IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 63 OF 1991
(High Court Judicial Review No. 2 of 1991)

BETWEEN:

THE MINISTER OF FINANCE & ECONOMIC PLANNING AND THE COMPTROLLER OF CUSTOMS — APPELLANTS

-and-

WESTERN WRECKERS LIMITED — RESPONDENT

Mr. N. Nand for the Appellants
Mr. H. K. Nagin for the Respondent

Date of Hearing : 20th August, 1993
Date of Delivery of Judgment : 19th November, 1993

JUDGMENT OF THE COURT

The facts of this case, when analyzed, really present a problem that is very simple of solution. Unfortunately, in our opinion, the learned Judge from whose decision this appeal has been brought, got the wrong answer.

The relevant facts are as follows:

Section 64 of the Customs Act Cap (1986) (the Act) empowers the Minister to make regulations as follows:

> *"64-(1) The Minister may make regulations to prohibit or restrict the importation into Fiji or exportation from Fiji of any goods of any description whatsoever.*
>
> *(2) The power conferred by subsection (1) may be exercised-*

(a) by prohibiting the importation or exportation absolutely;
(b) by prohibiting the importation or exportation of goods from or to a specified place; or
(c) by prohibiting the importation or exportation of goods unless specified conditions or restrictions are complied with."

The Minister for Finance on 30th October 1986 made regulations pursuant to the Act, the Customs (Prohibited Imports and Exports) Regulations, 1986. Schedule 1 to those regulations contained a list of goods the importation of which was absolutely prohibited.

In November 1990, and at least up to 10th November, Western Wreckers Ltd, the respondent to this appeal and the applicant in the original proceedings, advertised on various occasions that "arriving shortly" from Japan were over 50 "front half cut cars" for most models of Japanese cars. By notice published in the Fiji Republic Gazette on 21st November, 1990, Schedule 1 to the regulations was amended by adding a new item, viz:

"17 Used motor vehicles and bodies thereof cut or dismantled into segments."

(record p.65). The reason for making this regulation was explained in later correspondence, but that is immaterial.

The Gazette notification was followed by correspondence in which the respondent claimed, inter alia, that it would, as a result of the addition to the list of prohibited imports, suffer

substantial pecuniary loss. It is not material, but it can be noted, that there was no suggestion by it that any of such half cut vehicles were en route to Fiji, or indeed that it had acquired any.

However, on 24th December 1990 two half cut vehicles consigned to the respondent arrived at Lautoka. A person claiming to be the proper officer signed what is described as a "Detention Notice" dated the same day, and the two half vehicles were seized. It can be noted here that the validity of the detention notice was never put in issue in these proceedings; the only issue related to the validity of the regulation.

On 22nd March 1991 an application for leave to apply for a judicial review pursuant to Order 53 rule 3(2) of the High Court Rules was filed on behalf of the respondent, and in due course various orders were made. The matter eventually came on for hearing on 21st August 1991 before Saunders J. He made a declaration on 11th September 1991 that the 1990 amendment to the 1986 regulations was null and void, so that the consequent detention notice was ineffectual. He ordered the return of the two seized vehicles. He also ordered the appellant to pay the respondent's costs.

The application of the respondent for judicial review sought various orders and for declarations. The first, in effect, was that the 1986 regulations were null and void. The second was, in effect that the 1990 amendment was null and void. A third

declaration was sought in the alternative that, if the 1990 amendment was valid it was not applicable to used vehicles or half vehicles that were the subject of a valid contract made before 21st November 1991 (as to which there was no evidence).

The attack on the validity of the 1986 regulations seems to have been based on a claim of constitutional invalidity. The Judge found that they had been validly made and there is no appeal against this finding. The claim of invalidity of the 1990 amendment was put on various bases, denial of natural justice, the so called doctrine of legitimate expectation, unreasonableness. The Judge found in favour of the respondent on this issue. The third basis, namely that the particular vehicles seized were not caught by the amendment does not seem to have been argued. In the view that we take it could not possibly have succeeded. That will become apparent.

As counsel for the respondent stated at the hearing at first instance: "Sole real ground is that my clients should have been given a chance to be warned of change - should have been consulted" (record p.116). He went on to submit that there was in law no elected Minister and no Parliament. It can be seen that the amendment was made after the Military Government took control in 1987 and before the 1990 Constitution came into effect.

The only legal point in issue is a very simple one, namely whether the making of the 1990 amendment to the regulations was

a legislative action or an executive one. The 1986 Act was clearly a valid exercise of the legislative power of the government of Fiji. Unless it somehow ceased to be operative it empowered the responsible Minister to make regulations to give effect to it. That power remained, unless somehow, as a result of the 1987 events, the laws of Fiji ceased to have effect. This Court is certainly not going to hold that all laws in Fiji made before 1987 ceased to be operative after the 1970 Constitution was abrogated in 1987. But that is the effect of the submission. Naturally enough this ground was not pursued.

Unless the 1986 Act ceased to be operative after 1987, then it continued in force. If so, the power to make regulations still existed in 1990. What was the nature of that power? It was clearly legislative. The exercise of the power required an executive act; the issuing of the detention notice was clearly an executive act. But it was the validity of the regulation that was challenged and it was this that was the subject of the proceedings and what the Judge decided. The actual issuing of the notice was not the subject of challenge.

The Judge apparently decided that the 1990 regulation was void on the basis of a denial of natural justice. This is a compendious way of describing the various heads which were referred to - unreasonableness, legitimate expectation and so on - they are aspects of the same principle. It appears that he based his conclusion on some very dubious findings of fact, for which he used "judicial notice", and as a result went on to

decide that because the making of the regulation would adversely affect "every owner in Fiji of a used vehicle" (record p.121), and because the responsible Minister had made the regulation "without consulting a representative of anyone of the persons likely to be detrimentally affected by his decision" (record p.120) - a finding which he made in the absence of evidence to the contrary - it was invalid. This he based on the fact that in an elected legislature, as in England, there is "provision for a representative of the people ... to debate the making of a law in a forum where all representatives have a right to attend" (record p.121). He went on (ibid):

> *"With the elected legislature, whether you have voted for him or not, there is a representative of you to debate whether a law should be passed or not. He is there to put forward the views of those he represents. It is often a futile exercise because he cannot represent the views of all whom he represents where their views differ amongst themselves, but this is deemed to be their voice.*
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> *Mr Koya contends that the Minister does not listen to any voice if he so wishes, under the present Government, and he says that in this case this is against the rule of natural justice. If there is in force a system whereby the people's voice is put to the Minister, effectively or otherwise, then the people cannot complain.*
>
> *But if there is no way that the voice of the people can be heard, unless the minister takes steps to seek out and listen to that voice, then decisions taken affecting the rights of the people, offend firstly, the rules of natural justice and secondly, Articles 4 and 9 of the 1990 Constitution of this country. That is why the elected system of Government has developed, so that everyone, in theory, had his say, and having had his say, had to put up with what was decided."*

If this states some principle related to the making of laws then we confess we have not heard of it before, nor, we confess, have we been able to find any authority to support it. His Lordship cites Ridge v Baldwin (1963) 1 QB 539, as one of the cases:

> *"which lay down that powers of a purely administrative character must be exercised "fairly", meaning in accordance with natural justice - which after all is only fair play in action"*

(record p.122), a quotation which in terms refers to administrative action and not legislative.

The consequences of adoption of any principle such as that referred to above are startling, to say the least. We suppose that all legislation adversely affects the "rights" of someone, in the sense that it applies where there had previously been none, or alters what had previously been the situation. In this or a more immediate sense, all decrees or ordinances or rules made during the period 1987 until the 1990 Constitution came into force are invalid, unless, we suppose, the persons likely to be affected were consulted by someone. As far as we are aware the validity of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990, which brought the 1990 Constitution into operation, has never been challenged, and it, by clause 8, provided that all existing laws shall continue to have effect as if they had been made under the 1990 Constitution. This need not be pursued further.

In fact the decision of the Judge seems to recognise the validity of the Act, to recognise the power to make regulations, but goes on to postulate that for the reasons he expressed the exercise of the power in this case was invalid because of the failure to consult.

In the case of the exercise of legislative power or authority, original or delegated, there is no duty on the body or person exercising it to consult anyone. We quote, and, with respect, adopt the principles as stated by Megarry J. in Bates v Lord Hailsham (1972) 1 WLR 1373 at p.1378. After referring to the case of Reg. v Liverpool Corporation, Exparte Liverpool Taxi Fleet Operations' Association (1972) 2 QB 299 he went on:

> *"The case supports propositions relating to the duty of a body to act fairly when exercising administrative functions under a statutory power: see at pp.307, 308 and 310. Accordingly, in deciding the policy to be applied as to the number of licences to grant, there was a duty to hear those who would be likely to be affected. It is plain that no legislation was involved: the question was one of the policy to be adopted in the exercise of a statutory power to grant licences.*
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> *In the present case, the committee in the question has an entirely different function: it is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of*

> *fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative authority is a commonplace; but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections (see, for example, the Factories Act 1961, Schedule 4), I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attack, whether by injunction or otherwise; but what is important is not its form but its nature, which is plainly legislative."*

The position is stated thus in Wade, Administrative Law, 10th Ed at p.573: "... there is no right to be heard before the making of legislation whether primary or delegated unless it is provided by Statute". There was no such provision here.

The cases upon which the Judge relied in particular CCSV v The Minister for the Civil Service (1984) 3 All E R 935 dealt with the taking of administrative steps pursuant to original or delegated legislation. Thus the invalidity of the action taken by the Minister was based upon "an implied limitation on the Minister's exercise of the power contained in article 4 of the 1982 Order .... that is to say on the exercise of the power conferred on him by the Order (emphasis added). Lord Roskill at p.953 says this in express words:

"Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds."

No more need be said. The making of the regulation here was clearly a legislative act. The Judge's reasons are clearly referable to executive or administrative actions.

If the so called doctrine of "legitimate expectation" applies to legislative activity, its application is very confined, and is explained in the cases of Council of Civil Service Unions v Minister for the Civil Service (1984) AC 374 and Re Westminister CC (1986) AC 668, cases to which we were referred in the very careful and helpful submissions supplied to us by counsel for the appellants. Quite clearly no such principle is applicable in this case.

The appeal will be upheld.

The formal orders are:

Appeal upheld. Declaration and orders made on 11th September 1991 and entered on 27th September 1991 are quashed and the application dismissed.

Respondent is ordered to pay the appellant's costs of the appeal and in the High Court.

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Mr Justice Michael M Helsham
President, Fiji Court of Appeal

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Sir Peter Quilliam
Justice of Appeal

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Sir Edward Williams
Justice of Appeal