UTTAM CHANDRA and Anor v PERMANENT SECRETARY FOR FINANCE and Anor

HIGH COURT — CIVIL JURISDICTION

FATIAKI J

25 January 2002

[2002] FJHC 59

Taxation — tax exemptions — action for declaratory relief — taxability of nonresident pensioners — Income Tax Act (Cap 201) ss 7(1), 7(4), 11, 17, 24(1), 31 — 1990 Constitution ss 38(1), 38(2), 133, 133(5) — 1970 Constitution ss 111(5), 133(5) — 1997 Constitution s 195(2)(b).

Civil and political rights — unfair discrimination — resident and nonresident pensioners — 1997 Constitution ss 34(3), 37, 38, 38(7).

Uttam Chandra had been taxed with the pension he received since his retirement and emigration in New Zealand. Uttam Chandra and the Fiji Pensioners Association sought declaratory relief from the provisions of the Income Tax Act. The ground for the action was that the provision of the Income Tax Act was inconsistent with the Constitution of Fiji.

Held — (1) The first applicant's liability to tax under the Income Tax Act does not depend upon his residence in the country nor does it depend upon the raising of an assessment by the commissioner as counsel submits. This is clear on a reading of the provisions of the Act.

(2) The critical words in s 111(5) which determine a nonresident pensioner's liability to normal tax are not those contained within parenthesis relied upon by the Applicants, rather, it is the phrase "after he has received that payment" which expression very clearly identifies or refers to the "location of the source" of the payment in this country. Such payments which are received in this country are part of the chargeable income of a nonresident pensioner derived in this country and are chargeable with normal tax.

(3) The text of the section itself contains its own limitations. It only proscribes discrimination amongst the members of categories which are themselves similar. Thus the issue, for each case, will be to know which categories are permissible in determining similarity of situation and which are not. It is only in those cases where the categories themselves are not permissible, where equals are not treated equally, that there will be a breach of equality rights.

Smith Kline & French Laboratories Ltd v Attorney-General (Canada) (1986) 34 DLR (4th) 584, cited.

Declaratory relief refused.

Cases referred to

Andrews v Law Society of British Columbia (1989) 56 DLR (4th) 1; *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130; *Dews v National Coal Board* [1986] 3 WLR 227; *Matadeen v Pointu* [1999] 1 AC 98; [1998] 3 WLR 18; *Peterson v Canada* 124 DLR (4th) 96, cited.

Vijay R. Singh for the Applicants

S. Kumar for the Respondents

Judgment

Fatiaki J. In this action the applicants by way of originating motion dated 21st January 1999 seek the following declaratory relief:

> *(1) A Declaration that the provisions of Sections 11 and 17 of the Income Tax Act Cap 201, or any other provision of the Act that purport to charge with income tax the pension benefits of non resident pensioners, are, and always have been, invalid for being inconsistent with section 133(5) of the 1990 Constitution of Fiji.*

It was pointed out to counsel at the initial stages that the particular wording of this declaration presents some problems in so far as it contains an element of vagueness and retrospectivity which in turn raises questions of "*locus*" (the first applicant not having retired until October 1984), and every likelihood of a "*limitation*" bar (not to mention the administrative nightmare involved), in so far as any claims for tax refunds on pension payments made since 1970 to the present day, would involve hundreds of unnamed now dead or living pensioners spread all over the world and, exceeds thirty (30) years!

The second declaration which the applicants seek is similarly vague but suffers from fewer problems. It reads:

> *A Declaration that any provision of the Income Tax Act as stated above is invalid on the further ground of being inconsistent with Section 38(1) and (2) of the 1997 Constitution.*

The grounds put forward by the applicants for seeking relief are as follows:

> *Pursuant to Income Tax (Amendment) Decree No 30 of 1992, Government has imposed income tax on pension benefits of non-resident pensioners. The applicants claim that sections 11 and 17 of the Act are invalid to the extent that they (or any other provisions of the Act) purport to charge pensions of non-residents with tax on the ground that such provisions have always been inconsistent with section 133(5) of the 1990 Constitution and are now also inconsistent with section 38(1) and (2) of the 1997 Constitution.*

If I may say so this composite ground is unfortunately worded in so far as it too suffers from the problems of retrospectivity earlier mentioned, but more so, in that it purports to suggest that income tax was first imposed on pensions in 1992 which is factually and legally incorrect, and furthermore, the words in parenthesis introduces an undesirable vagueness into a matter that should be clear.

Be that as it may there are before the court the following relevant affidavits:

(1) an affidavit of the 1st applicant dated 10th January 1999;

(2) an affidavit of the President of the 2nd applicant Association dated 14th January 1999; and

(3) an affidavit of the Deputy Secretary of Finance dated 16th March 1999;

I am also grateful to counsels for the helpful written submissions and authorities placed before the court.

In this latter regard counsel for the applicants conveniently summarises the "*substantive questions*" as follows:

> *(1) Whether the provisions of the Income Tax Act (ITA) pursuant to which Government has imposed taxes on the pension benefits of non-resident retired public servants are, and have since 1970 been, invalid for being inconsistent*

with the provision of sections 111(5) and 133(5) respectively of the 1970 and 1990 Constitutions and which provision has been preserved by section 195(2)(b) of the 1997 Constitution.

(the invalid taxation argument)

(2) *Whether the provisions of the ITA unfairly discriminate against non-resident retired public servants in violation of the provisions of section 38 of the 1997 Constitution.*

(the unfair discrimination argument)

Taxability of pensions

The first applicant in his primary affidavit deposes somewhat cryptically, that since his retirement and emigration to New Zealand, he had been receiving his pension "*in full*" until 1994 (whatever that may mean) and further, that "*it was common knowledge that Government remitted pensions of retired non-resident expatriate officers free of tax*".

I say "*whatever that may mean*" advisedly because as was said by Parker L J in *Dews v National Coal Board* [1986] 3 WLR 227 at 236:

> *Tax is imposed by law… The taxpayer must pay, and in my opinion, it cannot make any difference whether he receives the gross income and pays tax later… or whether it is deducted before he receives it… In either case to say a taxpayer has the benefit of his full income is, in my opinion, to be "out of touch with reality"…*

Be that as it may, in reply the Deputy Secretary of Finance deposes: "*That all pensioner's either resident or non-resident were paying tax to the government until the new Decree No. 30 of 1992 … which did not include nonresidents whose pensions are still taxed by government*".

More specifically, in regard to the first applicant's pension payments, the Deputy Secretary deposes: "*income tax has been continuously deducted from his pension with effect from 29.10.87*". As for nonresident expatriate officers, "... *(They) are paid gratuity and income taxes are deducted on a normal basis*".

Plainly there appears to be some disagreement as to the taxability of pensions which must be clarified before advancing any further.

Section 7(1) of the Income Tax Act (Cap 201) (1985 revised edition) provides that "*normal tax*" shall be assessed levied and paid for each year of assessment on every dollar of "*chargeable income*" and s 24(1) defines the "*chargeable income*" of a taxpayer as being the taxpayer's "*total income*" whether accruing or derived from Fiji or elsewhere subject to various deductions specified in certain sections of the Act. In respect of non-resident pensioners however, s 31 provides for a reduced level of deductions depending upon what other income is received by the pensioner. Section 11(1) of the Act then defines the "*total income*" of a taxpayer as the aggregate of all sources of income including under para (i): "*any income received or accrued by way of … pension including a voluntary pension*".

Section 17(50) of the Act however additionally provides that "*any pension received by a resident individual* (would not be chargeable to normal tax) *to the extent of $1,000*". In similar albeit discriminatory vein s 17(43) wholly exempts "*any pension received by a resident from the Fiji National Provident Fund*".

The former exemption was further extended by s 7(4) of the Income Tax (Amendment) Decree No 30 of 1992 (the Amendment Decree) so as to totally exempt from normal tax: "a*ny pension received by a resident individual*". This particular provision is the subject matter of the applicant's above-mentioned

"unfair discrimination argument" which I shall deal with later in this judgment. I turn firstly to deal with counsels "invalid taxation argument".

From the foregoing it is clear that pension payments are treated for tax purposes as part of a pensioner's "*total income*" and, subject to allowable deductions, is chargeable to normal tax unless exempted under s 17. What's more the legislature in imposing normal tax on pension payments draws a distinction between resident and non-resident pensioners in respect of the allowable deductions as well as the amount that is chargeable to normal tax.

Given therefore that the scheme of the Income Tax Act is to treat as taxable any pension payments received by a pensioner, counsel submits that "*Sections 11 and 31 of the Income Tax Act, in so far as they seek to tax the pension benefits of nonresidents, offend against and are ultra vires subsection (5) of Sections 111 and 133 respectively of the 1970 and 1990 Constitutions*".

It should be pointed out that ss 11 and 31 are strictly not charging provisions and therefore no tax is imposed or recovered under either provision, nor is it entirely clear from the applicant's submissions when? It is said, income tax was first levied on pension payments if they were not always taxable.

Be that as it may, the invalidity argument counsel writes: "*is founded on the provisions of Section 111(5) of the 1970 Constitution and its reincarnation in Section 135(5) [sic] of the 1990 Constitution, continued into existence by Section 195(2) of the 1997 Constitution*". Counsel further advanced an interesting chronology tracing the historical origins and the "*rationale*" behind these so-called protective provisions.

Section 111(5) of the 1970 Constitution provides:

> *Any person who is entitled to the payment of any pension benefit and who is ordinarily resident outside Fiji may, within a reasonable time after he has received that payment, remit the whole of it* (free from any deduction, charge or tax made or levied in respect of its remission) *to any country of his choice outside Fiji.*
>
> *Provided that nothing in this subsection shall be construed as preventing:*
>
> *(a) The attachment, by order of a court, of any payment or part of any payment to which a person is entitled in satisfaction of the judgment of a court or pending the determination of civil proceedings to which he is a party to the extent to which such attachment is permitted by the law with respect to pension benefits that applies in the case of that person; or*
>
> *(b) The imposition of reasonable restrictions as to the manner in which any payment is to be remitted.*

It is common ground that the above provision was duplicated in the 1990 Constitution as s 133(5) and although not repeated in the 1997 Constitution, nevertheless, s 195(2)(b) expressly provides that "*Section 133 of the Constitution of 1990 continue(s) in force according to (its) tenor...* "

What then is the true meaning and effect of the above provision?

Counsel for the Applicants submits that "(the provision) *refers to a person's entitlement to a pension benefit as provided in the Pensions Act and it is that amount that is exempt from tax or any other charge*".

Counsel for respondent on the other hand in seeking to uphold the taxability of all pension payments, and in urging various rules of statutory construction, writes:

> *... the tax referred to in ... the* (1970 & 1990) *Constitution specifically related to one made or levied in respect of the remission of a pension benefit only* (and) *does not include any other form of tax which is not associated with the remission of such monies.*

More particularly counsel submits that the exclusion in s 111(5) above refers:

> *…to bank charges which commercial banks* (and other authorities) *would normally charge for the remittance of such monies overseas. This does not include income tax.*

In reply counsel for the applicants asserts that s 111(5) cannot possibly refer to "*bank charges*" which are essentially a private matter "*outside the purview of the Constitution*". What's more counsel submits "*a person's liability to tax under the Income Tax Act arises when the Commissioner raises and serves an assessment pursuant to Section 55*".

In this latter regard however, in *Clark (Inspector of Taxes) v Oceanic Contractors Inc* (1983) 2 AC 130 per Lord Scarman speaking generally about the basis of a taxpayer's liability to tax said at 42:

> *Put very briefly, liability to tax depends, as it always has, upon the location of the source from which the taxable income is derived or the residence of the person whose income is to be taxed: If either the source of income or the residence of the owner of the income is in the United Kingdom, the income is liable to tax.*

and later at 144 his lordship said:

> *Residence is not a necessary condition of tax liability if there be otherwise a sufficient connection between the source of the income, profit or gain and the United Kingdom.*

Plainly the first applicant's liability to tax under the Income Tax Act (Cap 201) does not depend upon his residence in the country nor does it depend upon the raising of an assessment by the commissioner as counsel submits. This is clear in my view, on a reading of the provisions of ss 7, 11, 17, 24, 79 and 80 of the Act.

Furthermore counsel's competing submissions on this aspect of the case, are predicated upon quite different assumptions or premises. The applicants argue that pension benefits of non-residents were always exempt from income tax and it is the tax position of resident pensioners that has finally "*caught-up*" with their non-resident counterparts, whereas, the Respondent starts with the position that all pension benefits paid by the government are taxable under the Income Tax Act and the legislature has progressively relieved resident pensioners' from income tax while leaving the tax position of non-resident pensioners, unaltered.

In my considered view the critical words in s 111(5) which determine a non-resident pensioner's liability to normal tax are not those contained within parenthesis relied upon by the applicants, rather, it is the phrase "... *after he has received that payment...*" which expression very clearly identifies or refers to the "*location of the source*" of the payment in this country. Such payments which are "*received*" in this country, are part of the "*chargeable income*" of a non-resident pensioner derived in this country and are chargeable with normal tax.

Needless to say I do not accept that the words in parenthesis namely, "*free from any deduction, charge or tax made or levied in respect of its remission*" means that no charge(s) whatsoever may be made or imposed on pension payments that are sent abroad [*see*: proviso (b) to the Section], rather, the expression means and is to be understood by non-resident pensioners as signifying that the amount remitted abroad is the net amount after deduction of all reasonable charges and taxes.

In my view the so-called "*right*" (if any) that is protected by s 111(5) is not the "*right*" claimed by applicant's counsel, "*to receive the pension exempt of any tax or levy*" but, the "*right*" of non-resident pensioners to require the remittance of their pension payments abroad.

I cannot accept that a complete tax exemption was ever intended by the mere enactment of s 111(5) of the 1970 Constitution or its continuation thereafter, nor, in my view, was the taxability of pension payments, the relevant "*mischief*" that the subsection sought to address and which counsel so-ably identified in his historical analysis.

The subsection no-where uses the word "*exempt*" and the ending words in parenthesis "*... made or levied in respect of its remission*", cannot be so easily ignored as mere surplussage. Furthermore the wording of the subsection contrasts quite graphically with the formula adopted in para 15 of the Fiji (Retiring Benefits) Order 1970 to wit, "*... shall be exempt from tax under any law in force in Fiji relating to the taxation of incomes or imposing any other form of taxation*", which was referred to in counsel's written submissions and formed part of the 1970 constitutional documents.

For the foregoing reasons the "invalid taxation" argument is rejected. The first declaration sought by the Applicant is accordingly refused. I turn my attention next to counsel's "unfair discrimination" argument.

This argument counsel writes "*is founded on Section 38 of the 1997 Constitution*" which provides an "*over-riding protection against direct or indirect unfair discrimination on grounds of 'personal characteristics or circumstances' and... extends beyond the grounds enumerated and applies to grounds analogous to those prohibited*".

More particularly counsel submits that a person's entitlement to pension benefits is earned for service in Fiji irrespective of whether or not the pensioner was then normally permanently resident in Fiji and "*having become entitled to pension benefits on the day of their retirement, their subsequent residential status or circumstance is irrelevant*".

This submission if I may say so is a "*non-sequitur*" in so far as it fails to distinguish between a pensioner's legal entitlement to a pension which is governed by the relevant provisions of the Pension Act(s) *and* the tax status of pension payments which is solely to be determined under the Income Tax Act.

Be that as it may, in counsels view, the provisions of the Income Tax Act throws up into stark contrast "*a resident-v-non-resident pensioner dichotomy*" by subjecting nonresident pensioners to the disadvantage or burden of a tax to which resident pensioners are not subjected through the denial of the benefit of a law (exempting the pensions of resident pensioners from tax) to nonresident pensioners.

Furthermore counsel writes: "*the tax treatment accorded to non-resident pensioners is, in effect, also a penalty for their having exercised the mobility right guaranteed to them by section 34 of the Constitution, and which makes the discrimination even more unfair*"...

Section 38 of the 1997 Constitution reads (so far as relevant for present purposes):

> *(1) Every person has the right to equality before the law.*
>
> *(2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:*
>
> *(1) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or*

(2) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others;

or on any other ground prohibited by this Constitution.

(3) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground.

On the face of it the exemption granted to resident pensioners by s 7(4) of the "Amendment Decree" undoubtedly treats (to adopt a neutral expression) nonresident pensioners differently from their resident counterparts for tax purposes. But different treatment does not necessarily mean that nonresident pensioners are being "*unfairly discriminated against*" in breach of the fundamental "*right to equality*" envisaged under s 38.

As was said by the Privy Council in *Matadeen v Pointu* [1999] 1 AC 98 at 109:

Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently. Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour.

But the very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer … Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve, …, questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves … In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislative and the executive in deciding how the principle is to be applied.

Earlier in its judgment the Privy Council said under the subheading "*Constitutional Interpretation*" (ibid at 108):

The context and purpose of a commercial contract is very different from that of a constitution. The back ground of a constitution is an attempt, at any particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account … It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used.

It is noteworthy that s 38(7) expressly provides that:

A law is not inconsistent with subsection (1), (2) or (3) on the ground that it:

(7) imposes on persons who are not citizens a disability or restriction or confers on them a privilege or advantage, not imposed or conferred on citizens.

but only to the extent that the law is reasonable and justifiable in a free and democratic society.

The provision is noteworthy in so far as it expressly excludes from the ambit of the prohibitive provisions of s 38, a law which treats persons differently on the basis of a "*personal characteristics or circumstances*" namely, their "*citizenship*" provided that such a law is both "*reasonable and justifiable in a free and democratic society*".

Undoubtedly the location of a person's permanent residence or home is part of his "*personal … circumstances*" and any differentiation based on such a ground would be prima facie discriminatory, but, is it "*unfair*"?

Plainly, if one were to consider the provisions of the "Amendment Decree" solely on the basis of how it treats or affects all pensioners as a discrete group, then there can be no doubting that its provisions are discriminatory in treating like individuals (ie pensioners) unlike. However, if the basis or criterion of comparison were altered to the residential status of the pensioner then, equally, there would be no obvious inequality or unfairness since one would be dealing with unlike individuals (ie resident vs non-resident pensioners) differently.

Plainly the basis of comparison upon which a claim of discrimination is to be determined under s 38 is not one of strict numerical equality.

Hugessen J in delivering the judgment of the *Canadian Federal Court of Appeal* in *Smith Kline & French Laboratories Ltd et al v Attorney-General of Canada* (1987) 34 DLR (4th) 584 and speaking about s 15 of the Canadian Charter of Rights and Freedoms which prohibits discrimination based on several enumerated grounds including "*national or ethnic origin*" said (at 590):

> *At the most basic level, the equality rights guaranteed by S 15 can only be the right of those similarly situated to receive similar treatment. The issue will be to know, in each case, which categories are permissible in determining similarity of situation and which are not.*

later at 591 his honour said:

> *The answer, in my view, is that the text of the section itself contains its own limitations. It only proscribes discrimination amongst the members of categories which are themselves similar. Thus the issue, for each case, will be to know which categories are permissible in determining similarity of situation and which are not. It is only in those cases where the categories themselves are not permissible, where equals are not treated equally, that there will be a breach of equality rights.*
>
> *But how to know who is equal and who is not and what are the permissible grounds for categorisation? In my view, there is no single test that will serve. Not even a category based upon one of the enumerated prohibited grounds of discrimination will necessarily fail: the refusal of a driver's licence to a child of three does not need to seek its justification … I do not think it is prudent, or even possible, to lay down any hard and fast rules. The most we can do is suggest a range or spectrum of criteria to determine on which side of the line any given categorisation must fall. These criteria, which are, in effect no more than indicators, may, as it seems to me, be drawn from three sources. First, the text of s 15 itself, the other rights liberties and freedoms enshrined in the Charter and, thirdly, the underlying values inherent in the free and democratic society which is Canada.*

Furthermore as was said by the Supreme Court of Cyprus in *Serghios Antoniades and Others v The Republic* (1979) 3 CLR 641 at 645:

> *… when the constitutionality of a law imposing taxation is attacked on the ground that it infringes the principle of equality, the legislative discretion is allowed a great latitude in view of the complexity of fiscal adjustment and that in taxation matters there is a broader power of classification by the legislation than in the exercise of legislative power in other fields; that, moreover, absolute equality in taxation cannot be obtained,*

and it is not really required by the principle of equality; that in matters of taxation the state is allowed to pick and choose districts, objects, persons, methods and even rates of taxation; that a state does not have to tax everything in order to tax something;

In similar vein Gonthier J (with whom the majority agreed) in *Thibaudeau v Canada* [1995] 2 SCR 627 said at 29:

It is of the very essence of the ITA(Income Tax Act) to make distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests. In view of this, the right to the equal benefit of the law cannot mean that each taxpayer has an equal right to receive the same amounts, deductions or benefits, but merely a right to be equally governed by the law …

That being the case, one should not confuse the concept of fiscal equity, which is concerned with the best distribution of the tax burden in light of the need for revenue, the taxpayers' ability to pay and the economic and social policies of the government, with the concept of the right to equality, which … means that a member of a group shall not be disadvantaged on account of an irrelevant personal characteristic shared by that group.

later his honour said at 31/32:

In *Andrews v Law Society of British Columbia (1989) 56 DLR (4th) … McIntyre J first noted that discrimination will not result from every distinction or difference in treatment. In my view, this observation applies especially to tax legislation, the very essence of which is to create categories.*

It is, of course, obvious that legislatures may — and to govern effectively — must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society.

As for discrimination on the basis of a person's residency, in the Canadian case of *Peterson v Canada* (1995) 124 DLR (4th) 96 where the appellants were denied the benefits of a government assistance program on the basis that they were neither Canadian citizens or permanently resident in Canada, the Federal Court of Appeal in upholding the judgment of the trial judge dismissing the action for damages based upon an infringement of the guarantee of equality under the Canadian Charter of Rights held:

The differential treatment accorded to the appellants … does not amount to discrimination. The non-resident characteristic of the appellants … is not analogous to the prohibitive criteria found in (the Section guaranteeing equality). *Residency is not an immutable characteristic and is within the control of the individual … The distinctions drawn by Parliament in targeting the beneficiaries of this subsidy programs are not irrelevant personal characteristics.*

Similarly in the present case the Plaintiff and any member of the group to which he belongs could become eligible for the tax exemption by reacquiring resident status in Fiji. Needless to say, the change in their residential status was entirely of their own choosing and within their control and cannot be said to be of an "*immutable*" character.

In this context it is difficult to understand counsel's submission based on s 34(3) of the Constitution which grants "*every citizen… the right to leave the Fiji Islands*". Quite simply the taxing of a non-resident pensioner's pension is not a denial of his right to leave Fiji; on the contrary, it assumes his absence from Fiji. Furthermore as has been earlier pointed out the taxability of pensions is not based on the residence of the pensioner but on its source or receipt within the country.

It might be that a pensioner's entitlement to the tax exemption is dependant on his residential status but that is an entirely different thing from saying that citizen pensioners are forbidden by the tax exemption law from leaving Fiji. They have a choice.

McDonald JA delivering the judgment of the court in the *Peterson* case (ibid) cited with approval the observation of the trial judge (at 104) when the learned trial judge said:

> *… an Act which provides for the distribution of public funds only to actual grain producers who have a substantial connection with Canada through permanent residence or citizenship, and denies such payments to those with less tangible connections, cannot be characterised by any court with assurance as involving irrelevant personal characteristics.*

Likewise in the present case the provisions of the "Amendment Decree" denying the benefit of a tax exemption on the basis of a taxpayer's residency cannot be categorised as "*unfair*" discrimination and I so find.

If however I should be wrong in so finding that differentiating between resident and nonresident pensioners is not discrimination, then I am persuaded that such discrimination on the basis of residency in a taxing statute is both "*reasonable and justifiable*" in the Fiji context.

In the first place, this country since the coups of 1987 may be described as a "*nett-emigration*" society losing both skilled personnel as well as scarce foreign exchange and, although pensioners are not normally identified with the "*brain drain*", the fact that their pensions are remittable to a foreign country "*as of right*" directly impacts on the country's foreign reserves which is undoubtedly a matter in the government's interest to conserve.

Second, in the absence of a comprehensive social security or welfare system in this country as opposed to that which exists in wealthier neighbouring states, it may well be that government in its wisdom has chosen to extend some favour towards individual resident pensioners who in this country might be considered a distinctly disadvantaged group, by alleviating their tax burdens and thereby increasing the already limited funds available to them.

In the *Serghios Antoniades* case (op cit) Triantafyllides P in upholding the constitutionality of the provision there under consideration said (at 863):

> *Such differentiations are an expression of social policy of the State as it has been adopted by the Legislature, and this Court cannot substitute its own views in the place of those of the legislature as regards the advisability of the said policy.*

For the foregoing reasons I am satisfied that there is no merit in the applicant's "unfair discrimination" argument. The second declaration is accordingly refused with costs which are summarily assessed at $500.

Declaratory relief refused.