IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 003 of 2015

BETWEEN:

CHIEF REGISTRAR
Applicant

AND:

RAMAN PRATAP SINGH
Respondent

Applicant: Mr. A. Chand
Respondent: In Person

Dates of Hearing: 29th March, 21st April and 6th June 2016
Date of Judgment: 7th June 2016

RULING
RESPONDENT'S ORAL APPLICATION FOR DISMISSAL

1. The Counts

[1] On 9th September 2015, an Application was filed by the Chief Registrar setting out two allegations of Unsatisfactory Professional Misconduct against the Respondent as follows:

Count 1

Allegation of Professional Misconduct: Contrary to Section 82(1)(a) of the *Legal Practitioners Decree 2009*.

PARTICULARS

RAMAN PRATAP SINGH, a Legal Practitioner, since around April 1999 to the 28th October 2005 whilst acting for one Mani Lal, failed to take any further steps or move the matter forward in the proceedings between *Mani Lal v Mike Cardigan* Labasa High Court Civil Action No.16 of 1999 which matter was subsequently struck out on the 28th of October 2005, which conduct was contrary to section 82(1)(a) of the ***Legal Practitioners Decree 2009*** and was an act of professional misconduct.

Count 2

Allegation of Professional Misconduct: Contrary to Section 83(1)(a) of the *Legal Practitioners Decree 2009* and Rule 8.1(1)(b) and (d) of the Rules of Professional Conduct and Practice (Schedule of the Legal Practitioners Decree 2009)

PARTICULARS

RAMAN PRATAP SINGH, a Legal Practitioner, since around April 1999 to September 2013 whilst acting for one Mani Lal, failed to inform the said Mani Lal by providing written confirmation both at the outset and during the course of the matter between *Mani Lal v Mike Cardigan* Labasa High Court Civil Action No.16 of 1999 as to the issues raised by the said matter, the steps which were likely to be required, how long it was likely to be before the matter be concluded and progress from time to time, which conduct was contrary to section 83(1)(a) and Rule 8.1(1)(b) and (d) of the *Legal Practitioners Decree 2009* and was an act of professional misconduct.

[2] When the matter was first called on 15th September 2015, before the previous Commissioner, Justice P.K. Madigan, the Respondent denied both of the allegations and said that he was of the view that the matter was a breakdown of communications and he was hoping that it could be resolved by mediation. Counsel from the Legal Practitioners Unit ("LPU") indicated that he was of the view that it was not suitable for mediation due to an alleged substantial amount of inactivity by the Respondent. The matter was then adjourned until 22nd October 2015 so as to allow the Respondent to liaise with the Chief Registrar.

[3] On 22nd October 2015, the Respondent advised that he had been unable to organise to write to the Chief Registrar and thus no mediation had been arranged and sought more time to contact the Chief Registrar. Counsel for the LPU objected. The matter was adjourned until 17th November 2015 for mention.

[4] On 17th November 2015, the Respondent advised that he had made no progress on making representations and Counsel for the LPU asked for a hearing date. Justice Madigan adjourned the matter until 27th January 2016 to be listed before the new Commissioner to fix a hearing date.

[5] I arranged for a call over of this matter on 10th February 2016, following my swearing-in as the new Commissioner on 9th February 2016.

[6] On 10th February 2016, I set the matter down for hearing on Tuesday, 29th March 2016 with liberty to either party to contact the Secretary of the

Commission to have the matter restored before me for mention on the previous Thursday, 24th March 2016, if there had been difficulties arising to compiling an agreed bundle of documents and/or an agreed set of facts.

[7] Between the 10th February and 24th March 2016, although the parties were able to prepare an agreed bundle of documents together with a supplementary bundle, there were unable to have an agreed set of facts. In addition, Counsel for the LPU sought permission to have a witness give his evidence via "Skype" from Labasa.

[8] On 24th March 2016, Mr A. Nand of Counsel appeared on behalf of the Respondent who was in New Zealand and was due to return to Fiji on the following Sunday, 27th March 2016. Counsel for the LPU agreed to serve a draft set of agreed facts upon the Respondent's Counsel by 12noon on 24th March and the Respondent was to reply by 3pm that afternoon and it was noted that the issue of "agreed facts" would be dealt with at the beginning of the hearing set down for 10am the following Tuesday, 29th March 2016.

2. Preliminary objections

[9] At the commencement of the hearing on 29th March 2016, Mr Singh appeared on his own behalf and raised two preliminary objections to the hearing proceeding:

(1) In relation to both Counts 1 and 2, whether or not the Respondent is protected under section 14(1)(a) of the *Constitution of the Republic of Fiji*?

(2) In relation to Count 2, whether or not the Respondent's conduct satisfies Rule 8.1(3) of the 'Rules of Professional Conduct' and Practice set out in the Schedule to the *Legal Practitioners Decree 2009*?

[10] It should be noted that neither of these objections had been raised by the Respondent or through his agent who appeared on his behalf at the five previous mentions of this matter, that is, 15th September, 22nd October and 17th November 2015, 10th February and 24th March 2016. To say that both the Applicant and the Commission were caught completely by surprise is an understatement. Indeed, at the Call Over held the previous Thursday, 24th

March 2016, to ensure that the matter was ready for hearing, there was no mention by the Respondent's agent that he wished to raise two preliminary objections. If these two objections had been so raised, then Orders would have been made for the Respondent (as the Applicant) to file written submissions in support of his Application/Objection and for the Applicant (as the Respondent to the Application/Objection) to be given time to submit written submissions in Reply.

[11] As arrangements had already been made for the complainant to give evidence by Skype form Labasa, I was not prepared to immediately agree to the Respondent's oral applications. Indeed, there is an argument that the Respondent should have filed a formal Summons (soon after he was first served with the Application in 2015, or well prior to the hearing), seeking a stay or dismissal as occurred in ***Chief Registrar v Adish Kumar Narayan*** [2013] FILSC 13; Case No.009.2013 (25 September 2013) (Paclii: <http://www.paclii.org/fj/cases/FJILSC/2013/13.html>). Therefore, I resolved that I would take the complainant's evidence and then adjourn the matter part-heard so to allow Mr Singh to file written submissions on his preliminary objections and set that application down for hearing on 21st April 2016. This judgment is a ruling on that application.

Objection 1 – Counts 1 and 2 breach section 14(1)(a) of the Constitution

[12] The first objection raised by the Respondent is that these proceedings breach Section 14(1)(a) of the Constitution of the Republic of Fiji which states:

> *'Rights of accused persons*
> 14._(1) A person shall not be tried for –
> (a) any act or omission that was not an offence under either domestic or international law at the time it was committed or omitted'.
> (see <http://www.paclii.org/fj/Fiji-Constitution-English-2013.pdf>)

[13] The Respondent's submission is that he has been charged under the *Legal Practitioners Decree 2009* and it cannot be retrospective for an alleged failure during the period April 1999 until 28th October 2005 (as per Count 1).

[14] He has further submitted that he has been charged under s.101(2) of the Decree which states:

'Application to legal practitioners and law firms

…

(2) A complaint under section 99 may be made, or an investigation under section 100 may be carried out, in relation in relation to **any alleged professional misconduct or unsatisfactory professional conduct <u>occurring before the commencement of this Decree</u>**.' [My emphasis]

[15] The *Legal Practitioners Decree 2009* came into effect on the 22nd May 2009. The Respondent's submission on 21st April 2016 was that if it was the "intention to prosecute offences that occurred before 2009 they would have saved the old section, the old law, under the transition" to the *Legal Practitioners Decree 2009*.

[16] Reference has also been made to the 'Rules of Professional Conduct and Practice' (attached as a Schedule to the Decree pursuant to section 129(8) of the Decree) and Rule 8.1(b) which states:

'CHAPTER 8—CLIENT CARE

8.1- (1) Subject to paragraph (2) of this rule, every principal in private practice shall:

(b) Both at the outset **and during the course of the matter cause the client to be informed**, where appropriate, as to the issues raised by the matter, the steps which are likely to be required, how long it is likely to be before it is concluded, **<u>and progress from time to time</u>**.' [My emphasis]

[17] The Respondent's oral submission that he made on 21st April 2016 was "that particular offence under 2009 is not [a] proper way to charge me sir there should have been a saving clause" and the Applicant could not discontinue with the present application and bring a new application under the 1997 Act as that has been repealed.

[18] The Applicant in reply submitted that what occurred in this matter as set out in Count 2 was also an offence under the previous *Legal Practitioners Act 1997* which stated at Rule 8.01(1)(b):

'CHAPTER 8—CLIENT CARE

8.01 - (1) Subject to paragraph (2) of this rule, every principal in private practice shall:

> *(b)* Both at the outset **and during the course of the matter cause the client to be informed**, where appropriate, as to the issues raised by the matter, the steps which are likely to be required, how long it is likely to be before it is concluded, **and progress from time to time**.' [My emphasis]

[19] As for the Respondent's submission that he has been charged with behavior that is not an offence under the 2009 Decree although it was an offence under the previous *Legal Practitioners Act 1997* which has now been repealed (and the particulars in Count 1 state that it was in relation to behavior from around April 1999 to 28th October 2005 when the matter was struck out by the High Court at Labasa), the Applicant submitted it was the same conduct. The complaint was lodged in 2011.

[20] As for the section 14(1)(a) of the Constitution argument applicable to both Counts 1 and 2, the Applicant submitted this type of behavior was professional misconduct and that professional misconduct was an offence under the previous *Legal Practitioners Act 1997* as it is now an offence under the *Legal Practitioners Decree 2009*.

[21] In relation to the Respondent's argument that there are no savings provisions in the Decree, the Applicant cited section 101(2) which states:

> *'Application to legal practitioners and law firms*
>
> …
>
> (2) **A complaint under section 99 may be made, or an investigation under section 100 may be carried out**, in relation in relation to any alleged professional misconduct or unsatisfactory professional conduct **occurring before the commencement of this Decree**. ' [My emphasis]

[22] Counsel for the Applicant submitted that for conduct that occurred before the Decree came into force, the Applicant is relying upon section 101(2) as it allows for a "complaint mechanism" whereby the Chief Registrar can receive and investigate complaints for conduct that occurred prior to the Decree coming into force. Counsel for the Applicant submitted that if this were not the case, then what is the purpose of the Decree setting out for the Chief Registrar to receive and investigate such matters as occurred before the commencement of the Decree?

[23] The Respondent in reply on this point submitted that Count 2 is defective because there was no reference in the charge to it being an offence by virtue of *Legal Practitioners Act 1997* and Rule 8.01(1)(b).

Objection 2 – Count 2 is an isolated breach of Rule 8.1(b)

[24] The Respondent's second objection specifically concerns Count 2 and Rule 8.1(3) of the 'Rules of Professional Conduct and Practice'. The Rule states:

> '(3) **A practitioner shall not be prosecuted for an isolated breach of this rule** unless
>
> (i) the practitioner **wilfully refuses or consistently neglects** to comply with this rule; or
>
> (ii) the failure to comply with this rule **is associated with some other matter or circumstance** which might give rise to a charge of professional misconduct or unprofessional conduct.'

[25] The Respondent's oral submission on 21st April 2016 was that "if there was a letter from the Chief Registrar 'go and comply with it' and if I failed" then that would be a breach of Rule 8.1(3).

[26] In relation to this objection, Counsel for the Applicant drew the Commission's attention to the fact that Rule 8.01(1)(b) of the 'Rules of Professional Conduct and Practice' (attached as a Schedule to the Act pursuant to section 102(8) of the previous *Legal Practitioners Act 1997*) and Rule 8.1(b) of the 'Rules of Professional Conduct and Practice' (attached as a Schedule to the Decree pursuant to section 129(8) of the *Legal Practitioners Decree 2009*) are identical.

[27] As for the Respondent's submission that this was an isolated breach, Counsel for the Applicant noted that the conduct alleged is that the Respondent failed to update the client of the steps that would be required to progress the matter and that it did not happen on one occasion, rather it happened over a lengthy period of time – from April 1999 to September 2013. He drew the analogy with a probate application and where there was a delay and the client was not informed about the delay and makes a complaint against the practitioner, then perhaps there might be some leeway given to the practitioner to view it as a single

matter. Whereas here, by contrast, the allegation was that the client had given instructions to take action over a number of years, and the conduct alleged is that the practitioner never informed the client about the progress of the matter.

[28] The Respondent in reply again submitted that Count 2 is defective because there was no reference in the charge to it being offence by virtue of *Legal Practitioners Act 1997* and Rule 8.01(1)(b).

[29] Further, the Respondent submitted (as I understood the submission) that both Count 1 and Count 2 should have stated that "the complainant requested and the practitioner refused on a number of occasions", that is, the counts should have clarified each alleged offence and are "defective in that sense it [the particulars] does not elaborate on the fact that on the allegation that there was a recurrence of that particular offence".

3. The Commission's Ruling

Objection 1 – Both Counts 1 and 2 breach s.14(1)(a) of the Constitution

[30] I note that in ***Amrit Sen v Chief Registrar*** **[2014] FJILSC 5; No026.2013 (8 August 2014)**, (<http://www.paclii.org/fj/cases/FJILSC/2014/5.html>), a similar argument was raised in relation to section 14(1)(a) of the Constitution. Justice Madigan made the following findings at paragraphs [13-[16] which I set out in full:

> '13. In his submissions under this heading, the Applicant prays that the Commission cannot hear an allegation into conduct occurring in 1995 or 1996 when the enabling section (s.82) of the Legal Practitioners Decree was enacted only in 2009. He submits that section 14 of the Constitution forbids it. He concludes by saying that "any act or admission which happened prior to 2009 cannot be subject to prosecution under the present Decree."
> 14. **This ground and the submissions to support it are misconceived. There is no evidence before the Commission** that possession of the original Registrar's copy of the lease **was not misconduct in 1995**, **and as such section 14 of the Constitution would not apply.**
> 15. More importantly the Applicant appears to have overlooked the provisions of section 101(2) of the Legal Practitioners Decree; which section reads
>
> "101(2) – A complaint under section 99 may be made, or an

investigation under section 100 may be carried out, in relation to any alleged professional misconduct or unsatisfactory professional conduct occurring before the commencement of this Decree."

16. **The complaint being validly made and not statute barred and not in contravention of the practitioner's constitutional rights; this application for stay or dismissal is refused.'** [My emphasis]

[31] I am not sure that I can add anything further in relation to the s.14(1)(a) Constitutional objection in respect of Count 1. The Respondent's argument on this issue is, in my view, misconceived for the reasons set out by Madigan J. In relation to Count 1, therefore, the Respondent's application for dismissal (due to it being a breach of s.14(1)(a) of the Constitution), is refused.

[32] In relation to Count 2 and the constitutional objection, as Counsel for the Applicant submitted, Rule 8.01(1)(b) of the 'Rules of Professional Conduct and Practice' (attached as a Schedule to the previous *Legal Practitioners Act 1997*) and Rule 8.1(b) of the 'Rules of Professional Conduct and Practice' (attached as a Schedule to the *Legal Practitioners Decree 2009*) are identical. It was an offence under the previous *Legal Practitioners Act 1997* and still is an offence under the *Legal Practitioners Decree 2009* for the similar reasons set out by Madigan J in ***Sen,*** that is, 'the complaint being validly made and not statute barred and not in contravention of the practitioner's constitutional right'. In relation to Count 2, therefore, the Respondent's application for dismissal (due to it being a breach of s.14(1)(a) of the Constitution), is also refused.

Objection 2 – Count 2 is an isolated breach of Rule 8.1(b)

[33] It was submitted by the Respondent that this complaint involved an isolated breach of Rule 8.1(b) and, thus, it not could not be said to be a case where the Respondent's behaviour comes within the definition 'wilfully refuses or consistently neglects' so as to justify his being prosecuted as per Rule 8.1(3) of the 'Rules of Professional Conduct and Practice'. Again, the objection is misconceived. **This is a matter for hearing the whole of the evidence and considering submissions once all the evidence has been heard.**

[34] In ***Chief Registrar v Adish Kumar Narayan*** **[2014] FJILSC 6; Case No.009.2013 (2 October 2014)**, (Paclli: <http://www.paclii.org/fj/cases/FJILSC/2014/6.html>), Justice Madigan made the following points at paragraphs [4]-[5] in relation to interlocutory applications:

> '4. An essential matter raised by the practitioner in each of his applications and again in his final submissions concerns the nature of the proceedings that are heard before the Commission. There appears to be quite a misunderstanding throughout the profession and in particular by the present practitioner, of the exact nature of proceedings in the Commission when an allegation has been referred to it by the Registrar for hearing. **The operative word is hearing and not trial**. Although the Commissioner and the Commission have the roles of Judge of the High Court and the High Court respectively, **hearings before the Commission are hearings by way of an enquiry and not adversarial trials**. As such formal rules of evidence do not apply (see section 114 of the Decree) **and it will only be in exceptional circumstances that interlocutory applications and no case applications will be entertained**. **The whole purpose of a hearing before the Commission is to establish the validity of the application made by the Registrar** and if so established to then make an appropriate penalty order; at all times seeking to protect the interests of the consumer public, while endeavoring to maintain high standards of ethics and practice within the profession.
> 5. **This can be done only after hearing and seeing ALL of the evidence that is available to the Commission**. **For that reason an application to dismiss that allegation after the Registrar has presented his evidence is premature.** In a trial it could well be, and often is, that a concluded prosecution case does not disclose all the elements of an offence; however in a full hearing with no trial evidentiary restrictions, the presentation of the practitioner's case may well alter the Commission's view of the allegation.'
> [My emphasis]

[35] In ***Narayan*** **[2014]**, Madigan J also dealt with the argument regarding the particulars of the offence as follows:

> '9. As a preliminary point the Practitioner by his Counsel argues that that the mischief complained of does not come within the purview of either section 82 or 83 of the Decree. In effect he submits that the particulars of the complaint against him do not state any offence.
> 10. This argument was dealt with in some detail by the Commission in a ruling on the practitioner's Application for Stay, (Ruling 009 of 2013 dated 25 September 2013) in which it was held that the

examples of misconduct listed in section 83 of the Decree are not exhaustive and in any event any conduct undertaken by the Practitioner need not necessarily be confined to competence or fitness to practice but it may include any conduct that the Commission might find to be professionally blameworthy, dishonourable or unethical.

11. In the case of ***Law Society of N.S.W. v Marando*** [2013] NSWADT 267, it was said:
"*However it is well settled that the statutory definition of professional misconduct does not exclude the common law definition emerging from the oft-cited case of* ***Allison v Gen Council of Medical Education and Registration*** *[1894] 1KB 750; that is "****conduct which would reasonably be regarded as disgraceful or dishonorable by professional [colleagues] of good repute and competency****""*
12. The Commission adopts these definitions and finds that the conduct of the practitioner complained of, if established is well within the disciplinary jurisdiction of this tribunal.' [My emphasis]

[36] In relation to Count 2 on the isolated incident objection, **this is a matter for hearing the whole of the evidence and considering submissions once all the evidence has been heard.** The complainant has given his evidence. The Applicant has closed their case. It is now a matter for the Respondent to present his case. The Respondent's application for dismissal of Count 2, therefore, is refused.

Stay application

[37] Before I proceeded to judgment in this application, I arranged for the Secretary of the Commission to write to each of the parties on 23rd May 2016 in an attempt to clarify the following matters:

(1) The parties were referred to the judgment of ***Sen v Chief Registrar*** **[2014]** where a similar argument was raised in relation to section 14(1)(a) of the Constitution, however, it was noted that this case was not cited to me by either party. As not all cases before the Commission are on Paclii, **Counsel for the Applicant** (whose office has had the carriage of prosecution matters since 2009) **was asked to confirm whether they were aware of any other cases** that had been decided before the Commission or the Court of Appeal in relation to the *Legal Practitioners Decree 2009* and section 14(1)(a) of the Constitution;

(2) The parties were invited to submit short written submissions addressing the judgment in *Sen* and its applicability or otherwise to the Respondent's

applications;

(3) The attention of the parties was also drawn to section 124(2)(b) of the of the *Legal Practitioners Decree 2009* and the question of costs which states:

'*Costs*

'124.—(1) **After hearing any application for disciplinary proceedings under this Decree, the Commission may make such orders as to the payment of costs and expenses as it thinks** fit against any legal practitioner or partner or partners of a law firm.
(2) The Commission shall not make any order for payment of costs and expenses against the Registrar or the Attorney-General.
(3) Without limiting subsection (1) **the Commissioner may**,
(a) **without making any finding adverse to a legal practitioner** or law firm or any employee or agent of a legal practitioner or law firm, and
(b) if the Commission considers that the application for disciplinary proceedings was justified and that it is just to do so,

order that legal practitioner or partner or partners of the law firm as the case may be to pay to the Commission and the Registrar such sums as the Commission may think fit **in respect of costs and expenses of and incidental to the proceedings**, including costs and expenses of any investigation carried out by the Registrar.' [My emphasis]

[38] The parties were also referred to **The Solicitors Disciplinary Tribunal of England and Wales** which has recently published (December 2015) the **4th edition of 'Guidance Note on Sanctions',** (<http://www.solicitorstribunal.org.uk/Content/documents/GUIDANCE%20NOTE%20ON%20SANCTIONS%204th%20edition%20December%202015%20website.pdf>), and the 'General considerations' it has set out in relation to costs (though noting that in Fiji, pursuant to the *Legal Practitioners Decree 2009*, costs cannot be awarded against the Applicant). The parties were advised that depending upon the ruling, if either or both of the Respondent's applications for dismissal were refused, the Commissioner would then invite the parties to address the Commission in relation to costs and, as such, the parties should be prepared to address the Commission in that regard (even if it is that costs should be considered at the end of the disciplinary hearing rather than just in relation to the Respondent's applications for dismissal).

[39] After writing to the parties on 23rd May 2016, I had the Secretary of the Commission check with the Court of Appeal as to the whether any appeals have been filed in the matters of *Sen* and/or *Narayan*. The Secretary was advised that

in *Sen* an appeal has been filed but has not as yet been allocated a hearing date. It may be in the Call Over list for July 2016 to allocate hearing dates, however, this has not been confirmed. In *Narayan,* an appeal has also been filed but the Appellant is still to file a court record and has not been allocated a hearing date.

[40] Following this advice, I then had the Secretary of the Commission write a second letter to each of the parties the following day (24th May 2016) setting out what she had been so advised. I also had her note that it was my understanding that *Narayan* involves an appeal not by the practitioner but the Registrar. That is, the practitioner is not appealing the earlier decision of the Commissioner set out in 2013 in *Narayan [No.1]*, not to stay the matter. Rather, it is the Chief Registrar who is appealing the later decision in 2014 *Narayan [No.2]* whereby the Commissioner found 'that the complaint against the practitioner is **not established**'. As for the appeal in *Sen*, I also had the Secretary refer the parties to ***State v Bainimarama, ex parte Bokini; Makutu v Attorney-General*** [2008] FJHC 337; HBJ015.2008; HBC132.2008 (9 December 2008) (Paclii: <http://www.paclii.org/fj/cases/FJHC/2008/337.html>), a case that I had to consider when I had been sitting previously as a Judge of the High Court of Fiji. In *Bokini*, I granted a Stay of a hearing in the High Court of an Application for Leave to apply Judicial Review as I noted at [18] there were 'two separate appeals pending to be heard by the Fiji Court of Appeal relevant to the two present matters before me'. In one, leave to appeal had been granted and it was to be allocated a hearing date in the March 2009 sittings, just under four months away. Similarly, in the other appeal, a hearing date had already been set by the Court of Appeal in the March 2009 sittings. I had the Secretary note in her letter that my preliminary view in relation to the Respondent's application was that it was not similar to that which I had to consider in ***State v Bainimarama, ex parte Bokini; Makutu v Attorney-General*** when I had granted a Stay in the High Court, however, the parties were invited to address their submissions on that issue.

[41] The parties were further advised in that second letter that depending upon my ruling of the Respondent's oral applications for dismissal, if either or both were dismissed, the parties were put on notice that I would also consider in my judgment the issue of whether a Stay should be granted pending judgments of

the Court of Appeal in the appeals of *Sen* and/or *Narayan*. In that regard, the parties were invited to address the Commission in short written submissions in relation to a Stay pending the outcome of those two appeals. The matter was relisted for 6th June 2016 so as to allow each party to clarify anything arising from that notification (including if they had filed any written submissions) prior to the handing down of judgment that was listed for 7th June 2016.

[42] The Applicant, in summary, raised the following:

(1) One of the grounds of appeal in *Sen* is an argument pertaining to s.14(1)(a) of the Constitution;

(2) The appeal in *Narayan* is an appeal by the Chief Registrar on the substantive matter;

(3) The Rulings of the previous Commissioner in *Sen* and *Narayan* should still stand as they have not been overruled.

[43] The Respondent, in summary, raised the following:

(1) In *Sen*, one of the issues raised by the practitioner was section 14(1)(a) of the Constitution, in that, the conduct occurred in 1995 or 1996, the *Legal Practitioners Decree* was enacted in 2009 and section 14 of the Constitution forbade any (retrospective) charges being laid (where an act or omission was not an offence);

(2) This issue was not dealt with by the previous Commissioner in any detail, whereas the onus was on the Chief Registrar to show that the act complained of was an offence in 1995;

(3) There is an important issue to be decided whether s.101(2) of the *Legal Practitioners Decree 2009* is in contravention of s.14(1)(a) of the Constitution, which the previous Commissioner failed to deal with, in particular, in relation to alleged misconduct that happened prior to the Decree (2009) and Constitution (2013);

(4) The Commissioner has powers to grant a Stay as set out by the previous Commissioner in paragraph [18] of *Narayan*;

(5) The Commissioner in the present case has referred the parties to ***State v Bainimarama, ex parte Bokini; Makutu v Attorney-General****,* where there were two appeals pending in the Court of Appeal relevant to two matters before the Judge in the High Court and those matters were stayed pending the outcome of

those appeals. Similarly, in the present case there are two appeals pending which are relevant to the present case and a 'Stay should be granted so that we have a decision from the Court of Appeal to guide us on this matter'.
(6) Whether the section 101(2) of the *Legal Practitioners Decree 2009* contradicts section 14(1)(a) of the Constitution should be decided by the Court of Appeal first before a decision is made in the present case;
(7) *Sen*'s case is ready for hearing and it may not be too long before it is heard.

[44] This judgment has taken into account the further written submissions submitted by each party as well as the further oral submissions they each made on 6th June 2016. Having considered those further submissions, I have not altered my view that the Respondent's application for dismissal of Count 2 (on the basis of it being an isolated incident) is misconceived and should be refused. As I have stated above, this is a matter for hearing the whole of the evidence and considering submissions once all the evidence has been heard.

[45] I have also noted the Applicant's submission that the appeal in *Narayan* is an appeal by the Chief Registrar on the substantive matter not by the practitioner, that is, the Order by Justice Madigan to dismiss the application of the Chief Registrar. The appeal in *Narayan*, therefore, has no bearing on the present application before me.

[46] In relation to *Sen*, however, I note that it is the practitioner's appeal and, according to the submissions of the Respondent, one of the issues raised by the practitioner is section 14(1)(a) of the Constitution. That is, the conduct occurred in 1995 or 1996, however, the *Legal Practitioners Decree* was not enacted until 2009 and section 14 of the Constitution forbids any charges being laid for any act or omission that was not an offence at the time such act or omission was committed. That is, it is the argument of the Respondent that the Court of Appeal needs to clarify whether s.101(2) of the *Legal Practitioners Decree 2009* is in contravention of s.14(1)(a) of the Constitution? This is directly on point in relation to both Count 1 and Count 2. The question then becomes how long a delay must we wait until that issue in *Sen* is heard by the Court of Appeal?

[47] In that regard, I note in my judgment in *Bokini* (to which I referred the parties in this present matter), cited the reasoning of the Fiji Court of Appeal in ***Goldenwest Enterprises v Pautogo*** (Unreported, Fiji Court of Appeal, No.ABU0038.2005, 3 March 2008) (Paclii: [2008] FJCA 3, <http://www.paclii.org/fj/cases/FJHC/2008/380.html>). *Goldenwest*, in turn, cited the English and Welsh Court of Appeal in ***Re Yates' Settlement Trusts. Yates and Anor v. Paterson and Ors*** [1954] 1 WLR 564; [1954] 1 All ER 619.

[48] Counsel for the Applicant did not address *Bokini* either in his written submissions or during his appearance on 6th June 2016, preferring instead to submit that the law is as set out by Justice Madigan in *Sen.* In addition, Counsel for the Applicant raised, for the first time on 6th June 2016, an objection to the Commission hearing the Respondent's oral applications for dismissal. Counsel for the Applicant submitted that the Respondent should be proceeding by way of filing a Notice of Motion and, in the meantime, the Commission should proceed to complete the hearing of the Applicant's substantive application.

[49] By contrast, the Respondent argued in his written submissions that a 'Stay should be granted so that we have a decision from the Court of Appeal to guide us on this matter'. Further, at the hearing on 6th June 2016, he responded to the objection of the Applicant that the Respondent should be proceeding by way of filing a Notice of Motion, noting that there have been no formal rules of procedure published by the Commission, even though the Respondent agreed that in *Narayan*, the practitioner's initial objections (to the LPU's application being heard by the Commission), proceeded by way of Summons.

[50] Whilst, I agree with the Applicant that the appeal in *Narayan* does not have any relevance (particularly where it is the Chief Registrar's appeal against the Commissioner's judgment in dismissing the application), I agree with the Respondent that the appeal in *Sen* is another matter (even though I agree with the view of Justice Madigan in relation to the Constitutional objection.)

[51] As the Fiji Court of Appeal explained in *Goldenwest* (at [34]-[35])*:*

> '34. In ***Re Yates' Settlement Trusts*** the question was whether the Court should have granted an adjournment where there were two cases ahead of

that with which the Court was dealing, which dealt with the same or similar issues. In the one, ***Re Downshire's Settled Estates*** [1953] 1 All ER 103, the determination was that the court had jurisdiction to approve a scheme similar to that in ***Re Yates' Settlement Trusts***. In the other, ***Re Chapman's Settlement Trusts*** [1953] 1 All ER 103, in similar circumstances the decision had gone on appeal, with no outcome as yet. The Court in ***Re Yates' Settlement Trusts*** granted the adjournment on the basis that it should await the House of Lords decision on appeal in ***Re Chapman***.

35. The English Court of Appeal said the adjournment should not have been granted:

> *The law has been settled by this court in **Re Downshire**, and the judge should have applied the law as there laid down without any misgivings as to what the House of Lords may hereafter say. I do not think that the plaintiffs should be sent away for an indefinite period, especially when it is not known whether the settlor [whose life is of considerable importance in the proposed scheme] will live so long: at 622, per Lord Denning, MR'*

[52] In *Re Yates' Settlement Trusts* an application before a judge in the High Court 'for the approval … to a scheme of family arrangement … on matters relating to the trusts of a settlement' was adjourned pending a decision of the House of Lords In *Re Chapman's Settlement Trusts*. As the case note summary in the Weekly Law Reports sets out (at p.565):

> 'The settlor's two sons appealed against the granting of the adjournment, contending first that the case was not analogous to In *Re Chapman's Settlement Trusts;* and, secondly, that the law should be applied as it was at present without waiting for the opinion of the House of Lords to be given. If the scheme was to be effective, it was necessary for the settlor to be alive at the date when the scheme was approved … and evidence was adduced showing that he was in a precarious state of health. It was submitted that injustice might result if the adjournment was continued.'

[53] In *Re Yates' Settlement Trusts*, the justices of the Court of Appeal were unanimous that the adjournment should not have been granted in the High Court as the law had been settled by the Court of Appeal's previous decision in *Re Downshire's Settled Estates* and that judgment had not been appealed to the House of Lords. The appeal that was before the House of Lords was an entirely new matter (*In Re Chapman's Settlement Trusts)*, although the outcome may have had some bearing on the case (*In Re Yates' Settlement Trusts*) before the judge in the High Court. Further, the Court of Appeal was concerned that the settler in *Re Yates' Settlement Trusts* may die before judgment was delivered by the House of Lords in *Re Chapman's Settlement Trusts*. As Lord Evershed,

Master of the Rolls, noted (at p.567):

> 'Whatever might be the right answer to a case not affected by a consideration of this kind, it seems to me that a real injustice might result if this case were adjourned, perhaps for some months, and if during that period Mr. Yates were to die … the fact that *In Re Chapman's Settlement Trusts* is pending before the House of Lords is not a sufficient justification for the judge's decision to adjourn this case.'

[54] Thus, in *Re Yates' Settlement Trusts*, the law had already been settled by the Court of Appeal and there was an urgency as to why the matter should be heard in the High Court. This is not the situation in the present application before me. An appeal is pending before the Court of Appeal and the Applicant has not put before me any urgency to continue with the hearing until judgment has been handed down by the Court of Appeal in *Sen*. As I noted in *Bokini* at [15]:

> 'Indeed, as Sir Raymond Evershed MR said in ***Re Yates' Settlement Trusts*** at 621 [All ER]:
>
> > *"It may well be that,* ***if*** *a case, and* ***an important case, is known to be subject to appeal*** *to the House of Lords, or* ***from a judge of first instance to the Court of Appeal, a judge may reasonably and properly think that it is in the general public interest not to decide another case on the same lines until the result of the case under appeal has become known****. I say that it may be so. It depends very much on the circumstances of the particular case ..."'*
> >
> > [My emphasis]

[55] Further, as the Fiji Court of Appeal concluded in *Goldenwest* (at [51])*:*

> 'This Court has every sympathy with the wish of trial courts to maintain a tight rein on proceedings and to ensure expeditious hearings. This is particularly so if a trial date has been set, or if the history of a matter reveals a litany of delays particularly caused through adjournments. Adjournments by consent between the parties can indicate a lack of preparation and attention to the need for litigation to be conducted in a timely manner. The Court is aware that in too many instances adjournments are or may be sought as a matter of course and that due to the Court's schedule and a mounting number of cases, adjournments may too readily be gained. It is understandable that as an antidote to this, a Court may ultimately be loath to grant an adjournment where otherwise a trial is ready to proceed and the Court has set a firm date after a number of adjournments. **At the same time, Courts must be careful to ensure that all the circumstances must be borne in mind and that ultimately expedition is not the sole measure. Justice and fairness are essential features of the consideration for a request for an adjournment.'**
> [My emphasis]

[56] Accordingly, I will grant a stay at this time pending the hearing and handing down of judgment by the Court of Appeal in *Amrit Sen v Chief Registrar*.

[57] I am fortified in my decision by the fact that the sworn evidence of the complainant has been recorded, a transcript of it is presently being typed and Counsel for the Applicant has closed his case. Depending upon the outcome of the appeal, the present application may be discontinued or the part-heard hearing continued with only the Respondent to present his case. In that regard, I note the observations made recently by the President of the Fiji Court of Appeal, Mr Justice W.D. Calanchini, in ***Chief Registrar v Sharma*** [2016] FJCA 4; ABU 86.2014 (27 January 2016) (Paclii: <http://www.paclii.org/fj/cases/FJCA/2016/4.html>) at [26] that:

> '… **it must be recalled that an order staying proceedings does not discontinue the proceedings**. A stay order has the effect of maintaining the position reached in the proceedings when the stay order was made. A stay order is usually ordered to prevent an injustice being done. **The proceedings may take their normal course if and when there are grounds for the Commission to lift the stay order.**' [My emphasis]

[58] The formal Orders of the Commission are:

ORDERS

1. In relation to Count 1, the Respondent's oral application for dismissal is refused.

2. In relation to Count 2, the Respondent's oral application for dismissal is refused.

3. The part-heard hearing of the substantive Application filed by the Applicant on 9th September 2015 be stayed pending the hearing and handing down of judgment by the Court of Appeal in *Amrit Sen v Chief Registrar*.

4. The Application of the Chief Registrar in this matter is adjourned part-heard for mention on 19th September 2016 at a time to be fixed.

5. The Applicant is to advise in writing, as soon as practicable, to both the Secretary of the Commission and the Respondent, as to whether the appeal in *Amrit Sen v Chief Registrar* is allocated a hearing date in the July 2016 sittings of the Fiji Court of Appeal.

Dated this 7th day of June 2016.

I will now hear the parties in relation to costs and a time for mention of this matter on 19th September 2016.

Dr. Thomas V. Hickie
COMMISSIONER