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257

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0061 OF 2001S
(High Court Civil Action No. HBC119 of 2001S)

BETWEEN:

REV. AKUILA YABAKI
VIJAY NAIDU
DOROTHY JANE RICKETTS

Appellants

AND:

THE PRESIDENT OF THE REPUBLIC
OF THE FIJI ISLANDS
THE ATTORNEY GENERAL OF FIJI

Respondents

Coram: Barker, PJ
Ward, JA
Davies, JA

Hearing: Tuesday, 4th February 2003, Suva

Counsel:
Mr. J. Stephen Kos)
Ms Gwen Phillips) for the Appellants
)
Mr. S.J. Gageler S.C.)
Mr. J.J. Udit) for the Respondents
Mr. E. Tuiloma)

Date of Judgment: Friday, 14th February 2003

JUDGMENT OF DAVIES, JA

The facts and issues are described in the reasons for judgment of my colleagues Barker and Ward JJA. I need not repeat them.

In the proceedings below, there were issues raised which were the proper subject of Judicial determination. Included among the applicants were members of the Parliament

which the President dissolved on 14 March 2001, including one or more members of Mr Chaudhry's Government. They were persons who were directly affected by the President's acts and who were interested in the relief sought, including the declaration that "the Parliament constituted after the May 1999 General Elections exists and has not been dissolved." When the proceedings first commenced, injunctions were sought. Apart from making one declaration with which we are not now concerned, the learned trial Judge refused the relief sought. The members of Parliament did not proceed with their challenge. The appeal was instituted by appellants who are no more than "concerned citizens." The relief sought in the appeal includes no declaration as to an existing situation.

In my opinion, this appeal at this time lacks a subject matter suitable for judicial determination . That is in part because the present appellants are merely concerned citizens who have no special interest in the matters which they raise for decision. It is also because the orders sought, declarations, would provoke rather than resolve legal issues. The declarations sought would not constitute final and binding decisions on any issue. The declarations sought would not enunciate or enforce any right. Nor do the declarations seek the enforcement of any duty. The relevant events occurred in mid 2001. The appellants do not now seek orders restraining the acts of which they complain or restoring the previous state of affairs. In this appeal, the appellants do no more than seek an expression of the Court's view on what is an academic question in relation to which the appellants have no special connection.

In Croome v. Tasmania, [1997] 191 CLR 119 at 124-7 Brennan CJ, Dawson and Toohey JJ discussed the term "matter" which appears in s.76 of the Australian Constitution and s.3 of the Judiciary Act (1903) (CLR). The same term appears in s.120(2) and s.121(2) of the Constitution of Fiji. At 125, their Honours said:

> *"The 'matter' is not the proceeding but the subject of the controversy which is amenable to judicial determination in the proceeding. Such a controversy has particular characteristics. In In re Judiciary and Navigation Acts, the majority of the Court said:*
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> *'In our opinion there can be no matter within the meaning of s.[76] unless there is some immediate right, duty or liability to be established by the determination of the Court.... But [the Legislature] cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law.'*
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> *Speaking of this passage, the majority in Mellifont v. Attorney -General (Q) said it contained 'two critical concepts':*
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> *'One is the notion of an abstract question of law not involving the right or duty of any body or person; the second is the making of a declaration of law divorced or dissociated from any attempt to administer it.'*

More recently, in Truth About Motorways Pty Limited v. Macquarie Infrastructure Investment Management Limited (2000) 200 CLR 591, Gaudron J. said at 610:

> *"Although the constitutional meaning of "matter" is to be derived, in significant part, from the concept of "judicial power', it is not necessary in this case to attempt any exhaustive exposition of that concept. It is sufficient to describe judicial power as that power exercised by courts in making final and*

binding adjudications as to rights, duties or obligations put in issue by the parties. Similarly, it is sufficient to note that the constitutional meaning of 'matter' involves the existence of a controversy as to 'some immediate right duty or liability to be established by the determination of the Court.'

At 611-612, her Honour relevantly observed:

"There may be cases where, absent standing, there is no justiciable controversy. That may be because the court is not able to make a final and binding adjudication. To take a simple example, a court could not make a final and binding adjudication with respect to private rights other than at the suit of a person who claimed that his or her right was infringed. Or there may be no justiciable controversy because there is no relief that the court can give to enforce the right, duty or obligation in question."

The High Court of Australia has taken the stand that declaratory relief should be directed to the determination of legal controversy and should not be granted where the declarations would produce no forseeable consequences for the parties. Gardner v. Dairy Industry Authority of New South Wales (1977) 52 ALJR 180 at 188; Church of Scientology v. Woodward (1982) 154 CLR 25 at 62; Ainsworth v. Criminal Justice Commission (1992) 175 CLR 564 at 581-2.

In the United Kingdom, which does not have a written constitution, courts have taken a more relaxed stand. Nevertheless, the same basic concept is recognised. In Regina v. Secretary of State for the Home Department, Ex parte Salem [1999] 1 AC 450, Lord Slynn with whom Lord Mackay, Lord Jauncey, Lord Steyn and Lord Clyde agreed, said inter alia, at 455-6:

"In Sun Life Assurance Co. of Canada v. Jervis [1944] A.C. 111, 113-114 Viscount Simon L.C. said:

'I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way..... I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.'

In Ainsbury v. Millington (Note) [1987] 1 W.L.R. 379, 381 Lord Bridge of Harwich, with whom the other members of the House agreed, said:

'In the instant case neither party can have any interest at all in the outcome of the appeal. Their joint tenancy of property which was the subject matter of the dispute no longer exists. Thus, even if the House thought that the judge and the Court of Appeal had been wrong to decline jurisdiction, there would be no order which could now be made to give effect to that view. It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.'"

However, his Lordship pointed out that these cases concerned private law and that a court has jurisdiction to determine important public law issues which do not directly affect the applicant before it. At page 456-7, his Lordship said:

"My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se."

.....

"The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

In Fiji, the approach taken in the United Kingdom has been followed. See Naidu v. The Attorney General of Fiji, (Court of Appeal, 20 August 1999 unreported).

In practice, the difference in approach between that of the Australian courts and that of the courts of the United Kingdom may be more a matter of terminology than result. In Australia, it has been recognized that there are circumstances where it is appropriate for a member of the public to seek and be granted public law relief. See Croome. v. The State of Tasmania; Truth About Motorways Pty Ltd. v. Macquarie Infrastructure Investment Management Ltd. In the United Kingdom in Regina v. Secretary of State for the Home Department; Ex parte Salem, relief was refused as the legal controversy between the parties had been resolved.

The declarations which were sought in the appellants' notice of appeal were:

"B. a declaration that the purported dismissal by the President of Mahendra Pal Chaudhry as the Prime Minister on 14 March 2001 was inconsistent with the Constitution and was therefore null and void.

C. *A declaration that the purported dissolution of Parliament by the President on or about 14 March 2001 was inconsistent with the provisions of the Constitution and was therefore null and void.*

D. *A declaration that the purported appointments of Senator Laisenia Qarase as Prime Minister and of other persons as Ministers of a caretaker government for Fiji made on or about 15 March 2001 were inconsistent with the Constitution and each such appointment was null and void."*

Of these, the declaration that the dismissal of Mr Chaudhry was unconstitutional as contrary to s.109(1) of the Constitution is the most important for it is submitted that, because Mr Chaudhry's dismissal was unconstitutional, then the later appointments of Ratu Tevita and of Mr Qarase as caretaker Prime Ministers were necessarily flawed. Mr Qarase's appointment is also challenged on the ground that, at the time of his appointment, he was not a member of the House of Representative as s.98 of the Constitution requires of a Prime Minister.

It is therefore of significance that the appellants seek no order rectifying what they allege was an unconstitutional dismissal. The person directly affected by the dismissal, Mr Chaudhry, made no such claim in legal proceedings. Mr Chaudhry is not a party to the present proceedings and no affidavit from him was filed. Mr Chaudhry appears to have accepted the dismissal. Thereafter, he did not act as seek to act as Prime Minister of Fiji. He participated in the general elections which were held in August - September 2001 and his current position, as illustrated by the decision of this Court in Chaudhry v. Qarase (Court of Appeal, 15 February 2002, unreported)is that he and members of his party are entitled, by

virtue of s.99(5) of the Constitution, to participate in the Cabinet of Mr Qarase's Government.

Because Mr Chaudhry accepted his dismissal, whether or not he regarded it as unconstitutional, there is no reason to doubt that the dismissal took effect in law as a dismissal. An analogous situation was postulated by Barwick C.J. in Victoria v. The Commonwealth (1975) 134 CLR 81 at 120, where his Honour said:

> *"Argument was presented to the Court as to what would be involved when the Governor-General dissolved the House without having the power so to do under the Constitution: that is to say, if he erroneously concluded that the conditions existed on which his power to dissolve depended. The dissolution itself is a fact which can neither be void nor be undone. If, without having power to do so, the Governor-General did dissolve both Houses, there would be no basis for setting aside the dissolution or for treating it as not having occurred."*
>
> .....
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> *"It is not necessary, in my opinion, to regard any part of s.57 as directory in order to conclude that, though the proclamation be unlawful, the sequential dissolution in fact occurred and was incapable of being disregarded, reversed or undone."*

Had the applicants below wished to assert seriously that the act of dismissal did not operate as a dismissal, it would have been incumbent upon them to seek an immediate injunction restraining officials from acting on the basis of the dismissal. They did not do so. Nor did they join Mr Chaudhry as a party to the proceedings. The applicants could not seriously have contended that Mr Chaudhry remained Prime Minister without doing so, for Mr Chaudhary was entitled to contend that, whether or not the dismissal was unconstitutional, he accepted it.

In light of the fact that Mr Chaudhry's dismissal could not be undone, the principal challenge to the appointments of Ratu Tevita and of Mr Qarase as caretaker Prime Ministers fall away.

There is also a challenge to the appointment of Mr Qarase as caretaker Prime Minister based upon the contention that, not being a member of the House of Representatives, he was not qualified for appointment as Prime Minister. But; again, Mr Qarase acted as caretaker Prime Minister. That is not something which can be undone. The appellants concede, indeed propound, that the defacto doctrine, whereby legitimate actions may be carried out by persons invalidly appointed to official positions, applies. Had the applicants including the appellants seriously challenged Mr Qarase's appointment and his acting as a caretaker Prime Minister, it would have been incumbent upon them to seek an immediate injunction against his so acting and to have joined him as a party to the proceedings.

These matters are indicative of the point that the appellants seek a ruling of the Court that the President ought to have acted differently from the manner in which he did but they do not seek an order of the Court having operative legal effect.

It was suggested to Mr S. Kos, counsel for the appellants, early in his address, that the Court could not make declarations that the dismissal of Mr Chaudhry and the appointments of Ratu Tevita and Mr Qarase were null and void for Mr Chaudhry had not acted as Prime Minister after being dismissed and Ratu Tevita and Mr Qarase had acted as caretaker Prime Ministers. No doubt having in mind the remarks of Barwick CJ in Victoria v. The

Commonwealth, cited above, Mr Kos conceded that the Court could not turn back the clock and restore the status quo which existed before the President dismissed Mr Chaudhry. Mr Kos informed the Court that he did not seek declarations that the challenged acts were null and void.

It was also put to Mr Kos that, although his submissions raised questions as to the interpretation of the Constitution, no such legal question had been posed for the consideration of the Court below. That led Mr Kos to redraft the declarations sought so that they read:

> *"B. A declaration that the purported dismissal by the President of Mahendra Pal Chaudhry as the Prime Minister on 14 March 2001 was inconsistent with the Constitution, because the President has no power under s.109(1) to dismiss a Prime Minister absent a vote of no confidence in the House or a general electoral defeat.*
>
> *C. A declaration that the purported dissolution of Parliament by the President on or about 14 March 2001 was inconsistent with the provisions of the Constitution, because Ratu Tevita Momoedonu was not lawfully appointed caretaker Prime Minister under s.109(2).*
>
> *D. A declaration that the purported appointments of Senator Laisenia Qarase as Prime Minister and of other persons as Ministers of a caretaker government for Fiji made on or about 15 March 2001 were inconsistent with the Constitution, because a caretaker Prime Minister must be appointed from among the elected Members of the House of Representatives, and caretaker Ministers from among the Members of Parliament."*

In that form, the declarations would provoke questions rather than resolve them. Declaration B does not state that the dismissal of Mr Chaudhry was null and void but it uses

the terms "purported dismissal" and the expression "inconsistent with the Constitution." These terms suggest that the dismissal was not effective. Yet, Mr Chaudhry was dismissed as Prime Minister and the appellants concede that the dismissal cannot be undone. In my opinion, a declaration in that form would not constitute a final and binding determination of any legal issue.

I need not discuss declarations C and D individually. They suffer from the same defect. Ratu Tevita and Mr Qarase acted as caretaker Prime Ministers. This appeal raises no issue as to the legal effect of the acts done by them or their Governments.

The declarations suffer from the further defect that they fail to deal with the point that, were the President's acts inconsistent with the Constitution, they may have been saved by the doctrine of necessity. In Mitchell and Others v. Director of Public Prosecutions [1986] LRC (Consl) 36, Haynes P said, at 91, that the doctrine would save otherwise invalid acts which were done "for a temporary period only and for the specified and limited objective of the restoration of law and order, and the earliest possible holding of free and fair elections leading to constitutional government under the ..... Constitution."

In an address to the Nation given on 15 March 2001, the President made these remarks, inter alia:

> *"I AM VERY CONSCIOUS THAT THE APPEALS COURT RESTRICTED ITSELF TO LEGAL QUESTIONS. IT FOUND THAT THE 1997 CONSTITUTION REMAINS THE SUPREME LAW OF THE REPUBLIC AND PARLIAMENT HAS*

NOT BEEN DISSOLVED. BUT IT DID NOT GIVE US A SOLUTION TO OUR POLITICAL DILEMMA. THAT IS FOR US TO DEAL WITH. I HAVE, THEREFORE, BEEN WEIGHING NUMEROUS POLITICAL QUESTIONS IN EXTREMELY COMPLICATED CIRCUMSTANCES. THESE WERE PERHAPS NOT ANTICIPATED BY THE 1997 CONSTITUTION. IT DOES NOT, IN MY VIEW, PROVIDE COMPLETE AND REALISTIC ANSWERS TO THE MISFORTUNES CAUSED BY AN ARMED INSURRECTION AND REVOLUTION IN A RACIALLY SPLIT DEVELOPING NATION.

LADIES AND GENTLEMEN, I BELIEVE THAT GOING BACK TO THE PEOPLE THROUGH FRESH ELECTIONS IS THE MOST SENSIBLE AND DEMOCRATIC WAY TO RESOLVE THE EXISTING DISUNITY AND CONFUSION WITHIN AND AMONG ALL POLITICAL PARTIES IN PARLIAMENT. I REMIND OURSELVES TOO THAT WE CANNOT PRETEND THAT THE ATTEMPTED COUPS OF MAY 19 LAST YEAR, NEVER HAPPENED. IT HAPPENED BECAUSE FIJIANS CAME OUT IN MASS PUBLIC DEMONSTRATIONS AGAINST A LEADERSHIP AND GOVERNMENT, WHICH THEY FEEL WERE INSENSITIVE TO THEIR INTERESTS. INTERESTS WHICH THE 1997 CONSTITUTION PROCLAIMS TO BE PARAMOUNT AND WHICH SHOULD NOT BE SUBORDINATED TO THOSE OF OTHER COMMUNITIES.

AN EARLY ELECTION WILL GIVE US A NEW START. IT WILL ALLOW THOSE WHO ASPIRE TO BE IN PARLIAMENT TO GO BACK TO THE PEOPLE TO SEEK THEIR MANDATE. THE PEOPLE THEMSELVES WILL BE ABLE TO SPEAK ON ISSUES SUCH AS LAND LAWS,. RECONCILIATION, INDIGENOUS RIGHTS, NATIONAL UNITY, LEADERSHIP AND THE CONSTITUTION.

.....

THE APPROACH I HAVE ADOPTED IS ABOUT DEALING IN THE MOST EFFECTIVE MANNER WITH THE UNCERTAINTIES AND REALITIES OF FIJI'S POSITION. IT IS ABOUT CHOOSING A MIDDLE WAY OF MODERATION, REASONABLENESS AND COMMON SENSE. THESE ELEMENTS ARE VITAL IF WE ARE TO FIND A WAY THROUGH OUR CRISIS. THAT I OFFER IS AN OPPORTUNITY TO MOVE TO FULL CONSTITUTIONAL RULE IN THE SHORTEST TIME. WE CANNOT GO BACK. WE MUST LOOK TO THE FUTURE; WE MUST MOVE FORWARD TOGETHER AS A MULTI-CULTURAL AND MULTI-ETHNIC SOCIETY."

Arguably, these remarks could support the respondents' claim to the application of the doctrine of necessity. Indeed, I doubt that it is in dispute that the actions taken by the President and the holding of the general election in 2001 were effective to restore law and order after the tumultuous events of 2000 and did return the country to Parliamentary democracy at an early time. It is of significance that the President's actions appear to have received the support of the general populace.

Moreover, even if the doctrine of necessity did not save the dismissal of Mr Chaudhry and the appointment of the caretaker Prime Ministers, it can result in many acts done by an unlawful government being treated as valid. In Madzimbamuto v. Lardner - Burke [1969] 1 AC 645, at 727 Lord Reid, delivering the judgment of the majority of their Lordships, cited the following remarks of the Supreme Court of the United States in Texas v. White (1868) 7 Wallace 700 (74US) at 733:

> *"It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void."*

When these issues were pointed out to Mr Kos, he submitted that the words "and was not saved by the application of the doctrine of necessity" could be added to each of the declarations. However, declaration B would still fail to identify any act or thing which should be declared to null and void. Indeed the allegation that any act or thing was null and void appears to have been abandoned. For my own part, the declarations which are now sought are not capable of making a final and binding determination on any legal issue.

The declarations seek to obtain an expression of the Court's opinion upon what is now a purely academic question. They would not resolve any existing legal controversy. They would be misleading for, by using the terms "purported" and "inconsistent with the Constitution," they imply unlawfulness, invalidity and ineffectiveness. But they do not identify what was invalid or ineffective. Moreover, the amended declaration B suffers from the fault that it uses words that do not appear in s.109(1) of the Constitution. Section 109(1) uses the expression "loses the confidence of the House of Representatives." If there is any question to be debated, it is whether the President was entitled to dismiss Mr Chaudhry because Mr Chaudhry had lost the confidence of the House of Representatives. Declaration B as redrafted substitutes other words for the words of the Constitution.

In my opinion, the declarations propounded on behalf of the appellants should not be considered by this Court. They would not resolve any legal controversy and their terms are misleading.

The learned trial Judge discussed the operation of s.109(1) of the Constitution and the question whether the Constitution requires that a caretaker Prime Minister be a member of the House of Representatives. I content myself with saying that I agree with Barker and Ward JJA that s.109(1) reposes the determination of a Prime Minister's loss of the confidence of the House of Representatives in the House of Representatives itself. It is not reposed in the President. I also agree with their Lordships that s.109(2) of the Constitution permits the President to appoint "a person" as caretaker Prime Minister.

I would dismiss the appeal.

FIJI COURT OF APPEAL

J Daryl Davies

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Davies, JA

Solicitors:

Munro Leys, Suva for the Appellants
Office of the Attorney-General, Suva for the Respondents

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