

THE STATE

v

REGISTRAR OF TRADE UNIONS

ex parte

FIJI PUBLIC SERVICE ASSOCIATION

[HIGH COURT, 1990 (Palmer J) 24 May]

Civil Jurisdiction

Trade Unions- whether actions of the Registrar of Trade Unions are justiciable- whether organising a union on racial lines is prohibited- whether the Registrar abused his discretion- Trade Unions Act (Cap 96) Sections 2, 5, 8, 9, 11, 12, 13 & 16.

Judicial Review- whether decisions of Registrar of Trade Unions are subject to judicial review.

The Registrar of Trade registered the Viti Civil Servants Association despite the objections of the Applicant. The High Court in dismissing a motion to review the Registrar's decision HELD: (i) that the Registrar's decisions are, in principle, subject to judicial review (ii) that organising a union on racial lines is not prohibited by law and (iii) that the Registrar had not breached the rules of natural justice in arriving at his decision.

Cases cited:

Air Pacific Senior Staff Association Case (Sup. Ct. Civ. App. No. 7/1980)

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147

Federated Airline Staff Association v. Registrar of Trade Unions & Anr
(Sup. Ct Action No. 196/80)

Association of Professional Engineers, Australia v. Professional Officers

Assn. Commonwealth Public Service & Anr (1952) 73 C.A.R. 151

Rendell v. Release on Licence Board [1987] 10 NSWLR 499

Seafarers Union of Fiji v. The Registrar of Trade Unions & Anr 35 FLR 146

Swaine v. Wilson (1890) 24 QBD 252

H. Nagin for the Applicant

V. Nathan for the Respondent

Palmer J:

In these proceedings the applicant Fiji Public Service Association (FPSA) is

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A seeking a Judicial Review of the action of the Registrar of Trade Unions in registering the Viti Civil Servants Association (VCSA) as a Trade Union. The application for leave was filed on the 25th November 1987 and leave was granted on the 1st December 1987. The matter came before me on the 3rd of October 1989 when I was informed by Counsel for the Applicant that the Viti Civil Servants Association had been served but had never put in any appearance. By consent I made Orders giving leave to both Parties to file further Affidavits. It had been agreed by Counsel there would be no oral argument and that they would both make written submissions. Accordingly by consent I ordered that the Applicant file and serve written submissions by 3rd November 1989 and the Respondent by the 17th November 1989. In the event the Applicant's submissions were filed and served on the 21st November 1989 and those of the Respondent on the 18th January 1990. Both submissions were placed before me on the 17th April 1990. In this manner the matter which is approaching 3 years of age is pursuing its slow course.

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D Apart from the submissions the material before me consists of an affidavit sworn by Mr. Mahendra Pal Chaudhary the General Secretary of the FPSA sworn on the 25th November 1987, the application for leave and Order 53 Statement and Notice of Motion for Judicial Review, an affidavit in reply by Davendra Pathik a Resident Magistrate at Suva and at the material time the Registrar of Trade Unions sworn on the 16th August 1989, a further Affidavit by Mahendra Pal Chaudhary sworn on the 10th October 1989 and finally a further Affidavit by Davendra Pathik sworn on the 19th October 1989.

E The Motion seeks an Order of Certiorari that the decision of the Registrar of Trade Unions registering the Viti Civil Servants Association as a Trade Union be removed to this Court and be quashed and a Declaration that the Registrar of Trade Unions acted in breach of the Rules of natural justice or abused his discretion under the Trade Unions Act Cap.96 or exceeded his jurisdiction. The grounds stated are as follows:

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- “(a) That the Registrar acted in breach of the relevant rules of natural justice and that he failed to give the applicant a hearing or a proper hearing before deciding to register Viti Civil Servants Association as a Trade Union.
- (b) That the Registrar in registering Viti Civil Servants Association abused his discretion under the Trade Unions Act in that
1. he took into consideration irrelevant matters; and
 2. he did not take into consideration relevant matters; and

3. he acted arbitrarily and or unreasonably

I deal first with a preliminary point taken by the Respondent. Counsel for the Respondent submits that the decision of the Registrar is not open to challenge by the applicant because of the provisions of Section 5 of the Trade Unions Act which is as follows:

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PROTECTION OF OFFICERS

“5 No suit shall lie against any officer appointed under the provisions of Sections 3 or 4 for anything done or omitted to be done by him in good faith and without negligence and in the exercise or intended exercise of any power or in the performance or intended performance of any duty conferred or imposed by this Act.”

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Section 3 provides for the appointment of a Registrar of Trade Unions and of a Committee of 4 persons to advise the Registrar in relation to the performance of his duties and functions. Section 4 provides for the appointment of Assistant Registrars, inspectors and other officers as may be required. In support of that submission Counsel for the Respondent refers to Federated Airline Staff Association v. Registrar of Trade Unions and Another Supreme Court of Fiji Civil Action No. 196 of 1980. In that case Kermode, J stated that Section 5 affords protection to the Registrar and expressed the view that the section precludes the Court from granting the interim injunction sought in that action. But in my view that decision may be distinguished from the present case because that was an action in which the Federated Airline Staff Association was the Plaintiff and the Registrar of Trade Unions and the Attorney-General were the Defendants and the decision was of an application by the Plaintiff for an interim injunction against the Defendant. Counsel also very properly drew attention to the fact that such a provision as Section 5 may not now afford protection from review of administrative decisions by the Courts because of the decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission 1969 2 AC 147. In that case the privative clause which was being discussed was in these terms:

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“The determination by the Commission of any application made to them under this Act shall not be called in question in any Court of Law”

And Lord Reid on page 170 at letter C said:

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“It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary

jurisdiction of the Court.”

- A However there is hardly any need to have recourse to what was said in Anisminic because in the present case the privative clause is not even of that frequently found kind. The provision of Section 5 in my view quite plainly is one which protects only against civil actions. That in my view is the plain meaning of the use of the word “suit”. There is ample authority for the proposition that the protection of rights such as those being claimed by the FPSA in this matter is to be obtained by way of Judicial Review and not by way of Civil Action. In my view Section 5 is quite inadequate to oust the jurisdiction of the Court to entertain
- B a Judicial Review of the Registrar’s decision in this case and accordingly the preliminary submission of the Respondent fails.

- C In order to better deal with the various submissions made it is convenient first to say something about the scheme of the Act and secondly to set out some items of evidence which I regard as fundamental to the determination of this application.

The fundamental provision in the Act is Section 9 which is as follows:

REGISTRATION

- D “9. Subject to the provisions of Sections 11, 12, and 13 the Registrar shall register the Trade Union in the prescribed manner as a registered Trade Union.”

Section 8 provides that application may be made for the registration of a Trade Union. Section 11 is as follows:

- E POWER OF REGISTRAR TO CALL FOR FURTHER PARTICULARS

- F “11. The Registrar may call for further information for the purpose of satisfying himself that any application made by a Trade Union or proposed Trade Union for registration complies with the provisions of this Act or that the Trade Union or proposed Trade Union is entitled to registration under this Act.”

Section 12 provides for the power of the Registrar to require alteration of name, which is of no consequence in the present case. Section 13 is important and is headed “Refusal of Registration”. It is as follows, as far as relevant:

- G “13. (1) The Registrar may refuse to register any Trade Union if he is satisfied that –
- (a) The Trade Union has not complied with the provisions of this Act or of any regulations made thereunder
 - (b) any of the objects in the Constitution or rules of the

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- Trade Union is unlawful or conflicts with any such provisions;
- (e) Any other Trade Union already registered is adequately representative of the whole or of a substantial proportion of the interests in respect of which the applicant seek registration;

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Provided that the Registrar shall, by notice in the Gazette or otherwise, notify any registered Trade Union which appears to him to represent the same interest as the applicants of the receipt of such application and shall invite the registered Trade Union concerned to submit in writing within a period 21 days any objection which such Trade Union may wish to make against registration."

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It may, also be noted that Section 16 provides for an appeal against a refusal of the Registrar to register a Trade Union or a decision to cancel or suspend such a registration. However there is no provision for any Appeal against an order of the Registrar registering a Trade Union.

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The FPSA substantial claim may, I think, be fairly summarised as being that it is adequately representative within the terms of Section 13 (1) (e) and that therefore the Registrar was wrong in granting registration to the Association and was obliged to refuse or should have refused the, same.

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Another of the applicant's argument which loom large is that the VCSA is organised on racial lines and is therefore racially divisive. It may be a matter of conjecture to what extent that argument is prompted by a perceived loss of membership and to what extent by a genuine concern for the effects upon the community of registration of such a Union.

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I now set out hereunder the critical provisions of both Unions as to objects and membership and for ease of reference I set them out side by side. They were both tendered in evidence and are critical to an understanding of the principal issue.

OBJECTS

FPSA CONSTITUTION

Clause 4:

"4. The objects of the Association shall be:

- (a) To secure the membership in the Association of all bona fide Civil Servants in Fiji, other than the Unestablished Staff, and all other persons who may from time to time

VCSA CONSTITUTION

Clause 4:

"4. The objects of the Union shall be as follows:

- (a) To secure the complete organisation in the Union of interested workers who are Fijian Civil Servants and Civil Servants of Fijian descent, Rotuman or of Rotuman descent, Banabans or of

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HIGH COURT

- A be eligible for membership of the Association under this Constitution.” Banaban descent and others approved by the Annual General Meeting who are employed in the Civil Service and who are resident in the Dominion.”

MEMBERSHIPFPSA Clause 6 (a)VCSA Clause 5

- B “Membership of the Association shall be open to:
1) persons not being unestablished staff who are employed by the Fiji Government as bona fide Civil Servants, provided they are not eligible membership of any other registered Trade Union.
- C The Union is open to all persons of either sex who are Fijian Civil Servants or of Fijian descent, Rotuman or of Rotuman descent, Banaban or of Banaban descent, and for others approved by the Annual General Meeting who are employed in Government and who are resident in the Dominion.”

From the applicant’s submissions and Affidavits the following complaints may be gathered:

- D 1) “Unlawfulness of the VCSA’s objects”. It is claimed by the applicant that the Registrar should have refused registration under Section 13 (1) (b) and the same point is also raised under the heading “Excess of Jurisdiction”. The proposition there is that the Registrar exceeded his jurisdiction because of the alleged unlawfulness of the Association’s objects. The applicant makes reference to the definition of “Trade Union” in Section 2 of the Act and also to the definition of “employee” therein. It submits that the Trade Unions Act does not anywhere allow for or mention that a Trade Union may be organised along racial lines. That submission amounts to the proposition that everything is prohibited unless it is expressly permitted. I reject this. Quite clearly the converse is true. There is ample authority for the proposition that if something is to be prohibited or declared unlawful the legislator must do so in clear terms. I am surprised that a
- E Trade Union should put forward the proposition that only those acts are lawful which are expressly declared to be so by the legislature.

- F On the same topic the FPSA claims that the organisation of the VCSA along racial line is “inherently wrong” and “inherently unlawful”. I do not know what this means. It can have no connotation in law. It is also claimed that it is contrary to Section 15 of the Constitution and Section 14 of the Protection of Fundamental Rights and Freedoms of the Individual Decree No.12 of 1988. The Constitution was in effect when the Registrar made his decision but was no longer in effect when these present proceedings were instituted. However nothing turns on this because Section 14 of Decree No.12 of 1988 substantially re-enacts
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the provisions of Section 15 of the Constitution. That Section as far as relevant reads as follows:

- “14 (1) Subject to the provisions of this Decree A
- (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
- (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office of any public authority.” B

It therefore has no application to the present circumstances. Moreover Section 12 (1) of the Decree almost identically re-enacting Section 13 (1) of the Constitution – provides as follows: C

“12. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons including the freedom to belong to any Associations or Trade Unions for the Protection of his interests” D

For these reasons I reject the submission that the Registrar in registering the VCSA either acted in breach of Section 13 (1) (b) of the Act or that he exceeded his jurisdiction on those grounds. It is also claimed that the objects Clause is unlawful because it discriminates against Civil Servants who are not Fijian, Rotuman or Banabans or of such descent. I reject this. It does not discriminate against anybody; there are plenty of associations of various kinds whose objects and membership are oriented towards particular racial religious political or other objects and purposes to the exclusion of others. As long as such associations are not declared to be unlawful they are lawful. Therefore in my view registration of such an association under the Act should not be refused on that ground. E

Lindley, L.J. in a Trade Union type case: Swaine v. Wilson (1890) 24 QBD 252 in referring to the question of whether the society was a legal one, said at 259: “Illegality is not to be presumed; it must be established by those who rely upon it.” F

In the present case, apart from the reference to the Constitution and Decree No. 12 nothing has been put forward to support the bold assertion that the VCSA is unlawful by reason of the unlawfulness of its objects. I find that this ground has not been made out. In my view the VCSA is lawful. It should be made clear that I am not called upon to determine the desirability or otherwise of a racially orientated Trade Union. What the Court has to determine on this part of the case is its lawfulness or otherwise. I hold that the Registrar did not go wrong or G

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exceed his jurisdiction in not being satisfied that the objects of the VCSA were unlawful in terms of Section 13 (1) (b).

- A 2) The next complaint is "Failure to consider the views of the Trade Unions Advisory Committee." The Advisory Committee, as already noticed, is set up under Section 3 of the Act. Its function is clearly advisory and Section 3 (5) provides that the Registrar shall consult the Committee when performing any duties or functions under Section 13 and that the Committee shall tender any advice in writing. The written advice of the Committee in this case has been exhibited to the Registrar's Affidavit. I need not set it out here. There were 3 Committee Members present, 2 of whom were not in favour of the registration and the third one was. I note with interest that one of the members who opposed registration based his view apparently on the views expressed some time ago by another Board of which he was a member and which had resolved not to entertain Trade Unions which were drawn up on racial lines. Had that member's view been a determination rather than merely an advice it would have been clearly in breach of what the Court of Appeal of New South Wales said in Rendell v. Release on Licence Board (1987) 10 NSWLR 499 to the effect that the Board there had failed to carry out its functions or exercised its discretion by reference to a rule adopted by a body other than the Board and without regard to its applicability to the particular circumstances of the person involved in that case. That must reduce the weight to be given to that member's opinion. However, as already noted the Committee's function is merely to advise which was recognised by it in the last sentence of its written advice which said:

"The members left the matter with the Registrar to make a decision".

- E This is in accordance with the law. The Registrar in his Affidavits has said that he did take the views of the Advisory Committee into account. I accept the Registrar's evidence on this point and reject this submission.

- F 3) The next allegation is "Abuse of discretion". This is the only complaint of the Applicant of any substance and refers to Section 13 (1) (e) of the Act. It is also referred to elsewhere in the submissions under the heading of "Unreasonableness" and allegations that the Registrar's decision is tainted with irrationality and is arbitrary.

- G It is not the case, as has been submitted, that the registration of an applicant union is altogether discretionary. As has been seen from Section 9 of the Act there is a fundamental obligation on the Registrar to register an applicant union, subject only, for the purposes of the present submission, to Sections 13 (1) (e) and 11. It was held by Kermode, J. in the Federated Airline Staff Association case and affirmed again in the Air Pacific Senior Staff Association case, Civil Appeal No. 7 of 1980 that the word "may" in Section 13 (1) of the Act is not

permissive but enabling and that therefore if the facts are such as to satisfy the Registrar that any of the paragraphs (a) to (g) of Section 13 (1) have application he is obliged to refuse registration. I respectfully accept that interpretation. Section 11 has already been noted. The crux of the applicant's complaint in this context re-iterated in various forms and strongly urged is that it "is adequately representative of the whole or of a substantial proportion of the interests in respect of which the applicant seeks registration." Under Section 13 (1) (e) the Registrar is obliged to notify any registered Trade Union which appears to represent the same interest as the applicants of the receipt of such application and invite it to submit any objections. I accept that inherent in that provision is a duty upon the Registrar to consider such objections, otherwise the provision would be pointless. It is common ground that the applicant was notified and that it did lodge an objection. The objection, apart from reference to the alleged unlawfulness, with which I have already dealt, is on the grounds of adequate representation. The Registrar has exhibited the note he took of this matter. I set it out below:

"REGISTRATION OF VITI CIVIL SERVANTS ASSOCIATION"

1. Noted the views of the 3 members of the T.U.A.C. Views differ 2 to 1, 1 (Chairman) absent from meeting.
2. Noted objections from FNA, FTA, and FPSA.
3. (i) The application is in compliance with the provisions of the Trade Unions Act.
- (ii) The applicants have given reasons for wanting to form a union of their own although there are three other unions in the same industry.
- (iii) Membership clause is not identical to that of the other 3 unions of civil servants.
- (iv) The ones who have signed the application have no intention of belonging to the FPSA and they have been out of that union for some time. Their feelings in the matter appear to be genuine.
- (v) The fact that there are other unions registered which cater for civil servants is not a bar to registering the applicant union bearing in mind all the circumstances and reasons surrounding the application I consider that justice will be done by granting the application lest it be felt that certain employees have been deterred from presenting their rights through a union of their own."

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In his first Affidavit, in paragraph 4, the Registrar says inter alia:

- A “(b) In the instant case section 13 (1) (e) had to be specifically considered in the light of the facts before the Registrar.
- (c) There are three other registered trade unions of civil servants.
- (d) The membership clause of the Respondent Union is not identical with that of the other three unions of civil servants.
- B (e) The fact that there are other unions registered which cater for civil servants is not a bar to registering another union in the same industry.
- C (f) I considered the Respondent Union’s application and the reasons for their wanting to register the Union. Furthermore, I also considered the objections raised and in accordance with the requirements of the Trade Unions Act and after placing the application before the Trade Unions Advisory Committee (which I am required to do under the Act) I registered the Union.
- D (g) After having considered all the material before me, I was firmly of the view that unless the Union, was registered the interests of the applicants (particularly when the facts revealed that the applicants will not be accepted as members of the appellant’s union) will not be served by any registered trade unions including those which objected to the registration.”
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- F The Applicant complains of a discrepancy between the words in parenthesis in paragraph 4(g) above and paragraph 3 (IV) of the Registrar’s notes. It claims that the Registrar should have made the allegation as to the membership in the FPSA referred to in the above two abstracts available to the applicant and given it an opportunity to respond to it and it says that therefore the Registrar had an obligation to conduct a further inquiry in pursuance of his power under Section 11. It is said his failure to do so amounts to a failure to give a hearing and therefore a breach of natural justice. That submission is sought to be supported by Judicial Review Seafarers Union of Fiji v. The Registrar of Trade Unions and
- G Another (35 FLR 146). In that case Jesuratnam J. held that a proper enquiry was a necessary pre-requisite to resolve the question whether to register the second Respondent or not. But that case can be distinguished from the present one. In the first place in that case the Advisory Committee had unanimously agreed to advise the Registrar to obtain clarification from the applicant union of its membership position and that the same should be done with the Seafarers Union’s

position. It is in that context that Jesuratnam J. said:

“It (that it to say the need for a proper enquiry) flowed logically from the Advisory Committee’s advice to the Registrar.”

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He goes on to say: “This was not done in the proper way. The Registrar acted unfairly and unreasonably.” Furthermore, and this gets to the real nub of this case, Jesuratnam, J. said:

“The present case is not a dispute between two Unions as regards the class of employees it represents. As shown above the interests sought to be represented are practically the same. It is only a question of which is more representative. It is a question of mere arithmetic. When such is the case it was the elementary duty of the Registrar to have held an enquiry and investigated into the truth of the claim of membership made by the respective Unions.”

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In the objections filed in the present case by the FPSA no membership figures either of its or the other Union are given.

The case has not been presented by either party as turning on membership numbers. Very little material has been placed before me as to the case put forward by the VCSA. I note what the Registrar said in paragraph 3 (IV) of his Note. What is said there, and the inference of some split and/or hostility between the VCSA applicants and the FPSA receives some support from what the General Secretary of the FPSA, Mr. Chaudhary said in the objection to registration:

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“The applicant Association has been initiated by a splinter group in the FPSA and their intention, as stated in the membership clause, is to poach members from all four registered Civil Service Unions.”

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This tends to support the Registrar’s acceptance of the VCSA applicants unhappiness with the FPSA.

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I do not think the Registrar needed to resolve whether the VCSA members were unable to belong to the FPSA or whether they were unwilling. That was not the decisive factor on the question of adequacy of representation. I have carefully considered whether the Registrar should have put this matter to the FPSA with an opportunity to respond. But what would it have contributed to his deliberations?

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The FPSA have not placed before me what their response would have been. But assuming the highest point in their favour it could only have been to the effect that the VCSA applicants were welcome to remain in or return to the FPSA. That would not have advanced the position. Nor would it have assisted

A the Registrar in determining whether the particular interests of the VCSA applicants were being adequately represented by the FPSA. There was no need to make an enquiry if the outcome was not likely to affect the result of the application. The decisive point lay elsewhere.

B It must be borne in mind that the matter is governed by statute. The Registrar was obliged by Section 9 to register the VCSA unless he was satisfied – in terms of Section 13 (1) (e) - that the FPSA is adequately representative of the whole or of a substantial proportion of the interests in respect of which the applicants sought registration. Quite clearly he was not so satisfied. The onus lies on the objector (Association of Professional Engineers, Australia v. Professional Officers Association Commonwealth Public Service and Others (1952) 73 C.A.R. 151). This is also clear from Section 13.

C In the circumstances I hold that the Registrar did not abuse his discretion, nor was he guilty of any breach of the rules of natural justice in not holding an enquiry under Section 11.

D But there is another difference between the two unions, apart from the racial one. Although the point has not been expressly adverted to by either party it is in my view important to the determination of this application. The object and membership clauses of the FPSA contain the express exclusion of Unestablished Staff. Those of the VCSA do not contain that exclusion and in fact positively embrace all persons (of the described races) employed in the Civil Service. In the light of this it is just not true for Mr. Chaudhary in his Affidavit to say “That the applicant is the only Union which caters for membership of all the Civil Servants” or that it and three other named Unions “adequately catered and continues to fully represent and cater for the Civil Servants of all categories.” I can take judicial notice of the facts:

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- (a) that Unestablished Civil Servants form a substantial proportion of the interests concerned, and
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- (b) that Fijians Rotumans and Banabans and persons of those respective descents similarly form a substantial proportion of such interest.

G Indeed the Fiji Service Commissions Decree No. 7/188 provides in Section 6 (10) for a 50 per cent component of such persons in the Public Service. In those circumstances I am not prepared to say that the Registrar was wrong in not being satisfied that the FPSA is adequately representative of the whole or of a substantial proportion of the interest in respect of which the VCSA sought registration, in accordance with Section 13 1 (e).

Nor am I persuaded that a reasonable Registrar would have had to refuse to

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register the Association (the "Wednesbury principle"). For these reasons the Motion is dismissed. The Applicant is to pay Respondents costs.

(Motion for Judicial Review dismissed.)

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