ATTORNEY-GENERAL OF FIJI v TIMOCI SILATOLU

COURT OF APPEAL — APPELLATE JURISDICTION

BARKER, WARD and DAVIES JJA

11 February, 6 March 2003

[2003] FJCA 12

Criminal Law — appeals — appeal against judgment of the trial court — rights of a charged person — whether the trial judge erred in law and in fact when he waived the formal requirements — whether the declaration for mandatory injunction against the State was proper — whether is a distinction between the services of a legal practitioner of the Constitution and legal assistance of the Legal Aid Act — whether the interests of justice was complied with — whether the right of the Accused was violated under the Constitution — Constitution of Fiji ss 28(1)(d), 37, 38(1), 41(10) — Legal Aid Act 1996 s 10 — Human Rights Commission Act 1999 s 37(2).

The Respondent, Timoci Silatolu, was jointly charged with treason with one Josefa Nata. The trial was set down to commence before Wilson J and assessors. The Respondent applied for legal aid and referred to his constitutional right under the Constitution. The court ordered by mandatory injunction that the State gives the services of a legal practitioner under a scheme of legal aid to the Respondent and the second accused at its own expense. Also, the court declared that the applicant's right to equality had been contravened. The Attorney-General representing the State appealed against the judgment of the court.

Held — (1) The judge's view was that the interests of justice required legal assistance be provided for the Respondent. He did not consider that judicial review was an adequate alternative remedy for the Respondent.

(2) The rationale for not making injunctive orders against the State is that the court exercises judicial authority on behalf of the State and that it is incongruous for the State to give orders to itself. There is also difficulty in enforcement, since the officers of the court who customarily enforce judgments are themselves employees of the State.

(3) Even in constitutional and human rights cases, injunctions against the State or a Minister are to be a last resort. A declaration is sufficient. In the present case, an order in the nature of mandamus against the Legal Aid Commission (LAC) could have been appropriate as a last resort. The proper recipient of any injunction would have been the LAC.

(4) The trial judge issued injunctions instead of making declarations without consideration of the propriety of doing so. One might have thought that, if he were suspending the trial pending compliance with his orders, declarations would have been sufficient and complied with by the State. The mandatory injunction was inappropriate and unnecessary.

(5) The Respondent was entitled to the services of a legal practitioner under a scheme for legal aid. The requirement of "in the interests of justice" was fulfilled in this case. The Respondent was facing a most serious charge which the death penalty would have been imposed if convicted.

(6) The Constitution must prevail. If an accused is able to satisfy that his/her rights are being infringed by the lack of a grant or an inadequate grant of legal aid and that the interests of justice require such an order, then the LAC will have to supply the legal assistance, given that it operates the only scheme for legal aid in terms of the Constitution.

Appeal dismissed.

Cases referred to

Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51; *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385; *Gairy v*

Attorney-General of Grenada [2001] UKPC 30; *Harrikissoon v Attorney-General of Trinidad & Tobago* [1980] AC 265; *Health Insurance Commission v Peverill* (1994)179 CLR 226; [1994] HCA 8; *Jaundoo v Attorney-General of Guyana* [1971] AC 972; *Levesque v Attorney-General of Canada et al* (1985) 25 DLR (4th) 184; *Mavilima v Republic of Namibia* High Court of Namibia, 14 December 2001; *Observer Publications Ltd v Campbell "Mickey" Mathew* (unreported, UK PC 11, 19 March 2001); *R v Alick Shiu-yuen* (1991) 1 HKPCR 71; *R v Secretary of State for the Home Department; Ex parte Salem* [1999] AC 450; *Sinnott v Minister of Education* [2001] 2 IR 505, cited.

N Nagendra Rao and Co v State of AP AIR (1994) SC 2663; *R v Shatwell* [2002] 2 Cr App R 342; *Re M* [1994] 1 AC 377, considered.

N. Basawaiya for the Appellant.

S. Valenitabua for the Respondent.

S. Shameem and *D Sudhakar* for the Human Rights Commission (intervener).

P. Ridgway for the Director of Public Prosecutions (intervener).

Barker, Ward and Davies JJA. This appeal by the Attorney-General representing the State is against a judgment of Wilson J given in the High Court at Suva on 22 August 2002 in the following circumstances.

The Respondent, Timoci Silatolu, was jointly charged with treason with one Josefa Nata. The trial was set down to commence before Wilson J and assessors on 22 July 2002. Mr Nata was represented by counsel who was an employee of the Legal Aid Commission (LAC). Mr K Vuataki of counsel made what he called "a provisional appearance" for the Respondent when the case was called. The judge thereupon adjourned the hearing in open court to enable Mr Vuataki to clarify his instructions. Mr Vuataki advised the judge that his instructions had been terminated and that the Respondent would thereafter represent himself.

Concerned by that intimation, Wilson J asked the Respondent if he wished to engage another lawyer. The Respondent replied that he wished to apply for legal aid and referred to his constitutional right under s 28(1)(d) of the Constitution. The LAC both through its director and on appeal to the full commission, had decided to contribute $4000 to Respondent's legal costs, which sum was to be repaid within 6 months and to be secured by way of statutory charge on his vehicle, house and property, pursuant to s 10 of the Legal Aid Act 1996 (LA Act).

Having been given the opportunity to speak with the Director of the Human Rights Commission (HRC), a body established under the Human Rights Commission Act 1999 (HRC Act), the Respondent advised the court on 5 August 2002 that he declined the LAC's offer. He had sought the HRC's assistance in making an application to the court for constitutional redress under s 41 of the Constitution. Invoking his right under s 28(1)(d) of the Constitution, he sought legal assistance for his pending trial.

Counsel for the HRC sought leave of the court pursuant to s 37(2) of the HRC Act to intervene on the Respondent's application. Such leave, having earlier been given provisionally by the judge, was unconditionally given on 5 August 2002.

The Respondent had made an oral application for constitutional redress on the grounds of his rights to legal representation and to equality before the law. The judge waived the requirements of the High Court (Constitutional Redress) Rules 1998 (the Rules) which had been made by the Chief Justice pursuant to s 41(10) of the Constitution. Rule 3 of the Rules requires an applicant for constitutional

redress to apply by motion supported by affidavit and to seek a declaration, an injunction or other relief. Rule 4(a) requires 3 clear days' notice to affected parties but r 4(b) entitles the court to make *ex parte* orders in named circumstances. Rule 7 incorporates the normal civil Rules of Court. Rule 5 requires service on the Attorney-General, if he/she is not already a party to the proceedings.

For 8 sitting days between 5 and 19 August 2002, Wilson J heard the Respondent's oral constitutional application. Counsel for the Director of Public Prosecutions (DPP), the Attorney-General, the HRC and the Respondent himself all participated in the hearing which was conducted in private. This court was informed by counsel for the HRC that the reason for the in camera sitting was to preserve the Respondent's right to privacy under s 37 of the Constitution because his financial affairs were being discussed. We should not have thought that a sufficient reason for hearing a case of considerable constitutional significance in chambers. Courts frequently make confidentiality orders about sensitive personal or commercial information given in the course of evidence, without having the whole proceedings heard *in camera*.

Largely due to the efforts of the DPP'S office, further evidence was provided to the court which showed the Respondent to be insolvent. On 13 August 2002, the LAC removed the tag on the grant of legal aid but said that $4000 would be all it would pay the Respondent to assist him to engage a lawyer of his choice. Counsel for the HRC pointed out that the LA Act did not provide for a ceiling for the amount of legal aid which could be given in any one case. Discussion then ensued as to whether the LAC should become a party in the case. Its director sought to make submissions.

Wilson J considered that the LAC should not be a party. Its director gave evidence before him. Other evidence was given which confirmed that the Respondent was clearly insolvent, a fact that the LAC accepted. The LAC could not find counsel to represent the Respondent because such counsel as it had approached were otherwise engaged or would not undertake the defence for less than $6–10,000 in what was foreseen as a lengthy and difficult trial. The co-accused was receiving the services of two legal practitioners through the auspices of the LAC — one of whom was employed as a quasi-Public Defender by the LAC. There was no material difference between the two accused in respect of their lack of means. The reason why the Director of the LAC differentiated between them was unclear.

While all this lengthy debate was carrying on in chambers, the treason trial was put on hold — no doubt inconveniencing witnesses, assessors and others. On 22 August 2002, Wilson J delivered a judgment. The formal orders were as follows:

> *Orders and Remedies*
>
> Being of the opinion that orders by way of constitutional redress are necessary and appropriate to secure to the applicant the enjoyment of his rights.
>
> *This Court Orders as follows:*
>
> (1) A declaration that the applicant's right to equality to be given legal representation has hitherto been and continues to be contravened;
>
> (2) A declaration that the applicant's right to equality before the law has hitherto been and continues to be contravened;
>
> (3) By way of a mandatory injunction directed to the State ordering that the applicant (ie the Respondent) "be given the services of a legal practitioner under a scheme for legal aid" (or otherwise provided with legal representation) at the State's expense;

(4) By way of a mandatory injunction directed to the State ordering that the applicant, in relation to the matter of his "being given the services of a legal practitioner" for the treason trial, be treated in a manner equal or proportionate to the legal representation provided to the second accused, Josefa Nata;

(5) By way of temporary stay of proceedings (or an adjournment) in the treason trial (in so far as it affects the applicant) until a legal practitioner has been appointed or assigned;

(6) That, in the event of the applicant within 12 months of the date of this order coming into possession of net funds sufficient to meet all or part of the costs of his legal representation at the treason trial, liberty be and is hereby reserved to the State to apply to this Court on 14 days' notice in writing to all parties to these proceedings for an order by way of reimbursement.

AND IT IS HEREBY FURTHER ORDERED, that liberty is hereby reserved to all parties to apply for such further or other orders as to this Court seem just and appropriate.

After the orders were made, Mr Valenitabua of counsel accepted the task of representing the Respondent at the trial. Counsel was given an undertaking that he would be remunerated by the State on a basis that did not restrict the number of days he was necessarily engaged in the Respondent's defence. Counsel has represented the Respondent throughout the trial which was nearing completion, as at the date of the hearing of this appeal.

Although, by agreeing to pay for counsel to represent the Respondent at the trial, the Appellant has effectively complied with the decision of Wilson J the Appellant nevertheless lodged an appeal to this court on 13 September 2002 on the following grounds:

1. That the learned Trial Judge erred in law and in fact when he waived the formal requirements under the High Court (Constitutional Redress) Rules 1998 while entertaining an application for constitutional redress, with the attendant problem that parties were not fully aware of the grounds of redress or the relief sought by the applicant.
2. That the learned Trial Judge erred in law and in fact by granting relief against the appellant by way of mandatory injunctions.
3. That the learned Trial Judge erred in law and in fact in granting the First Respondent a declaration that his constitutional rights to be given legal representation has been and is likely to be infringed.
4. That the learned Trial Judge erred in law and in fact in finding that there was a distinction between the constitutional right to the services of a legal practitioner under section 28(1)(d) of the Constitution and the concept of legal assistance as provided for by the Legal Aid Act, 1996.

When the appeal was called in this court, counsel for the Respondent and counsel for the DPP sought and were granted leave to withdraw. The DPP had intervened in the High Court by leave of the judge. Counsel for the HRC sought and were granted intervener status under s 37(2) of the HRC Act, as had been granted to them in the court below. The court is grateful to counsel for HRC as intervener for their learned and comprehensive submissions.

At the outset of the hearing, the court pointed out to counsel for the Appellant the court's reluctance to hear moot cases. The court intimated that it was prepared to hear some aspects of the case on the basis of the principles established in *R v Secretary of State for the Home Department; Ex parte Salem* [1999] 1 AC 450. (*Salem's case*). These principles were discussed by the court in its recent decision in *Yabaki v President & Attorney-General* (judgment 14 February 2003) and do not need to be repeated.

The court decided to hear counsel on all aspects of the case, except the judge's decision to permit an informal oral application for constitutional relief. Although the argument of counsel for the HRC suggested that Fiji follow the "epistolary jurisdiction" of the Indian Supreme Court, the fact is that the Respondent's application for constitutional redress — albeit made orally — was articulated before the judge over 3 weeks, with input from all parties possibly affected. No party was ultimately prejudiced by the oral application. Consequently this question is truly moot and does not fall within the *Salem* guidelines.

Constitutional provisions

Wilson J cited several parts of the Constitution which have relevance: the principal extracts are now reproduced.

Rights of charged person

28(1) Every person charged with an offence has the right:

(a) to be presumed innocent until proven guilty according to law;

(b) to be given details in legible writing, in a language that he or she understands, of the nature of and reasons for the charge;

(c) to be given adequate time and facilities to prepare a defence, including, if he or she so requests, a right of access to witness statements;

(d) to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid.

Access to courts or tribunals

29(1) Every person charged with an offence has the right to a fair trial before a Court of law.

Equality

38(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:

(a) 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

(b) 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.

(c) 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.

Enforcement

41(1) If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.

(2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.

(3) The High Court has original jurisdiction:

(a) to hear and determine applications under subsection (1); and

(b) to determine questions that are referred to it under subsection (5); and may make such orders and give such directions as it considers appropriate.

(4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made to it under this section if it considers that an adequate alternative remedy is available to the person concerned.

(5) If in any proceedings in a subordinate Court any question arises as to the contravention of any of the provisions of this Chapter, the member presiding in the proceedings may, and must if a party to the proceedings so requests, refer the question to the High Court unless, in the member's opinion (which is final and not subject to appeal), the raising of the question is frivolous or vexatious.

(6) When the High Court gives its decision on a question referred to it under this section, the Court in which the question arose must dispose of the case in accordance with:

(a) the decision; or

(b) if the decision is the subject of appeal to the Court of Appeal or to the Supreme Court - the decision of the Court of Appeal or Supreme Court, as the case maybe.

(7) The Attorney-General may, on behalf of the State, intervene in proceedings before the High Court that relate to a matter concerning a provision of this Chapter.

(8) If proceedings before the High Court relate to a matter concerning provision of this Chapter, the High Court must not proceed to hear and determine the matter until is satisfied that notice of the matter has been given to the Attorney-General and a reasonable time has elapsed since the giving of the notice for consideration by the Attorney-General of the question of intervention in the proceedings.

(9) A notice under subsection (8) is not required to be given to the Attorney-General if the Attorney-General or the State is a party to the proceedings.

(10) The Chief Justice may make rules for the purposes of this section with respect to the practice and procedure of the High Court (including Rules with respect to the time within which applications are to be made to the High Court).

Interpretation

43(1) The specification in this Chapter of rights and freedoms is not to be construed as denying or limiting other rights and freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.

(2) In interpreting the provisions of this Chapter, the Courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.

(3) Law that limits a right or freedom set out in this Chapter is not invalid solely because the wording of the law exceeds the limits imposed by this Chapter if the law is reasonably capable of a more restricted interpretation that does not exceed those limits. In that case, the law must be construed in accordance with the more restricted interpretation.

High Court judgment

After setting out the constitutional provisions, Wilson J addressed the procedure adopted and went on to consider whether the Respondent's right under s 28(1)(d) of the Constitution "to be given the services of a legal practitioner under a scheme for legal aid" had been contravened. He noted that the right was qualified by the words "if the interests of justice so require" and that the assistance is to be given "under a scheme for legal aid".

The judge discussed the scheme of the LA Act. He noted that, under s 7, the LAC could either arrange either for its own employees or for private practitioners to provide the legal assistance. The judge considered that the s 38(1)

constitutional requirement for equality before the law had been infringed when one co-accused had received "legal aid" representation and the other had not. In his view, the test as to whether "the interests of justice so require" in s 28(i)(d) brought several factors into account.

(a) the seriousness of the charge
(b) the length & complexity of the case
(c) the potential maximum sentence
(d) the inability of the applicant to contribute effectively to his own defence

The judge based his conclusions on a variety of authorities from many different jurisdictions including *R v Rowbotham* 30R (3d) 113: *R v Alick Shiu-yuen*,(1991) 1 HKPCR 71 and *Dietrich v R* (1992) 177 CLR 292.

The judge's view, which was not surprising, given the seriousness of the charge faced by the Respondent and the obvious length and complexity of trial, was that the interests of justice required that legal assistance be provided for the Respondent. He did not consider that judicial review was an adequate alternative remedy for the Respondent under s 41(4). Citing *Harrikissoon v Attorney-General of Trinidad and Tobago* [1980] AC 265 at 268, he considered the Respondent's constitutional remedy application far from frivolous or vexatious. He found that the respondent did not wish to defend himself in person but that he was unable to afford counsel for the trial. The judge considered that the respondent's constitutional rights both to legal representation and to equality before the law had been contravened and that he was entitled to the remedies ordered, as noted earlier. In appendices to the judgment, he summarized the submissions of counsel and the background history. He marked these as "confidential". It was possibly justifiable to keep these documents confidential until after the treason trial had been concluded, but we can see no reason whatsoever for not publicising them thereafter. Any alleged privacy reasons do not hold water in a matter of such public importance. If they did, then many civil trials would be heard in camera, since a litigant's financial information is frequently revealed in the course of a trial.

Mandatory injunction

The first ground of appeal which this court considers should be treated as a matter of public importance is whether the judge should have made mandatory injunctions against the state as described above.

Counsel for the Appellant, while acknowledging that r 3 of the Rules allows a prayer for an injunction in an application for constitutional redress, submitted that "the Rule did not alter the long-standing prohibition against the issuing of injunctions against the State". She pointed to s 15 of the State Proceedings Act (Cap 24) which forbids injunctions against the Crown (now State) but provides, in lieu, for an order declaratory of rights. The convention is that the State will comply with any declarations from the court.

The rationale in constitutional theory for not making injunctive orders against the State is that the court exercises judicial authority on behalf of the State and that it is incongruous for the State to give orders to itself. See *Jaundoo v Attorney-General of Guyana* [1971] AC 972 at 984. There is also difficulty in enforcement, since the officers of the court who customarily enforce judgments (for example sheriffs, bailiffs) are themselves employees of the state.

However, the situation is different on applications for judicial review, as is discussed in the significant speech by Lord Woolf in *Re M* [1994] 1 AC 377 at 396–427. Section 15 of the Fiji State Proceedings Act (Cap 24) (referred to by

counsel) was modelled on and is identical to s 21 of the English Crown Proceedings Act 1947. References to the Crown in the Fiji Act must now be taken as references to the State. Section 15 reads:

> 15(1) In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between the subjects, and otherwise to give such appropriate relief as the case may require:
>
> (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between the subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> (b) in any proceedings against the Crown for the recovery of land or other property the Court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.
>
> (2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which would not have been obtained in proceedings against the Crown.

However, in Fiji as in England, section 15 is limited in scope by s18(2) which, in essential terms, is similar to section 23(2) of the English Act. Section 18(2) reads:

> 18(2) Subject to the provisions of this section, any reference in this Part to civil proceedings against the Crown shall be construed as a reference to the following proceedings only:
>
> (a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by any such proceedings are as mentioned in paragraph 2 of the First Schedule;
>
> (b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, is this Act had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney-General, any Government department, or any officer of the Crown as such; and
>
> (c) all such proceedings as any person is entitled to bring against the Crown by virtue of this Act.
>
> and the expression "civil proceedings by or against the Crown" shall be construed accordingly.

Lord Woolf, in *Re M*, held that the language of s 23(2) of the English Act (s 18(2) of the Fiji Act) made it clear that Pt II of the Act (which includes Fiji s 15) does not apply to all proceedings which can take place in the High Court. The Fiji Act, in the definition in s 32(1), has a direct equivalent of the English s 38(2) which Lord Woolf relied on as further support for the above proposition. The definition of "civil proceedings" in Fiji s 32(1) reads:

> … "civil proceedings" include proceedings in the Supreme Court for the recovery of fines or penalties but do not include proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division;

Lord Woolf held, at 412, that there is no reason, in principle, why if a statute places a duty on a specified minister or other official which creates a cause of action, an injunction could not be sought against the specified minister personally. But, if there are proceedings to which s 21(1)(a) and (b) (s 15(1)(a)

and (b) of the Fiji Act) apply, then s 21(2) (s 15(2) of the Fiji Act) would appear to prevent injunctive relief. "Civil proceedings" as defined above do not include "proceedings on the Crown side", such as proceedings for judicial review.

After a lengthy review of authority, Lord Woolf held that s 31(2) of the Administration of Justice Act 1981(UK), which provided statutory authority for the modern English system for judicial review, gave the Court jurisdiction to grant declarations and injunctions directly linked to the already-existing jurisdiction in relation to prerogative orders.

Lord Woolf said at 422–3:

> The fact that, in my view, the Court should be regarded as having jurisdiction to grant interim and final injunctions against officers of the Crown does not mean that that jurisdiction should be exercised except in the most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations. To avoid having to grant interim injunctions against officers of the Crown, I can see advantages in the Courts being able to grant interim declarations. However, it is obviously not desirable to deal with this topic, if it is not necessary to do so, until the views of the Law Commission are known.

This court considers that s 41(3) of the Constitution and r 3 of the Rules, which permit an injunction as a remedy on an application for constitutional redress, are akin to the English jurisdiction in judicial review proceedings. Accordingly, such an application does not fall within the definition of "civil proceedings" in the State Proceedings Act for the same reasons as Lord Woolf enunciated in *Re M*.

An application in Fiji for constitutional redress is not a normal civil case based on contract or tort to which s 15 of the State Proceedings Act applies. The High Court's constitutional jurisdiction is comparable to the English Court of Queen's Bench's jurisdiction under the judicial review regime in that country.

In any event, the Constitution in s 41(3) allows the High Court to make such orders and give such directions as it considers appropriate. This provision is in a section of the Constitution dealing with the enforcement of human rights. Clearly, the Constitution will override, pro tanto, any prohibition against an injunction against the State which may be found in the State Proceedings Act. This view was taken of a similarly—worded constitution by the Privy Council in *Gairy v Attorney General of Grenada* [2001] UKPC 30 per Lord Bingham's words which follow have relevance to the situation in Fiji.

> [2] By Chapter 1 and section 106 of their constitution the people of Grenada established a new constitutional order. The constitution has primacy (subject to its provisions) over all other laws which, so far as inconsistent with its provisions, must yield to it. To read down its provisions so that they accord with pre-existing rules or principles is to subvert its purpose. Historic common law doctrines restricting the liability of the crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the constitution.

Even in constitutional and human rights cases, injunctions against the State or a minister are to be a last resort. A declaration should normally suffice. In the present case, an order in the nature of mandamus against the LAC could have been appropriate as a last resort. Such an order was held to have been appropriate by the Privy Council in the *Gairy* case. The following further definitive extracts from the Privy Council judgment in *Gairy* are apposite to the Fiji situation.

> [23] This submission, it would seem, derived from the principle that mandamus only lies to compel a minister or public official to perform a statutory or public duty. But for

reasons already given, the appellant is not constrained by the principles governing applications for judicial review. Having proved a breach of a right protected by the constitution, having obtained a money judgment and having failed to obtain full payment, the appellant now seeks an effective not merely a nominal, remedy. The Court has power to grant such a remedy. And if it is necessary to fashion a new remedy to give effective relief, the Court may do so within the broad limits of section 16. Whereas, in granting a person constitutional relief not related to Chapter 1, the court may under section 101(3) "grant to that person such remedy as it considers appropriate, being a remedy available generally under the law of Grenada in proceedings in the High Court", the court's powers under section 16(2) are not so limited. The Court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right.

[24] The expression "coercive" is sometimes used to describe an order which requires a party to do something. Such orders, directed to ministers and public officials, are commonplace. They may be made in support of constitutional rights, as evidenced, for example, by the recent Judgment of the Board in *Observer Publications Ltd v a Campbell "Mickey" Mathew* (19 March 2001, unreported, [2001] (UK PC 11). The expression is also used to describe mandatory orders to which there attaches a sanction (whether explicit or implicit), such as committal, for non-compliance. Such orders, regularly made against private individuals, are not made against ministers and public officials. There is no need. Experience shows that if such orders are made there is compliance, at any rate in the absence of most compelling reasons for non-compliance. That is so in the United Kingdom, and the Board has no doubt it is so in Grenada also. But the Board would caution against the view that a mandatory order made against a minister (or a government or a public official) may be disregarded with impunity; a Court charged under the constitution with securing effective protection of fundamental rights cannot be denied such power of enforcement as proves necessary for its task.

[25] In this case the Minister of Finance is the minister upon whom there rests the obligation to ensure that the debt owed by the state to the appellant is discharged. There is no one to whom the court's order can more appropriately be addressed.

[29] To deny the appellant, on the present facts, the remedy which he now seeks to enforce his constitutional rights would run counter to the Board's constitutional decision-making exemplified by the cases of *Maharaj and* Observer Publications mentioned above, and also by the recent case of *Bahamas District of the Methodist Church in the Carribean and the Americas v Hon Vernon J Symonette MP, Speaker of the House of Assembly and 7 Others* (unreported, 26 July 2000). It would also run counter to the trend of constitutional decision—making elsewhere. In *Levesque v Attorney-General of Canada et al* (1985) 25 DLR (4th) 184 a serving prisoner claimed and sought to enforce a right to vote. It was held that he had such a right, and the question arose whether an order of mandamus could issue to enforce it. Rouleau J held (at pages 191–192).

> If the Canadian Charter of Rights and Freedoms, which is part of the Constitution of Canada, is the supreme law of the country, it applies to everyone, including the Crown or a Minister acting in his capacity as a representative of the Crown. Accordingly, a fortiori the Crown or one of its representatives cannot take refuge in any kind of declinatory exception or rule of immunity derived from the common law so as to avoid giving effect to the Charter.

The Crown was held to be subject to the provisions of the charter in the same way as any other individual (p 191). The decision has been tentatively understood to qualify, where constitutional rights are at stake, the rule hitherto prevailing in Canada that orders of mandamus cannot be made against the Crown (see Mullan, *Administrative Law*, 3rd ed 1996, at para 545), and it has been suggested that Levesque could well be followed in New Zealand (see Joseph, *Constitutional And Administrative Law in New Zealand*, 1993, at pp 797–8). In Australia

mandamus has issued to compel payment of money from the consolidated fund where there was an unperformed statutory duty in that regard (*Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 242; *Commissioner of State Revenue (Vic) v Royal Insurance Aust Ltd* (1994) 182 CLR 51 at 81, 88; and see Aronson and Dyer, Judicial Review of Administrative Action, 1996, pp 775–8). In *N Nagendra Rao and Co v State of AP AIR* (1994) SC 2663 R M Sahai J (in para 24 of his judgment) said:

> No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy… The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity.

On the basis of this authority, the court holds that the High Court has jurisdiction to grant an injunction against the State on an application for constitutional redress. The authorities suggest that such is a remedy of last resort and that the State would normally comply with a declaration. In the present case, the proper recipient of any injunction would have been the LAC. Wilson J issued injunctions instead of making declarations without consideration of the propriety of doing so. One might have thought that, if he were suspending the trial pending compliance with his orders, declarations would have sufficient and would have been complied with by the State.

An example of a declaration as a remedy in a human rights case is found in the decision of the Supreme Court of Ireland in *Sinnott v Minister of Education* [2001] 2 IR 505 at paras 80 and 156. There, the mother of an autistic 23-year old sued the State for failure to provide her son with free education facilities, contrary to the Irish Constitution. The judges emphasised that, while there was nothing to preclude mandatory relief directed to the appropriate minister, the court would normally assume that, where the court had granted a declaration, the minister would take the appropriate steps to comply with the law as laid down by the court.

We consider that the LAC would have been the most suitable recipient of the court's order had there been the need to issue an injunction. The first injunction issued by the judge appears in its terms to address the constitutional direction in s 28(1)(d) of "under a scheme for legal aid". There is only one such scheme, that is that under the LA Act. Therefore, the LAC should have been the proper addressee. As a statutory corporation (see s 4(2) of the LA Act), any mandatory order against it would not encounter the same restrictions as are to be found in issuing an injunction against the State or a minister.

Wilson J should therefore first have made appropriate declarations, in the expectation that the State (through the LAC) would comply with them. In any event, the injunctions, as issued, are open to criticism under the general law relating to mandatory injunctions. They were not specific enough in their terms (particularly order 4 in the list of orders above). A mandatory injunction must be susceptible of no doubt as to its terms, which should be simply and clearly expressed. How could one compare the legal representation to be given to the Respondent with that already given to the other accused? Must there be some subjective evaluation of the quality of counsel for the other accused as a measure of the quality of counsel to be provided for the Respondent? A mere statement like that demonstrates the inappropriateness of the second mandatory injunction, which in our view was unnecessary.

Grounds 3 and 4 of appeal

These two grounds can be considered together, since they both challenge the judge's view that the Respondent's constitutional right under s 28(1)(d) had been infringed.

Counsel for the Attorney-General submitted that the trial judge erred in law in finding that there was a distinction between the constitutional right under s 28(1)(d) of the Constitution and the concept of legal assistance provided by the LA Act. Counsel submitted:

> It is the Attorney-General's respectful submission that there is only the one scheme of legal assistance available to those persons meeting the eligibility criteria as decided by the Legal Aid Commission.

This submission fails to appreciate that an accused person has not only his or her statutory rights under the LA Act but also the constitutional right granted by s 28(1)(d) of the Constitution. That latter right is determined by the requirement of "the interests of justice."

Because the right granted is a constitutional right, the Constitution imposed an obligation on the State to provide one or more legal aid schemes to provide for the provision of legal aid to accused persons when the interests of justice so require. Read widely, the LA Act so provides, even if the guidelines for its administration do not. However, because the State provides only one legal aid scheme, the Constitution requires that the scheme be administered so that legal aid is provided to accused persons where the interests of justice require it. The LA Act should be read and applied as if the constitutional provision were incorporated.

Because s 28(1)(d) refers to a scheme for legal aid, it necessitates that the "interests of justice" will be judged in the light of all those problems which continually beset legal aid schemes, namely too little funding to satisfy all the demands for assistance. The constitutional right does not permit every accused person to call upon the State to provide defence counsel at the State's expense. All factors relating to legal aid must be taken into account, including the accused's monetary circumstances and need for legal assistance in the particular circumstances.

It had been submitted that the constitutional right is limited to the provision of legal representation at the State's expense and does not contemplate a monetary contribution to legal expenses. We do not read s 28(1)(d) in that light. Because the provision refers to "a scheme for legal aid," it permits all forms of legal aid including the funding of part of the costs of legal representation. If an accused has funds to contribute towards obtaining the services of a legal practitioner, the interests of justice will be served if the legal aid scheme provides such additional funds as are necessary to obtain adequate representation.

On the facts of this case, established after what seems to have been an excessively lengthy inquiry by the High Court, there can be no doubt that the Respondent was entitled to the services of a legal practitioner "under a scheme for legal aid". The requirement that such provision be "in the interests of justice" was obviously fulfilled in this case. The Respondent was facing a most serious charge, one for which up until February 2002, the death penalty would have been imposed on the Respondent if convicted. The law relating to treason is difficult and rarely-encountered, given the small number of such trials in parliamentary democracies. The trial was expected to take a long time and it has indeed fulfilled that expectation.

Such a case called for the provision by the State to the Respondent of experienced counsel. The offer of $4000 under the LAC's "take it or leave it" it approach was quite arbitrary and inadequate. It failed the State's constitutional responsibilities to the Respondent. A fortiori when it was tagged with a charge over the Respondent's slender assets and had to be repaid after 6 months. Unless he won a lottery or came into an inheritance, it was difficult to see how he could have fulfilled the repayment condition.

The LAC should have fixed a daily rate to be paid to counsel for reasonable preparation time and for as many days as the trial lasted. Such rate should reflect what is commonly paid to experienced criminal counsel in Fiji in private practice. Although under many legal aid regimes, legal practitioners accept a lesser rate than what would be paid in private practice (both as a *pro bono* gesture and as a recognition of certainty of payment), the legal aid fee paid should reflect the heavy responsibility and strain resting on counsel in a trial of such magnitude. Nor should it be forgotten that counsel by accepting a brief in such a trial, will be losing the chance of being briefed for other work for the duration of the trial.

The length of a criminal trial can rarely be estimated with complete accuracy; the longer the trial, the less accurate the time estimate. Consequently, legal aid for an impoverished person should be on a daily rate rather than as a lump sum. Nor do the guidelines published by LAC show any ceiling on the amount of a grant. They do fix ceilings on disposable income before a person is eligible for legal aid — but here again, flexibility is necessary. Even for a person on a disposable income greater than $6500 (the figure stated in the guidelines) there could be a case for some legal aid for someone facing a serious and/or lengthy criminal trial. We note that under s 6(2) of the LA Act, a person shall be deemed to be "impoverished" if that person is unable reasonably to afford the cost of legal services. Thus, a person earning more than $6500 could easily not be able to afford legal services for a lengthy and complex criminal trial.

We are aware of the tensions in Fiji—as in other jurisdictions with legal aid schemes — between the almost insatiable demand for legal aid in criminal, civil and family cases and the multiple demands on the limited resources of the State in a developing nation. Courts do recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction. See the discussion at pp 294–7 in (1992) Judicial Remedies in Public Law by Clive Lewis. However, s 28(1)(d) of the Constitution must be fully implemented by the administration of the LA Act. Already, in the current session, the court has encountered a situation where legal aid had been refused by the LAC to one murder Appellant and granted to another, in a case when a joint enterprise was alleged, both Appellants were equally indigent and both appeared to have an arguable appeal.

An order such as that made by Wilson J in the present case can be made under s 41(3) of the Constitution. Section 41(4) provides that, in the court's discretion, no order may be made, if there is an alternative remedy. *Harrikissoon's* case (above) notes that the value of the constitutional remedy will be diminished, if it is used as a general substitute for normal judicial review procedures. One filtering mechanism against a wholesale by-passing of the legal aid scheme by accused persons who have been refused legal aid and who simply stand up in court invoking a constitutional right, can be found in the right to review provisions of the LA Act itself. However, any review against a decision of the director is considered by the LAC itself or a committee of the LAC and not by an independent tribunal, as is provided in legal aid schemes elsewhere. Another approach, recommended as the norm in Harrikissoon, is to apply for judicial

review of the LAC decision. However, few indigent accused are likely to have the wit, the time or the means to do this. The discipline of making an application under the Rules cannot be underestimated. We do not comment on Wilson J's decision to accept an oral application on the facts of this case, which were exceptional. We merely note that, absent exceptional circumstances, the Rules are not burdensome and should be observed.

Further practical filter against frivolous applications lies in the words "if the interests of justice so require" in s 28(1)(d). Obviously, the judge in the High Court must make an assessment of this criterion which will not always be as obviously fulfilled, as it was in the instant case. The judge should take into account the fact that the LAC has gone through its normal processes, including a financial assessment of the applicant. It would be all too easy for an applicant to make bland assertions about his/her financial situation before a court which would have neither the time nor the resources to check those statements. The judge could consider the gravity of the charge and the reasons why legal aid had been declined by the LAC. Nevertheless, there will remain difficulties between the role of the courts in upholding a constitutional right to counsel and the fiscal concerns of the LAC as the Namibian case cited by Wilson J shows. (*Mavilima v Republic of Namibia* — High Court of Namibia, 14 December 2001.)

We see a difficulty between the clear words of s 28(1)(d) of the Constitution and any restrictive approach of the LAC, an approach that is imposed on it by the LA Act when s 6 speaks of the LAC providing legal assistance to impoverished persons *subject to the resources available to it*. The framers of the Constitution may not have realised fully how costly a legal aid scheme could be.

However, the Constitution must prevail. If an accused is able to satisfy a High Court Judge, on an application for constitutional redress, that his/her rights under s 28(1)(d) are being infringed by the lack of a grant or an inadequate grant of legal aid and that the interests of justice require such an order, then the LAC will have to supply the legal assistance, given that it operates the only scheme for legal aid in terms of s 28(1)(d).

If the LAC's budget were extended by such an order, then the State would have to address the situation without penalising LAC staff. It would not be proper for the LAC to say that, although there are X persons charged with serious offences or with reasonable appeal rights, but only enough money with which to supply X-Y persons with legal assistance, therefore the LAC will only assist X-Y persons. Such an approach obviously conflicts with the "equality before the law" principles of the Constitution.

In the result, we consider Wilson J reached the only conclusion possible on the application for constitutional redress. We do differ from him as to the remedies of injunction which he granted.

"Equality of treatment"

We do not consider the "equality of treatment" principle necessary for consideration in this case. It was clearly anomalous and wrong that one treason accused should have had legal aid counsel provided by the State and the other no counsel at all. But that factor was just one of many to be taken into account by the judge in assessing the "interests of justice". Clearly, the interests of justice required both accused to be represented — not just in their own interests, but in the interests of the court, assessors and witnesses. All judges know the difficulties in maintaining a fair trial where there are unrepresented accused — particularly ones facing a charge of such seriousness.

The right to counsel is expressed in Lord Woolf L CJ in *Attorney-General's Reference* (No 82a of 2000), *R v Lea*; *R v Shatwell* [2002] 2 Crim App R 342 in these words:

> Complaint is made that not to have equality of arms (here equal representation by leading counsel) contravenes Article 6 of the Human Rights Act 1998 and is unfair. In our judgment, there is no substance in this argument. The principle of equality of arms is as readily identified in the common law as it is in the Human Rights Act 1998. It is a principle that entitles any defendant to a fair trial. However, a fair trial does not necessarily entail representation by a Queen's Counsel merely because the Crown are represented by a Queen's Counsel. The importance is to have an advocate, whether he be a barrister or a solicitor, who can ensure that a defendant's defence is properly and adequately placed before the Court.

If a case for constitutional redress under s 28(1)(d) has been made out, then the High Court can, in appropriate cases such as the present, direct the LAC to provide such legal assistance to an accused person. This could cover the situation both where the LAC had refused to grant legal aid or where it has agreed to provide inadequate funding. The High Court, when making such an order, will be bound to consider alternative remedies such as review by the LAC or judicial review of the LAC's decision. It would only be on a rare occasion, such as the present case, where a judge would be faced with an unrepresented accused of little means facing an imminent trial for a serious offence for which, if convicted, the penalty was very heavy. In assessing the interests of justice, the judge would have to be careful when enquiring into the merits of the accused's case. There may be depositions or preliminary statements which may point to an obvious finding of guilt. However, an accused is not required to disclose his/her defence in advance. To require that disclosure could prejudice the constitutional right to a fair trial.

Wilson J's decision on the Respondent's right under s 28(1)(d) of the Constitution was the matter clearly in issue. It was not necessary for him to have enlarged upon this clear right by reference to other parts of the Constitution. Consequently, whilst most grateful for the researches of counsel for the HRC, we see no need to trawl through the plethora of learned articles and decisions from a bewildering array of diverse jurisdictions.

Result

In the result, the judgment of the court below is upheld, save to the extent that this court does not consider that mandatory injunctions against the State should have been issued. There should have been declarations. If these declarations had not been complied with, there should have been an order in the nature of mandamus addressed to the LAC. The court's observations on the relevant constitutional issues and appropriate remedies should be noted for future reference. There will be no order as to costs.

Appeal dismissed.