RONALD ZIRU (on behalf of SIMA Medical Centre) -v- THE ATTORNEY GENERAL

High Court of Solomon Islands
(Muria ACJ)
Civil Case No. 21 of 1993
Hearing: 1 March 1993
Judgment: 15 March 1993

P. Tegavota for Appellant
P.M. Afeau for the Respondent

MURIA ACJ: Leave was granted on 26/1/93 to the applicant in this matter. Pursuant to that leave the applicant commenced these proceedings for judicial review in the nature of an application for an order of *certiorari* to remove into this court and quash the decision of the Public Service Commission ("the Commission") made on 17/11/92 appointing one Dr. Roy W. Goonewardene to the post of Chief Consultant Surgeon in the Public Service of Solomon Islands. Objection to the applicant's *locus standi* had been taken, but this court ruled on 1/3/93 that the applicant had *locus standi* to be heard on the matter.

The Factual Background:

It is necessary to set out the background leading to these proceedings. On 6/7/92 the Solomon Islands Medical Association ("SIMA") which is an Association of national doctors working in the Public Service of Solomon Islands gave a 28 days notice to the Solomon Islands Government of its members' intention to resign from the Public Service over "the doctors' frustration over their terms and conditions of service". The issue had not been resolved and so 22 national doctors resigned on 3/8/92 from the Public Service and left their duty stations.

However, before the end of August 1992, fifteen (15) of the doctors who resigned, returned to work in the Public Service again. Seven (7) doctors did not return to work for the Government. One of the fifteen doctors who returned to work for the Government had again resigned on 3/11/92 and joined the other seven doctors who together, they now established and operate a private medical clinic called the Solomon Islands Medical Association Medical Centre ("the SIMA Medical Centre"). SIMA Medical Centre is an entirely separate organisation from SIMA.

The consequence of the doctors' resignation was that medical and other specialist services at the Central Hospital had been seriously affected. This led the Government to engage the services of some of the private doctors whose charges were paid for by the Government. Specialist services especially in surgery continued to be in demand, particularly in emergency cases. The Medical Superintendent of Central Hospital then had to request specialist services from SIMA Medical Centre doctors which request was agreed to by SIMA Medical Centre doctors.

Following a dispute over payments of the SIMA Medical Centre doctors' charges, the specialist services provided by SIMA Medical Centre doctors at the Central Hospital were withdrawn on 19/10/92. However on 4/11/92 SIMA Medical Centre again offered to provide specialist services at the Central Hospital but at double the charges previously charged to the Government. Such specialist services were to be provided only after hours as their clinic opened during normal working hours unless there were emergency cases. To add complication to the already existing difficult situation, the Solomon Islands Council of Trade Unions ("SICTU"), on 9/11/92, submitted on behalf of SIMA Medical Centre, a draft contract between SIMA Medical Centre and the Solomon Islands Government. It is interesting to note that the contract proposed by Solomon Islands Council of Trade Unions on behalf of SIMA Medical Centre was for the services to be provided by the SIMA Medical Centre and to be paid for by the Solomon Islands Government at the rates stipulated in the contract for a period of four (4) years. I shall return to this draft Agreement later. But I can say without hesitation here that the proposed Agreement makes no mention whatsoever as to any terms and conditions of service for doctors who have been employed in the Public Service.

Having looked at the SIMA Medical Centre doctors' offer to renew their service at the Central Hospital together with the costs as specified in the proposed Agreement, the Government rejected the offer by the SIMA Medical Centre to provide services at the Central Hospital. The Government's rejection of the offer was communicated to SIMA Medical Centre by letter from the Permanent Secretary, Ministry of Health & Medical Services dated 18/11/92.

The Medical Superintendent, Dr. Lester Ross, had been doing what he could to ensure services at the Central Hospital were provided. Unfortunately by November 1992, the situation at the Central Hospital became a serious concern, not only to the doctors who returned to work and the patients but also to the Government. The Ministry of Health and Medical Service was therefore directed by the Government to recruit from overseas for doctors to fill the vacant posts left by eight (8) doctors. The areas which needed to be attended to were surgery, obstetrics, gynaecology and internal medicine.

On 24/9/92 the Secretary to the Prime Minister wrote to Mr. Richard J.R. Unwin of the Embassy of Solomon Islands Mission to the European Community in Brussels seeking his assistance to recruit doctors for the positions left vacant by the national doctors who resigned from the Public Service. The job descriptions for those vacant positions, including that of the post of Chief Consultant Surgeon, were also sent to Mr. Unwin.

As one of the posts left vacant was that of Chief Consultant Surgeon, the Public Service Office directed the Ministry of Health & Medical Services to contact Dr. Roy Goonewardene who was well known to the Government and also the last expatriate Chief Consultant Surgeon at Central Hospital before he left the country in July 1991, to see if he was available to come back to Solomon Islands to take up the post of Chief Consultant Surgeon. Dr. Eric Pana whose substantive post was Chief Medical Officer (Surgery) had been acting in the post of Chief Consultant Surgeon until he resigned from the Government Service on 3/8/92. Thus, infact, the post of Chief Consultant Surgeon has never been substantively filled since Dr. Roy Goonewardene left on 15/7/91.

While requests and attempts were being pursued for the vacant posts to be filled, the Secretary to Prime Minister wrote on 12/10/92 to National Secretary of SICTU offering proposals to the resigned doctors. One of such proposals was that the resigned doctors to apply individually to rejoin Public Service if they wished. One of the doctors did rejoin the Public Service but left the service again in November as mentioned earlier.

The Under Secretary (Health Care) in the Ministry of Health & Medical Services again contacted Dr. Roy Goonewardene on 24/10/92 a week after the SIMA Medical Centre gave notice of the withdrawal of specialist services at the Central Hospital. Dr. Roy Goonewardene confirmed his availability to come to Solomon Islands to work at the Central Hospital if the Government required his service.

Formal recruitment arrangements were done and on 17/11/92 the Public Service Commission formally appointed Dr. Roy Goonewardene as Chief Consultant Surgeon. On 29/11/92 Dr. Roy Goonewardene arrived in Solomon Islands and on the next day, 30/11/92 he commenced duty at the Central Hospital.

The applicant called five witnesses who substantiated the factual background as described. Those being the circumstances surrounding this case, I shall now turn to the grounds for judicial review put by counsel for the applicant.

The grounds

In the Notice of Motion filed by Mr. Tegavota for an order of *certiorari* to quash the Public Service Commission's decision of 17/11/92 appointing Dr. Roy Goonewardene as Chief Consultant Surgeon, the grounds for relief sought are as follows:

1. That the Public Service Commission had acted *Ultra Vires* its under Regulation 19 of the Public Service Commission Regulations 1979 by failing to ensure that the post of Chief Consultant (Surgeon) had been publicly advertised before considering and appointing Dr. Roy W. Goonewardene.

2. That the Public Service Commission had also acted *ultra vires* its powers under Regulation 21 by appointing Dr. Roy W. Goonewardene, a no-National to the post of the Chief Consultant (Surgeon) on permanent basis.

3. That the Public Service Commission had also acted *ultra vires* its powers under Regulation 23 by appointing Dr. Roy W. Goonewardene to the said post on permanent basis without any recommendations from selection panels appointed under Regulation 23 also, and therefore Regulations 24 and 25 had not been complied with.

4. That the Public Service Commission had further acted *ultra vires* its powers under Regulation 27 by failing to appoint the said Dr. Roy W. Goonewardene on probationary period first for two years.

5. That the Public Service Commission had acted *ultra vires* its powers by appointing Dr. Roy W. Goonewardene to the said post with the knowledge that there are National Doctors available with appropriate and relevant qualification who could be appointed to the post of Chief Consultant (Surgeon) had the post been publicly advertised as required under Regulation 19."

The thrust of Mr. Tegavota's arguments revolved around regulations 19 and 21 of the Public Service Commission Regulations. Those two provisions deal with advertisement of appointments and appointment of non-nationals respectively. Counsel submitted that Public Service Commission failed to comply particularly with those two provisions and

so the Public Service Commission acted *ultra vires* when it appointed Dr. Roy Goonewardene to the post of Chief Consultant Surgeon.

The Issues

This case concerns an appointment to a post in the Public Service. As such Part II of the Public Service Commission Regulations 1979 applies.

The issues as canvassed from the materials before the court are fairly clear. The first one is should Public Service Commission publicly advertise the post of Chief Consultant Surgeon in this case? Second - was there a qualified national available to be appointed to the post? Third - is Dr. Roy Goonewardene's appointment permanent or temporary? Fourth - should the Public Service Commission appoint a selection panel to interview and make recommendation to the Commission before appointing Dr. Roy Goonewardene? and Fifth - should Dr. Roy Goonewardene's appointment be subject to a probationary period of two years?

Other issues which were raised in the course of the hearing were about the unresolved dispute between the national doctors and the Government which led to the resignation of the applicant and seven other national doctors. This court has not been asked to determine that dispute. The jurisdiction to determine that dispute vests, in the first instance, in the Trade Disputes Panel. Thus issues in that respect must await for the consideration by that body.

The applicant in this case only challenged the Public Service Commission's decision appointing Dr. Roy Goonewardene to the post of Chief Consultant Surgeon in the Public Service. That is what this court will concern itself with.

The arguments

There were a number of arguments advanced by Counsel for the applicant but, as I have said, the thrust of his arguments centred around regulations 19 and 21 of the Public Service Commission Regulations. He strenously argued that the breach of those two provisions rendered the Public Service Commission's decision appointing Dr. Roy Goonewardene *ultra vires* and void and should be quashed.

Mr. Tegavota argued that, regulation 19 requires all appointments in the Public Service to be publicly advertised. In the present instance, the Public Service Commission was required to advertise the post so as to give the Commission the opportunity to be

satisfied that there was no national available to apply for the post of Chief Consultant Surgeon.

Counsel further argued that the only way for the Public Service Commission to be satisfied that no qualified national was available was for the post to be advertised. As the post had not been advertised, but proceeded straight to the appointment of Dr. Roy Goonewardene, the Commission had by-passed the requirement of both regulations 19 and 21. Such a course of action taken by Commission, counsel argued, was *ultra vires.*

Counsel for the applicant submitted that the effect of the actions taken by Commission was that the national doctors, particularly the two Chief Medical Officers in the surgery department had been deprived of the opportunity to apply for the post of Chief Consultant Surgery. Had they been given the opportunity, they could have applied. One of the Chief Medical Officer (Surgery) Dr. Eric Pana, had been acting in the post of Chief Consultant Surgery up to the time he resigned on 3/8/92.

It was further argued by Mr. Tegavota that Dr. Roy Goonewardene was appointed not because there was no national qualified to take up the post but because of the withdrawal of specialist services by the SIMA Medical Centre doctors. Thus, Counsel argued, the argument of non-availability of qualified nationals cannot stand. This is so since Dr. Eric Pana had been acting in the post of Chief Consultant Surgery up to the time he resigned from the Government employment on 3/8/92, Counsel argued.

The other points raised by Counsel were about the failure by Public Service Commission to constitute a panel to interview the candidate (Dr. Roy Goonewardene) before recommending the appointment to the Commission. Counsel stated that in not doing so the Commission was in breach of regulations 23, 24 and 25 of the Public Service Commission Regulations.

A further point taken by Counsel for the applicant is that the appointment of Dr. Roy Goonewardene was a permanent one and as such regulation 27 requires that the appointment be subject to a probationary period of two years. As the Public Service Commission had not made the appointment in this case subject to any probationary period, Counsel said, the Commission was also acting *ultra vires* its powers under regulation 27.

Mr. Afeau, on behalf of the Respondent, argued that as regard regulation 19, the Public Service Commission has power to decide whether an appointment should be advertised or not. This, counsel argued, is shown by the opening words of the regulation which says *"Unless the Commission otherwise agrees."* Thus in the present case, the Commission agreed that no public advertisement was necessary. That was a decision on the course

of action made within the competence of the Commission and it is not for this court to enquire into the reasons for Commission's decision not to advertise the post.

On the argument that Public Service Commission was in breach of regulation 21, Mr. Afeau contended that the appointment of Dr. Roy Goonewardene was not permanent but only for a fixed period of two years. Counsel further argued that there was no qualified national "available" for the post of Chief Consultant Surgeon. As such Dr. Roy Goonewardene who is a non-national was appointed to the post and done so on a non-permanent basis.

The requirement under regulation 21 is that of the non-availability of a qualified national. Even if there were qualified nationals eligible to take the post, Counsel argued, they were not "available" and so the Commission was entitled to appoint a non-national to the post.

He argued that "available" means "available and ready and willing to work." In this case, Counsel submitted, there may be national doctors qualified to be considered for the post, but they were not willing to work in the Government Service. They resigned from the service and by doing so they were not 'available' on the terms and conditions offered by the Government.

It was further argued by Mr. Afeau that since the remedy is discretionary the court should exercise its discretion and refuse to quash the Public Service Commission's decision. This is because no benefit could be derived from the order or the order would in any event be unnecessary. He further contended that even if there was error on the part of the Public Service Commission, such error would not justify the making of the order.

In response to Mr. Afeau's submission on construction to be given to the word "*available*" Mr. Tegavota argued that the word "*available*" under regulation 21 must be given a wider meaning rather than restricting it to those "available and ready and willing" to work. Counsel urged that the word should be taken to mean "available with Solomon Islands" and not available in the sense contended by Counsel for the Respondent.

Decision

The remedy in the nature of *certiorari* is discretionary and the court will take into account all the circumstances of the particular case, the purpose for which the order is sought and conduct of the applicant when deciding whether to grant or refuse the remedy. That the court will do so in the exercise of its inherent supervisory function,

in relation to proceedings before any subordinate court, under section 84(1) of the *Constitution* which provides as follows:

> "84 (1) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court."

and in relation to any person or authority exercising functions under the *Constitution* or any other law, under section 138 of the *Constitution* which provides for jurisdiction of the courts over such person or authority in the following terms:

> "138. No provisions of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law or should not perform those functions."

Mandamus, prohibition and *certiorari* are prerogative writs. *Certiorari* was formerly used as a remedy to quash the proceedings of inferior tribunals and was used mainly then to supervise justices of the peace in the performance of their functions under statutes. Later on in the nineteenth century *certiorari* was used also to control the exercise of the administrative functions of government bodies as sell as local and statutory authorities. This is clearly shown by ***R -v- Electricity Commissioners, Exparte London Electricity Joint Committee Company Ltd [1924] 1 KB 171*** where at .205 Atkin LJ said about *prohibition* and *certiorari* writs:

> *"It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt with almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be and would not be recognised as Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs"*

The applicant brought these proceedings seeking the exercise of this court's supervisory functions in respect of the decision made by the Public Service Commission which is a public authority set up under the *Constitution* and having legal authority to decide on questions affecting the rights of public servants who are employed in the Public Service. The power to do this, as I have said, is conferred by section 138 of the *Constitution.*

The exercise of the supervisory function of the courts, the term of art is judicial review, in administrative law must be confined to the decision - making process, that is, the manner in which the decision was made and not to the decision itself. As Lord Brightmen stated in ***Chief Constable of the North Wales Police -v- Evans [1982] 3 All.E.R. 141 at 156***:

> " *Judicial review is concerned, not with the decision, but with the decision - making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.*"

This court will observe that principle when exercising its power of review over the decision-making process of administrative authorities including the Public Service Commission, to see whether the Commission had performed its functions according to the *Constitution* or Public Service Commission Regulations or any other law.

I now turn to consider the applicant's complaint on the alleged breach of regulation 19 of the Public Service Commission Regulations for not advertising the post of Chief Consultant Surgeon. Regulation 19 provides:

> "19. *Unless the Commission otherwise agrees, all appointments to the Public Service will be publicly advertised, by the Secretary for the Public Service or Officer delegated to make appointments.*"

There is in that regulation a provision for the advertisement of <u>all</u> appointments to the Public Service. It was argued by Counsel for the applicant that the reason why the Public Service Commission should advertise the post in this case was to give the opportunity to any qualified national doctor to apply for the post. While I accept the suggestion that if the post was publicly advertised any of the qualified national doctors might have applied for it, I do not think it is the rationale of regulation 19 that a fair opportunity must be given to the public to apply for appointments in the Public Service. In my view the purpose of advertising a post in the Public Service is to assist the Commission or the officer delegated to make appointments to ascertain who is qualified for the post.

The advertisement of the post, when it is done pursuant to regulation 19, need not provide equal opportunities to every potential candidate. Time factor may prevent some potential candidates from applying. Likewise the lack of the required qualifications for a post may result in a potential candidate not applying. Thus if a post is publicly advertised and candidates apply, the Commission will proceed and consider those who apply. It would not be right if the Commission, after publicly advertising a post, received only a few applicants or none at all, keep advertising the post until every possible candidate applies. Such a course of action will thwart the effective administration of the Government.

It is therefore obvious that the intention of the legislature is made known by the use of the words *"unless the Commission otherwise agrees"* in regulation 19. Those words clearly empower the Commission to do away with public advertisement of appointments to the Public Service, if it so agrees. Instances when the Commission may decide not to publicly advertise post will be a matter for the commission to decide. But the need for the effective administration of the Government must surely be a matter which the Commission will always bear in mind.

In the present case, the Commission decided not to advertise the post of Chief Consultant Surgeon. That is a decision made within the scope of the Commission's jurisdictional competence. It is not for this court to enquire into the reasons of policy which lie behind that decision not to advertise the post. To do so would be an act of usurpation of the Commission's power lawfully given to it by Parliament ***(see Section 116(1) of the Constitution)***

The next attack on the Commission's decision is that there were qualified nationals available to be considered for the appointment to the post of Chief Consultant Surgeon and that the Commission was in breach of regulation 21 when it proceeded and appointed Dr. Roy Goonewardene who is a non-national.

The evidence has shown that Dr. Eric Pana had been acting on the post of Chief Consultant Surgeon when he was still in the Public Service up to 3/8/92. The post had never been substantively filled since Dr. Roy Goonewardene left in July 1991. Dr. Pana and Dr. Pikacha of the SIMA Medical Centre had, on occasions and upon requests from the Medical Superintendent of Central Hospital, provided specialist surgical services at the Central Hospital. Of course, as they are private doctors, their services were rendered for fees charged to and paid for by the Government.

Dr. Lester Ross, the Medical Superintendent stated that SIMA Medical Centre doctors were requested only in emergency cases. However, there were still other cases which

required full time service by people like Dr. Roy Goonewardene. It appears from the evidence that as from 30/11/92 when Dr. Roy Goonewardene commenced duty at the Central Hospital, the specialist services of the SIMA Medical Centre doctors had not been requested by the Medical Superintendent.

An event which is worth nothing also was the break-down of the negotiation between SICTU and the Government on the terms and conditions of the proposed contract between SIMA Medical Centre and Government. That proposed contract covered the terms and conditions underwhich the SIMA Medical Centre doctors were to provide services at the Central Hospital for four (4) years. The annexure 'BNC' to Mr. Benjamin Newyear's Affidavit shows that the cost analysis of the proposed contract submitted by SICTU on behalf of SIMA Medical Centre would cost the Government about $7,065,856.00 for the whole four (4) years contract period.

It is also to be noted that there is absolutely nothing in the SICTU's proposed contract that deals with the conditions of service for doctors who are employed in the Public Service. Understandably one would expect that to be so, as the proposed contract was between a private Medical Clinic and the Government. But the Government obviously felt that the terms of the proposed contract were unacceptable and so refused to enter into contract with the SIMA Medical Centre.

The SIMA Medical Centre doctors had not return to work in the Public Service and have since their resignation been operating their private medical clinic. An offer from the Government for the resigned doctor's to return to join Public Service in their respective posts without losing seniority had been refused by the doctors.

They were only available to render their specialist services under arrangements after requests from the Medical Superintendent of the Central Hospital or upon the Government accepting the proposed contract. Clearly the SIMA Medical Centre doctors were available in the country, as submitted by Counsel for the applicant. However for them to provide the services, as can be seen, depended on other factors such as those mentioned.

In my judgement therefore, the doctors concerned could not be said to be "available" to be appointed to the post of Chief Consultant Surgeon. To be "available" under regulation 21 is to be available to be appointed to a post in the Public Service in order to render services to the Government. It is therefore, difficult to accept Mr. Tegavota's argument that because the doctors were within the country they must be said to be available in view of the circumstances of this case as described above.

Mr. Tegavota posed the question that how could the Commission be satisfied that no qualified national was available unless the post was advertised. The short answer to that question is that while in some cases it may be an useful aid to the Commission to satisfy itself of the non-availability of qualified nationals through advertisement of appointments, the Commission has the power to resort to other means of satisfying itself of such matter. That must be so, otherwise the words "*Unless the Commission otherwise agrees*" in regulation 19 would serve no useful purpose in that provision. I am therefore unable to see how it can be said that the Public Service Commission had acted *ultra vires* its powers under regulation 21 in the present case when it appointed Dr. Roy Goonewardene, a non-national, to the post of Chief Consultant Surgeon.

The argument by Counsel for the applicant that the Commission acted *ultra vires* its powers under regulations 23, 24, 25 and 27 of Public Service Regulations can be disposed of very briefly. As I have already concluded that the appointment of Dr. Roy Goonewardene who is a non-national to the post of Chief Consultant Surgeon was not *ultra vires,* I need only add that his appointment was for 24 months commencing on the date he deemed to have assumed duties. Annexure "P" to the applicant's affidavit is a copy of the contract of service entered into, between the Government and Dr. Roy Goonewardene. The contract has specified in no uncertain term that the period of service by Dr. Roy Goonewardene is 24 months. Clause 1(1) and (2) of that Contract are as follows:

> "1. (1) The Officer will proceed to Solomon Islands in accordance with directions which will be given to him by the Government or its appointed agents and shall there diligently and faithfully perform in the Public Service of Solomon Islands the duties of Chief Consultant Surgeon and such other duties as the Government may reasonable require for the period of service of 24 months commencing on the date he shall be deemed to have assumed the duties of his office.
>
> (2) The period of service may be extended by mutual agreement between the Government and the Officer or may be terminated under Clause 11, 12 or 13 of this Agreement."

The schedule to the Public Service Commission Regulations defines "*permanent*" and "*non-permanent*" appointments as follows:

> " *'non-permanent appointment'* means recruitment to the Public Service on any terms other than permanent.

'permanent appointment' means recruitment to the Public Service on permanent terms".

The Chairman of Public Service Commission who gave evidence under subpoena, pointed out that the appointment of Dr. Roy Goonewardene was on a non-permanent basis on a fixed term of two (2) years. He reiterated that length of non-permanent appointments would normally range between six months to two years. Permanent appointments are reserved for nationals.

It should be obvious to the applicant that the contract of service signed between the Government and Dr. Roy Goonewardene and which was exhibited to his affidavit clearly shows the contract period is to last only for a fixed period of 24 months. That can hardly be termed as permanent.

The appointment of Dr. Goonewardene was non-permanent and so the provisions of regulations 23 (Appointment of selection panels), 24 (Composition of panels), 25 (Reference back by Commission) and 27 (Probationary period for permanent appointment) of Public Service Commission Regulations do not apply in this case.

If I may be permitted to mention in passing that the action taken by the Public Service Commission, was taken with a view to remedying a necessity that had arisen due to the dispute between the national doctors and Government, and must be commended. It was also taken in consequence of the concern of the Government, and the need to avoid unnecessary difficulty in the service at the Central Hospital.

For all the reasons given in this judgement, the applicant had failed to establish that the Public Service Commission had acted *ultra vires* its powers when it decided on 17/11/92 to appoint Dr. Roy Goonewardene to the position of Chief Consultant Surgeon. The application for an order of *certiorari* is therefore refused.

Application refused.

(G.J.B. Muria)
ACTING CHIEF JUSTICE