RATU JEREMAIA NATAUNIYALO

v.

THE NATIVE LAND COMMISSION & RATU AKUILA KOROIMATA

[COURT OF APPEAL, 1998 (Tikaram P, Barker, Tompkins JJA) 13 November]

Civil Jurisdiction

Constitution- customary law- whether decisions of the Native Lands Commission are subject to judicial review- Constitution (1990) Section 100 (4).

On appeal against the refusal by the High Court to dismiss proceedings for judicial review of a decision of the Native Lands Commission the Court of Appeal distinguished its earlier judgment in Nava v. NLC & NLTB (1994) 40 FLR 252 and HELD: that Section 100(4) of the 1990 Constitution did not exclude an examination by the High Court to determine whether the principles of natural justice had been breached in reaching the decision impugned.

Cases cited:

Anisminic Ltd v. Foreign Compensation Commission [1969] 2 A.C. 147
Harrikissoon v. Attorney-General of Trinidad and Tobago [1980] A.C. 265
Ratu Isireli Rokomatu Namalu v. NLFC & Ors - Judicial Review No. HBJ002 of 1995
Ratu Nacamieli Nava v. NLC & NLTB – (1994) 40 FLR 252
Ridge v. Baldwin [1964] A.C.40.80:
The State v. NLC & Ors, ex parte Guru (Judicial Review 0034 of 1995)
Timoci Ramakovoi and Anor. (HBJ 11 of 1994)
Wood v. Woad (1874) LR 9 Ex. 190

K. Vuataki for the Appellant
S. Banuve for the First Respondent
T. Fa for the Second Respondent

Judgment of the Court:

The Appellant appeals against a decision of Byrne J. given on 23rd April 1997. The learned Judge held that s.100(4) of the 1990 Constitution did not prevent judicial review of a decision of the first respondent, the Native Lands Commission. On 5 November 1997, Byrne J. granted the appellant leave to appeal to this Court against his ruling of 23 April 1997.

The proceedings in the High Court arose out of a decision of the First Respondent given on 15th July 1994 deciding that the appellant be the Tui Lawa. The Second Respondent had disputed the Appellant's right to this chiefly

position which had fallen vacant in 1990. Both the Appellant and the Second Respondent had claimed the title and both had held installation ceremonies. The First Defendant was thus called upon to decide who the rightful Tui Lawa should be.

On 16 January 1996, the Respondent filed a summons to dismiss the application for judicial review on the grounds that judicial review of a decision of the First Respondent was contrary to s. 100(4) of the 1990 Constitution. We are unclear as to why there was an appreciable delay before this summons was filed and another delay before it was heard.

Application of this nature which are purely matters of law should be filed promptly and, once brought, heard promptly. Particularly so where, as in the present case, a person had been confirmed in a chiefly position for some years.

The principal ground for judicial review was that, contrary to the principles of natural justice, the First Respondent in reaching its decision had ignored two letters presented to it on behalf of the Appellant. One of those letters (written in the Fijian language) had been presented to Byrne J. He had it translated. The other letter and a record of the First Respondent's decision were not before the Judge. We find it extraordinary that the First Respondent, which should be aware of the duty of full disclosure to the Court, did not make those documents available to the Court and to the other parties as soon as it had been served with the proceedings. It would be impossible for any Court to assess the merits of the Appellant's assertions without these documents. Counsel for the First Respondent (who had not appeared as counsel in the Court below) made these documents available to this Court for translation with the consent of all parties. They have now been translated into English by the Judge' s Associates and considered by the Court.

Byrne J. commenced his judgment by referring to the prolix affidavits on both sides which breached Order 41 Rule 5. These included statements not claimed to be within the deponent's knowledge and/or of an argumentative nature as well as vernacular expressions. We agree wholeheartedly with the Judge's remarks in this area. Members of the legal profession drafting affidavits which blatantly defy the normal standards should realise that they run the risk of such affidavits being stricken from the file and solicitors being penalised in costs.

Section 100(4) of the 1990 Constitution reads as follows:

> "(4) For the purpose of this Constitution the opinion or decision of the Native Lands Commission on
>
> (a) matters relating to and concerning Fijian customs, traditions and usages or the existence, extent, or application of customary laws; and

(b) disputes as to the headship of any division or sub-division of the Fijian people having the customary right to occupy and use any native lands,

A

shall be final and conclusive and shall not be challenged in a court of law."

Byrne J. held that a decision or opinion of the First Respondent would only qualify for protection under s.100(4) if the decision were a valid decision - reached in accordance with the principles of natural justice. Accordingly, he held that he should conduct a judicial review hearing in order to determine whether in fact those principles has been breached.

B

In considering the privative provision of s.100(4), Byrne J. applied the well-known dictum of Lord Reid in Ridge v. Baldwin [1964] A.C.40,80:

C

"Time and time again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void and that was expressly decided in Wood v. Woad (1874) LR 9 Ex. 190. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case."

D

He distinguished the decision of this Court in Ratu Nacanieli Nava v. Native Lands Commission and the Native Land Trust Board (1994) 40 FLR 252. He declined to follow the unreported decision of Lyons J. dated 4th December 1995 in Judicial Review No. HBJ002 of 1995 Ratu Isireli Rokomatu Namalu v, Native Lands Fisheries Commission and Others.

E

Counsel referred in their submissions to other High Court judgments on the topic of whether s.100(4) precluded judicial review of the decision making process of the first respondent as against review of a decision reached after due process had been followed. See the decision of Scott J. in re Timoci Ramakovoi and Anor. (HBJ 11 of 1994) delivered on 24 April 1995 and that of Fatiaki J. in The State v. Native Land Commission and Others, ex parte Guru (Judicial Review 0034 of 1995 judgment 14 November 1997)

F

The principles laid down in Ridge v. Baldwin (supra) were underscored by the House of Lords in Anisminic Ltd. v.Foreign Compensation Commission and Anor. [1969] 1 A.C. 147 Lord Wilberforce's speech in that case is so well-known and authoritative as to make two quotations from it sufficient. Speaking of "privative clauses," he said at 207G and at 208B.

G

" ..... The question, what is the tribunal's proper area, is one which it has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality or unquestionability upon its decision. These clauses in their nature can only relate to

decisions given within the field of operation entrusted to the tribunal."

A

"The Courts when they decide that a decision is a nullity are not disregarding the preclusive clause. For just as it is their duty to attribute autonomy of decision of action to the tribunal within the designated area, so, as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed. In each task they are carrying out the intention
B of the legislature, and it would be misdescription to state it in terms of a struggle between the Courts and the executive. What would be the purpose of defining by statute the limit of a tribunal's powers, if, ... those limits could safely be passed?"

In Nava's case, this Court (at pp 7-8) expressly left open the question whether
C the English policy approach as shown in the above quotations was appropriate to and applicable in Fiji. The applicant for judicial review in that case had sought to impugn the Commission's decision on the merits. There was no claim of lack of process or breach of natural justice. Not surprisingly, this Court held that s. 100 (4) meant what it said in relation to a decision of the Commission which had been reached by valid process.

D

Counsel for the appellant referred us to the decision of the Privy Council in Harrikissoon v. Attorney-General of Trinidad and Tobago [1980] A.C. 265. There it was held that a provision in the constitution of Trinidad and Tobago precluded any challenge of all to a decision of a certain Commission. The advice of Lord Diplock at p.272 summarises the position.

E

"One of the grounds on which both the High Court and the Court of Appeal dismissed the appellant's claim was because they regarded themselves as precluded from adjudicating upon it by section 102(4) of the Constitution which provides:

"The question whether - (a) A Commission to which this
F section applies had validly performed any function vested in it by or under this Constitution .... shall not be inquired into in any court."

The ouster of the court's jurisdiction effected by this section is in terms absolute. In their Lordships ' view it is clearly wide
G enough to deprive all courts of jurisdiction to entertain a challenge to the validity of an order of transfer on either of the grounds alleged by the appellant in the instant case; and that is sufficient to support the dismissal of the appellant's claim on this ground also.

In all the judgments below, however, there is considerable discussion of recent English cases dealing with "ouster of jurisdiction clauses" contained in Acts of Parliament. Section

102(4) does not form part of an Act of Parliament; it is part of the Constitution itself Their Lordships do not think that the instant appeal provides an appropriate occasion for considering whether section 102(4) of the Constitution, despite its unqualified language, is nevertheless subject to the same limited kind of implicit exception as was held by the House of Lords in Anisminic Ltd v. Foreign Compensation Commission [1969] 2 A.C. 147 to apply to an ouster of jurisdiction clause in very similar terms contained in an Act of Parliament. This question is best left to be decided in some future case if one should arise, in which the facts provide a concrete example of the kind of circumstances that were discussed in the judgments in the Anisminic case. The facts in the instant appeal do not. The appeal is dismissed with costs."

We do not consider that Harrikissoon's case assists the second respondent's argument, rather the contrary. If s. 100(4) of the Fiji Constitution had been as widely drawn as s. 102(4) of the Trinidad and Tobago Constitution, then the valid performance of the First Respondent's function (e.g. whether it had acted in accordance with the principles of natural justice) would not be open to challenge.

However, in the absence of such an unusually wide provision, we consider that the Anisminic principles are part of the law of Fiji. We agree with Byrne J's approach and also with the reasoning of Fatiaki J. in the case cited earlier. We do not read this Court's decision in Nava as precluding this conclusion. Accordingly, the appeal must fail. The application for judicial review must proceed in its merits.

Before parting with the matter, however, we make some further relevant observations.

First, counsel for the first respondent drew our attention to a recent amendment to the Native Land Act (Cap. 133) which set up an Appeals Tribunal to hear appeals from decisions of the first respondent. A privative clause along the lines of s.100(4) is now to be found in that legislation. S.100(4) of the 1990 Constitution was not replicated in the 1997 Constitution. Any right of appeal is prospective and not retrospective unless there is a contrary indication in the statute. We find none.

Consequently unless the first respondent's decision is set aside and a new hearing ordered by the High Court then any right of appeal or lack of one from the first respondent's decision must be governed by the law existing at the date of the decision.

Secondly, Mr. Fa for the Second Respondent submitted that at the hearing on the merits, the applicant was entitled to certiorari as of right because, he claimed, of the lack of information provided by the first respondent. This

submission fails to recognise:-

A (a) that the High Court will need to be supplied by the First Respondent with all relevant information in its possession. There should be a directions hearing to ascertain the interlocutory steps required and the scope of the information to be supplied.

B (b) the issue of *certiorari* is a discretionary remedy which is by no means automatic. The fact that the second respondent has been in office for some 4 plus years could be a factor in the decision whether or not to exercise the discretion. There could be other considerations.

C We have perused the translations of the First Respondent's decision and the letters referred to by Byrne J. The decision appears to have been a careful appraisal of conflicting arguments and does in fact refer to two of the letters. On the face of it, grounds for attack based on lack of process do not appear strong. However, that will be for the High Court to decide.

D However, we urge the Second Respondent to consider carefully whether a case of lack of process can be sustained before taking the matter further.

The result therefore is

(a) The appeal is dismissed

E (b) case referred in High Court for hearing of judicial review application on the merits.

(c) Costs in favour of Second Respondent of $500 to be paid by Appellant.

F We have reduced the question of costs awarded to the Second Respondent because of the complete disregard by his counsel for the second respondent of the requirement to file submissions in this Court in a timely way. These submissions due in early September 1998 appeared only on the morning of the hearing. Counsel for the other parties had filed their submissions in time. Late filing is unhelpful to other counsel and contemptuous of the Court. We have received an affidavit of explanation and apology from Mr. Tevita Fa which we accept on this occasion. We emphasise that in the absence of good

G and valid reasons no similar delays will be tolerated in the future.

(Appeal dismissed.)