THE STATE

v.

MINISTER FOR COMMUNICATIONS, WORKS AND ENERGY

ex parte

FIJI TELEVISION LIMITED

[HIGH COURT, 1999 (Byrne J) 28 September]

Revisional Jurisdiction

Administrative Law- judicial review- whether ministerial decision to increase licence fee a public law matter- whether decision subject to rules of natural justice. Television Decree 35/1992.

Some years after Fiji Television began broadcasting under an exclusive licence the Minister decided vastly to increase the licence fee. On a motion for judicial review of this decision it was argued that the matter was purely contractual and did not raise matters of public law. It was also argued that the decision was within the limits of the Minister's discretion. Rejecting these submissions and quashing the decision the High Court HELD: (i) the exercise of a contractual power contained in a statute raises an issue of public law and (ii) that the Minister's decision was so unreasonable that the Court was entitled to review it.

Cases cited:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223.
Federal Airports Corporation v. Aerolineas Argentinas and Others (1997) 147 ALR 649.
Ha v. State of New South Wales (1997) 189 CLR 465.
Instrumatic Ltd. v. Supabrase Ltd. [1969] 1 WLR 519.
Kioa and Others v. West and Another (1985) 159 CLR 550.
Luby v. Newcastle Under-Lyme Corporation [1964] 2 Q.B. 64.
Nakkuda Ali v. Jayaratne [1951] AC 66.
R. v. Metropolitan Police Commissioner Ex-parte: Parker [1953] 1 WLR 1150.
R. v. East Berkshire Health Authority Ex-Parte: Walsh [1985] Q.B. 152
Wootton v. Central Land Board [1957] 1 WLR 424

Motion for judicial review in the High Court.

G.E. Leung for the Applicant
E. Walker for the Respondent

Byrne J:

Pursuant to leave to apply for Judicial Review which I granted on 22nd April 1998 of a decision of the Minister for Communications, Works and Energy made on the 6th of October 1997 or at the latest 9th of April 1998 that with effect from 24th June 1998 the annual Licence fee that the Applicant is required to pay was to be increased from $1,100.00 to $275,000.00 being $250,000.00 plus $25,000.00 VAT, the Applicant seeks by way of Judicial Review to challenge the Minister's decision. In particular it seeks the following orders:

(a) An order for certiorari to quash the decision of the Respondent purporting to increase the television Licence fee of the Applicant;

(b) A declaration that the Respondent's decision in adjusting and increasing the Applicant's Licence fee is:-

  (i) Unlawful;

  (ii) In breach of the rules of natural justice;

  (iii) Unreasonable; and

  (iv) Unconscionable.

(c) An order for mandamus directing the Respondent to reconsider the matter and to exercise the discretion vested in him under Clause 3.2 of the television Licence reasonably and according to law;

(d) An injunction to restrain the Respondent from giving effect to his decision to increase the Licence fee to $250,000.00 plus 10% VAT;

(e) An order that the Respondent pay the Applicant's costs on a full indemnity basis.

In my Interlocutory Judgment on the application for leave to apply for Judicial Review I set out the relevant facts and background on pages 2 and 3 of my judgment and on pages 4 and 5 the grounds on which the Applicant argues the decision should be quashed.

The principal contention of the Respondent is that Judicial Review should not be granted in this case because the Respondent has increased the Licence fee under the licence or contract it granted to or has with the Applicant. Thus, it is said, this is a matter of private law and does not raise any question of public law. Consequently the decision is not reviewable.

On pages 5 to 8 of my first judgment I mentioned the authorities, both text-book and decided cases, on which the Respondent relied in his submissions opposing the granting of leave and my comments thereon. I shall not repeat them here verbatim but shall make some comments now on the expanded submissions settled

by senior counsel for the parties. First however I must say something about the first submission by the Respondent about the correct date of the decision. This was not submitted originally by the Respondent but in the submissions prepared by Dr. Geoffrey Flick S.C. of Sydney it is said that the operative decision was made by the Minister on 9th of April 1998. It is therefore argued that the existing Application cannot competently review that decision; a fresh Application needs to be filed - the Applicant cannot merely seek to amend its existing Application. This is the first time this submission has been made because in the application for leave the Respondent accepted that the correct date was the 6th of October 1997. This apparently is because on 9th April 1998 the Minister wrote to the Applicant stating that the Government wished to revoke its earlier decision, wrongly stated as the 16th of October 1997, and that the new date for payment of the increased Licence fee was to be 1st July 1998. The letter concluded, "Fiji Television is given the opportunity to make submission to this office on this matter at the latest by 12 June, 1998".

Not surprisingly the Applicant disputes this claim and submits:

(a) There was, in reality, only one relevant decision by the Minister which is the subject of this review, namely the decision to increase the annual licence fee to $250,000.00 per annum plus VAT. That is the decision, regardless of whether it was made on 6th October 1997, or on 9th April 1998.

(b) Alternatively, by its conduct in permitting the current proceedings to follow the course described in the chronology (including without limitation, the fact that the Respondent did not raise this fact prior to my granting leave on 22nd April 1998), it is unconscionable for the Respondent to seek to rely on this procedural point and the Respondent ought to be estopped from so doing.

(c) Further, or alternatively, if the decision on 9th April 1998 is to be regarded as a later and separate decision from that made on 6th October 1997, it is submitted that it is appropriate, and, indeed, a matter of common sense, that the present proceedings should be amended so as to refer to the decision on 9th April 1998. Such an amendment would be made for the purpose of determining the real question in controversy between the parties and is therefore within the discretion of the Court pursuant to RHC Order 20 Rule 7(1).

I agree with the Applicant's submissions on this and since the Respondent can point to no prejudice which it might suffer if the date 9th April 1998 were substituted for 6th October 1997 I grant the Applicant leave *nunc pro tunc* to prosecute this application as if it were an application for Judicial Review of the decision made on 9th April 1998. This should satisfy the apparent sensitivity the Respondent feels about the correct date.

This very technical point having now been disposed of, I turn now to the Respondent's submissions on the substantive Motion.

The Respondent's Contentions in Summary

In summary form, the Respondent contends that:

- the decision to increase the licence fee is simply a decision in accordance with the terms of the licence and cannot - for whatever purposes - be characterised as a tax;
- the decision is not susceptible to judicial review;
- there has been no improper exercise of discretion;
- the Applicant is not entitled to natural justice;
- if the Applicant is entitled to natural justice, it has been afforded procedural fairness;
- the decision is not unreasonable;
- the Applicant has not discharged its onus of establishing any ground of review.

Furthermore, the Respondent Minister contends in the alternative that this Court should exercise considerable reluctance in reaching a conclusion that any ground of review has been established or that any judicial discretion should be exercised favourably to the Applicant in circumstances where the Minister's decision has been the subject of concurrence by Cabinet.

I shall deal with these submissions in that order.

I have serious reservations about the first submission. In Ha v. State of New South Wales (1997) 189 CLR 465 the High Court of Australia held that an amount equal to 75 or 100 percent of the value of tobacco sold during a relevant period could not be regarded as a mere fee for a licence required as an element in a scheme for regulatory control of businesses selling tobacco. By analogy I think it can be said that in the instant case, the very size of the increase in the licence fee in proportion to the quantum of the licence as originally set and the circumstances in which the level of the original licence fee was set, indicates in all probability in my view that what is now sought to be levied by the Respondent is not, in truth, a licence fee at all. However because of the clear views I have formed about other aspects of this case, but especially the magnitude of the proposed increase, I find it unnecessary to express a concluded opinion on this point.

The Respondent then submits that the decision is not susceptible to Judicial Review because he says the licence records the contractual obligations of the Applicant.

He then quotes several authorities, one being the well-known English Court of Appeal decision R. v. East Berkshire Health Authority Ex-parte Walsh [1985] Q.B. 152 and Lewis, *Judicial Remedies in Public Law* at 50.

In my first judgment of the 22nd of April 1998 at page 6 I distinguished this case from the present on the facts because the Court of Appeal was there concerned with the dismissal of a nurse by an English Health Authority which the Court held was not judicially reviewable on the ground that there was no element of public law involved or, as the Court put it, no statutory underpinning of the employment relationship. In my judgment the Television Decree provides the necessary underpinning for the present application, a fortiori when one considers the scheme of the Decree and the nature of the powers being exercised by the Minister and *the mixed character* of the licence which has been granted to the Applicant.

Section 4 of the Television Decree (35/1992) empowers the Minister to issue a Television Broadcasting Licence containing such terms and conditions as he may determine to any person. Sub-section 4 empowers the Minister to require payment of a licence fee of such amount as the Minister may determine. The Respondent submits that the regulation of the quantum of the fee is entirely within the domain of the licence.

In my first judgment on page 7 I said this in answer to a similar argument:

> "If the Respondent's arguments are correct then it would follow in my view that any exercise of a ministerial discretion under Section 4 or indeed any other part of the Decree, no matter whether it be unlawful, unreasonable or ultra vires the Decree, cannot be challenged in a court of law because the Minister has purported to act in accordance with such a contractual undertaking. I know of no legal authority, nor has any been cited to me, to support the proposition that where a Minister of State exercises a statutory power which results in the grant of a licence which may contain many if not all of the attributes of a contract to do something, the exercise of that ministerial discretion is not subject to review.
>
> In my judgment that cannot be right. Here the Minister was at the material time exercising public law functions and statutory powers. He is the holder of a public office. Therefore the exercise by him of any discretionary power under the Television Decree must be governed by the purposes of that Decree and any restrictions or powers expressed or implied vested in him under the Decree and that power must necessarily be subject to relevant public law principles, for example he must exercise it reasonably, lawfully, and in the public interest. Put another way this means that he must not act arbitrarily, capriciously or in bad faith. If he failed to do so then in my opinion any person aggrieved or adversely affected by

> the exercise of the power would be entitled to have recourse to Judicial Review."

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I summarised my views on this question on page 8 of my judgment when I said this:

> "It matters not in my view that the Minister or his agent has entered into a commercial arrangement through a contract or a licence if that document is based on a statute or in this case a Decree. Thus in *Applications for Judicial Review* 2nd Edition by Aldous and Alder p.112 the authors state:

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> > "Even where a power is essentially contractual, the presence in a given case of an additional statutory element or even the exercise of a general governmental policy might possibly convert a contractual private law issue into one of public law."

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Having given further thought to the matter in the light of the submissions received on the substantive Motion I am not prepared to resile from the views I then expressed. In my judgment the *fons et origo* of this matter must be the Television Decree.

In Lewis, *Judicial Remedies in Public Law* the author says at page 50 under the heading "Contract": D

> "Judicial Review is not, however, available to enforce private law rights."

But further down on the same page under the heading "Power to Contract" the author says this: E

> "The courts have been prepared to grant judicial review of decisions by public bodies to enter into contracts. Statute may confer a specific or a general power to contract. In such cases the decision to contract could be regarded as an exercise of statutory power, albeit one that may result in the creation of private law contractual rights."

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In my judgment the latter remarks apply to the instant case. I consider as I said at page 9 of my previous judgment that the licence in this case is not a mere private contract but an agreement based on a statutory instrument namely a Decree made by the then Government of the country and having the full force of law. As such I hold that any decision made by a relevant authority clearly acting under the Decree is subject to Judicial Review by the Courts. G

Interestingly I note that in the Respondent's submissions on the leave application he said that "The Respondent does not contest that the decision is an appropriate one for Judicial Review". I take that statement to mean that the Respondent was prepared to admit that the Applicant had an arguable case, a view which he then proceeded to contradict in his remaining submissions and of course in the present

submissions.

A For these reasons I consider that Judicial Review is available to the Applicant.

The Respondent then contends that the Applicant has not established that any matter referred to the Minister for his consideration by the Applicant has not been properly considered. It is said that the rejection of an applicant's submission is no proof of any failure of consideration; any contrary proposition would be an impermissible attempt to review the factual merits of a decision as opposed to its
B legality.

In Wade, *Administrative Law*, 7th Edition 1994 at 952 dealing with appeals against discretionary decisions the author says, "But in fact the Court may allow such an appeal if it appears that the tribunal's decision produces manifest injustice - Wootton v. Central Land Board [1957] 1 WLR 424 at 432 - or is "plainly
C wrong" - Instrumatic Ltd. v. Supabrase Ltd. [1969] 1 WLR 519. In that case at page 521 Lord Denning M.R. said:

> "In such cases, if the tribunal exercises its discretion in a way which is plainly wrong, it errs in point of law, and its decision can be reviewed by the courts."

D In his previous edition at page 39 Professor Wade states:

> "It is a cardinal axiom....that every power has legal limits, however wide the language of the empowering Act. If the court finds that the power has been exercised oppressively or unreasonably (emphasis added), or if there has been some procedural failing,
E such as not allowing the person affected to put forward his case, the act may be condemned as unlawful. Although lawyers appearing for government departments often argue that some Acts confer unfettered discretion, they are guilty of constitutional blasphemy. Unfettered discretion cannot exist where the rule of law reigns. The notion of unlimited power can have no place in the system.
F The same truth can be expressed by saying that all power is capable of abuse and that the power to prevent abuse is the acid test of effective judicial review."

At page 40 he then goes on to state that it is to be assumed that when Parliament confers powers, it intends that those powers be used fairly and with due
G consideration of the rights and interests of persons whose interests would be adversely affected. In the present case it is noteworthy that the legislation in question was promulgated by Decree. Arguably therefore, the level of scrutiny that the courts might wish to bring over decisions sourced from a Decree would be higher than where an elected Parliament enacts legislation.

In my judgment the outstanding feature of this case is the magnitude of the proposed increase which is in percentage terms 24,000 percent, to which the

Applicant has indicated its most strenuous opposition.

In Lewis op. cit., at page 53 the author states:

> "The courts have been prepared to superimpose public law principles onto contractual situations, and to ensure the observance of those principles by way of judicial review. They are prepared to do this even if the effect of granting a public law remedy is to vary the rights existing under a contract as for example, where a decision to terminate a contract is quashed and the contractual provisions then revived." (*Judicial Remedies in Public Law*, 1992, p.53)

I am firmly of the view that the Minister does not have unfettered discretion and that to the ordinary informed observer of the facts of this case an increase of that magnitude can only mean that the Minister has abused his discretion in the purported exercise of his powers to vary and increase the Applicant's fee under Clause 3.2 of the Licence.

I quote again from Professor Wade in his 6th Edition at page 388:

> "Parliament constantly confers upon public authorities powers which on their face might seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the courts refuse to countenance. They have woven a network of restrictive principles which require statutory powers to be exercised reasonably and in good faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering Act."

In my judgment that passage says all that needs to be said about the proposed increase. The courts will not stand idly by when they consider that one party to a contract, which I find as here has a statutory basis, has attempted to act unfairly towards the other party. It is a cardinal principle of our law that the State must always be the perfect litigant; to hold otherwise would mean that the public could not have any trust in the Government it has elected. That is something which the courts within the limits of their powers have steadfastly refused to condone.

On the facts of this case I am satisfied that the Minister was obliged by law to exercise his discretion reasonably and he failed to do so.

The Respondent Minister next contends that the Applicant is not entitled to either natural justice or an opportunity to be heard and to make submissions. In the way in which the law of natural justice has developed since Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223 these two concepts now virtually mean the same thing, namely that where any person's rights are adversely affected by a decision of an administrative body the person affected by the decision normally has a right to be heard and to make submissions.

The Respondent argues that the rules of natural justice are not applicable here by reason of:-

- the fact that the subject-matter of the exercise of discretion is inherently commercial and the fact that the Applicant consented to a right reserved to the Minister to vary fees without exacting any reciprocal right to be heard;
- the fact that the Television Decree, 1992 expressly confers no entitlement to be heard or to make representations;
- the fact that the Applicant retains no "right" to continue broadcasting or to continue broadcasting free of a term conferring an entitlement to increase fee subject to no express constraint.

Involved in this submission there seems to be a suggestion that the decision under review was legislative rather than administrative. If the Respondent means to argue this then I reject it because I am firmly of the opinion that the decision here was administrative.

In Federal Airports Corporation v. Aerolineas Argentinas and Others (1997) 147 ALR 649 the Federal Court of Australia on appeal held, upholding the decision of the Court below, that a determination fixing a charge under Section 56 of the Federal Airports Corporation Act (1986) (CTH) was made in the execution or administration of that Act and is administrative rather than legislative in character. I would hold the same of the licence fee in issue here. Furthermore in Kioa and Others v. West and Another (1985) 159 CLR 550 at 619 Brennan J. observed:

> "The presumption that the principles of natural justice condition the exercise of a statutory power may apply to any statutory power which is apt to affect any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation. It is not the kind of individual interest but the manner in which it is apt to be affected that is important in determining whether the presumption is attracted...
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> Therefore the presumption applies to any statutory power the exercise of which is apt to affect the interests of an individual alone or apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public. Of course, the presumption may be displaced by the text of the statute, the nature of the power and the administrative framework created by the statute within which the

power is to be exercised."

One of the cases on which the Respondent relies in support of this proposition is Nakkuda Ali v. Jayaratne [1951] AC 66. It is, if I may say so with respect, curious that this case should be relied on by the Respondent because it was criticised most severely by Professor Wade in his 7th Edition at pages 508 and 509. That decision and the decision of the Queen's Bench Division in R. v. Metropolitan Police Commissioner Ex-parte: Parker [1953] 1 WLR 1150 were described by Professor Wade in these terms:

> "These two notorious decisions threatened to undo all the good work of earlier judges. They exposed English law to the reproach that, though a man must be heard before being expelled from his trade union or his club, he need not be heard before being deprived of his livelihood by a licensing authority." (7th Edition p.509)

It is true that the decision in the instant case does not deprive the Applicant of its livelihood but the increase in my judgment is so unreasonably high, given the material in the hands of the Minister at the relevant time, as to quite possibly make it difficult for the Applicant to continue operating if the fee is imposed.

This was an important part of the Applicant's submissions to the Government when applying for its first licence. It had submitted a Business Plan to the Government which is exhibited to the affidavits filed on behalf of both the Applicant and Respondent.

Then the Respondent submits that in any event the Applicant was accorded natural justice because it says that in the letter informing the Applicant of the decision of the 9th of April the letter stated:

> "Fiji Television is given the opportunity to make submissions to this office on this matter at the latest by 12th June 1998"

Instead of taking up the Respondent on this offer it is said that the Applicant consciously chose a course of litigation rather than a course of making submissions. Thus it is argued it is disingenuous to contend, as does the Applicant, that it is legally inappropriate for the company to engage in discussions on this issue is now *sub judice* because:

- the matter was not *sub judice* until the seeking of leave on 22nd April 1998.
- the mere commencement of litigation would not preclude the making of such submissions as the Applicant saw fit to advance.

I think there is some force in this submission and that the Applicant was wrong in at least not making some submissions after the receipt of the Minister's letter.

However, by the same token, it has never since been suggested by the Respondent that it was open to negotiation on the increase. Indeed this is the first time such a suggestion has come from the Respondent. Nevertheless it may well be that faced with such a large increase, the Applicant considered its chances of persuading the Respondent to change his mind were not likely to be very high. There was of course the newspaper cutting annexed the affidavit of the Applicant filed in support of its application for leave on the 19th of January 1998 that the Government was not going to change its mind.

It is possible that in its letter of the 9th of April 1998 the Respondent meant to convey that some six months later the Respondent was prepared to adopt a less intransigent attitude. The fact is however that the letter of 9th of April did not say so.

I have already dealt with the question of unreasonableness but must comment on a further submission by the Respondent that:

> "The sole touchstone advanced by the Applicant as to alleged unreasonableness or oppressiveness of the decision sought to be reviewed is the touchstone of the Applicant's asserted ability or inability to finance such a fee increase. Adverse commercial consequences of a decision cannot transform an otherwise lawful administrative decision into an unlawful administrative decision. An increase in fees may be assumed to have a greater adverse commercial consequence than the retention of a nominal fee. But the applicant has failed to establish any greater consequence. Such evidence as is sought to be relied upon is in totally inadmissible form."

In support of this submission the Respondent cites Luby v. Newcastle Under-Lyme Corporation [1964] 2 Q.B. 64 where Diplock L.J. said at p.72:

> "The court's control over the exercise by a local authority of a discretion conferred upon it by Parliament is limited to ensuring that the local authority has acted within the powers conferred. It is not for the court to substitute its own view of what is a desirable policy in relation to the subject-matter of the discretion so conferred. It is only if it is exercised in a manner which no reasonable man could consider justifiable that the court is entitled to interfere."

I accept that statement of the law, coming as it does from Lord Diplock, but consider that in this case the proposed increase is such that no reasonable man could consider it justified and that therefore the court is entitled to interfere.

As to this the Applicant contends that an arbitrary increase of this magnitude would be unreasonable on any licence, regardless of the depth of the licensee's pocket. I remind myself that Cabinet accepted representations made to it that a licence fee of $250,000.00 per annum for the first three years and a fee of one

million dollars per annum from year four would destroy the economic viability of the Business Plan and Cabinet's knowledge that "a zero licence fee" was a key assumption in the Business Plan.

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To summarise, I consider that the proposed increase was so high as to be unconscionable and unreasonable for the reasons I have given and I therefore order that:

(1) certiorari go to quash the decision of the Respondent purporting to increase the Television Licence fee of the Applicant;

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(2) I make an order for mandamus directing the Respondent to reconsider the matter and to exercise the discretion vested in him under Clause 3.2 of the Television Licence reasonably and according to law.

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I further order that the Respondent pay the Applicant's costs to be taxed if not agreed.

Finally I must express my thanks to the efforts of counsel in providing me with such full submissions including particularly their references to the volume of case-law relevant to this application. I hope I have been able to do justice to those submissions in this judgment.

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(Judicial review granted; certiorari and mandamus issued.)

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