IN THE COURT OF APPEAL - FIJI ISLANDS
AT SUVA

APPELLATTE JURISDICTION

Civil Appeal No. ABU0034 of 2007

BETWEEN : **COMMODORE JOSAIA VOREQE BAINIMARAMA**

First Appellant

REPUBLIC OF FIJI MILITARY FORCES

Second Appellant

THE ATTORNEY-GENERAL Third Appellant

AND : **ANGENETTE MELANIA HEFFERNAN**

Respondent

BEFORE THE HONOURABLE (EX-OFFICIO) MR ACTING JUSTICE OF APPEAL - BYRNE

For Appellants : Mr A.K. Narayan & Mr S. Sharma
For Respondent : No Appearance

Date of Ruling : 4th June 2007

RULING OF THE COURT

On 31st of January 2007, the Respondent initiated proceedings against the Appellants by way of Originating Summons in the High Court. That Summons sought five Declarations and three injunctions against the Appellants. I shall summarise the Declarations here because they are relevant to what I have to say

later. The first Declaration was that the Interim Military Government Regulations 2006 proclaimed by the first Defendant (now Appellant) on the 6th of December 2006 and published in an extraordinary Government Gazette on the 29th of December 2006 were proclaimed in the absence of any power by the 1st Defendant (Appellant) under the Constitution.

The second Declaration was that the State of Emergency Regulations 2006 proclaimed by the 1st Defendant (Appellant) on the 6th of December 2006 and published in an extraordinary Government Gazette on the 29th of December 2006 were proclaimed in circumstances which did not comply with the provisions of Section 2 of the Emergency Powers Act 1998 and were accordingly invalid.

The third Declaration was that the State of Emergency Regulations were published in circumstances which did not comply with the provisions of Chapter 14 of the Constitution and consequently were likewise invalid. Chapter 14 of the Constitution deals with emergency powers available to the State through the President.

The injunctions sought by the Respondent (Plaintiff) were first to restrain the Defendants (Appellants) from detaining or interfering with the freedom of movement of the Plaintiff (Respondent) and from entering any dwelling house or office occupied by her pending the further order of the Court. Secondly an injunction restraining the Defendants (Appellants) from directly or indirectly detaining or interfering with the freedom of movement of the Plaintiff's counsel or any of her legal advisers from entering any dwelling house or office occupied by her counsel and her legal advisers pending the further order of the court. Thirdly an injunction restraining the Appellants (Defendants) from directly or indirectly detaining or interfering with the freedom of movement of any witness in the present proceedings and from entering any dwelling house or office occupied by any such witness pending the further order of the Court.

There followed six grounds purporting to support the Declarations and Injunctions sought. Summarised these grounds are:

1. That since the 6th of September (obviously I take it meant to be December) members of the second Appellant that is the Republic of Fiji Military Forces acting on the authority expressed or implied of the first Appellant detained and assaulted and humiliated citizens who have questioned the authority of the Appellants allegedly because there was in existence a State of Emergency which deprived citizens of their right under the Constitution.

2. That the third Appellant (Defendant) had until recently not questioned the lawfulness of such detentions and continues to support the First and Second Appellants in their claim that the State of Emergency exists.

3. That the actions of the First and Second Appellants have received widespread media coverage which was intended by them to create a climate of fear and intimidation discouraging persons like the Plaintiff (Respondent) from exercising their rights to freedom of expression and association under the Constitution.

4. That the members of the Second Appellant acting on the authority of the First Appellant have expressed a wish to speak to the Plaintiff (Respondent) who feared that she might be unlawfully detained by them.

5. That reports of the recent detention and mistreatment of a lawyer, Richard Naidu, by members of the Second Appellant have caused the

Plaintiff (Respondent) to fear that she too may be mistreated if detained.

6. That the Plaintiff (Respondent) fears that if not enjoined by the court the First and Second Respondents may detain and mistreat her legal representatives and any witness who supports her claim for relief from the court in order to discourage them from assisting the Respondent in her legal action against them.

On the 13th of February 2007 the Respondent filed an Interlocutory Application seeking injunction against the Appellants. On the 20th of April 2007 the High Court granted the Respondent an interlocutory injunction against the Appellants.

After sealing the order of the High Court the Appellants then filed an Appeal in this Court against the interlocutory ruling of the High Court and on the 27th of April 2007 they filed an application in the High Court seeking a Stay pending Appeal from the High Court. On the 24th of May 2007, the High Court refused the Appellants' application for Stay pending Appeal.

Reasons for granting the interlocutory injunctions and the Stay Pending Appeal were given by the High Court and are before me now.

Presently before me is an application by the Appellants to grant a Stay of the High Court's order refusing Stay Pending Appeal and this is listed for hearing in the High Court on Wednesday, the 6th and Thursday, the 7th of June 2007. It is for this reason, the Appellants say, that they are making the present application to me as an ex-officio Judge of the Court of Appeal.

The burden of the Appellants' argument before me is that in his ruling on the interlocutory injunction the Judge of the High Court has effectively made certain

findings, such that if the matter in the High Court proceeds as scheduled, then the Appellants' appeal would be rendered nugatory. These findings include the following:

(a) By granting an Injunction under Section 15 of the Crown Proceedings Act, the High Court has effectively made a finding based on the submissions of the Respondent that the Interim Attorney-General has been appointed by the Military Regime as legal adviser to that regime and not a Constitutionally recognized government. In short, a finding has been made that the Attorney-General is not a representative of the State and cannot rely on Section 15 of the Crown Proceedings Act.

(b) The High Court has ruled that newspaper reports are admissible in the proceedings as relevant evidence, and has found that the Respondent's apprehensions are reasonable.

(c) The High Court has effectively proceeded on the premise that there had been a 'removal of a democratically elected Government on 5 December 2006', which was a matter beyond the issues or evidence, and unless corrected on appeal will impact on the substantive hearing.

(d) On page 3 of its ruling, the High Court referred to the 'might of the State whose lawfulness is in question in these proceedings' whereas the learned Judge of the High Court at page 5 of his decision identified three serious issues in the proceedings, and which I note did not include lawfulness of the State.

The serious issues mentioned by the Judge were:

(a) Whether the State of Emergency Regulations are valid.
(b) Whether the Interim Government Regulations 2006 are validly enacted.
(c) Whether the Respondents have a legal right to arrest the applicant or any citizen.

The contention of the Appellants is therefore that substantive issues appear to have already been determined. It is submitted to me that there will be no prejudice to the Respondent if this Court grants a Stay of Proceedings in the High Court. It is said that there is no risk of arrest of the Respondent and the interlocutory injunction can remain in effect if the Respondent has any fears about this.

I pass now to the reasons of the High Court in granting the relief sought by the Respondent. At page 3 of the Decision the learned Judge says that, "This is a case where I have before me an ordinary citizen pitted against the might of the State (albeit whose lawfulness is in question in these proceedings)" and for that reason in my judgment the learned Judge erred. This was never, and could not be in the nature of the proceedings be an issue before the High Court in an interlocutory proceeding.

On page 6 of his Decision the learned Judge referred to Section 15 of the Crown Proceedings Act and stated correctly that under that Section injunctions can not be granted against the State in civil proceedings against the State. He continued, 'On the face of it, it appears that the Plaintiff is met with this legislative hurdle'. He then said that in response to that apparent obstacle, counsel for the Respondent stated that only a lawful State can 'take shelter behind this provision, not a regime which has usurped power from a legitimate

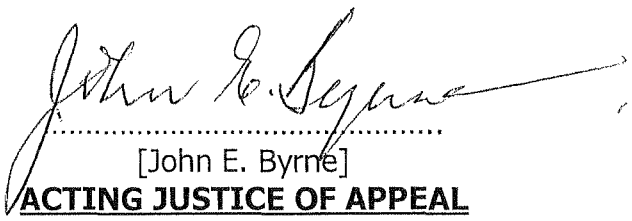
government'. He continued, "There is much force in Doctor Cameron's submission and is clearly an arguable matter".

With respect to the learned Judge, by his granting an injunction to the Respondent he has in effect held that the interim government headed by the First Appellant has usurped power from a legitimate government and in so doing, in my judgment, has exceeded his jurisdiction. In an interlocutory matter such a finding was not open to him. Likewise in granting the injunction the learned Judge, has in my view by clear implication found as a fact that the Third Appellant, the Attorney-General, has not been validly appointed. Such a finding was also not open to him on an interlocutory matter.

I will mention only briefly the Judge's Decision on Stay of the 24th of May 2007. At page 2 of his Decision he rejects a submission by the ~~Respondents~~ (Defendants) that the appeal will be rendered nugatory "as certain findings of his essentially determine the substantive issues in the originating summons." The Judge said he was at a loss to understand this ground because he had expressly stated that he expressed no conclusive views on the serious issues. The Judge obviously does not think his reference to a democratically elected government was expressing a conclusive view. As I understand the position in Fiji at present that question has yet to be decided by the Courts. It also seems to me that by granting the injunction, Judge expressed not only a conclusive view but also made a finding on the legitimacy of the present interim administration which in the circumstances he should not have.

For the reasons I have stated I am prepared to grant the Stay sought by the Appellants in terms of paragraphs 1 & 2 of the Ex-Parte Notice of Motion of the 4th of June 2007 I order that copies of this Order and all relevant documents are to be served on the Respondent or her solicitors no later than the 8th of June

2007 and that the matter be adjourned before me on Tuesday the 12th of June 2007 at 10.00am.



[John E. Byrne]
ACTING JUSTICE OF APPEAL

At Suva
6th June 2006