JOHN ALI (aka ASGAR ALI) and 2 Ors v SUPERVISOR OF ELECTIONS and Anor (ABU0053 of 2003)

COURT OF APPEAL — CIVIL JURISDICTION

HENRY, SCOTT and MCPHERSON JJA

6, 15 July 2005

Administrative law — administrative decisions — alteration of town boundaries — committee report — whether statutory procedure followed — 1997 Constitution s 174 — High Court Rules O 53 r 3(2)(a).

Local government — town planning — alteration of town boundaries — application for judicial review — Whether High Court erred in law and in fact — Local Government Act (Cap 125) ss 5(1), 7(1).

The second Respondent (R2), Minister for Local Government, Housing and Environment (R2), altered the boundaries of Nasinu and Nausori towns by transferring four wards, namely Wainibuku/Davuilevu and Naulu/Nakasi from Nasinu to Nausori. R2 made a decision relying on the committee report (report) which recommended the transfer. The Appellants sought judicial review contesting the transfer.

The High Court dismissed the application for judicial review stating that the statutory procedure to alter the boundaries of the two towns was followed. The Appellants appealed the High Court decision.

Held — (1) The statutory procedure was followed by R2 since it was carefully designed to ensure that the decision was openly and fairly arrived at. R2 accepted the committee's decision as reason for his decision. The Local Government Act (Cap 125) provides that boundary changes are to take place after careful and expert consideration of all the factors involved including public opinion. The Act does not provide that boundary changes should be decided by a popular vote or referendum. The report was one relevant consideration.

(2) It became clear that what the Appellants had really been seeking was an opportunity to see and consider the committee's report and an opportunity to make further representations to the minister before the final decision was taken. While undoubtedly such a procedure would be even more open and transparent than that provided by the Act, a judicial alteration to the statutory procedure was not justified.

(3) The duty to give reason for an administrative decision was neither expressed nor can be inferred from the legislation. Section 5(1) of the Local Government Act requires the exercise of a wide discretion which was not governed by guidelines or specific considerations. There was no right of appeal and the legislation does not contemplate a review procedure.

Appeal dismissed.

Cases referred to

Akbar Buses Ltd v Transport Control Board [1984] FJCA 6; *Pacific Transport Co Ltd v Mohammed Jalil Khan* [1997] FJCA 3, cited.

R. P. Singh and *G. O'Driscoll* for the Appellants

J. Udit and *N. Karan* for the Respondents

[1] Henry, Scott and McPherson JJA. On 28 November 2002, the second Respondent (R2) (the minister) purportedly acting under powers conferred upon him by s 5(1) of the Local Government Act (Cap 125) (the Act) altered the boundaries of Nasinu and Nausori towns by transferring four wards, namely Wainibuku/Davuilevu and Naulu/Nakasi from Nasinu to Nausori.

[2] The three Appellants who lived in Nasinu were aggrieved by the minister's decision and commenced proceedings for judicial review in the High Court at Suva. They sought certiorari to quash the minister's decision and an order of mandamus to compel the supervisor of elections to proceed with already planned municipal elections in the whole of Nasinu town and not merely the remaining seven untransferred wards.

[3] Somewhat unusually (and not satisfactorily) the grounds upon which relief was sought were not set out in a form 32 statement as is required by RHC O 53 r 3(2)(a) but were instead included in the first Appellant's (A1) supporting affidavit.

[4] In the affidavit the A1 deposed that the minister's action in ordering the transfer of the four wards was "an abuse of power, discriminatory, unfair and wholly unreasonable, improper and illegal". In the A1's opinion, the minister had "no justifiable reason to change the boundary". Furthermore, the affected ratepayers had been given no opportunity to challenge the findings of an advisory committee appointed by the minister upon the recommendation of which he had apparently relied. The A1 did not allege default on the part of the first Respondent (R1).

[5] In an affidavit filed in answer, the Minister's Permanent Secretary Mr Bhaksharan Nair deposed that in October 2001 the minister received a representation from one Hari Ram (who described himself as an "Indian Advisory Councellor") calling for the four wards to be transferred to Nausori. On 2 May 2002 Notice 745 was published in the Government Gazette. Similar notices were published in the local newspapers on four occasions during May and June 2002. The minister notified the public that he had received a representation calling for the transfer. He gave interested persons 2 months to lodge written objections. At the same time he also appointed a Local Government Committee (the committee) under the chairmanship of Mr Fred Archari to advise him on the proposal.

[6] According to Mr Nair, the committee received two petitions and a number of letters. A petition by the A1 contained the signatures of 1539 persons opposed to the transfer proposal. A petition was also presented by Mr Hari Ram which appeared to be signed by 1026 residents of the concerned areas. Following receipt of the petitions, the committee convened four public meetings at which it heard further oral submissions, including one by the A1.

[7] In para 15 of his affidavit Mr Nair deposed:

> In its findings the Local Government Committee recommended that the [four wards] be included in the Nausori Town boundary, with reasons.

[8] In para 27 of his affidavit Mr Nair deposed that:

> The Committee compiled its report and submitted it to the Minister on 1 November 2002. The Minister then made a decision on 28 November 2002, gazetted on 29 November.

[9] On 19 December 2002 the R1 also filed an affidavit in answer. He confirmed that he was responsible for the conduct of the Nasinu Town municipal elections which had been held on 14 December. He explained that the minister's orders of transfer were dated 28 November 2002 and that the writs of election issued by him on 2 December 2002 did not extend the four excluded wards.

[10] The relevant parts of the Act are as follows.

Section 5 — (1)
Declaration of Towns and Cities

Upon application in that behalf by the Council of any district, or upon representations being received that an area not being a district be constituted a town, or upon similar application of representation being made that the boundaries of any town be altered the Minister may make such order with regard to the definition or alteration of boundaries as he may consider appropriate or he may decline to make such order, and in any case may refer the matter to the Local Government Committee for enquiry and advice before deciding on the application or representation.

[11]

Section 7 — (1)
Notice of Proposal to Alter Boundaries

Before the boundaries of any town are defined under the provisions of subsection (1) of subsection 5 or the boundaries of any district are defined under the provisions of subsection (1) of section 6, or such boundaries are altered under the provisions of subsection (1) of section 5 or subsection (1) of section 6, as the case may be, the Minister shall arrange that a notice of the proposal to define or alter the boundaries of any town or district setting out details of such proposals be advertised once in the Gazette and four times in a newspaper published and circulating in Fiji calling upon all persons interested in the proposal to submit to the Local Government Committee within a period of two months from the date of the first of such advertisements, any objections which such persons may wish to make.
(2) The Local Government Committee shall after due enquiry advise the Minister on any objections referred to in subsection (1).

[12] Although, as has been seen, the Appellants originally sought relief against both Respondents, the claim for relief against the R1 was not, apart from a suggestion that he lacked the power to revoke writs of election once issued, pursued. Perhaps this was because by the time the matter came on for hearing the municipal election had already taken place or perhaps it was because of the lack of grounds of complaint against the R1 in the A1's supporting affidavit.

[13] The Appellants, who filed detailed written submissions in the High Court suggested:

(a) that there was no evidence to justify the minister's order of transfer of the four wards;
(b) that the minister had refused to publish the contents of the committee's report to him;
(c) that the minister should have held a referendum in the affected wards before deciding on their transfer; and
(d) that as a consequence, the minister's decision was "in abuse of power, in excess of jurisdiction, irregular, improper, unfair and illegal". It was also suggested that the decision reached was wholly unreasonable.

[14] The High Court dismissed the application for judicial review. The judge (Singh J) held that the statutory procedures precedent to a decision to alter the boundaries of the two towns had been followed, that according to the evidence the reason for the minister's decision was his acceptance of the committee's recommendation, that there was no requirement that the report containing the recommendation be published, that there was no statutory provision for the holding of a referendum and that publication would, in any event, have served no purpose. The judge held that while it appeared that there may have been more popular support for maintaining the status quo than there was for ordering the

transfer "the question is whether it is really an issue of numbers or other factors are also considered". He rejected the suggestion that the minister's decision was "outrageous or so absurd that no sensible person could ever dream of reaching it".

[15] On appeal, four grounds were advanced. In summary, it was submitted that the High Court erred in law and in fact:

(i) in holding that the Appellants were not entitled to a copy of the report of the committee and that providing them with a copy of the report would have served no purpose;

(ii) in not holding that in the face of "overwhelming" evidence that the majority of rate payers wanted to maintain the status quo, the minister's decision was unreasonable and taken in bad faith without any consideration of the public interest;

(iii) in ruling that the minister was not bound to give reasons for his decision; and

(iv) in holding that the minister had breached the rules of natural justice in arriving at his decision.

[16] Before addressing us on his submissions Mr O'Driscoll made an opposed preliminary application to adduce further evidence. Having heard counsel we dismissed that application. We indicated that we would incorporate our reasons in the present judgment. It will be convenient to do so when discussing the second ground of appeal referred to above.

[17] As recognised by Mr O'Driscoll, the four grounds really dealt with different aspects of the Appellants' central complaint. This complaint was that as a result of the minister's failure to disclose the committee's report and as a result of offering as his sole reason for taking his decision the mere assertion that he had agreed with the committee's recommendations the Appellants were unable to be satisfied that the decision was one which the minister could reasonably have reached. Furthermore, the Appellants were unable to object to those aspects of the committee's recommendations with which they did not agree. In the absence of any detailed reasons, and given the apparent preponderance of support for maintaining the status quo it was clear that the minister's decision was wholly unreasonable. We are unable to accept that analysis.

[18] In the first place, it is not correct to assert that the minister failed to give any reason for his decision. The reason that he gave was that he had accepted the committee's decision. In our view, that in itself does not appear to be a perverse step to have taken. Had the minister rejected the committee's report and acted contrary to its recommendations without offering any reason why, the point may have had more substance.

[19] In the second place, as pointed out by Singh J, the degree of popular support for and against the proposed transfer, although of significant importance was by no means the only or in our view the most important factor to be taken into account. The Act does not provide that boundary changes are to be decided by popular vote expressed in a referendum. Rather, boundary changes are to take place, if at all, after careful and expert consideration of all the factors involved, including public opinion. Typical among other relevant considerations are those taken into account by a previous committee in a report to the minister in 1997 on the proposal to establish a town at Nasinu, exhibited to the affidavit of Mr Nair. Since the degree of public support for the proposal is merely one of several

factors to be taken into account in reaching a final decision, the argument that a decision contrary to the preponderance of public opinion is clearly unreasonable cannot succeed.

[20] While it may be accepted that the additional evidence which it was sought to adduce was not and could not have been made available to the High Court, since the evidence only tended (very marginally) to suggest that the amount of popular support for the proposed change was rather less than represented by Mr Hari Ram, we are not satisfied that it would have had an important influence on the outcome of this appeal. For that reason the application to admit it was refused. It may be noted that a previous and very similar application to the President of this court was dismissed by him on 10 September 2004.

[21] In the third place, the statutory procedure which the minister must follow is carefully designed to ensure that his decision is openly and fairly arrived at. That is why, before reaching his decision the minister must receive a representation calling for an alteration to be made, must bring the proposed alteration to the attention of the public by having it widely published, must appoint (if none already exists) a Local Government Committee to enquire into the proposal and the public's reaction to it and must not take his decision before receiving the report of the committee.

[22] This procedure is not in our view in anyway unfair or unreasonable. As pointed out by Ms Karan, the question is not whether an even fairer procedure could be devised and then substituted by the court for that laid down by statute. The question is whether the statutory procedure is itself inherently unfair. We are satisfied in this case that it is not.

[23] In argument, it became clear to us that what the Appellants had really been seeking was an opportunity to see and consider the committee's report and an opportunity to make further representations to the minister before the final decision was taken. While undoubtedly such a procedure would be even more open and transparent than that provided by the Act we are unable to agree that such a judicial alteration to the statutory procedure would be justified.

[24] Before leaving the matter it may be worth remembering that in Fiji there is no general duty to give reasons for administrative decisions (see *Pacific Transport Co Ltd v Mohammed Jalil Khan* [1997] FJCA 3). Fiji has no legislation corresponding to the English Tribunals and Enquiries Act 1971 or the Australian Administrative Decisions (Judicial Review) Act 1977. While there is a general trend towards greater openness in the making of administrative decisions (this court has recommended that certain statutory bodies should always give their reasons — *Akbar Buses Ltd v Transport Control Board*. The Freedom of Information Act envisaged by s 174 of the 1997 Constitution which would probably enable members of the public to gain access to a report of the type under consideration has yet to be enacted. Pending further statutory developments in a case of this kind absent an express or inferred duty to give reasons the ultimate question for the court is whether the minister's failure to give detailed reasons indicated that the minister had no good reason for reaching the conclusion at which he arrived. In our view the High Court correctly held that the Appellants had not shown that this was so.

[25] This is not a case where a failure to give detailed reasons could itself give rise to setting aside the decision of the minister. A duty to give reasons is neither expressed nor in our view to be inferred from the legislation. Section 5(1) matters require the exercise of a wide discretion which is not governed by guidelines or

specific considerations. There is no right of appeal and the legislation does not contemplate a review procedure. Accordingly, the appeal fails.

Result

(1) Appeal dismissed.
(2) Respondents to have their costs which we fix at $1000.

Appeal dismissed.