

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

JUDICIAL REVIEW HBJ No. 48 OF 2008

BETWEEN:

THE STATE

AND

**THE MINISTER FOR LOCAL GOVERNMENT, URBAN
DEVELOPMENT, HOUSING AND ENVIRONMENT**

FIRST RESPONDENT

AND:

**THE PERMANENT SECRETARY FOR LOCAL GOVERNMENT,
URBAN DEVELOPMENT, HOUSING AND ENVIRONMENT**

SECOND RESPONDENT

AND:

**NASINU TOWN COUNCIL, a duly incorporated body constituted
under the provisions of the Local Government Act (Cap 125)**

INTERESTED PARTY

EX PARTE:

RAJESHWA KUMAR, Councillor and Mayor of Nasinu Town Council

APPLICANT

Appearances:

Applicant: Mr R. Chaudry

First & Second Respondents: Mr C. Pryde, Solicitor General, Mr S. Sharma and Ms S. Levaci

Interested Party: Ms M. Maharaj

Dates of Hearing: 22 December 2008, 20 January 2009

Date of Judgment: 16 February 2009

JUDGMENT

Application for leave for judicial review; Decision to suspend Mayor/Town Councillor; Contention that suspension not soundly based, or reasons not clarified; Contention that **Local Government Act** (Cap 125) not complied with; Contention that no ‘due enquiry’; **Local Government Act** (Cap 125) ss. 25, 34, 130, 131; ‘Due enquiry’ required for suspension; ‘Due enquiry’ required for removal; Meaning of ‘due enquiry’; Meaning of ‘satisfaction’ upon due enquiry; Basis of ‘opinion’ formed on ‘due enquiry’; ‘Due enquiry’ relevant to circumstances – viz suspension vs removal; ‘Due enquiry’ relevant to individual councillor/mayor vs ‘due enquiry’ for council (collective group); Application for leave premature; Intermediate or preliminary, not final, decision; Suspension should not become ‘final’ by default; Need to ensure against delay in final decision

Allbutt v. General Medical Council (1889) 23 QBD 400

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

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223

Baroness Wenlock & Ors v. River Dee Co. (1887) 19 QBD 155

Commonwealth v. Verweyan (1990) 170 CLR 294

Divendra Bijay v. Permanent Secretary for Education, Women and Culture (HBJ 5/97).

Fox v. General Medical Council [1960] 1 WLR 1017

General Medical Council v. Spackman [1943] 2 All ER 337

Kaliova Masau of Ekubu Village and Ors v. Attorney General of Fiji and Ors (Civil Action No. HBC 120 of 2007L, No. 48/2007 (19 April 2007))

Labouchere v. Wharncliffe (1879) 13 ChD 346

Leeson v. General Medical Council (1889) 43 ChD 366

Local Government Board v. Arlidge (1915) AC 120

Matatolu v. Attorney-General of Fiji [1978] FJSC 19; Civil Action 317 of 1977 (23 February 1978)

O’Reilly v. Mackman [1983] 2 AC 237

Pickwick Papers Pickwick International Inc (GB) Ltd v. Multiple Sound Distributors Ltd and Anor [1972] 3 All ER 384

Public Service Association v. Civil Aviation Authority of Fiji and Attorney General of Fiji and Airports Fiji Limited (JR No. 015 of 1998L, 30 November 1998)

Prasad v. Divisional Engineer Northern (No 1) [2008] FJHC 161; HBJ03.2007 (17 July 2008)

R. v. General Medical Counsel; Ex parte Spackman [1942] 2 B 261

R. v. Legal Aid Board; Ex parte Hughes (1992) 24 HLR 698

R. v. Phipps; Ex parte Alton [1964] 2 QB 420

R. v. Secretary of State for the Home Department; Ex parte Swati (1986) 1 WLR 477

R. v. Stains 62 LJQB 540

Rajendra Kumar Gounder v. The Minister for Local Government, Housing, Squatter Settlement and Environment (JudRev No. HBJ 010 of 2004L, 6 October 2004)

Rajesh Kumar Patel & Ors v. The Minister for Urban Development, Housing & Ors (Civil Action No. HBJ0010 of 1997L).

Rodney Bragg v. The Greyhound Racing Authority (NSW) [2003] NSWSC 103 (27 February 2003)

Slinn v. Nominal Defendant [1964] HCA 72; (1964) 112 CLR 334 (17 November 1964)
State v. Chief Executive Officer; Ex parte Fiji Public Service Association [2004] FJHC 284; HBJ0005J.2004S (17 November 2004)
The State v Commissioner for Magistrates Courts Inquiry Connors and Attorney General; Ex parte Sayed Mukhtar Shah (JudRev No. HBJ 47 of 2007, 7 April 2008)
The State v. Francis John (No. 54 of 2001, 21 May 2002)
State v. PSC; Ex parte Penisai Kunatuba (HBJ 18 of 2002)
The State v. Public Service Commission; Ex parte Damodaran Nair (JudRev Action No. HBJ 02 of 2007, 30 March 2007)
State v. Public Service Commission; Ex parte Oveti Laladidi (JudRev No. 17 of 1992, 19 July 1995)

Tikoduadua v. Human Rights Commission; Ex parte Tuiwawa (No. 1) [2008] FJHC 353; HBJ40.2008 (22 December 2008)
Twist v. Randwick Municipal Council [1976] HCA 58; (1976) 136 CLR 106 (17 November 1976)
Workcover Corporation/Employers Mutual Limited/Austra Entertainment Pty Ltd v. Racanati [2007] SAWCT 38 (20 July 2007)

1. The Decision

Originally filed ex parte, in accordance with *Pickwick Papers Pickwick International Inc (GB) Ltd v. Multiple Sound Distributors Ltd and Anor* [1972] 3 All ER 384, followed by this Court in *Kaliova Masau of Ekubu Village and Ors v. Attorney General of Fiji and Ors* (Civil Action No. HBC 120 of 2007L, No. 48/2007 (19 April 2007)) and subsequently, this application was heard inter partes.

1.1 The Applicant, Rajeshwar KUMAR, is a Councillor and the Mayor of Nasinu Town Council.¹ By letter of Monday 15 December 2008 (the Letter) the Permanent Secretary for Local Government, Urban Development, Housing and Environment (Permanent Secretary), the Second Respondent, informed Mr Kumar of his being ‘suspended in [his] capacity as Mayor as well as a Councillor of Nasinu Town Council’ with effect from that day. The suspension was said to be made under ‘powers vested with’ the First Respondent, the Minister for Local Government, Urban Development, Housing and Environment (the Minister) ‘through the Local Government Act (Cap 125), section 25(2)’.

1.2 Bearing the handwritten notation ‘Received letter at 9.15am 16/12/2008’, the Letter says ‘the ground’ of Mr Kumar’s suspension ‘is based on certain concrete evidences produced by the Fiji Independent Commission Against Corruption (FICAC) for acting in a manner prejudicial to the interests of the Nasinu Town Council’, the Interested Party. The letter goes on to advise Mr Kumar that FICAC:

‘... is [at this stage], still in the process of completing its investigation against you. Therefore in the interest of the Council you are hereby directed to cease performing all your municipal duties and to keep yourself out from entering into any council premises or interfering with any council business forthwith. Council’s properties and assets including

¹ On 31 January 2009 the terms of office of all councils, councillors and mayors in Fiji expired by reason of Cabinet Decision (GCB (09)439 of 02.12.08), relayed by letter of 10 December 2008 to all mayors and town clerks. This is referred to later at paragraph 10.9ff.

vehicle, mobile phone, computer etc under your control are to be handed over to the Town Clerk as from today.

1.3 Mr Kumar was directed 'to comply with this instruction immediately': Letter of 15 December 2008, Affidavit of Applicant, 17 December 2008, Annexure 2

1.4 This Letter forms the basis of the application for leave to apply for Judicial Review.

2. The Application & Notices of Opposition

Leave is sought in accordance with Order 53, Rule 3(1) of the High Court Rules 1988 in respect of 'the Decision on the suspension of [Mr Kumar] made by the Permanent Secretary and/or the Minister ... dated 15th December 2008'. A stay is also sought 'until further Order'; alternatively, Mr Kumar seeks that the grant of leave 'operate as a stay of proceedings ... until the determination' of the application or until other Order: Notice of Inter Partes Motion, 17 December 2008

2.1 Together with the stay, the application seeks an Order of Certiorari quashing the decision to suspend Mr Kumar. The Grounds are that in arriving at the decision of 15 December 2008 the Permanent Secretary and/or the Minister:

- acted ultra vires and/or illegally and/or unlawfully and/or without jurisdiction in breach of and/or in contravention of the provisions of the *Local Government Act* (Cap 125);
- failed to accord natural justice to Mr Kumar;
- made errors of precedent fact, fundamental errors or findings unsupported by evidence;
- failed to act and/or exercise powers so as to promote the purpose for which the powers upon it were conferred;
- acted so unfairly as to abuse his powers and unjustifiably defeated Mr Kumar's legitimate expectations;
- failed to have regard to all, and to only, legally relevant considerations and took into account irrelevant ones;
- acted unreasonably and/or irrationally and/or in a way which was not open to them: Statement Pursuant to High Court Rules 1988, Order 53, Rule 3(2)(a)

2.2 Notices of Opposition are filed by the Respondent and the Interested Party.

2.3 For the Permanent Secretary and the Minister it is said Mr Kumar does not have an arguable case established on any of the grounds sought because:

- the Minister was satisfied on due enquiry that the Mayor [Mr Kumar] had acted in a manner prejudicial to the interests of the municipality;
- the Minister had the benefit of similar evidence provided through a Report submitted sometime in September 2007 by an appointed inspector under section 130 of the Local Government Act, of which Mr Kumar was made aware;
- the Minister thereby acted in accordance with his powers under sections 25 and 34 of the Local Government Act;
- Mr Kumar is aware of the evidence submitted from FICAC regarding his alleged misconduct on which the Minister acted.

2.4 The Notice of Opposition advised that leave was sought to adduce any additional grounds at the leave application hearing; in the event, no further grounds were adduced.

2.5 The Nasinu Town Council opposes the application for leave, grant of stay, or leave to operate as a stay on grounds that:

- the application for leave is premature and therefore the decision of the Permanent Secretary and/or Minister is not amenable to Judicial Review as no final decision has been made by them or either of them to terminate Mr Kumar as Mayor;
- the Permanent Secretary and/or Minister acted properly and within their powers to suspend Mr Kumar as Mayor pursuant to sections 25 and 34 of the Local Government Act in the interests of the Nasinu Municipality.

3. Local Government Act (Cap 125)

Essentially, the parties join issue as to the impact and implications or meaning of sections 25 and 34 of the Local Government Act. As sections 25 and 34 are central to submissions of the parties, I set them out here as they are relevant:

Resignation or removal of mayor

25. - (1) ...

(2) Where the Minister is satisfied after due enquiry that the mayor has been guilty of misconduct or is incapacitated from performing his duties or has acted in a manner prejudicial to the interests of the municipality, he may order that the mayor be suspended or dismissed.

(3) ...

Removal of councillors

34. - Where the Minister is after due enquiry of the opinion that a councillor has been guilty of misconduct or is incapacitated from performing his duties or has acted in a manner prejudicial to the interests of the municipality he may order the suspension or removal of such councillor.

3.1 The key elements of sections 25 and 34 are, first, 'due enquiry'; then, in section 34, the forming by the Minister of an 'opinion', whilst in section 25, 'satisfaction' of the Minister. Both 'satisfaction' (s. 25) and 'opinion' (s. 34) hinge upon 'due enquiry'.

3.2 Here, for Mr Kumar it is said that no 'due enquiry' has been carried out by the Minister (or Permanent Secretary) and hence the requisite satisfaction cannot have existed at the relevant time, on the Minister's part (that is, the Minister cannot have reached 'satisfaction' as required under section 25) and, similarly, in the absence of 'due enquiry' the opinion of the Minister could not have been formed at the relevant time or, if formed, has not been formed as required by section 34.

3.3 For the Minister and Permanent Secretary, and insofar as the Interested Party is concerned, the 'due enquiry' requirement was met prior to the forming of the opinion and finding of satisfaction, and it is upon such due enquiry (and only upon it) that the satisfaction and opinion were formed. Hence, say the Respondents and Interested Party, the contention of non-compliance with sections 25 and/or 34 is unfounded.

4. 'Due Enquiry' Defined

What, then, is 'due enquiry' within the meaning of the Local Government Act? The basic principle distilled from the authorities is that what constitutes 'due enquiry' (or 'inquiry') is to be determined generally by reference to:

- the circumstances of the case and the purpose of the legislation or provisions in issue; and
- the import and/or effect of the outcome of any decision said to be based in 'due enquiry'; and
- taking these into account, the 'reasonableness' of the steps taken; and
- that the steps taken are genuine –
 - there is genuine or a genuine enquiry;
 - no *mala fides* are involved.

4.1 That is, the circumstances, purpose, import and/or effect or outcome dictate the interpretation of the term 'due enquiry' or how 'due enquiry' is to be defined and applied to any given set of facts, under particular provisions or legislation. So long as enquiry or the enquiry is genuine, this determines what is 'reasonable'.

5. 'Due Enquiry/Inquiry' – Authorities

'Due enquiry' has a place in a number of statutes, providing a number of general authorities. 'Due enquiry' is used in the Local Government Act and in statutes in other jurisdictions. Albeit such provisions are not or may not be 'the same' as those in the Local Government Act, the use of 'due enquiry' (or 'inquiry') and elaborations upon what this expression means in other contexts can be useful in determining the meaning in the Local Government Act.²

5.1 (a) United Kingdom Authorities on 'Due Enquiry/Inquiry':

R. v. General Medical Council; Ex parte Spackman [1942] 2 B 261 – English Court of Appeal

General Medical Council v. Spackman [1943] 2 All ER 337 – English House of Lords

Section 29 of the *Medical Act* 1858 (UK) sharply distinguished between the medical practitioner:

- convicted of a criminal offence – proof of conviction giving the General Medical Council (the Council) the power of disciplinary action; and
- alleged otherwise to have engaged in misconduct – where the *power of disciplinary action is acquired only after 'due inquiry'* the Medical Council is satisfied the alleged misconduct has been committed/engaged in.

'Due inquiry' cannot imply all the formal exactness of a trial in a court of law: the Council has no power to summon witnesses or administer an oath. It can inform itself of the facts without formality and without observance of any technical rules of evidence.

² *Words and Phrases Judicially Defined*, Burrows, ed, vol. II, Butterworth & Co., London, UK, 1943; *Stroud's Judicial Dictionary of Words and Phrases*, 6th Edn, Greenberg and Millbrook, eds, vol. 2, Sweet & Maxwell, London, UK, 2000; and *Words and Phrases Legally Defined*, 3rd Edn, Saunders, ed, vol. 2, Butterworths, London, UK, 1989 provide useful insights by reference to authorities generally; a number of the authorities listed here were obtained by reference to those sources.

It could have had recourse ... to shorthand notes of evidence before the court for the facts and to the judgment for assistance on interpretation of the facts, but **'due inquiry' involves 'at least a full and fair consideration of any evidence ... the accused desires to offer, and, if s/he tenders them, hearing his witnesses: R. v. General Medical Council; Ex parte Spackman** at 272, 272, per MacKinnon, LJ (Emphasis added)

[Can] the [Council] regarded as having reached its adverse decision 'after due inquiry' when it ... refused to hear evidence tendered by the practitioner with a view to showing ... he has not been guilty of the infamous conduct alleged and that the finding of the Divorce Court against him as co-respondent is wrong ... It seems obvious, in ... instances [of slander, seduction, a bastardry order and many other instances of adverse conclusions reached in a court of law], that while the Council might well treat the [court's] conclusion as *prima facie* proof of the matter alleged, ***it must when making 'due inquiry' permit the doctor to challenge the correctness of the conclusion and to call evidence in support of his contention.*** The previous decision is not between the same parties; there is no question of estoppel or of *res judicata*. ***[The] decision of the courts may provide the Council with adequate material for its own conclusion if the facts are not challenged before it, but, if they are, the Council should hear the challenge and give such weight to it as the Council thinks fit ...***[a divorce] decree provides a strong *prima facie* case which throws a heavy burden on him who seeks to deny the charge, but the charge is not irrebuttable. So much follows from the structure of sect. 29 [of the Medical Act, 1858], and from ***the necessity, if there is to be 'due inquiry', of giving the accused party a fair opportunity of meeting the accusation. [The] duty of considering the defence of party accused, before pronouncing the accused to be rightly adjudged guilty, rests upon any tribunal, whether strictly judicial or not, ... given the duty of investigating his behaviour and taking disciplinary action against him. The form in which this duty is discharged – e.g., whether by hearing evidence viva voce or otherwise – is for the rules of the tribunal to decide. What matters is that the accused should not be condemned without being first given a fair chance of exculpation: General Medical Council v. Spackman***, at 339, 340, per Lord Simon, LC (Emphasis added)

Baroness Wenlock & Ors v. River Dee Co. (1887) 19 QBD 155 – English Court of Appeal
Section 56 of the ***Judicature Act*** 1873 (UK) provided for 'inquiry and report', here as to monies advanced by a deceased testator to a company, plaintiff executors contending it borrowed the monies ultra vires. The plaintiffs succeeding but disputes arising as to amounts, the defendants took a preliminary point that the order must have been made under section 57, saying no power lay under section 56 to order examination of witnesses (which had been done). As to the meaning of 'inquiry' in section 56:

It does not appear to me that the word 'inquiry' only includes an inquiry which the referee is to make with his own eyes. The word 'inquiry; in my opinion signifies an inquiry in which he is to take evidence and hold a judicial inquiry in the usual way in which such inquiries are held. The word 'inquiry' is used because it is not meant to have the same result as a trial. [I and other judges have always] treated [the section] as having [this] meaning ... [T]he section cannot have the limited meaning contended for when ... the official referee ... is not an expert or a person [with] any special knowledge of particular matters ... [To give it that limited meaning would overturn] practice to the contrary [and] limit the beneficial effect of the section to a most unfortunate extent ...: at 158-59, per Lord Esher, MR (Emphasis added)

... I entertain more doubt [than the Master of the Rolls] whether the intention of the legislature in that section was not merely to enable the Court to order a referee to make inquiry into the subject-matter by personal observation and to report to the Court, and not to enable him to make an inquiry by taking evidence of other people ... The form ... for use under s. 56 merely directs an inquiry and report, whereas that ... under s. 57 expressly gives power to examine witnesses. ***[If] it is intended that the referee under s. 56 should have power to administer oaths and hear the evidence of witnesses, it would be much better that the order should expressly give that power. But having given expression to these doubts, ... the practice to the contrary ... has been, if not uniform, at any rate very common: and I think ... that interpretation ... is undoubtedly a beneficial one.*** Therefore, though not without doubt, on the whole I agree with the Master of the Rolls on this point: at 159-60, per Fry, LJ (Emphasis added)

... It is not easy to construe ss. 56-59 and the rules applicable ... The forms, too, raise a difficulty. ***The form given for use under s. 57 no doubt gives express power to examine witnesses, whereas that under s. 56 does not, but the forms are not part of the Act. Sects. 56 and 57, however, clearly contemplate different kinds of report;*** the one kind of report is a report to be made to the judge or Court requiring information; the other is to be equivalent to the verdict of a jury ... The reference under s. 56 is for inquiry and report, and the question is whether under those words the referee is to be in a position to examine witnesses. On the best consideration ... I agree with ... the Master of the Rolls: at 160, per Lopes, LJ (Emphasis added)³

Labouchere v. Wharncliffe (1879) 13 ChD 346

Rule 20 of 'The Beefsteak Club' provided:

[Where] conduct of any member either in or out of the club shall in the [committee's] opinion, after inquiry, be injurious to the welfare of the [club's] interests, the committee of the club shall call upon him to resign, and [where he] refus[es] to do so, shall call a general meeting [where] votes of two-thirds of those present [may] expel [him].

An altercation occurring between two members, Lawson and Labouchere, both were asked to resign. Both refused, albeit subsequently Lawson did so. It was said:

In a case ***where a decision depended upon [the committee's] opinion – in other words, upon their judgment – it was most important that the material on which that judgment was formed should be accurately ascertained; and, of course, that could only be done by a proper investigation, by giving due notice to the accused*** and by taking – I do not say legal evidence, or that evidence not strictly legal might not be admissible – but by ***taking evidence on the question of fact before them, and satisfying themselves as to the truth. They could then form their opinion.*** That was not done ...; and ... the committee have not followed in substance their own rule at all. The [committee's] judgment, with the facts of a case fully before them, might be right or it might be wrong. With that the Court has nothing to do. If, having given the accused fair notice, and made due inquiry, the committee came to the conclusion that the conduct of [a club member] was injurious to its welfare and interests, no judicial tribunal could interfere with any consequences [arising] from an opinion thus fairly formed: at 352, per Jessel, MR (Emphasis added)

³ See also ***Twist v. Randwick Municipal Council*** [1976] HCA 58; (1976) 136 CLR 106 (17 November 1976) for 'reading in' the scope of due process where provisions are silent.

***Leeson v. General Medical Council* (1889) 43 ChD 366 – English Court of Appeal**

Having been found by the Council to have given ‘cover’ to an unregistered person to practice as a ‘medical electrician’, holding himself to be duly qualified, Dr Leeson sought to restrain the Council from erasing his name from the medical register under section 29 of the *Medical Act* 1958. As to the conduct of the inquiry:

There has been here a good deal of questioning [of] what took place ..., and we have [before us] the evidence which was before the ... Council ... The ... Council cannot, strictly speaking, take evidence. They cannot take evidence on oath ... They have statements made before them in support of any complaint made, and statements made on the other side by [he] against whom the complaint is made, and if .. established that the complaint does involve a matter in respect of which they can exercise ... jurisdiction [under] sect. 29, then ... we ought not to look at the evidence or in any way consider whether they have arrived at the right conclusion. [I]f it was alleged and proved ... they had acted corruptly, [or] had no statement made before them on which they could reasonably and honestly arrive at the conclusion at which they did arrive, then ... we ought to consider it to see whether the fact that there was no statement [to] satisfy the conclusion ... would lead us to the conclusion that the Council had not acted honestly ... but ... from some other motive ... [But *the*] ***complaint was brought forward in the ordinary mode required by the rules and regulations of the ... Council. He was there; he was represented by his solicitor, and he brought his own witnesses - ... those who with him were to make statements in support of his contention that in his conduct he had done nothing ... infamous in a professional respect; and everything was heard, most fully heard, and considered, and then the Council arrived at [its] conclusion ... [T]hat being so, we cannot consider whether they are right or wrong. That must be left to them:*** at 377-78, per Cotton, LJ (Emphasis added)

The jurisdiction is defined by statute. ***There must be an allegation before the ... Council of infamous conduct in some professional respect, and adjudication must be arrived at after due inquiry. The statute says nothing more, but in saying so much it certainly imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be an inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard. With respect to the charge ... of which he has notice ... the particulars ... should be brought to his attention ... to enable him to meet that charge and [must] be particulars of conduct which, if established, is capable of [founding the charge].*** That is all. We have seen those conditions ... fulfilled by the inquiry ... [W]e have no power to review the evidence any more than we have a power to say whether the tribunal came to the right conclusion. If ... nothing [before] the tribunal ... could raise in the minds of honest persons the inference that [the requisite] conduct [was] established, that would go to shew ... the inquiry [was] not a due inquiry; but if there is no blot of that kind upon the proceedings, the jurisdiction of the domestic tribunal which has been clothed by the Legislature with the duty of discipline ... must be left untouched by Courts of Law ... I entirely concur with [Lord Justice Cotton]: at 380-81, per Bowen, LJ (Emphasis added)

The nature of the proceeding and the effect of the proceeding seem to me to be very strong to shew that ***it must be judicial, because the result was to deprive Dr Leeson of rights which before that were vested in him as a duly qualified medical man on the register ... [T]he language of the statute ... is ... equally clear; it requires a due***

inquiry. It requires a judgment. It requires that that judgment shall find him guilty. Now ‘inquiry’ and ‘judgment’ and ‘guilt’ are all words which express and which are relevant to judicial proceedings, and therefore, although this body proceeds by different rules of evidence from ... Courts of Law .. I cannot ...doubt that the Council were proceeding judicially ...: at 386, per Fry, LJ (Emphasis added)

Allbutt v. General Medical Council (1889) 23 QBD 400 – English Court of Appeal

Dr Allbutt was ‘struck off’ under section 29 of the **Medical Act** 1858 (c. 90)(UK) for publishing a book containing a chapter ‘How to prevent conception when advised by the doctor’, with descriptions of methods and appliances to be employed. A footnote said: ‘This chapter is not intended for reproduction without the author’s permission. Like the rest of The Wife’s Handbook, it is copyright. It is intended to be read in the privacy of the chamber by married women or by those contemplating marriage, and is not intended for the publicity of the streets, or to satisfy the curiosity of the vicious.’ Sold by non-professional booksellers, it ‘could be purchased by anyone at the price of sixpence’:

It is said by the plaintiff that there was no ‘due inquiry’ ... We can find nothing irregular in the proceedings of the council; ***the plaintiff had every opportunity afforded to him of bringing his case before the council, who heard his counsel and his evidence***, and adjudicated thereon: at 408, per Lord Coleridge, CJ, Lindley and Lopes, LJJ (Emphasis added)

Fox v. General Medical Council [1960] 1 WLR 1017 - English House of Lords

‘Due inquiry’ was enjoined of the Council in taking disciplinary action against a medical practitioner, with the decision made by the Council acting by its Disciplinary Committee:

There is only a finding ... that ‘the committee have determined ... the facts alleged ... in the charge have been proved to their satisfaction’. It is not possible to tell, except by inference, what ... weight [was] given by the committee to various items or aspects of the evidence, or what considerations of fact or law [were] the determining ones [leading] members to arrive at the decision finally come to. Such considerations ... do sometimes require that the Board should take a comprehensive view of the evidence as a whole, and endeavour to form its own conclusion [on] whether a proper inquiry was held and a proper finding made upon it, having regard to the rules of evidence [regulating] the committee’s proceedings ...

The validity of any [committee] determination is, certainly, dependent upon the performance of its statutory duty to hold a ‘due inquiry’ ..., and the Board will need to be satisfied as to this if it is challenged on an appeal. But to say that there must be due inquiry does not greatly elucidate the question unless there is some exhaustive definition of the conditions which such an inquiry postulates ...: at 1023, per Lord Radcliffe

The case then refers to ‘natural justice’ breach, citing ***Spackman’s case*** and observing that appeals from Council decisions are now governed by prescriptive rules of procedure to be followed by the committee/Council, so that a focus on whether or not those rules were followed – is necessary: at 1024ff

R. v. Stains 62 LJQB 540

Under the **Public Health Act** 1875 (UK), section 299 required the Local Government board to make ‘due inquiry’. It was held that ‘due inquiry’ is one the Board thinks sufficient and, in the absence of *mala fides*, the court had no right to interfere:

R. v. Phipps; Ex parte Alton [1964] 2 QB 420

Section 5(2) of the *Costs in Criminal Cases Act* 1952 (UK) gave discretion to a magistrate to grant costs when ‘inquiring into any offence as an examining justice’. The indictable offence against the party seeking costs was withdrawn, withdrawal occurring immediately the case was called on: after informing the magistrate that no evidence was to be offered, the prosecution applied for the summons to be withdrawn. The application having been granted, it was held that the magistrate rightly refused costs, for:

... when the case was called on, the time [n]ever came when the magistrate began to inquire into any offence. To begin with, one would think that as a matter of common sense *some step would have to be taken before an inquiry* began ...’: at 426, per Lord Parker, CJ

There was no embarkation upon the inquiry. However, had the defence objected to the application, asked for the matter to be commenced then sought costs when no evidence was brought, costs could have been awarded, for (notwithstanding the failure to call evidence) the inquiry would have begun.

5.2 (b) *Australian Authorities on ‘Due Enquiry/Inquiry’:*

Slinn v. Nominal Defendant [1964] HCA 72; (1964) 112 CLR 334 (17 November 1964) – Australian High Court

‘Due inquiry and search’ required under the *Motor Traffic Ordinance* 1936-1959 (ACT) where party unable to locate an allegedly offending vehicle following a motor accident and seeks to sue the Nominal Defendant. Claim dismissed as Court unprepared to accept sufficient evidence of ‘due inquiry and search’. On appeal, the material was ‘scanty’ however there was:

- an accident report to police on the day, including a description (admittedly non-comprehensive) of the vehicle;
- a further discussion with police vis-à-vis the accident a week later, resulting in police advice that finding the missing vehicle was unlikely;
- passerby on the day asked whether he saw another car, replying in the negative;
- insertion by Plaintiff’s solicitors of a newspaper advertisement some five months’ later (with little reliance placed upon this in the appeal).

... The concept ... is that *there should be inquiry and that inquiries when they yield leads should be followed up.. Asking questions without pursuing answers may very well be found insufficient.*

However, the controlling word for relevant purposes Is the word ‘*due*’. This word, as has been pointed out in decisions of this Court, *accommodates to the circumstances of the case the nature and extent of the inquiry and search*⁴ ... required: at 339, at 3, per Barwick, CJ (Emphasis added)

⁴ Note that ‘search’ was held not to add anything effectively to ‘inquiry’: it was held to be a composite term. Therefore, for present purposes nothing turns on the use of ‘search’ in ‘due inquiry and search’ rather than simply ‘due enquiry’.

The evidence is slender, but ***taking into account the circumstances of the case***, it is ... sufficient ... it is not a case in which no effort to ascertain the identity of the vehicle was made ... There was [one other person alone] at the scene of the accident. He had not seen [it]. This was the only possible inquiry which could be made on that occasion. The communications made ... to the police were with a view to discovering the offending motor vehicle ... Clearly what [was] said involved a seeking of the vehicle ... Advertisements were subsequently put in newspapers ...; [they] were as complete as they could be.

It would not have been reasonable for the plaintiff to have asked her husband or any other person to do anything further to find the offending vehicle. There was no scent to follow. ***What course could the investigations take? ... If there has been a genuine endeavour*** to find a motor vehicle the identity of which is wanted ***and such endeavour shows ... further search would be useless such ... it is a case where ‘the identity of the motor vehicle cannot after due inquiry and search be established’***: at 341-42, at 4, per McTiernan, J. (Emphasis added)

Rodney Bragg v. The Greyhound Racing Authority (NSW) [2003] NSWSC 103 (27 February 2003) – NSW Supreme Court

Section 10 of the ***Greyhound Racing Authority Act*** 1985 (NSW) provides that if a person, after notice and due inquiry, is found guilty of breaching the rules, the Authority may:

- impose a fine,
- suspend for a term thought fit;
- disqualify permanently or for such term as thought fit;
- cancel registration;
- impose penalties.

Rule 9(4)(a) says that after ‘due inquiry’ penalties may be imposed if the Authority is ‘satisfied ... the person has done anything, or caused or permitted anything to be done, in connection with greyhound racing which is dishonest, corrupt, fraudulent, negligent, improper or otherwise detrimental to the proper control and regulation of greyhound racing’.

‘Due inquiry’ breached through denial of natural justice. The Plaintiff was given the opportunity of answering matters alleged and in that respect accorded procedural fairness. However, the Committee must ‘inevitably’ have been prejudiced in its deliberations by reason of examining the Plaintiff’s record from another proceeding [before ICAC – the Independent Commission Against Corruption] simultaneously with deliberating on his guilt or otherwise with respect to the charge, ‘and with no assistance as to how that record is to be used’. The Committee:

- was provided with a limited part of a transcript of the ICAC inquiry, that evidence ‘elicited by compulsion’ and given on the basis of no self-incrimination;
- did not have the opportunity to properly assess witness-credibility from observation at the ICAC inquiry and circumstances of the evidence ‘a large part of which was led’;
- had evidence (from the ICAC inquiry) ‘not given in circumstances where the person giving [it] was conscious ... it could be used against him’

so rendering weight of the evidence extremely slight: at 13-14, per Dowd, J.

Further, the Court said the prosecutor's both advising the Committee of the requisite standard of proof, but then 'urg[ing] the Committee that the standard had been met' made it 'very difficult' for the Committee to form a view 'relying on the advice given and receiving from that same person a submission as to the finding they should make'. The Committee 'operated without proper guidance' as to how to deal with that evidence. A submission as to what was or was not hearsay evidence and 'a complete failure to have pointed out that evidence of opinion is not hearsay evidence would make it very difficult for the Committee to properly assess the effect of that evidence: at 13-14, per Dowd, J.

Workcover Corporation/Employers Mutual Limited/Austra Entertainment Pty Ltd v. Rakanati [2007] SAWCT 38 (20 July 2007) – SA Workers Compensation Tribunal

The question was whether Workcover could prospectively adjust weekly payments to take into account an earlier redemption of which it was not aware when first accepting liability to make those payments. Did 'due enquiry' per the *Workers Rehabilitation and Compensation Act* 1986 (SA) mean that at the time it accepted liability, Workcover should have investigated whether there had been a prior redemption, there being a statutory requirement of 'expeditious determination' and an expectation that claims should be determined within 10 business days of receipt:

... The key is whether the failure to discover the information was unreasonable in light of what could be expected by 'due enquiry' ...

... the process of enquiry and investigation ... does not have to be exhaustive in every case and, ... in an appropriate case, in keeping with the spirit of the Act, it might be that the compensating authority conducts very few inquiries and investigations prior to its determination to accept a claim.

[T]hat approach has to colour the construction to be given to the expression 'could not reasonably be discovered by due enquiry at the time that the original determination was made' in s 53(7a) ... ***I ... construe the word 'due' as meaning: having regard to the scope of the investigations and inquiries then undertaken and the reasons underpinning that scope:*** at para [51] (Emphasis added)

5.3 And, later:

... due enquiry did not at that time require the ascertainment of whether the disclosed earlier inquiry had been the subject of a redemption agreement. To conclude otherwise would be to set the bar for 'due enquiry' in respect of what appeared to be a routine claim for compensation far too high and would discourage the expeditious decision-making that the Act envisages: at para [59]

5.4 (c) ***Authorities re 'Preliminary Enquiry' – Akin to 'Due Enquiry'?*** Counsel for the Applicant, Mr Kumar, says that authorities as to 'preliminary enquiry' are relevant to the assessment of what is required by 'due enquiry' under the Local Government Act. Here, it is said that requirements for a committal proceeding ('preliminary enquiry') are to be equated with what is required for 'due enquiry' in the present application.

The State v. Francis John (No. 54 of 2001, 21 May 2002) – High Court of Trinidad and Tobago

Committal for incest and serious indecency, where child's evidence by statute allowed unsworn and uncorroborated. The Court focused on due process of law as 'the Rosetta stone' and 'the antithesis of arbitrary infringement of an individual's right to personal liberty', saying the principles required to be met are:

- reasonableness and certainty in the definition of criminal offences;
- trial by an independent and impartial tribunal;
- observance of the rules of natural justice: at 4-5

The Court said both the first and second principles were met. There was no contention of bias, and no complaint of unreasonableness or uncertainty in the definition of offences charged. As to natural justice, there was no complaint that the proceedings 'were conducted in breach of the rules of natural justice in any of its facets'. As to corroboration, this went to evidence at trial, whilst at *the preliminary enquiry the question was 'whether on the whole of the evidence there is material which if believed would support the basic elements of the charge'*: at 6 (Emphasis added)

5.5 (d) **'Due Enquiry' – Fiji: Local Government Act:** Counsel for Mr Kumar cites Local Government Act cases involving 'due enquiry': *Rajendra Kumar Gounder v. The Minister for Local Government, Housing, Squatter Settlement and Environment* (JudRev No. HBJ 010 of 2004L, 6 October 2004); *Matatolu v. Attorney-General of Fiji* [1978] FJSC 19; Civil Action 317 of 1977 (23 February 1978) and *Rajesh Kumar Patel & Ors v. The Minister for Urban Development, Housing & Ors* (Civil Action No. HBJ0010 of 1997L).

5.6 *Rajendra Kumar Gounder's case* is particularly apposite, for it relates to the post of mayor. The elected Mayor of Lautoka City Council had his position terminated (not suspended) by the Minister for Local Government, Housing Squatter Settlement and Environment. There, letters of complaint were received by the Minister for Local Government as to procedural matters in Council, declaration of interest and an allegation of utilizing an illegally constructed facility. Section 25(2) of the Local Government Act was relied upon in dismissing Mr Goundar as mayor. Mr Goundar said there had been no 'due enquiry', invoking section 130 of the Local Government Act.

5.7 Section 130, also referred to by the Applicant here, Mr Kumar, says:

Appointment of inspector

130. - The Minister may appoint any fit and proper person to investigate and report upon the manner in which a council is exercising all or any of its functions under this Act and for the purposes of such investigation the person appointed shall have power –

- (a) to enter on and inspect any real property occupied or owned by a council or any institution under its control or management or any work in progress under its direction;
- (b) to call for any return, statement, account or report which he may think fit to require;
- (c) to call for and inspect any extract from the proceedings of any council or from the proceedings of any committee thereof and any books or documents in the possession of or under the control of a council.

5.8 As section 131 is directly relevant to this provision and it, too, is referred to by Mr Kumar, I set it out here:

Appointment of committee of inquiry

131. - (1) If, after consideration of a report submitted to him under section **130**, the Minister is satisfied that there is reason to believe that a council is in default on the grounds that the revenues of the council are not being used in the best interests of the municipality as a whole or that the administration of the council is inefficient, wasteful or corrupt or that the council has in any other way failed to act in conformity with the provisions of this Act, he may appoint a committee of inquiry to investigate the affairs of the council.

(2) A committee of enquiry shall consist of not less than two but not more than five members one of whom shall be nominated by the Minister as chairman.

(3) For the purposes of carrying out its functions under this section a committee of enquiry shall have the same powers and authority to summon witnesses and to admit and receive evidence as are conferred upon the commissioners of a Commission of Inquiry by section 9 of the Commission of Inquiry Act and the provisions of sections **14** and **17** of that Act shall apply *mutatis mutandis* in relation to the powers and authority vested in the committee of inquiry under this subsection.

(4) A council shall be entitled to be heard at an inquiry held under the provisions of this section and may be represented by any member or officer of the council authorised by the council for that purpose or by a barrister and solicitor .

(5) At the conclusion of the inquiry the committee of inquiry shall submit a written report of its findings to the Minister.

5.9 In *Rajendra Kumar Gounder's case*, His Lordship Justice Singh held that the proposition that there had been no 'due enquiry' was unfounded. Notably, section 130 relates to 'investigation and report upon the manner in which **a council** is exercising all or any of its functions' under the Local Government Act – that is, the council as a whole rather than simply the mayor or a councillor as expressed in sections 25 and 34.

5.10 The Deputy Secretary of the Ministry of Local Government had, in *Rajendra Kumar Gounder's case*, been appointed by the Minister of Local Government to carry out an investigation, however, said Singh, J. this appointment was in respect of 'due enquiry' under section 25: the letter appointing the Deputy Secretary explicitly referred to that section, indicating that the investigation was into matters including the conduct of the Mayor and to find whether the Mayor was guilty of misconduct or acting in a manner prejudicial to Lautoka City Council's interests under section 25.

5.11 Section 130 sets out the powers of the 'fit and proper person' appointed under that provision. Section 131 sets out in detail the way a committee must go about its task of 'due enquiry', on its appointment following a report provided under section 130. The focus of *Rajendra Kumar Gounder's case* was on section 25 and section 130. So, once having found that section 25 rather than section 130 applied, Singh, J. observed that section 130 does not lay down the process for 'due enquiry' under section 25, for (again) it relates to full council processes of investigation and due enquiry only:

Section 130 enquiry is far more comprehensive [than that under section 25] ... One of the possible consequences ... can be dissolution of [an] entire council and management placed [in the] hands of [an] appointed administrator ...

... As the consequences of section 25 enquiry are not as severe as those under section 130, the statute itself does not state the exact nature which the enquiry must take. **An enquiry under section 25 need not be as comprehensive as that conducted pursuant to sections 130 & 131. It is for the Minter to decide the nature of enquiry and its extent** ...: at 5, per Singh, J. (Emphasis added)

5.12 As to what had occurred in the process applied to Mayor Gounder, His Lordship said that the ‘nature of the enquiry envisaged’ by section 25(2) ‘is not an enquiry similar to court proceedings’:

All section 25(2) requires is a fair opportunity to be heard. A person must be given an opportunity of a hearing unless it is expressly excluded by statute. If the statute is silent, then the common law would imply the requirements of such hearing: **Permanent Secretary for Public Service Commission v. Lepani Matea** (No. 9 of 1998, Supreme Court of Fiji)

Procedural propriety means proper consultation with the person affected must be afforded. The authority must listen genuinely or properly otherwise the consultation is a sham or a farce: **Rajendra Kumar Gounder’s case**, at 6-7, per Singh, J.

5.13 His Lordship went on to observe that the nature of the enquiry ‘depends on circumstances of the case’, adding that in every case it is not necessary that the person affected ‘be given a personal hearing’. However, where a decision may affect a person’s livelihood, ‘a more thorough enquiry can be expected’: **Rajendra Kumar Gounder’s case**, at 7

5.14 There, it was submitted for Mr Goundar that procedural unfairness arose in that there was:

- non-disclosure of accusatorial documents;
- no opportunity to cross-examine witnesses;
- failure to put specific allegations to Mr Goundar;
- failure to disclose or to put to Mr Goundar witnesses’ statements; and
- denying Mr Goundar the opportunity to address before the imposition of penalty: **Rajendra Kumar Gounder’s case**, at 6

5.15 However, the Deputy Secretary had conducted enquiries by preliminary investigations over two days, with a subsequent day some two weeks later devoted to enquiry. According to this recitation, Mr Goundar was interviewed on both occasions ‘even though it appears time was limited to 20 to 30 minutes for each interview’. Mr Goundar said he was interviewed on the first occasion for 15 minutes, and on the second for 20 minutes, whilst he was ‘not shown any written material for his comments’. After the investigation conducted by the Deputy Secretary, a report was prepared. That report showed that the allegations against the Mayor ‘were used as the basis of the discussions with the Mayor’, with the Mayor’s reactions noted, the investigator also visiting the Mayor’s home. In addition, the proprietor of the illegal facility the Mayor was alleged

to have used and in relation to which a non-disclosed conflict of interest was alleged was ‘seen’ by the investigator: *Rajendra Kumar Gounder’s case*, at 4, per Singh, J.

5.16 Singh, J. concluded that in addition to having the powers under section 25 to call for an enquiry and hence not acting ultra vires, the Minister acted in conformity with section 25(2) in that ‘the type of enquiry conducted amounted to a due enquiry’. The threshold test set in regard to ‘Wednesbury unreasonableness’ – that the decision was ‘so wrong that no reasonable person could sensibly take that view’ or ‘so unreasonable that no reasonable person’ could make it: *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 – was not reached in *Rajendra Kumar Gounder’s case*: at 7, 8, per Singh, J.

5.17 *Matatolu v. Attorney-General of Fiji* [1978] FJSC 19; Civil Action 317 of 1977 (23 February 1978) involved the Local Government Act and its application to Suva City Council, when the Council itself passed a resolution asking the Government of Fiji to consider appointing a Commission of Enquiry to ‘look into’ the Council’s ‘financial management, system of accounting and other matters relating to finance’: at 2

5.18 A Committee of Inquiry was duly appointed (under regulations promulgated by the Minister under section 123 of the Local Government Act), sitting for twelve days when thirty-six witnesses gave evidence. This was preceded by the appointment of two persons as ‘inspectors’ by the Minister for Urban Development (administering the Local Government Act), which report was provided to the Committee of Inquiry.

5.19 The question before the High Court in *Matatolu’s case* was ‘whether or not the procedures leading up to and culminating in the dissolution of the Suva City Council denied justice to the plaintiffs’ – eleven members of the Council, which had been dissolved by the Minister for Urban Development who then appointed three administrators, consequent upon the report by the Committee of Inquiry.

5.20 At that time, section 131 of the Local Government Act provided:

131. If, at anytime it shall appear after due enquiry that the revenues of a council are not being properly used in the best interests of the municipality as a whole or that the administration of the affairs of a council is wasteful, inefficient or corrupt or that the council has failed to act in conformity with the provisions of this Act, the Minister may, after such inquiry (at which inquiry the council shall be heard) -

- (a) reduce the amount of any grant payable to the council ...
- (b) dissolve the council and by order name or appoint ...
 - (ii) one or more persons to be administrator or administrators ...
- (c) suspend elections to the council [leaving] all members of the council ... in office for such period as the Minister may determine ...

5.21 It needs therefore to be noted that *Matatolu’s case* assists in defining ‘due enquiry’, however, it (like the current section 130 and 131) relates to ‘the council’ rather (as with sections 25 and 34) to an individual councillor or the mayor.

5.22 As to procedural fairness, His Lordship Chief Justice Grant said that a ‘certain approach’ is required from all persons or tribunals ‘entrusted with the making of decisions’ imposing a liability or that affect the rights or property of others. An approach conforming with ‘our natural sense of justice’ is required. Courts of law, he said, ensure this through ‘rigid procedures ... by no means applicable elsewhere’. He cited the English Court of Appeal in ***Local Government Board v. Arlidge*** (1915) AC 120:

Where ... the question of the propriety of procedure is raised in a hearing before some tribunal other than a Court of law there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice.

In determining whether the principles of substantial justice have been complied with in matters of procure, regard must necessarily be had to the nature of the issue to be determined and the constitution of the tribunal: at 140, per Lord Parmoor

5.23 Grant, CJ went on to observe that the procedures to be followed outside courts are:

... of necessity, ***flexible so as to meet the very varied circumstances that can arise and what constitutes conformity with, or a breach of, the rules of nature justice in one case, may have no bearing on another.*** The rules of natural justice are not an end in themselves, but means to an end, specifically that those responsible for coming to a decision have, in all the circumstances, acted fairly; and each case turns on its own facts: ***Matatolu’s case***, at 13, per Grant, CJ (Emphasis added)

5.24 As to the inspectors’ report (the first step in the process adopted by the Minister for Urban Development):

The inspectors, when examining into and reporting on the financial affairs of the Council were acting as a preliminary fact-finding body; and the sole purpose of their report, which consisted of a detailed analysis and criticism of the accounting system and financial procedures of the Council, was to enable the Minister to decide what further steps, if any, should be taken. ***The report was not made public, and contained no criticism of individual councillors; and in all the circumstances natural justice did not require the inspectors to give the plaintiffs [the various councillors] a hearing or an opportunity of commenting on their report ...:*** at 15, per Grant, CJ (Emphasis added)

5.25 Then, having ‘considered the inspectors’ report, the Minister came to the conclusion that further steps were necessary and decided that an inquiry should be instituted under ... section 131 ...’ At that stage:

I am in no doubt that, quite apart from statutory provision, what is known as the audi alteram partem rule applies to such an inquiry and that the Council had a right to be heard ...: at 15, 16, per Grant, CJ (Emphasis added)

5.26 One of the breaches advanced by the plaintiffs lay in the presentation of the report to the Committee of Inquiry by one of the inspectors. He had not only presented the report formally, but had been ‘examined [by the Committee] on certain aspects of the inspectors’ report and consequently ... the plaintiffs were entitled to cross-examine him [under the regulations passed by the Minister for Urban Development]’. The Committee had refused to recall the inspector when one of the plaintiffs sought to ask him questions. However, this was held not to be a breach,

because when he was called, none of the plaintiffs was (so far as the record showed) denied the right to cross-examine him. The plaintiffs, said His Lordship, ‘must be taken to have been aware of the law, including [the regulations]’, and:

... so long as the ... plaintiff, ... supplied with a copy of the inspectors’ report twenty-six days before the hearing, was not actively prevented from questioning [the inspector] at the time he was examined, no right was conferred on the ... plaintiff either by natural justice or by the regulations to require [the inspector] to be recalled. Counsel for the committee of inquiry stated the matter correctly when he told the ... plaintiff:

[The inspector] having given evidence has been formally discharged. No councillor has any further right to question [him] on matters put before the committee from his evidence: at 17-18, per Grant, CJ

5.27 As for whether the Minister for Urban Development ‘ought to have given the councillors the opportunity to be heard after he had received the report’ of the Committee of Inquiry, and ‘before deciding which, if any, of the alternative courses of action to take under paragraphs (a), (b) or (c) of [then] section 131 of the [Local Government] Act’:

In setting up a committee of inquiry before which the Suva City Council including the councillors had the right to be heard, and in giving full consideration to its report before making his decision, the Minister was acting justly as he was obliged to do, and nothing more of him was required. Being satisfied, as I am, that the inquiry was properly conducted, that the Suva City Council and the councillors, including the plaintiffs, were given a fair opportunity of being heard; and there being no suggestion that the Minister did not give genuine consideration to the comprehensive report of the committee of inquiry, copies of which were made available to the councillors, there can be no question of the councillors being entitled to a further hearing before the Minister made his decision: *Matatolu’s case*, at 18, per Grant, CJ (Emphasis added)

5.28 The conclusion was ‘that from beginning to end’ the plaintiff-councillors ‘were treated fairly’, with the ‘mode of procedure adopted not fall[ing] short of the requirements of natural justice’: at 18

5.29 The third case, *Rajesh Kumar Patel & Ors v. The Minister for Urban Development, Housing & Ors* (Civil Action No. HBJ0010 of 1997L) involved consideration of sections 130 and 131 of the Local Government Act – section 131 in the terms as existed at the time of *Matatolu’s case*. The Applicants, Councillors of Lautoka City Council had (not unlike the situation in *Matatolu’s case*) raised with the Minister for Urban Development concerns they had as to financial affairs at Lautoka City Council. Having had no response when they raised certain matters with the Town Clerk, then putting them to the Mayor, they wrote to the Minister for Urban Development. He then appointed an inspector under section 130, requesting a report. The Applicants cooperated with the inspector, furnishing him with ‘a full report of their grievances’.

5.30 Having considered the report, the Minister for Urban Development appointed a Committee of Inquiry under section 131. The Applicants apparently ‘welcomed’ this – at least initially. The Committee of Inquiry sat at Lautoka, however, on the second day of sitting, some of the Applicants brought Judicial Review proceedings to halt the Inquiry. This was refused. The Committee of Inquiry proceeding, the Applicants made full written submissions, whilst the Lautoka City Council appeared with legal representation. The Committee of Inquiry then reported to the Minister for Urban Development.

5.31 Following his consideration of the Committee’s findings, the Minister dissolved the Council, appointing administrators. Some of the Applicants brought Judicial Review proceedings in respect of this appointment. That application was dismissed. Next, the Applicants challenged the Minister’s actions claiming, amongst other matters, that he had ‘acted unreasonably and unfairly towards [them] by not divulging the Investigator’s ... report to them and inviting their comments’.

5.32 His Lordship Justice Lyons considered the Minister had no such obligation to the Applicants:

Unless it can be established that the Minister’s actions were *mala fide*, and it cannot, his actions in considering the report and then appointing the committee is his function and his alone. In my view the Minister can evoke S130 by his own motion, completely independent of any other person/complainant. In fact I would consider it most unusual if he did divulge the contents of [the inspector/investigator]’s report to any person. The report is surely confidential between the Minister and the Investigator: **Rajesh Kumar Patel’s case**, at 8, per Lyons, J.

5.33 The appointment of a Committee of Inquiry may be done, however, only if the Minister is ‘given reason to believe’ by the report that:

- (i) the Council is in default in respect of its revenues;
- (ii) the administration is wasteful, inefficient or corrupt; or
- (iii) the Council in any other ways has failed to act in conformity with the Local Government Act: s. 131

5.34 The report’s not being before the Court, the Court supposed it was a ‘privileged document between the Minister and [investigator]’. Therefore, ‘I do not know whether nor not all or any of the 3 “limbs” were addressed in it’, however, in agreement with Counsel for the Applicants it was ‘only if all or any of these “limbs” [were] addressed [that] the Minister [could] act’:

To put it another way, he can only appoint the committee of inquiry if the report sufficiently raises one of those 3 ‘limbs’. If he acts on other considerations, the Minister is acting ultra vires: at 8, per Lyons, J.

5.35 The Court said it was ‘unable to find anything in the Minister’s actions, up to and including the appointment of the Committee of Inquiry, which would successfully attract Judicial Review’:

The Committee met and conducted a well-publicised public inquiry. All parties were able to present its case to the Committee. The Applicants put in their submissions. As Councillors they constituted the then LCC. The LCC had legal representation at the inquiry. There is nothing before me to suggest that the ... legal representative was prevented from putting the LCC’s case. Thus, it could be said that as the Applicant-Councillors were in the majority in the LCC, that ... their argument could have been put forward under cover of that of the LCC.

At the conclusion of the Inquiry, a report was submitted to the Minister, who decided to dissolve the Council.

The Applicants' complaint is that the decision to dissolve is unreasonable. Again I do not have a copy of the report of the Committee. But, again, I do not need it.

I return to the Applicant's initial request. If the Committee came to the conclusion that the Applicant's complaint was valid, and finds support for it in the inquiry, then, in my opinion it must be accepted that the Council was not functioning as the Act requires. Thus the Minister had only 2 options in these circumstances –

Either issuing directions – section 131A(a)(a);
Or dissolving the Council – section 131A(1)(c)

Even without knowing the content of the report, the Applicants' very complaint, if found, would bring the Minister to that point. Thus it is difficult conceive that he could have been said to be acting unreasonably or irrationally ...

... I am unable to see any areas where he failed to follow proper procedure ... [He] was asked to intervene. He elected to do so. He properly followed the procedure prescribed by the Act. The Applicants were given ample opportunity to present their views and grievances. I do not consider they were deprived of natural justice ...: at 9, 10, per Lyons, J.

5.36 (e) **'Due Enquiry' – Fiji: General:** As to authorities dealing generally with 'due enquiry' or the requirement for 'inquiry', Counsel for Mr Kumar cites *Seafarers Union of Fiji v. Registrar of Trade Unions* [1989] FJHC 33; [1989] 35 FLR 134 (28 June 1989). Counsel for the Respondents vigorously rejected any application of this case to the present, on its circumstances being clearly distinguishable, particularly as it related to section 13(1)(e) of the *Trade Union Act* (Cap 96), and not to local government.

5.37 Two unions vied for registration. One was approved, one rejected. There was a dispute about membership figures, for the classes and interests to which both catered 'were practically the same', making the 'crucial issue – in fact the only issue – ... as ... which ... *was more representative*': at 3 (Emphasis in original) His Lordship Justice Jesuratanam held that a 'proper enquiry' was required as 'a necessary prerequisite to resolv[ing] the question whether to register the second [union]'. In the absence of such 'proper enquiry', the Registrar 'acted unfairly and unreasonably'.

5.38 Citing *Anisminic Ltd v. Foreign Compensation Commission* [1969] AC 147:

... there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity: at 171, per Lord Reid

Jesuratanam, J. held 'there was no inquiry at all':

The present case is not a dispute between two unions as regards the class of employees it represents. As shown ... the interests sought to be represented are practically the same. It is only a question of which is more representative. It is a question of mere arithmetic. When such is the case, it was the elementary duty of the Registrar to have held an inquiry and investigated into the truth of the claim of membership made by the representative unions. When the proviso to s. 13(1)(e) gave the registrar power to entertain objections he

was also by necessary implication empowered to deal with those objections by, for instance, holding inquiry in the presence of each other. Here the Registrar has not dealt with the objection even in an elementary way. ***It is true that he made a query from each of the two unions. But there was no follow-up. There was no inquiry at all in the real sense.*** The situation demanded an inquiry to verify whether the membership lists were bona fide and fool-proof.

In my view the Registrar's approach to the question was irrational. Lord Diplock remarked in *CVCSU v. Minister for Civil Service* [1985] AC 374, at 411:

Irrationality by now can stand upon its own feet as an accepted ground on which a decision may be attacked by Judicial Review: at 5, per Jesuratanam, J. (Emphasis added)

5.39 Jesuratanam, J. went on to observe that 'nothing whatever' justified the Registrar's decision, 'except for some unauthenticated and uncertified figures supplied by the second [union]'s solicitors. This was not a case of a wrong decision made by the Registrar. The entire decision-making process was tainted and tarnished. The decision has been made without an inquiry. What the Registrar did was not even an apology for an inquiry': at 5 The decision was quashed.

6. Basic Issues in the Present Case

The Applicant, Mr Kumar, says that 'due enquiry' was not carried out before his suspension, so that the decision of the Minister should be quashed. The question then is, taking into account the facts and the authorities, whether there was 'due enquiry' and what that entails vis-à-vis section 25 and 34 of the Local Government Act. For the purpose of leave, the threshold is low. All that needs to be shown is that there is an 'arguable case' to be resolved only by a full hearing of the application for judicial review: *R. v. Legal Aid Board; Ex parte Hughes* (1992) 24 HLR 698

6.1 Hence, if there is an arguable case that there was, here, a lack of 'due enquiry' within the meaning of the term as applicable to section 25 and/or section 34, one step in the requirement for leave is met.

6.2 However, this applies only if the factors militating against grant of leave for judicial review do not apply, namely:

- Other than in 'exceptional circumstances', courts will not grant leave unless a final decision has been reached: *The State v. Public Service Commission; Ex parte Damodaran Nair* (JudRev Action No. HBJ 02 of 2007, 30 March 2007), at 2
- If leave is applied for prematurely, the application will be dismissed: *Ex parte Damodaran Nair; The State v. Commissioner for Magistrates Courts Inquiry Connors and Attorney-General; Ex parte Sayed Mukhtar Shah* (JudRev No. HBJ 47 of 2008, 7 April 2008)
- If an alternative remedy exists, the court has discretion to refuse leave if the applicant has failed to utilise it: *R. v. Secretary of State for the Home Department; Ex parte Swati* (1986) 1 WLR 477; *Ex parte Damodaran Nair*, at 2

6.3 Before addressing those arguments against grant of leave, it is necessary to consider:

- First, which provisions apply – section 25 and/or section 34, or section 130 and section 131.
- Secondly, here the issue is suspension not dismissal – what impact does that have upon ‘due enquiry’ and the Minister’s ‘satisfaction’ (s. 25) and/or the forming by the Minister of an ‘opinion’ (s. 34).
- Thirdly, the extent of ‘due enquiry’ where the office in question is an elected office vs an appointed office: ***Rajendra Kumar Gounder’s case***

7. The Authorities – Sections 25 and/or 34 Applicable

First, it is clear that those two provisions apply here, for Mr Kumar was suspended as councillor and as mayor: it is not a question of any application of sections 130 and/or 131, because those provisions apply to councils as a whole, not to individuals. This is apparent in their terms: ***Rajendra Kumar Gounder v. The Minister for Local Government, Housing, Squatter Settlement & Environment*** (JudRev No. HBJ010 of 2004, 6 October 2004)

7.1 For Mr Kumar it is said that as the Letter of 15 December 2008 (‘the Letter’) is signed by the Permanent Secretary it has no force or effect, because the Permanent Secretary has no powers under sections 25 and 34: this power is confined to the Minister. For the Minister and Permanent Secretary it is said that the Minister, not the Permanent Secretary, made the decision and that this is not countered by its having been conveyed to Mr Kumar by the latter rather than the former.

7.2 The Respondents’ submissions have force. The Letter says the decision was made ‘under the powers vested with’ the Minister. As it is only the Minister who has the power (they are ‘vested’ with the Minister) it follows that the Minister made the decision. In his Affidavit, the Minister affirms that it was he who made the decision. There is no countervailing response to that, and it does not appear to me extraordinary or indicative of any ultra vires action on the part of the Permanent Secretary that he rather than the Minister wrote the letter, or signed it.

7.3 A problem does, however, arise in respect of the Letter. It refers to section 25(2) only. Its precise words in this regard are:

This is to inform you under the powers vested with the Minister for Local Government, Urban Development, Housing and Environment through the Local Government Act Cap 125 Section 25(2) that you are hereby suspended in your capacity as Mayor as well as a Councillor of Nasinu Town Council with effect from today, Monday 15th December 2008: annexure 2, Affidavit of 17 December 2008

7.4 Section 25(2) relates only to a mayor:

Where the Minister is satisfied after due enquiry that the mayor has been guilty of misconduct or is incapacitated from performing his duties or has acted in a manner prejudicial to the interests of the municipality, he may order that the mayor be suspended or dismissed.

7.5 Section 34 must be invoked for suspension or dismissal of a councillor:

Where the Minister is after due enquiry of the opinion that a councillor has been guilty of misconduct or is incapacitated from performing his duties or has acted in a manner prejudicial to the interests of the municipality he may order the suspension or removal of such councillor.

7.6 This is effectively recognised by all parties, in that reference is made to both section 25 and section 34 in submissions. In *Rajendra Kumar Gounder's case*, the mayor was dismissed as mayor, retaining his position as councillor. The distinction there was clear, and 'dismissal' was referable to section 25 alone.

7.7 Insofar as Mr Kumar's position as councillor is in issue, therefore, it would appear he has an arguable case vis-à-vis his purported suspension (as distinct from his suspension as mayor). The Local Government Act clearly envisages a distinction between the two offices – that of mayor (s. 25) and that of councillor (s. 34). A mayor can be mayor only by virtue of having been elected as councillor. That cannot, however, undercut the import of section 34 and its existence alongside section 25.

7.8 If Mr Kumar were to be suspended from both, then the Local Government Act requires 'due enquiry' per section 25 (and 'satisfaction') and 'due enquiry per section 34 (and forming of the requisite 'opinion'). The terms of the Letter do not encapsulate both.

7.9 This is not a question of niceties, but one of statutory exactitude which would appear to be required for the proper suspension or dismissal of a mayor not only from the post of mayor, but from the office of councillor. That both offices are held simultaneously would not appear to abrogate the need for compliance with section 34. Mr Kumar is entitled to rely upon the terms of the Letter as setting out the statutory authority by which the Minister operated or to which the Minister had reference in coming to the decision to suspend him. In the absence of any reference to section 34, it would appear that the Minister did not address its terms in purporting to suspend Mr Kumar as councillor.

7.10 It may be that the Minister complied with section 34 in fact – that is, in addressing his mind to the matter of and undertaking due enquiry (if due enquiry has been undertaken – see below), he formed the opinion required. However, the question is whether as a matter of law he suspended Mr Kumar as councillor in accordance with section 34 – the applicable provision, rather than section 25. The Letter conveys the decision. On the basis of the Letter, the decision for suspension of Mr Kumar as councillor is *ultra vires* because it is said to have been made by reference to section 25(2).

7.11 In making no reference to section 34, there is an arguable case that section 34 has not been complied with insofar as the power of the Minister to suspend Mr Kumar as councillor. Further, there is an arguable case that the Minister acted ultra vires in purporting to suspend Mr Kumar as councillor under section 25(2) of the Local Government Act.

8. The Authorities – 'Suspension' not 'Dismissal'

Secondly, the focus here needs to be upon 'suspension': sections 25 and 34 refer to 'due enquiry' in relation both to suspension and to dismissal. There is clearly a difference. Albeit there is loss of status through suspension, that loss is not final as it is for dismissal. Hence, 'due enquiry' legitimately has a different content or meaning, or need not have the same depth or extent where the outcome is suspension as opposed to dismissal. Both need to conform to procedural fairness, but what meets procedural fairness in the particular circumstance of suspension can (and generally in my opinion does) differ under sections 25 and 34 from what constitutes procedural fairness where dismissal is the outcome.

8.1 (a) **Authorities on ‘dismissal’:** The cases to which the Court has been referred and those the Court has found to define ‘due enquiry’ involve dismissal or termination rather than suspension. It would generally be agreed, and this Court in any event accepts, that ‘suspension’ and ‘dismissal’ or ‘termination’ are qualitatively different and that, therefore, they do not require an identical scope, breadth, width or depth, etc.

8.2 All the medical cases involved the practitioner’s having been ‘struck off’ – that is, the name removed from the register: **R. v. General Medical Council; Ex parte Spackman** [1942] 2 KB 261; **General Medical Council v. Spackman** [1943] 2 All ER 337; **Leeson v. General Medical Council** (1889) 43 ChD 366; **Allbutt v. General Medical Council** (1889) 23 QBD 400;⁵ **Fox v. General Medical Council** [1960] 1 WLR 1017. Hence, the requirement that the person be entitled, for the purpose of ‘due enquiry’ to call witnesses and to have a hearing in person, to be legally represented and so on must be seen against the important distinction: dismissal or termination is final – at least for the term of years (if it is a term of years) applicable to it, and in some (possibly many if not most) instances it will or may be ‘forever’. ‘Suspension’ on the other hand is not final, in the sense that it is or can be an interim step – preliminary to a determination as to a ‘final’ step or outcome (to be preceded by a more ‘in depth’ enquiry to meet the ‘due enquiry’ requirement).

8.3 In **Labouchere v. Wharncliffe** (1879) 13 ChD 346 the outcome was final: expulsion from membership of a club. Again, this is not the same as ‘suspension’, because the consequences are more serious – there is an end altogether of membership rather than suspension of membership with the opportunity of return or the opportunity of a ‘due enquiry’ following the suspension and prior to any final determination as to ending (or not ending) membership entirely. The ‘due enquiry’ here preceded finality.

8.4 As to the local government cases, these relate either to dismissal of councils: **Mataolu v. Attorney-General of Fiji** [1978] FJSC 19; Civil Action 317 of 1977 (23 February 1978) and **Rajesh Kumar Patel & Ors v. The Minister for Urban Development, Housing & Ors** (Civil Action No. HBJ0010 of 1997L) or dismissal of a mayor: **Rajendra Kumar Gounder v. The Minister for Local Government, Housing, Squatter Settlement and Environment** (JudRev No. HBJ 101 of 2004L, 6 October 2004). That is, they do not deal with *suspension*, whether of a mayor or councillor.

8.5 As sections 130 and 131 are prescriptive as to the nature of an investigation and due enquiry, whilst sections 25 and 34 are not, it could be argued that sections 25 and 34 are not intended to, and do not, incorporate any of the indices of ‘due enquiry’ incorporated by explicit reference in the provisions relating to councils (as a whole). This was the view effectively expressed in **Rajendra Kumar Gounder’s case**. On the other hand, in **Baroness Wenlock & Ors v. River Dee Co.** (1887) 19 QBD 155 the English Court of Appeal did not see the spelling out of indices vis-à-vis one provision (s. 57 **Judicature Act** 1873 (UK)), and lack of any spelling out in

⁵ In **Allbutt’s case**, albeit the outcome was that his name was removed from the medical register, it appears that there was contemplation Dr Allbutt would or could continue practising. That is, the English Court of Appeal saw as the or a justification for publishing the report in full (to meet Dr Allbutt’s claim of defamation) was that anyone seeking his services would be apprised thereby that the complaint was of his activities vis-à-vis publication of contraceptive advice: the English Court of Appeal refers to ‘gentlemen’ seeking his services and thereby Dr Allbutt’s effectively being advantaged by the publication, as those gentlemen would be aware that his being struck off was not a consequence of any neglectful or substandard treatment or attention vis-à-vis masculine medical needs. This does not, however, undercut the conclusion that the impact of ‘striking off’ is, like dismissal or termination, of a different quality from suspension.

respect of the other (s. 56 *Judicature Act* 1873 (UK)) as a reason for cutting down the scope of ‘due enquiry’ in the latter. There, the spelling out was through Forms rather than within the terms of the provision itself (unlike the Local Government Act). However, it can provide some guidance in the present exploration of what ‘due enquiry’ means in sections 25 and 34 of the Local Government Act.

8.6 That sections 130 and 131 are prescriptive and sections 25 and 34 are not does not, in my opinion, mean that the scope of the latter ‘due enquiry’ is or is necessarily curtailed. Rather, as set out earlier, the basic principles to be applied in determining what ‘due enquiry’ means must take into account:

- the circumstances of the case and the purpose of the legislation or provisions in issue; and
- the import and/or effect of the outcome of any decision said to be based in ‘due enquiry’; and
- taking these into account, the ‘reasonableness’ of the steps taken; and
- that the steps taken are genuine –
 - there is genuine or a genuine enquiry;
 - no *mala fides* are involved.

8.7 Here, no dismissal has been effected or purported to be effected. What the Letter refers to is ‘suspension’. Albeit ‘suspension’ and ‘dismissal’ appear in the same provisions – section 25 and 34 – this does not mean, in my view, that ‘due enquiry’ must mean the same and must be applied in the same scope, breadth, etc for both ‘suspension’ and ‘dismissal’. Clearly, there are different consequences. The one is far more severe than the other – dismissal means an end to the individual’s holding office as mayor (s. 25) or as councillor (s. 34). Suspension means an hiatus in the individual’s holding such office. That hiatus will generally precede a ‘due enquiry’ into whether the individual’s holding of the office will be ended by dismissal, or the suspension will be lifted because ‘due enquiry’ results in vindication.

8.8 At the same time, whilst accepting that there is a difference in the impact, import or effect, suspension is not inconsequential. For an individual who holds elected office – of councillor, and of mayor by reason of having been elected to the post of councillor then coming into the office of mayor – suspension brings with it possible (and highly likely) humiliation, loss of face, loss of self-esteem, infringement of dignity, implications of having been involved in nefarious conduct and even criminality. It brings with it a contention that the person has damaged the democratic process and brought shame to it through betrayal of the electorate. Consequences come, too, in family relationships and general community standing of the individual and her/his family. Children, in particular, can be seriously affected through taunting at school and on the street and in the neighbourhood generally. At the same time, these are not equal to what accrues when a mayor or councillor is dismissed: the latter brings with it certainties that the former does not. In addition, suspension’s being followed by a process that precedes dismissal or vindication means that the ‘due enquiry’ for the former need not be the same as ‘due enquiry’ for the latter.

8.9 (b) **‘Due enquiry’ for suspension:** What has occurred in the present case?

8.10 Mr Kumar says he has been provided with ‘no evidence ... in respect of [the] allegation’ made in the Letter of 15 December 2008, namely:

The ground of your suspension is based on certain concrete evidences produced by the Fiji Independent Commission Against Corruption (FICAC) for acting in a manner prejudicial to the interests of the Nasinu Town Council: Affidavit, 17 December 2008, para 3

8.11 He observes that the Letter goes on to say:

At this stage FICAC is still in the process of completing its investigation against you ...

8.12 Mr Kumar says, therefore, it is 'quite clear that nothing has been finalised and the letter by the 1st Respondent ... is nothing more than harassment of an elected municipal councillor and mayor': Affidavit, 17 December 2008, para 4

8.13 On the other hand, the Minister says Mr Kumar is apprised of the matters leading to his suspension. In his Affidavit of 12 January 2009, the Minister traverses what appears to have been a relatively lengthy process of inquiry into the affairs of Nasinu Council. This commenced under a former Minister for Local Government, Urban Development, Housing and Environment, continuing under a subsequent Minister and up to the present Minister:

8.14 The form and content of the Letter is raised by Mr Kumar for consideration, and the Court returns to it later. At this point, however, it is important to note what constitutes 'due enquiry' on the part of the Minister for the purposes of section 25 (and 34). That Mr Kumar has knowledge of reasons for the suspension albeit all is not disclosed in the Letter arises from the Minister's Affidavit:

August 2006 –

Minister appoints Deputy Secretary as inspector to inquire and investigate the Council's affairs, preparing a report on the findings 'regarding various allegations from ratepayers and publications in the newspapers in relation [thereto]'. Before the Deputy Secretary's appointment, responses from the Council sought - at that time Mr Kumar is Mayor. Copy of report provided to Mr Kumar, all other councillors, and the Town Clerk 'with sufficient opportunity to provide their comments': Affidavit, 12 January 2009, paras 3-5

October 2006

Committee of Inquiry appointed to 'further investigation the allegations in the report': para 6

December 2007

Minister for Local Government (following on from the former) dissolves Nasinu Town Council, appointing two administrators after receiving a copy of the Committee of Inquiry report: Affidavit, 12 January 2009, para 7

December 2007

Nasinu Town Council, including Mr Kumar as Mayor, institutes Judicial Review, resulting in dissolution being 'withdrawn' (para 9) and copy of Inspector's report provided to Mr Kumar and other councillors 'for their comments before making a decision under the [Local Government] Act': para 9

February 2008

Copy of Inspectors' report forwarded to Nasinu Town Council, Mr Kumar and other councillors for their comments. Responses required within 14 days; received in March: Affidavit, 12 January 2009, paras 11 and 12

August 2008

(Former) Minister for Local Government decides 'all complaints against municipal councils, including the Nasinu Town Council, be referred to [FICAC] ... for appropriate investigation and prosecution ... [N]o decision was taken by the Minister at that stage, pending appropriate investigations by FICAC': para 13

12 December 2008

Letter to present Minister from Deputy Commissioner of FICAC that Mr Kumar and another person (accountant) 'charged by FICAC' and further investigations into Nasinu Town Council affairs being conducted by FICCA and continuing:

... documents, which were apparently relevant to further FICAC investigations, were still in the possession of Nasinu Town Council, the mayor and the accountant. FICAC recommended to [the Minister] that the mayor and the accountant be kept out of bounds of the premises of the Nasinu Town Council': Affidavit, 12 January 2008, paras 15-16

December 2008

Minister decides Mr Kumar should be suspended as mayor and councillor:

... as an interim measure, pending further investigations by me to determine whether [Mr Kumar] should be dismissed under the Act, as the mayor and councillor of Nasinu Town Council: at para 17

8.15 Mr Kumar objects to the inclusion of this history and the reports upon the basis that the former Minister had already made decisions consequent upon those reports, and says that the present Minister is disentitled from taking the earlier report/s into account in making a determination to suspend. He says the Minister is estopped from doing so, citing *Commonwealth v. Verweyan* (1990) 170 CLR 294, or that there has been a 'waiver' precluding the Minister from relying or taking into account the earlier report/s. This is put forward on the basis that the former Minister set up a Committee of Inquiry and did not suspend or dismiss Mr Kumar at that time. Further, it is said that as the reports were made under section 131, then Mr Kumar's suspension cannot be made under section 25 (or 34) but must be referable to sections 130 and 131.

8.16 As to estoppel or waiver, the Minister says: 'From the records, I have ascertained that no decision was taken by the Minister [in August 2008], pending appropriate investigations by FICAC': Affidavit, 12 January 2009, para 13 The history also shows that there was an intervention of Judicial Review proceedings, leading to the steps taken by the Minister. In any event, to succeed on estoppel, Mr Kumar would have to show he relied upon the former Minister's action or approach to dealing with the report/s, and suffered a detriment in so doing. That is, he has to show that the detriment claimed arises out of a reliance he placed upon the Minister's action or approach as he asserts it. To succeed on waiver, he has to show that the Minister's action or approach as he asserts it was such as to abandon the right to take any other action in respect of the report/s – such as, now, having relied upon those reports (amongst other matters) as a part of the 'due enquiry' by the (present) Minister into whether he should suspend Mr Kumar. This does not appear to be confirmed on the material before the Court.

8.17 As to the report/s having been secured under sections 130 and 131, it does not appear to me that this precludes their use in respect of action taken under sections 25 and/or 34. If an investigation or inquiry instituted under the former provisions results in report/s showing conduct on the part of a councillor or mayor, or individual councillors (not all or ‘the Council’) requiring action vis-à-vis those individuals, then the Minister is bound to take action. That action must be taken under sections 25 and/or 34. Not to take action in the face of report/s showing conduct requiring it would be for the Minister to be derelict in her/his duties.

8.18 Insofar as ‘due enquiry’ for the purpose of section 25, taking into account the history as set out by the Minister in his Affidavit, the material indicates a conformity on the Minister’s part for the forming of ‘satisfaction’, as related to ‘suspension’. Had section 34 been referred to in respect of suspension of Mr Kumar from his position as councillor, then the same would or could be likely to apply to it in regard to ‘due enquiry’ and the forming of his opinion.

8.19 This is not a case where, as in *Seafarers Union of Fiji v. Registrar of Trade Unions* [1989] FJHC 33; [1989] 35 FLR 134 (28 June 1989), there was ‘no enquiry at all’. Nor is it akin to *R. v. Phipps; Ex parte Alton* [1964] 2 QB 420 where there was ‘no step taken’. Before suspension, Mr Kumar:

- Had notice of the matters which gave rise to the initial report of the Deputy Secretary appointed in August 2006 – according to the Minister for Local Government, prior to appointing the Deputy Secretary, responses were sought from the Council (when Mr Kumar was mayor) regarding ratepayer allegations and newspaper publications: Affidavit, 12 January 2008, para 3
- Was provided with a copy of the report of the Deputy Secretary with ‘sufficient opportunity to provide ... comments’: para 5
- Received a copy of the report of the Committee of Inquiry appointed in October 2006, in consequence of which Nasinu Town Council was dissolved in December 2007: paras 6-10
- Provided responses (from himself as Mayor, and from Nasinu Town Council) in March 2008 to that report: para 12

8.20 There was afforded to Mr Kumar ‘a fair opportunity to be heard’ and a ‘proper consultation’. There is nothing to suggest that there was no ‘genuine listening’ or a ‘sham or a farce’ constituted by the opportunities provided in respect of the Deputy Secretary’s report and the Committee of Investigation’s report. True it is that the latter consultation came about only as a consequence of the Council’s taking judicial review action. However, a purpose of judicial review action is to secure a fair hearing. If a hearing comes about subsequent to such action, then simply because it took legal action to effect such a hearing cannot then be said to undercut the validity or fairness of the hearing. What must be looked at is the nature and quality of the hearing itself and, as noted, there is nothing in the material to undercut the hearing afforded.

8.21 All this was available to be taken into account by the Minister in arriving at ‘satisfaction’ in accordance with section 25 of the Local Government Act. According to the Minister’s Affidavit, he did so. There is nothing to contradict his having done so.

8.22 As to the matters raised in *Rodney Bragg v. The Greyhound Racing Authority (NSW)* [2003] NSWSC 103 (27 February 2003), this related to a final outcome, rather than a preliminary or precedent outcome as in the present case. Counsel for Mr Kumar raises concerns about the reference, by the Minister, to FICAC matters. There is, however, no material before the Court to indicate that procedural fairness was breached in the ways found by Dowd, J. in *Rodney Bragg's case*. Concerns about FICAC material can be raised by Mr Kumar in the course of 'due enquiry' when embarked upon for the Minister's determining on dismissal or not. Counsel for Mr Kumar put before the Court the provisions of the New South Wales legislation where specific reference is made to the Independent Commission Against Corruption (ICAC) and material emanating from that body. Counsel's submission that consideration could be given to incorporating similar provisions into the Local Government Act has merit. However, for the purposes of the present application, that such provisions do not exist does not mean Mr Kumar's rights have been breached through the Minister's reference to FICAC material for 'due enquiry' preceding suspension.

8.23 Further at suspension stage, where this is preliminary to the forming of 'satisfaction' (or an 'opinion') after 'due enquiry' on dismissal (per ss 25 and 34), as here, 'due enquiry' does not in my opinion require a personal hearing – that is, in the sense of 'in person'. In *Rajendra Kumar Gounder's case* it was said that the nature of the enquiry 'depends on the circumstances of the case' and it was not necessary in every case that the person be 'given a personal hearing': at 7 What happened here is 'due enquiry' taking into account 'the circumstances of the case': suspension, not dismissal. 'Due enquiry' 'accommodates to the circumstances of the case ... ': *Slinn v. Nominal Defendant* [1964] HCA 72; (1964) 112 CLR 334 (17 November 1964), per Barwick, CJ Mr Kumar was in fact given a 'personal hearing' (though not 'in person') in that he had the opportunity (which he took according to the Minister's Affidavit) to respond to the Deputy Secretary's report, then to the Committee of Inquiry's report.

8.24 The requirements here may be equated at least in some way to the committal or preliminary enquiry versus trial, as in *The State v. Francis John* (No. 54 of 2001, 21 May 2002) – High Court of Trinidad and Tobago, referred to by Counsel for Mr Kumar. What must be decided by a court at the committal or preliminary enquiry stage is 'whether on the whole of the evidence there is material which if believed would support the basic elements of the charge': at 6 There is no full trial as when a person is tried for a criminal offence – albeit procedural fairness must be met. In the present situation of due enquiry in respect of suspension, this requires the Minister to undertake due enquiry and to be 'satisfied' or form an 'opinion' on the basis of such due enquiry as apposite for the purpose of deciding on suspension – or not. It is then, if suspension is the outcome – that 'due enquiry' relevant in scope and breadth comes into play for the purpose of a determination by the Minister as to 'satisfaction' and 'opinion' for dismissal.

8.25 Mr Kumar was not given an opportunity directly by the Minister to respond to any material or queries put forward personally to him by the Minister. However, the investigations and reports resulting from them were instigated by the Minister and carried out under his auspices (or those of his predecessors). Mr Kumar knew – from the reports - and responded.

8.26 'Due inquiry' does not mean that the Minister must personally seek out a response from the councillor or mayor under section 25 or 34. Nor does it mean that before making a decision under those sections the Minister has to conduct a personal investigation or seek a personal response after having read and considered the report/s. 'Due inquiry' on the Minister's part involves the Minister in applying her/his own mind to what is in the report/s – and here, the report/s were compiled by reference to input by the councillors, including Mr Kumar and/or were open to comment and response from them. In my opinion, it is fair to accept that the Minister in

making his decision – as a part of ‘due enquiry’ – considered that comment and response. Again, there is nothing before the Court to countermand this.

8.27 Here, the Minister having all the foregoing information before him, it cannot be said that there was ‘irrationality’: *Seafarers Union of Fiji v. Registrar of Trade Unions* [1989] FJHC 33; [1989] 35 FLR 134 (28 June 1989) or Wednesbury unreasonableness: *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223

8.28 **Insofar as the foregoing is in issue, that the ‘due enquiry’ was directed to suspension, not dismissal, there does not appear to me to be an arguable case that procedural fairness was denied to Mr Kumar in the forming of the Minister’s ‘satisfaction’ upon the ‘due enquiry’ undertaken by the Minister per section 25.**

8.29 (c) **‘Due enquiry’ for dismissal:** The Minister for Local Government says the suspension is ‘an interim measure, pending further investigations by me to determine whether [Mr Kumar] should be dismissed under the Act, as the mayor and councillor of the Nasinu Town Council: Affidavit, 12 January 209, para 17

8.30 He states again:

I wish to reiterate that the decision to suspend [Mr Kumar] as the mayor and councillor of the Nasinu Town Council is an interim decision, as I intend to direct that a thorough inquiry ... be carried out in order for me to determine whether [Mr Kumar] should be dismissed from the position of mayor and councillor, pursuant to the provisions of the Local Government Act. No doubt, in this inquiry, [Mr Kumar] and all other relevant persons will again be provided with full opportunity to be heard during the inquiry process: at para 21

8.31 At that stage, being a question of dismissal (or not, as the case may be), ‘satisfaction’ and ‘opinion’ must be based upon a ‘due enquiry’ more substantial and extending more depth, breadth or width than required for suspension. In *Rajesh Kumar Patel & Ors v. The Minister for Urban Development, Housing & Ors* (Civil Action No. HBNJ0010 of 1997L) councillors were given the opportunity of appearing in person, making representations and the Council had the opportunity of being legally represented. That was before a Committee of Inquiry. It was also the full council rather than an individual councillor or mayor being at risk of dismissal. However, I do not accept that an individual councillor or mayor would have fewer rights vis-à-vis ‘due enquiry’ where at risk of dismissal than would a full council. Indeed, where one individual is the focus, consequences may be greater and hence there may be cause for a greater scope being given to ‘due enquiry’. That is, where a full council is suspended or dismissed, ‘everyone’ is treated the same and there is no individual whose reputation suffers or whose rights are affected as an individual. When only one party is the subject, however, there individual reputation and rights are in issue.

8.32 In *Matatolu v. Attorney-General of Fiji* [1978] FJSC 19; Civil Action 317 of 1977 (23 February 1978) His Lordship Chief Justice Grant noted there was, in the report in question, ‘no criticism of individual councillors’. This was a factor in his determination that ‘in all the circumstances natural justice did not require the inspectors to give the plaintiffs [the various councillors] a hearing or an opportunity of commenting on their report ...’: at 15

8.33 Where there is criticism of individual councillors or an individual councillor, or a report or enquiry is made in respect of an individual councillor (or mayor) then the circumstances would appear to require that there be such an opportunity afforded to that or those individuals.

8.34 *(d) Timeframe applied to 'due enquiry' or upon which 'due enquiry' is based:* A caution must be sounded in the present case, however. The procedure – as noted commencing in or about August 2006 - has been protracted. Mr Kumar cannot be blamed for feeling aggrieved at the length of the process. It is understood that processes in government can take time. This is particularly so where there is a need to be fair and to take into account the views and responses of persons affected by government action or possible government action. At the same time, investigations into affairs at Nasinu Town Council have been ongoing, on the Minister's recitation, since August 2006. The abortive dissolution of Nasinu Town Council occurred more than one year later – December 2007. The proceedings for judicial review resulted in relatively swift action in that the Inspector's report was provided in February 2008 and one month later (March 2008) responses were received. However, it took from March 2008 to August 2008 for referral to FICAC to occur – that is, for 'appropriate investigation and prosecution' to be instituted.

8.35 On the other hand, government processes cannot be expected to be rapid where investigation and enquiry into matters relating to finance, bureaucratic process of local government, allegations of wrongful conduct or mismanagement, etc raising complexities are in issue. Time has to be taken to ensure that investigations and enquiries are properly instituted and managed. Ultimately, this benefits all: a precipitate enquiry carried out with injudicious expedition which required reversal of a wrong outcome would be lamentable. It would not advance the interests of government, the community, nor those directly affected.

8.36 This is no doubt why the Local Government Act provisions – ss. 25, 34 and 130 and 131 – incorporate suspension and dismissal – so that initial steps may be taken and investigations and enquiries instituted, with suspension as a preliminary outcome pending further and more detailed investigations and enquiries. This also provides a basis, as regards 'due enquiry', for a distinction vis-à-vis its application to suspension and dismissal. This is anticipated by the Minister for Local Government in his Affidavit.

8.37 A two-step process ensures that records and documents are preserved for a more indepth enquiry, particularly into matters financial, bureaucratic processes and management. Hence, 'due enquiry' for suspension may in such circumstance require less than 'due enquiry' for dismissal (whilst always adhering, of course, to due process). The urgency that can arise when documents and records are at risk or potentially at risk – particularly computer records which can be damaged or destroyed or corrupted with a rapidity that did not, or does not, exist for 'hardcopy' or paper records – will in some circumstances at least dictate relatively rapid decision-making as a first step.

8.38 This did play a part in the Minister's action: Affidavit, 12 January 2009, para 20

8.39 *(e) Accuracy of advice vis-à-vis suspension:* The Letter of 15 December 2008 in its advice to Mr Kumar not only omits reference to section 34. It does not fully adumbrate the reasons upon which the Minister now relies for Mr Kumar's suspension.

8.40 The Letter was spare in its terms. These need to be repeated here, for they form the basis of the suspension insofar as Mr Kumar was informed of his suspension 'with effect from ... Monday 15th December 2008':

The ground of your suspension is based on certain concrete evidences produced by the Fiji Independent Commission Against Corruption (FICAC) for acting in a manner prejudicial to the interests of the Nasinu Town Council.

At this stage FICAC is still in the process of completing its investigation against you. Therefore in the interest of the Council you are hereby directed to cease performing all your municipal duties and to keep yourself out from entering into any council premises or interfering with any council business forthwith. Council's properties and assets including vehicle, mobile phone, computer etc under your control are to be handed over to the Town Clerk as from today.

You are to comply with this instruction immediately: Annexure 2, Affidavit, 17 December 2008

8.41 Mr Kumar complains 'no evidence' was provided to him in respect of the 'basis of suspension' appearing in the first quoted paragraph.

8.42 In the present application, the Minister says that in making his decision to suspend, he:

- Noted the contents of the report of the Deputy Secretary appointed in August 2006 by the then Minister for Local Government: Affidavit, 12 January 2009, para 5
- Considered the report of the inspector ... prepared in response to various allegations of misconduct in the Nasinu Town Council: para 18 – this is understood to be the report of the Committee of Inquiry appointed in October 2006 (para 6) which reported in December 2007 (para 7) copy of which was provided to Mr Kumar and other councillors in February 2008 (paras 9, 10) and to which responses were received (paras 11, 12)
- Took note of the fact that Mr Kumar 'has been charged with criminal offences by FICAC, and that further criminal investigations are currently being conducted by FICAC into the Nasinu Town Council, including the mayor, the councillors and other officials of the Nasinu Town Council': para 19

8.43 According to the Minister, he made due enquiry by reference to those matters and made his decision upon that basis. That he took into accounts reports, etc does not mean that he did not make his own enquiry as required by sections 25 (and 34): he is entitled to and indeed one could say must refer to them. That is a part of 'due enquiry'. Then it is his satisfaction and opinion based upon the 'due enquiry' he made in regard to the reports that is required. There is nothing to contradict that he did this.

8.44 However, Mr Kumar was entitled to know – with accuracy as now elicited - the basis upon which the Minister 'was satisfied' within the meaning of section 25. In the sole reference to FICAC, Mr Kumar was not informed of that upon which the Minister based his satisfaction. The lack of this provision in the Letter means that Mr Kumar was denied clarity as to the basis for his suspension.

8.45 Realistically, taking into account the history and the information provided to him during the course of the various investigations and reports, it is fair to say that Mr Kumar will have been aware of the matters before the Minister and which the Minister took into account for 'due enquiry' and forming 'satisfaction'. Nonetheless, Mr Kumar should not have to 'guess' which

matters are those upon which the Minister relies for his decision to suspend the mayor as mayor and, as the Letter says (albeit without invoking section 34), as councillor – that is, the reports and other matters he took into account.

8.46 However, is this a matter for Judicial Review? This is more a matter referable to Freedom of Information legislation (in the event it existed), the principles underpinning such legislation, or ‘good administration’ in a general sense. That is, in the present circumstance ‘the right to know’ for the purpose of Judicial Review derives from the right a person has to be able to respond effectively to charges or contentions of indiscipline, wrongful conduct, misconduct, etc. The Letter was not provided to Mr Kumar for this purpose – which is the next stage (see below) but to inform him of a decision taken on the basis of a ‘due enquiry’ already conducted.

8.47 Even if there could be an arguable case that procedural fairness was breached in Mr Kumar’s not being advised accurately in the ‘Letter of suspension’ of what the Minister took into account in his ‘due enquiry’ and reaching ‘satisfaction’ under section 25 (or forming his ‘opinion’ were section 34 invoked), or his being inaccurately advised, the question then arises whether granting leave would afford Mr Kumar any benefit. The defect has arguably been remedied by the Minister’s Affidavit and its full explication of all the matters he took into account. Hence, there is no proper basis upon which leave can be granted in respect of this aspect.

8.48 As to ‘certain concrete evidences’ asserted in the Letter, although Mr Kumar’s dissatisfaction (and genuine discomfort) may be understood, there may be reasons why, at this stage, those actual matters are not spelled out. Procedural fairness calls for clear and explicit advice as to ‘charges’ or actual matters or incidents to which a party must respond or may respond, however, this occurs at the second stage under sections 25 and 34. That is not the stage reached by suspension. The Letter is not for the purpose of initiating ‘due enquiry’ in respect of possible dismissal. It is to advise of suspension.

8.49 At the next stage – that of ‘due enquiry’ as to whether or not dismissal follows - Mr Kumar should be fully informed of the actual matters the Minister will ‘duly enquire’ upon or which will be investigated for the purpose of ‘due enquiry’. Mr Kumar has that right. At that stage, obviously it would not be sufficient for the Minister to say, effectively, ‘Mr Kumar knows’ because of all that has passed in terms of the investigations and reports. Nor would it be sufficient for the Minister to decline to spell out precisely the ‘concrete evidences’ upon which he intends Mr Kumar to be investigated, or to which Mr Kumar is required to answer.

8.50 As His Lordship Justice Byrne said in *State v. Public Service Commission; Ex parte Oveti Laladidi* (JudRev No. 17 of 1992, 19 July 1995), where the decision to discipline was ‘based on [a] charge which ... fails to identify with precision the provisions of Regulation 36 which [he was] alleged to have breached and ... fails to state without ambiguity the precise nature of the charge and the facts [constituting] it’, it should be quashed as a nullity. Mandamus should issue to reinstate the Applicant, Mr Laladidi: at 12 This does not apply to Mr Kumar in the present circumstances, for the Letter is not directed to this purpose. When he is asked to respond vis-à-vis ‘due enquiry’ for possible dismissal, then the document instituting this process must ‘identify with precision ... and without ambiguity the precise nature of the charge/s and the facts constituting it/them’.

8.51 In all the circumstances, it appears to me that there is no arguable case that procedural fairness was breached by a failure to spell out the ‘certain concrete evidences’ in the Letter – this is a matter for ‘due enquiry’ preceding a possible dismissal and

‘satisfaction’ or the forming of the requisite ‘opinion’ under section 25 (as to Mr Kumar as mayor) and 34 (as to Mr Kumar as councillor).

9. The Authorities – Democratically Elected Office

Thirdly, does the fact that a councillor is a person elected democratically mean that the extent or scope of any ‘due enquiry’ should be greater than if the person subject to a suspension is not democratically elected?

9.1 In *Rajendra Kumar Gounder v The Minister for Local Government, Housing, Squatter Settlement & Environment* (JudRev No. HBJ 010 of 2004L, 6 October 2004) a distinction was drawn between termination of a person’s office as mayor, whilst that person remained in place as councillor. Councillors being democratically elected, whilst their fellow councillors chose mayors, the impact on the democratic process was less, said His Lordship Justice Singh. There, the decision was to dismiss the mayor as mayor, however, he remained as a councillor. The Court said:

Replacing duly elected councillors by ministerially appointed administrators usurps the democratic process as citizens’ nominees are got rid of. It is for this reason that because of the possible severe consequences that the enquiry into affairs as to be equally thorough.

The consequences of section 25 enquiry are not so drastic. It only alters the position of a councillor as a mayor. The mayor ceases to be a mayor but still remains a councillor. The citizens of a municipality do not choose the mayor; the mayor is councillors’ choice. As the consequences of section 25 enquiry are not as severe as those under section 130, the statute itself does not state the exact nature which the enquiry must take. An enquiry under section 25 need not be as comprehensive as that conducted pursuant to sections 130 & 131. It is for the minister to decide the nature of the enquiry and its extent ...: at 5, per Singh, J.

9.2 Singh, J. was addressing the distinction between sections 130 and 131 and section 25 of the Local Government Act, propounding an explanation for the setting out in the former of detailed steps constituting ‘due enquiry’. However, where a sole councillor were being removed or suspended (as under section 34), then because that individual holds an elected office, Singh, J.’s strictures as to the need for greater scope or depth in that required by ‘due enquiry’ follow.

9.3 In the present case, the Letter refers to both Mr Kumar’s position as mayor and as councillor. Counsel for Mr Kumar raised in oral submissions a contention that the position of a councillor is different from that of a public servant, referring to the *Constitution*.

9.4 In *Rajendra Kumar Gounder’s case* recognition may have been by reference generally to the concept and principle of democracy and/or to provisions in the *Constitution* effectively recognising local government – not positively, in the creation or explicit recognition of local government as such, but by implication or in acknowledgement of its existence in, for example:

Electoral Commission Provisions

The Office of Supervisor of Elections which is established under the *Constitution* conducts House of Representatives elections and ‘such other elections as the Parliament prescribes’: s 79

The Electoral Commission ‘has such other functions as are conferred on it by a written law’: s. 78(3)

Local government is specifically referred to in that ‘a member of a local authority’, a ‘local government officer’ and a ‘candidate for election to ... a local authority’ are precluded from being appointment as members of the Electoral Commission: s. 78(9)

Independent Service Commissions

Other restrictions upon persons who are local authority members appear in section 145: a person is Constitutionally disentitled from reappointment as a member of an ‘independent service commission’ (Constitutional Offices Commission, Discipline Services Commission or Public Service Commission) if s/he is or has at any time during the immediately preceding 3 years been:

- ‘a member of either House of the Parliament or a member of a local authority or of another representative body prescribed by the Parliament’: s. 145(1)(a)
- a ‘candidate for election as a member of the House of Representatives, a local authority or of another representative body prescribed by the Parliament for the purposes of this Section’: s. 145(1)(b) or
- ‘a local government officer’: s. 145(1)(e)

9.5 The ***Constitution*** makes specific provision for secret ballot in elections to the House of Representatives: 36 It makes no reference to voting for local government whether by secret ballot or otherwise. The provisions referring to ‘local government’ are dependent upon local government existing, in that if there were no local government, then those persons precluded from office, etc through being members would not exist. Further, the Electoral Commission’s conducting or supervising elections for local government is dependent upon Parliament, through legislation. However, the very existence of the provisions acknowledging members of local authorities and ‘local government officers’ provides a Constitutional recognition to the existence of local government.

9.6 This Constitutional presumption is compounded through section 3 of the ***Constitution*** in its provision that interpretation of the ***Constitution*** requires:

- a construction what would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, in preference to a construction that would not promote that purpose or object; and
- regard to be had to the context in which this Constitution was drafted and to the intention that constitutional interpretation take into account social and cultural developments, especially:
 - developments in the understanding of the content of particular human rights; and
 - developments in the promotion of particular human rights.

9.7 The Universal Declaration of Human Rights recognises the right of ‘everyone’ to ‘take part in the government of her or his country, directly or through freely chosen representatives ... through universal and equal suffrage’: ***Article 21*** The International Covenant on Civil and Political Rights recognises civil and political rights, ‘including participation in the conduct of public affairs, directly or through feely chosen representatives, and to vote by universal and equal suffrage’: ***Article 25***

9.8 In *Ali v. Nausori Town Council* [2008] FJCA 99; ABU123.2006S (15 April 2008) the Court of Appeal observed that there is ‘no Constitutional provision for local government’ in Fiji, that local government ‘is a creature of statute’,⁶ and that the right to vote in local government elections ‘is not a human right’. This may need to be revisited by reference to the above noted provisions and international treaties and conventions (relating to civil and political as well as human rights) which appear to give force to the principle espoused in *Rajendra Gounder’s case*. At the same time, experience in local government may confirm a need for supervisory oversight beyond the electoral process.

9.9 Mr Kumar has suggested that the conduct of the Minister in effecting the provisions of the Local Government Act breached the *Constitution*. The Respondents resist this contention vigorously. The above provisions are not referred to in this context; they do not relate to any contention of a lack of adherence to Constitutional requirements, or otherwise. Rather, the question here is what impact, if any, does a councillor’s holding an elected office have upon the Minister’s ‘due enquiry’ obligation?

9.10 Taking into account *Rajendra Gounder’s case*, ‘due enquiry’ vis-à-vis section 34 may require the Minister to take into account that a councillor holds office by reason of the ballot and this would be a factor to be weighed along with all other relevant matters. Indeed, the Minister alludes to this in observing that the ‘municipal councils ought to play an important and transparent role for and on behalf of the ratepayers’, whilst noting that where there are ‘allegations of abuse of office and misconduct by any mayor or councillor then such allegations must be investigated and necessary action must be taken in accordance with the law, including the Local Government Act’: Affidavit, 12 January 2009, para 32

9.11 Whatever the case in that regard, the absence of reference to section 34 (relating to (elected) councillors) in the Letter of 15 December 2008 as the basis for Mr Kumar’s suspension has already been referred to as an arguable ground.

10. Considerations Militating Against the Grant of Leave

Fiji Public Service Association v. Civil Aviation Authority of Fiji and Attorney General of Fiji and Airports Fiji Limited (JR No. 015 of 1998L, 30 November 1998) adopted the proposition that wherever any body of persons ‘has authority conferred by legislation to make decisions’ whether judicial, quasi-judicial or administrative, a court can make an order to quash that body’s decision:

- for error of law in reaching it; or
- for failure to act fairly towards the person to be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded him by the rule of natural justice of fairness, viz –
 - to have afforded him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it; and

⁶ As a matter of judicial notice, the place of local government has been subjected to vigorous debate and submissions to Constitutional Inquiries in Australia, calling for Constitutional reform to recognise it fully as the ‘third arm’ of government (in Australia, federal, state and local), particularly under the 1980s Hawke Government when the then Attorney-General, the Hon. Lionel Bowen established such an Inquiry as a consequence of which a number of referenda were put to the Australian people.

- to the absence of personal bias against him on the part of the person by whom the decision falls to be made: *O'Reilly v. Mackman* [1983] 2 AC 237, at 279, per Lord Diplock

10.1 However, Judicial Review has its limitations. These are clearly set out in the authorities, including *The State v. Public Service Commission; Ex parte Damodaran Nair* (JudRev Action No. HBJ 02 of 2007, 30 March 2007); *State v. PSC; Ex parte Penisai Kunatuba* (HBJ 18 of 2002); *Divendra Bijay v. Permanent Secretary for Education, Women and Culture* (HBJ 5/97). As observed, the Respondents and Interested Party say this application for leave should be refused on the basis that it is premature, and that no final decision has been reached.

10.2 (a) *No final decision reached:* In *The State v. Public Service Commission; Ex parte Damodaran Nair* (JudRev Action No. HBJ 02 of 2007, 30 March 2007) it was said:

The law is clear. Except in exceptional circumstances, the courts will not review proceedings of inferior tribunals until a final decision is reached. Here the proceedings have only reached the investigatory stage. It is granted that disciplinary powers must be exercised under the rules of natural justice but the High Court will not by its intervention take away statutory powers entrusted to a body or authority: *Ex parte Damodaran Nair*, at 2, per Singh, J., citing *State v. PSC; Ex parte Peniasi Kunatuba*

10.3 This appears to be unarguable. The 'investigatory stage' leading to suspension has been completed by suspension. However, as the material before the Court shows, the investigatory stage is continuing (or has commenced) for the purpose of enabling the Minister to determine upon dismissal or otherwise.

10.4 The provision under which the decision to suspend was made – section 25(2) – in itself indicates that the final stage has not been reached, in its provision for suspension and for dismissal. The decision to suspend, not to dismiss is a preliminary step. Mr Kumar will have his opportunity as the Minister proceeds with 'due enquiry' to determine whether or not to dismiss Mr Kumar as mayor (and/or councillor). As previously observed, the Minister has stated he 'intend[s] to direct ... a thorough inquiry to be carried out in order' for him to 'determine whether [Mr Kumar] should be dismissed from the position of mayor and councillor, pursuant to the provisions of the Local Government Act'. The Minister has affirmed that 'no doubt' Mr Kumar and 'all other relevant persons' will 'again be provided with full opportunity to be heard during the inquiry process': Affidavit, 12 January 2009, para 21 This is reiterated when the Minister says further that 'the Ministry 'will ... conduct further inquiries to determine whether [Mr Kumar] should be dismissed': at para 27

10.5 If this follows, then Mr Kumar's suspension is indeed 'not final'. Upon that basis, the application should be dismissed.

10.6 However, as was said in *Tikoduadua v. Human Rights Commission; Ex parte Tuiwawa (No. 1)* [2008] FJHC 353; HBJ40.2008 (22 December 2008) – a suspension (in that case of a public servant) is 'final' so long as it exists without crystallizing into dismissal (or termination) or reinstatement. This is particularly so if charges are said to be 'in process' – but months go by without charges eventuating: *Prasad v. Divisional Engineer Northern (No 1)* [2008] FJHC 161; HBJ03.2007 (17 July 2008). It would be undermining of the Judicial Review process and a denial of rights if, having suspended an officer or public office holder (for example), the body having statutory responsibility to take the process further by laying charges or putting in train dismissal proceedings takes no steps to progress the matter, or delays so that the officer or public office

holder is left without remedy. In such case, the officer or public office holder should be entitled to seek redress through Judicial Review. If the officer or public officer holder has made application which has been dismissed as premature, then provision should be made for a further application to be made without the prospect of its being classified as 'vexatious'.

10.7 In the present case, commonsense and caution are necessary. As the matters now providing at least part of the foundation for Mr Kumar's suspension have been under investigation and enquiry since August 2006, will 'due enquiry' for consideration of dismissal proceed with due promptitude? The Minister in his Affidavit provides assurances that this will occur, and that investigations are ongoing. The Minister says he intends to use the provisions of the Local Government Act 'to ensure transparency and that appropriate actions are taken against any abuses': at para 32 Both transparency and appropriate actions incorporate the notion of due expediency, taking into account the seriousness of any matters under investigation and their complexity. The *Constitution* also makes provision for 'speedy trial':

Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time: s. 28(3)

10.8 There is no cause for this provision to be limited to criminal trials or civil actions through the courts; it can apply to 'charges' brought in other contexts such as disciplinary proceedings or under the Local Government Act.

10.9 So that Mr Kumar will not be closed out from the possibility of reinstating Judicial Review proceedings if 'due enquiry' under section 25 and 34 does not proceed in a timely manner, 'liberty to apply' will enable the Applicant to reinstate proceedings for Judicial Review on the basis that the 'suspension' was, as a practical matter, 'final'. At the same time, the Minister must be extended a proper opportunity for 'due enquiry' – so as to fulfill his responsibility under the Local Government Act. Hence, liberty to apply will be set on a timeframe of not less than six months and then, if it is to be utilised, this must be done within seven days of the expiration of six months. In the event that 'due enquiry' is concluded or underway and an outcome imminent, there will be no basis for applying.

10.10 Further, the Applicant needs to bear in mind that reinstating Judicial Review proceedings while criminal proceedings are on foot may not be in his best interests. This of course is a matter for him. However, there can be a question which process should take precedence.

10.11 *(b) Application premature:* Effectively the same considerations apply. As the process of 'due enquiry' is not concluded in terms of dismissal, the application is premature. Mr Kumar will have an opportunity to respond to clearly defined charges, matters or contentions when the Minister embarks upon 'due enquiry' in regard to possible dismissal. The Minister has said that investigations are ongoing, with Mr Kumar to be asked in due course to respond..

10.12 *(c) Further matter:* An additional matter intervened on 31 January 2009, when all councils 'expired' through a 'decision taken by Cabinet': Affidavit of 12 January 2009, para 33

10.13 Mr Kumar raises this in his Affidavit, 17 December 2008, para 18, referring to a Letter of 10 December 2008 from the Permanent Secretary:

To All Mayors and Town Clerks

RE: Expiry of Councillors' Term in Office

This is to inform you that Cabinet through Cabinet Decision (GCP (09)439 of 02.12.08 has approved that the term of all Councillors will expire on the 31st of January 2009.

All non expendable items under each Councillor's control such as motor vehicles, computers, mobile phones, etc must be handed over to your respective Town Clerks and Chief Executive Officers before 31st January 2009. Town Clerks in the transition period will control the affairs of the Councils.

Upon receipt of this letter, Councils should not be conducting any further meetings of the Council nor commit to any capital projects. Should the Council feel otherwise, prior approval of the Minister must be obtained.

This letter supersedes any other earlier instructions or correspondence with respect to Councillors' terms in office.

I take the opportunity to thank you and your other fellow Councillors for your commitment shown in serving in the local governmental and at the same time wish you well in your future endeavors.

Yours faithfully ...

10.14 At first glance, it may appear that this pre-empts any further proceeding under sections 25 and 34 of the Local Government Act vis-à-vis Mr Kumar, and that he will be deprived of a chance to respond to matters or 'charges' clearly defined. That would mean that the suspension is transmuted into a 'final determination'; alternatively, it has 'disappeared' by the expiration of Mr Kumar's period in office. The latter alternative would leave Mr Kumar's suspension 'in limbo'. However, neither eventuality needs to be addressed as the Minister has confirmed his intention to continue with the investigation and enquiry, independent of the termination of all councils (and hence, independent of the ending of Mr Kumar's office as mayor and councillor). The Minister says:

... the decision taken by Cabinet whereby the term of all municipal councils will expire on 31 January 2009 is a totally separate matter, and is not in any way relevant to the decision made to suspend [Mr Kumar] as the mayor and councillor of Nasinu Town Council ...: Affidavit, 12 January 2009, at para 33

11. Costs

Notwithstanding that the Court has found that there is an arguable ground vis-à-vis the lack of reference to section 34 of the Local Government Act, leave must be refused because there is no final decision and the application is premature. It is therefore appropriate that costs follow the event.

Orders

1. Application for leave refused.
2. Liberty to apply as follows:

- (a) If the Minister has not concluded his 'due enquiry' in respect of the question of the Applicant's dismissal within six months of the date of these Orders, the Applicant has liberty to apply;
 - (b) Such liberty to apply must be exercised by the Applicant within seven (7) days after expiration of the six month period referred to in paragraph (a)..
3. Costs to the Respondents to be agreed and paid within 28 days of these Orders or to be taxed.

Jocelyne A. Scutt
Judge
Suva
16 February 2008