with initially here and which can only take place at a full hearing. There is also force in her submission that if there was such a concern as to the protection of the public, then surely there could not have been the granting of three interim practising certificates. There is also force in the submission of Counsel for the Respondent Chief Registrar that the public interest was in allowing the Applicant legal practitioner to appear at the trial so that it could proceed.

[28] For the record, I do note that whilst not directly applicable, sections 19(1) and (2) of the *Bail Act 2000* state:

'Reasons for refusing bail

19.-(1) An accused person must be granted bail unless in the opinion of ... the court ...

(a) the accused person is unlikely to ... appear in court to answer the charges laid;

(b) the interests of the accused person will not be served through the granting of bail; or

(c) granting bail to the accused person would endanger the public interest or make the protection of the community more difficult.

(2) In forming the opinion required by subsection (1) a ... court must have regard to all the relevant circumstances and in particular-

...

(iv) the strength of the prosecution case;

(v) the severity of the likely penalty if the person is found guilty;

(b) as regards the interests of the accused person-

(i) the length of time the person is likely to have to remain in custody before the case is heard;

(ii) the conditions of that custody'.

[29] Proceedings before the Commission are not criminal proceedings but civil disciplinary proceedings where the protection of the public is paramount. I do take note, however, of the ex tempore judgment of Commissioner Connors in *Chief Registrar v Siteri Adidreu Cevalawa*, (Unreported, ILSC Case No. 006/2011, 7 October 2011) where he drew an analogy with the granting of Bail stating:

'... I am addressing the simple issue that the six months that the practitioner wont have the practicing certificate and the only two reasons are the Chief Registrars refusal to issue it and the fact the commission isn't sitting if this commission were the high court, the

magistrates court or whatever and sat everyday then this matter could be dealt with next week and the practitioner wouldn't be placed in jeopardy by not having a practicing certificate for six months. If it were somebody charged with murder the Bail Act carries a presumption that bail be granted not a presumption to be locked up pending trial but a presumption that bail be granted there is an awful [lots] of hoops the prosecution has to go through to cause the person to remain in custody...

[My emphasis]

[30] In the present matter, I note that there is a possibility that it may be able to be heard late in the September 2017 Sittings (the Commission having already scheduled to sit during the first week of those Sittings from Monday to Saturday inclusive to complete a part-heard defended hearing and then in the second week of those Sittings other cases are already listed for hearing). If this matter cannot be heard as a final defended hearing in those Sittings or is adjourned part-heard to the November/December 2017 Sittings, the Applicant legal practitioner will have been without a practising certificate since 15 May 2017 - he having only been suspended until today for a month in a separate matter (Case No.001 of 2017) for appearing on 1st March 2017 without a valid practising certificate. That would mean if this matter was to be heard in the September Sittings he will have been without a practising certificate for approximately four months and judgment was not until the November/December 2017 Sittings, he would have been without a practising certificate for approximately six months. If the matter was not heard until the November/December 2017 Sittings (with judgment not until the February 2018 Sittings), he will have been without a practising certificate for approximately nine months.

[31] I further note that I have not been referred to any case that is "on point" in relation to Count 1. The *Chief Registrar v Singh*, from the Queensland Court of Appeal, as I have explained, differs to the count presently before me. I am, however, prepared to be convinced otherwise at a final Hearing.

[32] I have also taken note of the statement by Justice Madigan in *Chief Registrar v Devanesh Prakash Sharma* [2014] FJILASC 7 (Unreported, ILSC Case No 029 of 2013, 12 November 2014) at [52]:

Although practitioners are not "accused persons" as envisaged by

the Constitution, I will now declare that for this matter and all future matters before this Commission, the rights of persons being investigated and charged under the Legal Practitioners' Decree will be afforded all of the rights afforded to accused persons in the Constitution 2013.'

- [33] Although the rights under the Constitution was not raised by either Counsel, I note Counsel in *Vosarago and Vodo*, Counsel for Mr Vosarago highlighted the presumption of innocence (s.14(2)(a) and right to trial without unreasonable delay (s.14(2)(g). Ms Vodo, who appeared in that application her own behalf, also cited s.14(2)(a) as well as the right to economic participation (s.32(1)).
- [34] In coming to a decision, I have taken into account that:
- (1) Count 2, if proven, would be a fine and possibly a short suspension;
 - (2) Counts 3 and 4 would be probably be a fine.
- [35] Balanced against that I have taken note of what was said by Commissioner Connors in *Cevalawa*, the Respondent is only seeking an interim practising certificate to be issued until the hearing of the substantive matters to be set down either in the September of November/December 2016, and that conditions can be imposed to protect the public. Accordingly, I will grant the application for the issuing of the an Interim Practising Certificate.
- [36] I wish to record my thanks to Counsel for both in being prepared to deal with this application in a timely manner. I also wish to record my personal thanks to the Commission's Acting Secretary who has been working long hours to enable this to be heard so that a timely judgment could be delivered.
- [37] I will now hear from the parties as to what conditions should be attached to the interim practising certificate.

[38] The formal Order of the Commission is:

ORDERS

1. Pursuant to Section 121(3) of the Legal Practitioners Decree, the Chief Registrar shall issue a Practicing Certificate to the Respondent from today, 14th June 2017 up to and including 18th September 2017, on payment of the prescribed pro rata fees, and such further conditions as to be ordered this afternoon by the Commission after hearing from Counsel for both parties.

Dated this day of 14th June 2017

