STATE v FIJI ISLANDS TRADE & INVESTMENT BUREAU; Ex parte TELPAC

HIGH COURT — CIVIL JURISDICTION

JITOKO J

9 October 2003

[2003] FJHC 142

Administrative law — judicial review — application for leave for judicial review — Applicant to operate internet kiosks and call centre — call back scheme prohibited activity — sub judice inapplicable — no judicial review where alternative remedies exists — Applicant's non-disclosure of material facts — Respondent wrong party — Foreign Investment Act ss 4(1), 6(1), 13, 15(1), 15(2), 15(3), 15(4), 15(5), 15(6) — Post and Telecommunications (Call Back Schemes) Regulations 2002 — Interpretation Act (Cap 7) s 51.

Applicant sought an application for leave for judicial review due to the purported cancellation through a letter by the Fiji Trade and Investment Bureau Chief Executive of Applicant's Foreign Investment Certificate to operate internet kiosks and call centre. The certificate did not include a Call Back Scheme which is a prohibited service in Fiji. Applicant alleged sub judice since the issue of whether it was operating a Call Back Scheme was still being deliberated upon by another court. Respondent alleged there was no judicial review where alternative remedies exists, Applicant's non-disclosure of material facts and Respondent being named as wrong party.

Held — (1) Sub judice was inapplicable since the outcome of the appeal in the other case will not affect the decision already made by the Fiji Trade and Investment Bureau Chief Executive to cancel Applicant's Foreign Investment Certificate.

(2) The alternative remedy available to the Applicant was an appeal for the review of the Chief Executive of FTIB's decision by the Minister under s 15 of the Foreign Investment Act.

(3) Applicant failed to discharge its duty to disclose the terms of its application for its Foreign Investment Certificate as well as the terms and conditions of the licence.

(4) Applicant erred in naming FTIB as Respondent since the chief executive of FTIB acted alone and was independent of the FTIB in the performance of his statutory functions under the Foreign Investment Act.

Leave to apply for judicial review disallowed.

Cases referred to

Ashby v Minister of Immigration [1981] 1 NZLR 222; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Cocks v Thanet District Council* [1983] 2 AC 286; *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172; *Findlay v Secretary of State of the Home Department* [1984] 3 All ER 801; *R v Epping and Another; Ex parte Goldstraw* [1983] 3 All ER 257; *R v Lambeth London Borough Counci;, Ex parte Crookes* (1997) 29 HLR 28; *R v Law Society; Ex parte Lesopromyshlenny Complex* [1995] COD 216; *R v Metropolitan Stipendiary Magistrate; Ex parte London Waste Regulation Authority* [1993] 3 All ER 113; *R v Panel on Takeovers and Merger; Ex parte Guinness plc* [1989] 2 WLR 863; *R v Secretary of State for Home Affairs; Ex parte Capti — Mehmet* [1997] COD 61; *R v Tower Hamlets London Borough Council; Ex parte Ahern (London) Ltd* (1990) 59 P & CR 133; *Roy v Kensington and Another* [1992] 1 AC 624; *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, cited.

Council of Civil Service Unions v Minister for Civil Service [1985] AC 374; *Harley Development Inc v Commissioner of Inland Revenue* [1996] 1 WLR 727; *R v Secretary of State for the Home Department; Ex parte Swati* [1986] 1 WLR 477, considered.

Jon Apted for the Respondent.

A. Bale for the Applicant.

Jitoko J. The Applicant is a limited liability company incorporated on 23 April 2002. It describes itself as "a multi-faceted business that supplies numerous services to its customers", including the provision to them, for the purpose of marketing or networking by its customers, of a United States of America website address that will ultimately provide them their desired links overseas, through an international phone carrier.

The Applicant is foreign owned and is therefore required under our laws to first obtain permission of government before commencing business in Fiji. This it did when it obtained a Foreign Investment Certificate (FIC) from the chief executive of the Fiji Islands Trade and Investment Bureau (FTIB), the respondent, on 15 April 2002. This certificate is issued under s 4(1) of the Foreign Investment Act 1999 (the Act). Sub-section (1) states:

> A foreign investor must not carry on business in a relevant activity in the Fiji Islands unless the Chief Executive has granted the foreign investor a Foreign Investment Certificate under this Part and the Certificate remains in force.

In addition to the powers generally to grant FIC, the chief executive of FTIB may issue Certificates with conditions, if the investors will be involved in areas which the Minister of Commerce, Business Development and Investment, the minister responsible, has prescribed as restricted areas of activities (s 6(1) of the Act).

The FIC issued to the Applicant on 15 April 2002 stated that it was to invest in the activity known as "Establish internet Kiosks and a Call Centre" and then added the following:

> on the following terms and conditions:
> As per the attached letter Referenced 5/4294 Dated: 15 April 2002

The letter referred to in the FIC was not produced in evidence, although it is clear from the affidavit evidence and correspondence between the parties that the contents of the letter went to the details of the restrictive nature of the areas of activities which the Applicant was allowed to participate in.

On 24 December 2002, by a letter addressed to the chief executive of the Applicant Company, the chief executive of FTIB purported to cancel the Applicant's FIC, pursuant to his powers under s 13 of the Act. I include the full text of the letter which reads as follows:

> Dear Mr Gibbons,
> CANCELLATION OF FOREIGN INVESTMENT CERTIFICATE
> It has come to my attention that your Company Telpac is acting in breach of the terms and conditions of the Foreign Investment Certificate (FIC) issued to you on 15 April 2002.
> It was approved to operate internet Kiosks and a Call Centre. Instead of carrying on these businesses it operates a call back scheme — a prohibited service in Fiji.
> You will remember that when you were issued your FIC our manager investments, Mr Ulaiasi Tuikoro, explained to you that the approval was restricted to the operation of internet Kiosks and Call Centre. He stressed that the approval did not encompass call back scheme included in your proposal as it is a prohibited activity. You were also

informed that an appropriate licence would need to be obtained from the Ministry of Telecommunications if the Company is to operate a call back scheme. This condition was also expressly stated in our letter of April 15, 2002.

Because your Company has breached the terms and conditions of your FIC by not carrying on business activities in respect of which the Certificate was granted and because it is carrying on a prohibited activity, I have no option but to cancel your FIC with effect from 21 January, 2003 in terms of the provisions of the Foreign Investment Act and with specific reference to Section 13.

By copy of this letter I am advising the Director of Immigration of my decision as we had recommended the issuance of work permits to you and Mr Stephen Reid. Based on my decision to cancel your FIC I am advising the Director of Immigration that FTIB no longer supports the continuation of your work permit.

Yours sincerely,
Jesoni Vitisagavulu
CHIEF EXECUTIVE

Through its solicitors, the Applicant responded to the FTIB letter on 30 December, 2002 denying that it is in breach of the relevant provisions of the Act relating to its FIC. Furthermore, it argued that the question whether it operated a call back scheme which would have constituted the breach, was already before the court where the Applicant was challenging the validity of the Post and Telecommunications (Call Back) Regulations 2002 (Regulations 2002). As such, the Applicant suggested, the issue was sub judice, and that any action taken before the disposal of the matter was premature. The letter concluded by stating:

…Accordingly we request that you refrain from taking any action pre-judicial to our client. Should we not receive such an assurance immediately we shall be left with no other choice but to move the Courts in the appropriate manner…

The response from FTIB is contained in the chief executive's letter of 31 December 2002 saying:

re: TELPAC — CANCELLATION OF FOREIGN INVESTMENT CERTIFICATE

Thank you for your letter of 30 December 2002 in regards to the above matter.

This is just a quick note to say that we are taking legal advise on it and that I shall revert to you next week on our position.

I wish you a Happy New Year.

Yours sincerely
Jesoni Vitisagavulu
CHIEF EXECUTIVE

Presumably after consulting with his legal advisers, the chief executive was able to fully respond to the Applicant's solicitors on 13 January, 2003 in the following manner:

re: TELPAC — CANCELLATION OF FOREIGN
INVESTMENT CERTIFICATE

Further to my letter of 31 December 2002 I wish to advise that I have carefully considered the matter you raised in your letter of 30 December 2002 and advise as follows:

Telpac is carrying on business activities different from those it was approved as stated in my approval letter of 15 April, 2002 i.e. to operate internet Kiosks and a Call Centre.

To reiterate what I said in my letter of 24 December, 2002, we stressed to Mr Gibbons upon issue of Telpac's Foreign Investment Certificate (FIC) that the approved activities

did not encompass a Call Back Scheme as it was a prohibited activity. The point is reiterated here in case the Company should argue that its activity is a call centre operation.

Taking the above points into account I am still of the firm opinion that the Company is in breach of the terms and conditions of its FIC hence my decision to cancel its Certificate.

I believe the determination of whether or not the Company is operating a Call Back Scheme is a separate matter altogether.

Based on this I stand by the decision to cancel Telpac's FIC as conveyed to them in my letter of December 24, 2002.

Yours sincerely
Jesoni Vitisagavulu
CHIEF EXECUTIVE

It is this purported cancellation of the Applicant's FIC that has given rise to this application for leave for judicial review. In its motion filed on 8 April 2003, the Applicant sought, inter alia, the following orders:

1. Leave be granted to the Applicant on the following decisions:
   The decision of the Fiji Trade and Investment Bureau (hereinafter referred to as "FTIB") contained in the letter dated 13 January, 2003 cancelling the Applicant Foreign Investment Certificate.
2. An Order for stay of the decisions of the Respondent until final determination of this Judicial Review.

The ex parte application was upon order of the court made inter partes. The Respondent filed its notice of opposition on 29 April and a supporting affidavit by Isireli Koyamaibole, the Permanent Secretary for the Ministry of Commerce, Business Development and Investment filed on 2 May.

At the hearing on 6 May, the Applicant's counsel submitted that the hearing be adjourned to allow for the Applicant's other case on the validity of the Regulations 2002 to be concluded. Counsel for the Respondent argued that the subject matter of these proceedings was quite separate from the other action. The court at any rate, ordered submissions to be filed and the application was finally heard on 3 June 2003.

Applicant's submissions

The Applicant's first contention is that the FTIB's decision to cancel its FIC was based on the Regulations 2002, whose validity was being challenged by the Applicant in the other court proceedings CA No 518/2002. It was therefore sub judice for the matter to be raised or deliberated upon, while it remained before another court. The correct procedure was for the court to await the outcome of CA 518/2002.

Second is the issue of the decision to cancel the FIC. In the Applicant's view, the relevant decision to cancel and which is the subject of this application, is the one conveyed in Mr Vitisagavulu's letter dated 13 January 2003 which the court has quoted above. The Applicant's went on to say that in conveying its decision of 13 January 2003, the Respondent had failed to take into consideration the issue of sub judice.

There was in addition a further factor that the Respondent failed to consider and which at the same time lend weight to the argument advanced that the proceedings be stayed. According to the Applicant, the deputy registrar had adjourned sine die CA 133/2003 dealing with the Department of Immigration's cancellation of the Applicant's work permit, until CA 518/2002 was heard and decided.

The Applicant turned next, to the issue of unreasonableness. It argued that, quoting from Lord Greene Mr in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, that the Respondent had, in arriving at its decision, not included matters which were relevant but included irrelevant matters in arriving at its decision. For example, the Respondent failed to consider that the question of whether the Applicant was operating a call back centre and for which it was deemed to be in breach of the FIC conditions, was already before the court. Together with the challenge by the Applicant on the validity or otherwise of the 2002 Regulations, they constitute matters which were relevant but which were not taken into consideration by the Applicant. Therefore, in the application of the *Wednesbury* principles, the Applicant's decision must be deemed to be unreasonable.

The Applicant in addition, argued that the *Wednesbury* principles have been advanced further in same jurisdictions where, citing some New Zealand cases (*CREEDENZ v Governor-General* [1981] 1 NZLR 172; *Ashby v Minister of Immigration* [1981] 1 NZLR 222 CA and the english case, (*Finlay v Secretary of State for the Home Department* [1984] 3 All ER 801) the courts have distinguished between mandatory relevant considerations from permissible considerations. In the case of the former, especially where and when expressly provided for or implied in a statute, the courts have held that the decision makers must take such relevant matters into consideration.

The Applicant argued that the Respondent had not "enunciated clearly" the reasons for the cancellation of its FIC. It only referred to certain information that it, the Respondent, had received or come to its attention. If the Respondent has not given clear reasons then the question is how would anyone, including the court, know that the Respondent had acted in accordance with the *Wednesbury* principles.

Then there is the issue of natural justice which the Applicant submitted, was not considered by the Respondent or the responsible ministry of government, in respect of its appeal from the Respondent's action on its FIC. The failure or refusal to hear its appeal despite the Applicant having complied with all its legal requirements was in clear violation of the principle of natural justice.

Finally, the Applicant advanced the argument of legitimate expectation. The principle is set out in Lord Denning's well-known judgment in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 but aptly summarised by Lord Fraser in *Council for Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 401 thus:

> Legitimate, or reasonable expectations may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.

Applying it to the present circumstances, the Applicant argued that it was its legitimate expectation that the Respondent as well as the other agencies of government would await the outcome of its challenge to the Regulations 2002. By the same token, it is its expectation that they will heed the court's direction given on 29 January 2003 that it should be left alone unimpeded, until the court had disposed of the matter before it.

Respondent's submissions

In opposing the grant of leave, the Respondent submitted a number of grounds which the court will now summarily address.

In the first instance, the Respondent argued that the Applicant had named the wrong party. According to the application documents, the respondent is the FTIB whereas under the relevant provision of the Act, the decision which the Applicant is seeking leave for its review, belongs to the chief executive's. These proceedings, by its nature being a prerogative writ, requires that the name of the Respondent be specified and correct in its particulars. It is the decision that is at issue and such writs could not be issued at a non-existent decision of the Respondent so named. The Respondent in this regard, contented that the doctrine of vicarious liability in judicial review does not exist.

The Respondent further argued that the application is misconceived as it relates specifically and solely to the so called "decision" of the chief executive conveyed to the Applicant in its letter of 13 January 2003. In fact, the decision to cancel the Applicant's FIC conveyed in the letter dated 24 December 2002, which is, according to the respondent, the relevant decision which spawned the opportunity to appeal. This is because, the Respondent argued, it was the decision of the minister and the relevant ministry to return the appeal, which is the proper objective or target of judicial review.

The Respondent also raised the issue of alternative remedy in judicial review. Under it, the Respondent submitted that the Applicant had statutory right to appeal under s 15 of the Act. This, it failed to exercise. In its submission, the Respondent said that courts have been reluctant to grant judicial review where an alternative remedy existed (*R v Metropolitan Stipending Magistrate; Ex parte London Waste Regulation Authority* [1996] 1 WLR 727; *Roy v Kensington & Chelsea & Westminster Family Practitioner Committee* [1992] 1 AC 624; *R v Lambeth London Borough Council; Ex parte Crookes* (1997) 29 HLR 28; *R v Law Society: Ex parte Lesopromyshlenny Complex* [1995] COD 216; and *R v Secretary of State for Home Affairs: Ex parte Capti – Mehmet* [1997] COD 61). In this instance, the minister under s 15 of the Act possessed the power to review and reverse the chief executive of the FTIB's decision and although the Applicant had attempted to appeal it, it did not follow through with it.

On whether the Applicant had any arguable case at all, the Respondent submitted that the only ground that the Applicant seem to base all its arguments and consequently its challenge to the chief executive of the FTIB's decision, is that the matter was sub judice and should have prevented the Respondent from making the decision it did when it did.

Finally the Respondent accused the Applicant of not making full and frank disclosure to the court of all the facts and circumstances material to the matter before the court. Such facts which were not disclosed include the terms of the Applicant's application, the terms and conditions of its FIC granted by the chief executive of FTIB, the reasons for the minister rejecting the appeal, the permanent secretary's letter conveying the same, and the contention that it was in breach of its FIC not withstanding whether it was conducting a call back scheme or not. All of these, according to the Respondent, were not disclosed by the Applicant to the court, which it was under a legal duty to so do.

Court's consideration

The crux of the Applicant's case is that the Respondent should not have taken the decision to cancel its FIC while CA 518/2002 was before the courts. The matter was sub judice. In fact all of the grounds advanced for the judicial review stem from, and find their roots in, the argument that the respondent was wrong in cancelling the FIC before CA 518/2002 had been heard and decided.

In CA 518/2002, the Plaintiff, (Applicant in these proceedings) by originating summons sought a declaration that the Minister for Finance and National Planning and Communication had acted ultra vires his powers in enacting the Post and Telecommunications (Call Back Schemes) Regulations 2002. It further argued that even if it were to the contrary, the Regulations were void because of uncertainty and at any rate, the Plaintiff was not caught under its provisions. The defendants were the Director for Telecommunications Fiji and the Attorney-General.

The Regulations essentially prohibits, with the threat upon conviction of fine of $5000 or imprisonment not exceeding 3 years or both for anyone contravening its provisions, any person from establishing and operating a call back scheme in Fiji without the approval of the minister. It is sufficient for our present purpose to note that the court on 14 July 2003, found that "the Regulations are neither ultra vires the powers of the Minister nor void for uncertainty and apply to type of activity carried out by the Applicant".

However the point of contention advanced by the Applicant in this case is that, given that the question of whether it was operating a call back centre or not, was still being deliberated upon by the courts, it was totally unreasonable and an injustice for the Respondent to proceed regardless to cancel its FIC for breach of its conditions including the allegation of it operating a call back scheme.

The rule on sub judice does not, in the court's view, apply in this instance. Quite apart from the fact the respondent is not a party to CA 518/2002, the matters before each court are different involving exercises of different statutory functions by different authorities. It is true that the legal issue may very well be similar or connected, as the call back scheme in this instance, but each rely solely on the ambit of its statutory powers to exercise its functions.

In CA 518/2002, the powers of the minister to declare a call back scheme illegal had been challenged. In these proceedings, the powers of the Respondent to cancel the Applicant's FIC under s 13 of the Act is called into question. The common link, if one can call is that, is the so-called "Call Back Scheme". But it is not the relevant issue, as far as the Respondent is concerned. The exercise by the chief executive of FTIB of the powers under s 13 of the Act is independent of the Minister of Communication's Regulations 2002. The Respondent may certainly take cognisance of it and decisions that flow therefrom, but in the end, the Respondent acts independently. It is clear from the chief executive of FTIB's letter to the Applicant, dated 24 December 2002 and 13 January 2003, and attached as Annex D and G to Timothy Bryan Gibbon's affidavit in support, that the call back scheme had been declared a prohibited activity by the Respondent at the time its FIC was issued in April 2002. This is even before the Regulations 2002 came into existence in November 2002. Whether therefore the call back scheme would have been declared valid or not by the courts in CA. 518/2002, the fact of the matter is that the operation of such a scheme or call centre by the Respondent, would still be in breach of the conditions of its FIC, which specifically limited the Applicant to "establish internet kiosks and a call centre". In other words, the nature of the services provided by the Applicant, which is referred to as a "Call Back Scheme" and which the minister decided to regulate against and which ultimately became the subject of CA 518/2002, was an activity, which the Respondent had already decided, to be outside the permissible activities under the Applicant's FIC. As a final observation on this issue, the court notes that the Applicant is appealing Singh J's judgment in CA 518/2002. Whatever the outcome of the Appeal, will not in my view, and for the reasons I

have explained above, affect the decision already made by the chief executive of the FTIB to cancel the Applicant's FIC.

What decision is the Applicant seeking to be judicially reviewed? As far as the Respondent is concerned, there was only one decision to cancel the Applicant's FIC and that was made by and conveyed in, the chief executive of FTIB's letter of 24 December 2002 which the court has reproduced above. According to the Applicant, however, the decision to cancel the FIC was only made later on 13 January by the chief executive's letter (also reproduced above).

There is no doubt in the court's view, that the final decision to cancel the Applicant's FIC was that imparted to it by the letter of 24 December 2002. The exchange of correspondence between the Respondent and the solicitors acting for the Applicant amounted to no more then the clarifications on legal issues that were raised by the Solicitors. The 28 days after which the notice to cancel was to take effect as required under s 13 of the Act, began to run from 24 December 2002. It is also evident that the chief executive of FTIB was well aware of the 28 days requirement and from when it begun, judging by the haste he conducted his consultations before he wrote the letter of 13 January 2003, affirming the notice of cancellation made on 24 December 2002. Looked at another way, the Applicant's solicitors letters to the chief executive were the equivalent of an appeal for the latter to not proceed with the decision to cancel the FIC. It failed. The original decision remains.

Had the Applicant exhausted alternative remedies available to it? The law is clear. The courts are reluctant to grant judicial review remedy, where there exists alternative remedies. Sir John Donaldson, Mr in R v Secretary of State for the Home Department exp. Swati [1986] 1 WLR 477 said (at 485):

> …where Parliament provides an appeal procedure, judicial review will have no place unless the Applicant can distinguish his case from the type of case for which the appeal procedure was provided.

Lord Jauncey in *Harley Development Inc v Commissioner of Inland Revenue* [1996] 1 WLR 727 expressed it another way (at 736):

> A remedy for judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, it will only be very rarely that the Courts will allow the collateral process of judicial review to be used to attack an appellable decision …

The rationale behind the principle are two-fold. In the first place, where parliament has provided for a statutory appeals procedure, the courts should not be seen as usurping the functions of the appellate body. And second, public interest dictates that the judicial review proceedings should be dealt with expeditiously. These are fully explored in *R v Panel of Takeovers and Mergers, Ex parte Guiness Plc* [1989] 2 WLR 863.

In this case, s 15 of the Act provides avenues for appeals as well as the procedures and the mechanics involved. Subsection (1) defines what decisions of the chief executive of the FTIB maybe appealed (reviewable) against. It states:

> (1) In this section—
>
> "reviewable decision" means —
>
> (a) a refusal of the Chief Executive to grant a Certificate under Part II;
>
> (b) the grant by the Chief Executive of a Certificate under Part II on a condition or on conditions, to which the foreign investor concerned does not agree; or

(c) the cancellation of a Certificate by the Chief Executive under section 13.

Subsection (2), limits the appeal period of 28 days from the date the decision is made which dovetails with the time given for the chief executive's notice to come into effect under s 13.

Subsections (3), (4) and (5) deal with the form the appeal should take and the requisite period of consultation between the minister and the chief executive of FTIB before the minister makes a decision at subs (6). It stipulates as follows:

(6) Within 7 days of the receipt by the Minister of the Chief Executive's statement under sub section (5), the Minister must—
(a) affirm the reviewable decision;
(b) vary the reviewable decision; or
(c) set aside the reviewable decision *and make a new decision in substitution for it*. [Emphasis added.]

What is patently clear from one's reading of the appeal provisions, is that the scheme put in place had been carefully crafted to ensure that an Applicant's grievance is carefully scrutinised within a specific time frame, as between the minister and the statutory authority, before the final decision of the minister is made. It is also equally clear that the minister's powers are all-embracing, and includes the setting aside of the chief executive of the FTIB's decision to be substituted with a new decision altogether by the minister.

The question to be asked is whether the Applicant had availed itself of the appeal provisions of the Act. The answer is yes and no. Yes, the Applicant did file an appeal on 23 January 2003. No, because the minister had thrown out the appeal as it was out of time. The 28 days statutory appeal period under s 15(2) had expired 3 days earlier.

On the computation of time, the Applicant had argued that the 28 days, if one assumes that it begun to run from 25 December 2002, should not have included public holidays. Quite apart from the fact that there would have been only two public holidays involved (Boxing Day and New Year's Day), and therefore the appeal of 23 January 2003, would still have been outside the 28 days statutory requirement, Counsel for the respondent correctly pointed out that under s 51 of the Interpretation Act (Cap 7), public holidays are included in the computation of time where the time given exceeded 6 days and/or where the last day of the period is not a Saturday or Sunday.

This court is well satisfied therefore that there exists an alternative remedy available to the Applicant by way of an appeal for the review of the chief executive of FTIB's decision by the minister as provided for under s 15 of the Act. The fact that the Applicant had failed to meet the statutory requirement of 28 days for filing the appeal, is tantamount to failure by the Applicant to avail itself of the opportunity to do so.

This only leaves the residual jurisdiction of the court where it may still grant leave in exceptional circumstances as noted by the court in: *Secretary of States for Home Department; Ex parte Swati* (above). In this court's view, there are no exceptional circumstances. The Applicant was aware of the availability of appeal against the decision of the chief executive of FTIB. It did not avail itself of it until the expiry of the period of appeal. It failed, even at that late stage to argue the issue of the finality of the decision of 24 December 2002 to cancel its FIC.

There have however been situations where the courts have also allowed in exceptional circumstances, judicial review even if the individual had appealed out of time: *R v Epping and Harlow General Commissioners; Ex parte Goldstraw* [1983] 3 All ER 257. However, this is only where it considers that on the merits the case should be heard (see: *R v Secretary of State for the Environment, Ex parte Davidson* (1990) 59 P&CR 480; *R v Tower Hamlets London Borough Council; Ex parte Ahern (London) Ltd* (1990) 59 P & CR 133). This court finds nothing from the evidence before it to be convinced that this application falls under such a category.

I turn next to whether the Applicant has fully disclosed all the facts and circumstances that it is obliged to do. The Respondent submitted that the Applicant had failed to disclosed to the court all the material facts. The courts have adopted a much more restrictive attitude on ordering disclosure in judicial review proceedings from ordering in private law litigation. This is because the former is not usually concerned with making finding of facts. By its very nature judicial review proceedings do no more than perform a supervisory role. It is therefore important that as far as possible, facts that are material to the issue before the court, even if unfavourable to the application, should be disclosed. This is particularly so at the leave stage where frank disclosure of all relevant facts known to the Applicant can only help the court to act quickly and avoid the temptation for the court to substitute its own decision of the fact for that of the Applicant (see: *Cocks v Thanet District Council* [1983] 2 AC 286).

In this case the Respondent has pointed to certain material facts that the Applicant failed to disclose in its application. The terms of its application for its FIC for example, as well as the terms and conditions of the licence, the Respondent argued, should have been disclosed. The court agrees. It is for example, clear from the FIC that there were additional conditions to the certificate contained in the letter which was attached to FIC. Such details may have thrown more light to the court, on the exact areas of prohibited activities that were covered in the FIC. They may not have helped the Applicant's cause in the end, but the Applicant is under an obligation to disclose the contents and the details of the letter to this court. Equally the Applicant's affidavits do not anywhere disclose the contents of the Permanent Secretary of Commerce's letter conveying the decision of the minister. The reasons behind the rejection of the Applicant's appeal to the minister are, in the court's view, material facts to the question of whether the court should in the end, grant the relief sought. As such its non-disclosure, together with terms and conditions of the FIC are omissions which this court views seriously. In the circumstance, it holds that the Applicant has failed to discharge its duty to disclose all the material facts and circumstances known to it and relevant to the matter(s) before the court.

Finally the question of whether the FTIB had been named the correct party as the respondent. The Foreign Investment Act 1999 was enacted by Parliament "to facilitate and regulate foreign investment in the Fiji Islands". It's principal regulatory agent is in the person of the chief executive of the FTIB. The FTIB itself was established under its own separate legislation in 1980. Although both Acts deal with the promotion and the stimulation of economic growth of the country through foreign investment, there are no administrative or legal links between the two legislations except in the participatory role of the chief executive. However, while the chief executive is responsible to the board under the FTIB Act, no provisions under the Foreign Investment Act place the responsibility on the FTIB to oversee and be legally accountable for the actions

of its chief executive in the performance of his functions under it. The Act stands alone. It would appear from one's reading of the Act that, the chief executive of the FTIB under the Foreign Investment Act, is responsible to the Minister for Commerce, Business Development and Investment only. But what is nevertheless very clear is that in the performance of his statutory functions under the Foreign Investment Act, the chief executive of FTIB acts alone and independent of the FTIB. The provisions of the enactment provide him with his working tools, and within which he alone make decisions subject only to the sanctions of the minister. The powers therefore conferred under the Act are for the chief executive of the FTIB alone to exercise or delegate. Under the circumstances, this court agrees with the Respondent's Counsel submission that the Applicant had in error named the FTIB as the respondent in these proceedings.

What is its consequence? The application for judicial review being a specialised procedure seeking the court's intervention in the grant of any of the prerogative remedies, must be specific in the naming of the statutory body whose decision is being challenged. In this instance, the FTIB had not, vicarious or otherwise, made the decision to cancel the Applicant's FIC. In the court's view the mistake is fatal to the Appellant's application for leave. But even if it was possible for it to rectify the anomaly, the other issues already fully discussed above more than convinces this court, that the application as a whole is without merit.

The final outcome is that while the Applicant may have established sufficient interest in the matter to which the application relates, the court can find no arguable case in favour of it granting the relief sought.

Leave to apply for judicial review is refused.

Costs of $750 is awarded against the Applicant.

Leave to apply for judicial review disallowed.