REV AKUILA YABAKI and 2 Ors v PRESIDENT OF THE REPUBLIC OF THE FIJI ISLANDS and Anor

FIJI COURT OF APPEAL — CIVIL JURISDICTION

BARKER, WARD and DAVIES JJA

4–5, 14 February 2003

[2003] FJCA 3

Constitutional law — Constitution — appeal sought for declarations to be held unconstitutional — whether appeal should not be considered because of mootness — whether impugned actions of the President were constitutional — whether the acts of the President can be justified by doctrine of necessity — Constitution of Fiji ss 96(2), 109(1), 109(2).

The Great Council of Chiefs (GCC) appointed the Vice-President as President of the Republic pursuant to the Constitution. The GCC also supported the dissolution of Parliament and calling of a general election and requested the President to reappoint the interim government until the new Parliament was summoned. The President immediately dismissed the Prime Minister. A caretaker Prime Minister was appointed. The President dissolved the House of Representatives. The caretaker Prime Minister resigned and another was appointed. Seventeen Ministers and seven Assistant Ministers were also appointed. Justice Scott declared that these acts were constitutional and under the doctrine of necessity. The Appellants sought that these declarations be set aside as it is inconsistent with the Constitution. The Respondents submitted that the court should not consider the appeal on the ground of mootness.

Held — (1) Under the Constitution, the President acting on his or her judgment can appoint a member of the House of Representatives as Prime Minister which in his or her opinion can form a government that has the confidence of the house. The Constitution permits the appointment by the President acting on his order on judgment of a person as a caretaker Prime Minister. It is not mandatory for the caretaker Prime Minister to be a member of the house. The primary role of the caretaker Prime Minister is to advise the dissolution of the house.

(2) The elections were duly held despite any constitutional irregularities which may have preceded them. The nation has returned to democratic rule. The doctrine of necessity cannot be applied without extensive consideration of factual matters.

(3) The Appellants had the undoubted right to appeal to this court under the Constitution because the final judgment of the High Court involved interpretation of the Constitution. But contrary to counsel's submission, the mere fact of their right to file an appeal does not oblige the court to consider an appeal on the merits when the subject matter of the litigation has become moot. In that event, a moot case may be considered on appeal only in the very limited circumstances.

Appeal dismissed.

Cases referred to

Abegbenro v Ankitola [1963] AC 614; *Chandrika Prasad* Civ App No ABU 78 of 2000; *Church of Scientology v Woodward* (1982) 154 CLR 25; 43 ALR 587; *Clayton v Heffron* (1960) 105 CLR 214; [1961] ALR 368; *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216; *Finnigan v New Zealand Rugby Football Union Inc (No 1)* [1985] 2 NZLR 159; *Gardner v Dairy Industry Authority of New South Wales* (1977) 18 ALR 55; 52 ALJR 180; *Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd* [1982] AC 617; *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35; *Naidu v Attorney-General* Civ App No ABU 39 of 1998S; *R v*

Greater London Council; Ex parte Blackburn [1976] 3 All ER 184; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Ltd* (1970) 123 CLR 361; [1970] ALR 449; *Re Manitoba Language Rights* (1985) 19 DLR (4th) 1; *Republic of Fiji v Prasad* [2001] NZAR 385; *Simpson v Attorney-General* [1955] NZLR 271; *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111; *Victoria v Commonwealth* (1975) 134 CLR 81; 7 ALR 1, cited.

Ainsbury v Millington [1987] 1 WLR 379; *R v Secretary of State for the Home Department; Ex parte Salem* [1999] 1 AC 450, considered.

J. Stephen Kos and *Gwen Phillips* for the Appellants.

S. J. Gageler SC, *J. J. Udit* and *E. Tuiloma* for the Respondents.

Barker and Ward JJA.

Introduction

The Appellants appeal from part of a decision of Scott J delivered in the High Court at Suva on 11 July 2001. They and several others had sought by way of originating summons the following declarations against the above Respondents. Only the Appellants named above have appealed.

A. A Declaration that the first Respondent, His Excellency the President of the Republic of Fiji Islands (hereinafter "the President") acted in a manner inconsistent with the Constitution when he failed to summon Parliament after its prorogation on 27th May 2000.

B. A Declaration that the purported dismissal by the President of Hon. Mahendra Pal Chaudhry as the Prime Minister on 14th March, 2001 is inconsistent with the Constitution, and is therefore null and void.

C. A Declaration that the purported dissolution of Parliament by the President on or about 14th March 2001 is inconsistent with the provisions of the Constitution, and is therefore null and void. Accordingly, the Parliament constituted after the May 1999 general elections exists and has not been dissolved.

D. A Declaration that the purported appointments of Hon. Senator Laisenia Qarase as Prime Minister and of other persons as Ministers of a caretaker government for Fiji made on or about 15th, 16th and 19th March 2001 are inconsistent with the Constitution, and each such appointment is null and void.

The learned judge made a declaration along the lines of the first in the above tabulation. He held that the President, having received advice from the Prime Minister to recall parliament, had been required to act on that advice. There is no appeal against that declaration.

The judge declined to make the other declarations sought. He held that the other challenged actions of the President were either constitutional or else justified by the doctrine of necessity. Scott J delivered his judgment under conditions of urgency. Writs for the election were planned to be issued the following day and a date for the election had already been announced.

Because Scott J's decision involved interpretation of parts of the Constitution, the Appellants were entitled to appeal to this court as of right under s 121(2) of the Constitution. No question of their standing either to bring the originating summons in the first place or to appeal to this court was raised by the Respondents. However, the Respondents claimed that, given events intervening since the High Court judgment, — notably a general election, the questions for which the Appellants sought declarations were moot and that, therefore, this court should not consider the appeal on its merits.

The case concerns events following the delivery, on 1 March 2001, of the judgment of this court in *Republic of Fiji v Prasad* [2001] NZAR 385. The court there held, in brief: (a) that the purported abrogation of the Constitution in the aftermath of the May 2000 coup had been null and void, (b) that parliament had not been dissolved, but had been prorogued on 27 May 2001 and (c) that the Vice-President could continue the functions of President until 15 March 2001.

It is unnecessary to summarise the events which preceded the *Prasad* decision from which there was no appeal. All relevant facts are set out in the report of the decision. Relevant ensuing events which formed the basis for the relief sought in the High Court can be stated starkly as follows.

On the day the court delivered its decision, Prime Minister Chaudhry wrote to Vice President Ratu Iloilo as Acting President. He called upon him to summon parliament "as a matter of urgency". Attached to that letter was a petition signed by 46 members of the House of Representatives. No action was taken on this advice by the Vice President. Mr Chaudhry wrote again to the President on 7 March 2001.

The Great Council of Chiefs (GCC) met on 13 and 14 March 2001, and appointed Vice President Ratu Iloilo as President of the Republic, pursuant to s 90 of the Constitution. The GCC also resolved: (a) to respect the court's decision, (b) to support the dissolution of parliament and the calling of a general election and (c) to request President to reappoint the interim government until the new parliament was summoned. The President, purporting to act under s 109(1) of the Constitution, immediately dismissed Prime Minister Chaudhry. On 14 March 2001, he appointed Ratu Tevita Momoedonu caretaker Prime Minister, purporting to act under s 109(2). Ratu Momoedonu was a member of the House of Representatives.

On 15 March 2001, acting on the advice of the caretaker Prime Minister, the President dissolved the House of Representatives in terms of s 59(2) of the Constitution. Ratu Tevita resigned as caretaker Prime Minister that same day. The President addressed the nation.

The following day, the President appointed Mr L Qarase, then a Senator, as caretaker Prime Minister, purportedly pursuant to ss 109(2) and 194(2)(b) of the Constitution. The appointments of 17 ministers and seven assistant ministers followed. The originating summons was issued on 23 March 2001 seeking declaratory and other relief. An amended summons was filed on 3 April 2001.

This unadorned statement of events has to be seen against a factual matrix described by Scott J in his judgment and which will be referred to later in this judgment.

Mr Qarase as caretaker Prime Minister and his ministers continued to exercise office until the general election which took place from 25 August through to 1 September 2001. Mr Qarase, having been successful at the election, was appointed Prime Minister by the President acting under s 98 of the Constitution. He was sworn in as Prime Minister on 10 September 2001. He has remained in office ever since.

Originally, the Appellants (and their then co-applicants) had sought orders staying the "purported dissolution of Parliament" and directing the President to summon parliament without further delay. Applications for those orders were withdrawn on 28 June 2001. However, in the High Court, they continued to press their applications for the declarations stated above.

Relevant provisions of the Constitution

This case involves a number of sections of the Constitution, some of which are set out now, in order to facilitate an understanding of the judgment of the court below.

President acts on Advice

96. (1) Subject to sub-section (2) in the exercise of his or her powers and executive authority, the President acts only on the advice of the Cabinet or a Minister or some other body or authority prescribed by this Constitution for a particular purpose as a body or authority on whose advice the President acts in that case.

(2) This Constitution prescribes the circumstances in which the President may act in his or her own judgment."

Defeat of Government at polls or on floor of House

107. If:

(a) the Government is defeated at a general election; or

(b) the Government is defeated on the floor of the House of Representatives in a vote:

(i) after due notice, on whether the Government has the confidence of the House of Representatives;

(ii) that the Government treats as a vote of no confidence; or

(iii) the effect of which is to reject or fail to pass a Bill appropriating revenue or moneys for the ordinary services of the Government;

and the Prime Minister considers that there is another person capable of forming a Government that has the confidence of the House of Representatives, the Prime Minister must immediately advise the President of the person whom the Prime Minister believes can form a Government that has the confidence of the House and must thereupon resign.

Advice to dissolve Parliament by Prime Minister defeated on confidence vote

108. (1) If a Prime Minister who has lost the confidence of the House of Representatives (defeated Prime Minister) advises a dissolution of the House of Representatives, the President may, acting in his or her own judgment, ascertain whether or not there is another person who can get the confidence of the House of Representatives (alternative Prime Minister) and:

(a) if the President ascertains that an alternative Prime Minister exists- ask the defeated Prime Minister to resign, dismiss him or her if he or she does not do so and appoint the alternative Prime Minister; or

(b) if the President cannot ascertain that an alternative Prime Minister exists- grant the dissolution advised by the defeated Prime Minister.

(2) If the President appoints the alternative Prime Minister pursuant to paragraph (1)(a) but the alternative Prime Minister fails to get the confidence of the House of Representatives, the President must dismiss him or her, re-appoint his or her predecessor and grant that person the dissolution originally advised.

Dismissal of Prime Minister

109. (1) The President may not dismiss a Prime Minister unless the Government fails to get or loses the confidence of the House of Representatives and the Prime Minister does not resign or get a dissolution of the Parliament.

(2) If the President dismisses a Prime Minister, the President may, acting in his or her own judgment, appoint a person as a caretaker Prime Minister to advise a dissolution of the Parliament.

High Court judgment

After setting out the relevant narrative and summarising the very lengthy submissions he had received, Scott J made the following principal findings:

(a) On 1 March 2001, Mr Chaudhry, as Prime Minister, advised the Acting President to recall parliament. The importance of upholding and asserting a most fundamental aspect of the representative parliamentary system of government was such that there could be no reason for the court not clearly stating it. Accordingly, the judge granted the first declaration sought.

(b) Sections 107, 108 and 109 of the Constitution are linked. s 109 would not normally come into operation unless the Prime Minister had either failed or lost a confidence vote on the floor of the House. However, s 109(1) does not prevent the President from dismissing a Prime Minister without such a loss of confidence vote. The judge cited as an exceptional but possible situation, where a Prime Minister, knowing that a confidence vote would be lost, might advise a lengthy prorogation under s 59(2) or a long postponement of the next session under s 68(2) — advice that the President could neither ignore nor reject. Section 68(3) of the Constitution would not necessarily operate to prevent such an unacceptable situation. That subsection empowers the President to summon parliament when it is not in session, to receive a written request from not less than 18 members (out of a possible 71) that parliament be summoned to consider without delay a matter of public importance.

(c) Although the President's power under s 109(1) is not stated to be one where he/she may exercise his/her own judgment (such as the s 68(3) power), the President may nevertheless do so when dismissing a Prime Minister. Scott J drew support for this view from the Privy Council decision in *Adegbenro v Akintola* [1963] AC 614. He found that the relevant constitutional provision considered in that case was not materially different to that which he had to consider in this case. Consequently, there may be exceptional circumstances where the President would find him/herself validly satisfied that the Prime Minister had lost the confidence of the House, without a vote in the House having been held.

(d) The outcome of Declaration C above depended on the outcome of Declaration B. If Mr Chaudhry had been validly dismissed, then Ratu Tevita had been validly appointed as caretaker Prime Minister to advise a dissolution. Scott J noted that Mr Chaudhry himself was in favour of a dissolution in his letter to the President of 7 March 2001 albeit with certain conditions. He had sought also the reinstatement of his party as the caretaker government.

(e) Section 109(2) of the Constitution did not require a person appointed as caretaker Prime Minister to be a member of the House of Representatives, although, ordinarily, such an appointee would be. The interpretation section of the Constitution (s 3) supported the view that a literal interpretation of the relevant sections would "lead to paralysis".

Scott J then said:

> In this scenario the Prime Minister loses the confidence of the House and, the provisions of Sections 107 and 108 having been exhausted, the President dismisses him under Section 109 (1) and appoints a Caretaker Prime Minister to advise dissolution under Section 109 (2). This person, as already pointed out, does not have the confidence of the

House since, otherwise, he would not be advising dissolution. In the period between dissolution and the recall of Parliament after the general elections, a government is obviously required and must be made up of a Caretaker Prime Minister and Caretaker Ministers. But Section 97 of the Constitution states that governments "must have the confidence of the House of Representatives". In the case of a Caretaker Government this requirement is ex hypothesi impossible to satisfy. In this sort of circumstance, the Constitution has somehow to be made to work and it is at this stage of the discussion that Mr. Bale introduces the proposition that, where strict compliance with the provisions of the Constitution would lead to paralysis, the relevant sections must be read as directory rather than mandatory (see *Clayton v Heffron* (1960) 105 CLR 214; [1961] ALR 368 and *Simpson v Attorney-General* [1955] NZLR 271).

Mr. Bale pointed out that, in the situation in which Fiji now finds itself, were not such an approach to be taken, it is doubtful whether the Constitution could, as it were, be "got back on the rails". Sections 60 (1) and 68 (2) illustrate the dilemma particularly sharply.

It will be appreciated from the foregoing that, with the exception of Declaration A, I am not satisfied that the relevant sections of the Constitution must in every situation be interpreted in the strict manner advocated by the Applicants. In some unusual or extreme situations a departure from the normal requirements of the Constitution is in my opinion permitted.

As those of us with even a little general knowledge know under extreme conditions the rules governing normal situations tend to break down. This is the experience of physicians, mathematicians, psychiatrists and sociologists. It is also the experience of lawyers.

In law, as I have already mentioned, this departure is justified under what is known as the doctrine of necessity.

If disputed, the onus on the party advocating justification is not a light one, as emphasised by the Fiji Court of Appeal which in *Chandrika Prasad* (ABU 78/00) adopted and followed the five conditions set out by Haynes P of the Grenada Court of Appeal in *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35 at 88.

Scott J went on to opine that, in a constitutional or public law case, the court must have regard not just to the litigants' narrow interests but to the much wider context in which the litigation is taking place. He addressed the body of evidence produced by the Respondents in support of their claim that such departures from the strict requirements of the Constitution as might have occurred, were justified by the doctrine of necessity. Some of this evidence will be mentioned later in this judgment. It will not be necessary to set it out in the same detail as did the judge.

The judge accepted the proposition that it is not a requirement that there to be a breakdown of law and order before the necessity doctrine can be invoked. He saw no reason, in principle, why the doctrine should not support efforts to avert a breakdown of the institutions of government. He considered the practical consequences of nullifying the actions of the caretaker government, noting that a date for the general election had been fixed for 25 August 2001. He found that such departures from the normal requirements of the Constitution as may have occurred were justified on the grounds of necessity. He declined to make the declarations B, C and D as sought. We do not consider it necessary to consider these factual findings.

What the High Court had to decide was:

(a) Were the impugned actions of the President constitutional? In turn, this comes down to two discrete issues of interpretation of the Constitution viz: i) Can the President dismiss a Prime Minister if one or other of the preconditions in s 109(1) have not been fulfilled? and ii) Must a person appointed as caretaker Prime Minister be a member of the House of Representatives?

(b) If the President's actions were not in accordance with the Constitution, can they be justified by the doctrine of necessity?

Counsel did not submit that the relevant sections should be read as directory rather than mandatory. In other words, counsel did not seek the court to follow the path of such decisions as *Simpson v Attorney-General* (cited above)

If, as the judge held, the President's actions were constitutional, then there was no need for him to have considered the doctrine of necessity. It seems that the judge discussed the necessity doctrine in the event that he were incorrect in his interpretation of s 109 of the Constitution.

Standing/mootness

The Respondents submitted that the court should not consider the appeal. Since the High Court decision, there has been a general election as a result of which, the leader of the victorious party, Mr Qarase, had been validly appointed as Prime Minister by the President under s 98 of the Constitution. Accordingly, the issues raised in the declarations sought by the Appellants were now moot. In other words, there was no live issue on which the opinion of the court needed to be given and that any decision of this court would be in the nature of an advisory opinion. Counsel for the Respondents submitted that the situation was similar to that in *Victoria v Commonwealth* (1975) 134 CLR 81 at 120, 183–4; (1975) 7 ALR 1 at 12, 63–4. It was there claimed that the Governor-General had dissolved parliament without power to do so under the Australian Constitution. Barwick CJ in the High Court of Australia held that the dissolution was a fact which can neither be void or undone. Even if the Governor-General had had no power to dissolve, there would be no basis for setting aside the dissolution or treating it as not having occurred.

The Respondents did not question the locus standi of the Appellants, as concerned citizens and electors, to have brought the proceedings in the High Court and to have appealed to this court.

The Respondents' lack of challenge to the Appellants' standing was quite proper. The law of Fiji is similar to that in England and New Zealand in demonstrating a liberal approach to standing in public law cases. This court's decision in *Naidu v Attorney-General* (27 August 1999 — Civ App ABU0039 of 1998S) is an example of that approach. The text cited by counsel for the Appellants, Joseph, "Constitutional & Administrative Law in New Zealand" at ss 25.7.2 and 25.7.3, discusses how the former restrictive rules of locus standi were developed as a safeguard against the courts being flooded and public bodies harassed by vexatious applications. Nowadays, a generous approach to standing encourages publicly-minded citizens and groups to challenge unlawful and suspect public administration. Lord Denning Mr in *R v Greater London Council; Ex parte Blackburn,* [1976] 3 All ER 184 at 192 proclaimed it as a "matter of high constitutional principle" that an interested party should have standing to seek to have the law enforced. See also *R v Inland Revenue Commissioners; Ex parte the National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 641 644; *Environmental Defence Society Inc South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 and *Finnigan v NZ Rugby Football Union Inc* [1985] 2 NZLR 159.

The principles in the above cases would have justified the hearing of the proceedings in the High Court. Some of the Applicants who have not elected to prosecute the appeal, had been members of parliament. At that time, the election writs had not been issued and the issues encompassed by the declarations sought

were live. The election writs were due to be issued on 12 July 2001. Mindful of that fact, Scott J, with commendable despatch, delivered his judgment on the preceding day. Had the Appellants succeeded in obtaining declarations declaring null and void the various acts of the President of which they had complained, then the constitutional situation would have changed very dramatically.

The Appellants had the undoubted right to appeal to this court under s 121(2) of the Constitution because the final judgment of the High Court involved interpretation of the Constitution. But contrary to counsel's submission, the mere fact of their having an unassailable right to file an appeal does not oblige the court consider an appeal on the merits when the subject matter of the litigation has become moot. In that event, a moot case may be considered on appeal only in the very limited circumstances described below.

Section 121(2) of the Constitution does not give an unrestricted power to any concerned citizen to seek an advisory opinion on a constitutional matter. The only right to an advisory opinion is that conferred on the President by s 123 of the Constitution to seek the opinion of the Supreme Court on constitutional matters in stated situations. Even the recent line of authority on standing for declarations in public interest cases shows that there is normally to be sought from the court a ruling on the legality of something live: either the court is asked to declare illegal something which is to happen or to declare illegal something which has happened in circumstances, usually, where a return to the status quo is feasible, even although inconvenient. See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Ltd* (1970) 123 CLR 361 at 374; [1970] ALR 449.

The settled law about mootness in non-public law cases is found in *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 at 113-114 and *Ainsbury v Millington (Note)* [1987] 1 WLR 379 at 381. In the latter case, Lord Bridge said:

> In the instant case neither party can have any interest at all in the outcome of the appeal. Their joint tenancy of property which was the subject matter of the dispute no longer exists. Thus, even if the House thought that the judge and the Court of Appeal had been wrong to decline jurisdiction, there would be no order which could now be made to give effect to that view. It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved. Different considerations may arise in relation to what are called "friendly actions" and conceivably in relation to proceedings instituted specifically as a test case. The instant case does not fall within either of those categories. Again litigation may sometimes be properly continued for the sole purpose of resolving an issue as to costs when all other matters in dispute have been resolved.

However, *R v Secretary of State for the Home Department; Ex parte Salem* [1999] 1 AC 450 limited the above authorities to disputes concerning private law rights between parties to a case. The House of Lords held that there was a discretion to hear an appeal concerning a question of public law, even if, by the time the appeal reached the House of Lords, there was no longer any lis directly affecting the rights and obligations of the parties inter se.

At 457, Lord Slynn outlined the discretion to hear appeals in public law cases thus:

> I do not consider that this is such a case. In the first place, although a question of statutory construction does arise, the facts are by no means straightforward and in other cases the problem of when a determination is made may depend on the precise factual context of each case. In this very case, the first issue is expressed to arise "On the fact of this case"; the second issue concerns the question whether the Secretary of State had

> any discretion to record and rescind his decision and whether the discretion was exercised rationally and fairly in the instance case.
>
> In the second place, Mr. Pannick, on the basis of instructions from both the Home Office and the Department of Health and Social Security, told us that only in a few cases has this question arisen. In *R v Secretary of State for the Home Department; Ex parte Karaoui, The Times*, 27 March 1997 the issue was whether there was a record; the determination was quashed because there was no record. In *R v Secretary of State for the Home Department; Ex parte Bawa* (unreported), 27 October 1997 the claim was accepted by the Home Office after the trial judge's decision. In two other cases, applications are being made for judicial review, but leave has not yet been given. The unusual facts of the present case do not seem to provide a good basis for the matter to be raised as a general principle, the particular lis having gone.

Strictures against a court opining on hypothetical questions where the court's declaration will produce no foreseeable consequences for the parties, have been made in several decisions of the High Court of Australia. See *Gardner v Dairy Industry Authority of NSW* (1977) 18 ALR 55 at 71; (1977) 52 ALJR 180 at 188, *Church of Scientology v Woodward* (1983) 143 CLR 25 at 62.

In the course of the argument, counsel for Appellants realised the potential difficulties in the mootness point and invited the court to make amended declarations as follows:

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

With respect to counsel, the above formulation is still open to the criticism that the declarations sought are in the nature of advisory opinions on events which cannot be undone. We endorse the criticisms of the formulations made by Davies JA in his judgment.

We propose to consider the *Salem* criteria in ascertaining whether it should entertain this appeal which clearly involves public law issues, which have become moot.

The bare record of events establishes (a) the dismissal of Mr Chaudhry by the President without a prior vote of no confidence in the House, (b) the appointment of the first caretaker Prime Minister,(c) the advice of that caretaker Prime Minister to dissolve parliament, (d) the resignation of that caretaker Prime Minister after only one day in office and (e) the appointment of a new caretaker Prime Minister who was not a member of the House of Representatives. However, the judge in the High Court did not consider the questions raised by the declarations sought in a vacuum, divorced from what he perceived as the factual matrix in which the impugned decisions had been made.

Counsel for the Respondents drew to our attention a large amount of unchallenged evidence in the High Court designed to demonstrate that (a) Mr Chaudhary had lost the support of a majority of members of the house and (b) regardless of whether the President's actions were in strict compliance with the Constitution, he was acting under the doctrine of necessity as articulated in *Prasad* and a host of other cases.

Some further factual background therefore needs to be noted before an assessment can be made on whether Appellants have made out a case under the *Salem* authority for a decision on a moot point.

Mr Chaudhry's advice to the acting President, tendered on 1 March 2001, at a time when he was undoubtedly the Prime Minister, was to recall parliament. Mr Chaudhry envisaged a short session only — one in which the Constitution could be changed to substitute "first past the post" voting system instead of proportional representation as provided in the Constitution. He saw this change as desirable before the election which he and others wanted.

After this court's decision in *Prasad*, the President received many deputations, submissions and representations as to his best course of action. Many vouchsafed nominations for the position of Prime Minister. Special interest groups with a variety of agendas abounded. The President made a speech to the nation following on his swearing-in and following the declarations of the GCC. The following are extracts from that speech.

> When I spoke to you two weeks ago following the court of appeal decision on the 1997 Constitution, I described the course I intended to take in the search for the best way of bringing Fiji back to Constitutional rule. I have taken a lot of advice and listened very carefully to those who have given me the benefit of their ideas, their opinions and their concerns. I am grateful to all of them. I was privileged to attend the GCC meeting and to hear in that forum a forthright exchange of views.
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> I am very conscious that the appeals court restricted itself to legal questions. It found that the 1997 Constitution remains the supreme law of the republic and parliament has not been dissolved. But it did not give us a solution to our political dilemma. That is for us to deal with. I have, therefore, been weighing numerous political questions in extremely complicated circumstances. These were perhaps not anticipated by the 1997 Constitution. It does not, in my view, provide complete and realistic answers to the misfortunes caused by an armed insurrection and revolution in a racially split developing nation.
>
> I consider carefully the two obvious options. These were to recall and to re-instate the people's coalition government, or to request the establishment of a broader multi-party government, inclusive of all the political parties represented in the House of representatives.
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> This I have done, and out of practical necessity, appointed Ratu Tevita Momoedonu from the majority Fiji Labour Party to be caretaker Prime Minister. We have duly discussed the situation confronting our country, and in particular, the absolute (word omitted) of returning it to full constitutional rule at the earliest opportunity.
>
> The caretaker Prime Minister has fully concurred with my own judgment that this objective can best be attained by going back to the people through general elections. I have accepted his advice for parliament to be dissolved and have also accepted his resignation to open the way for election preparations to begin.

The quotations from the President's speech show (a) the course he took was adjudged by him to be in the best interests of the nation, particularly, in the best interests of restoring normality after the chaotic events of the preceding 10 months and (b) the Constitution was considered by him to have not always been appropriate to what he perceived as unusual and fraught circumstances.

The President's permanent secretary filed an affidavit articulating the matters taken into account by the President in making the decisions about which the Appellants complain. By and large, these reasons were reflected in the President's Address to the Nation. According to the deponent, the President understood that he might be left with no choice but to step outside the strict requirements of the Constitution in his quest to return the nation to peaceful parliamentary rule. The security council had advised him that it would be dangerous to reconvene parliament. This action would be likely "to bring about a further outbreak of law and order of a magnitude and consequences whose (sic) complexity would be greater than the events of 19th May 2000". The deponent exhibited numerous letters of support for the President's proposals, largely from ethnic Fijian groups. Scott J also outlined a number of other factual considerations which lead him to the view that the President was acting under the doctrine of necessity.

Counsel for the Respondents submitted that the necessity doctrine, either under that name or under other labels such as "implied mandate" can arise not only after a period of violence and upheaval. It can be invoked to prevent violence and upheaval in fraught situations. Counsel submitted that there is no reason why the well-known principles in *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35 at 88 (as adopted by this court in *Prasad*) should only apply during the reign of an illegal regime. The court however must always be vigilant against the doctrine being devalued and becoming an exercise for expediency or for not wanting to comply with what might be seen as awkward constitutional provisions.

One example where the doctrine of necessity, or something like it, was utilised in the situation of a long standing breach of a constitutional provision is *Re Manitoba Language Rights* (1985) 19 DLR (4th) 1. There, the Supreme Court of Canada held that the Province of Manitoba had contravened for many years a constitutional requirement that all laws be published in French and English. The laws had been published only in english. Rather than invalidate years of legislation, the Supreme Court gave the Manitoba Government a reasonable time within which to publish the laws in both languages. The court upheld the validity of the uni-lingual laws in the interim. Numerous cases from around the commonwealth, collected in the *Manitoba* decision, show that courts have taken pragmatic approaches to repairing the damage after constitutional breaches, many of them serious, have occurred.

Scott J considered that such constitutional breaches as there may have been here were excused under the doctrine of necessity. For this court to enquire whether he was correct would involve an examination of a detailed factual situation that no longer exists and cannot be resolved.

The present case is like *Salem's*. Although questions of statutory construction arise, the court would have to consider complex facts before it would be in a position to say that any constitutional infraction was excused under the necessity doctrine. The doctrine of necessity, if applicable, would prevent the making of declarations sought in the particular circumstances of this case. The situation is similar to *Salem's* case, in the words of Lord Slynn: "The unusual facts of the present case do not seem to provide a good basis for the matter to be raised as a general principle, the particular lis having gone".

Viewed outside of the unusual circumstances in this case which may have justified invocation of the necessity principle, we cannot accept Scott J's interpretation the s 109 of the Constitution. Because the situation may arise in the future — hopefully not in the aftermath of a coup — we make some comments on the constitutional questions.

Section 96(2) limits the circumstances where the President may act on his or her own judgment to those instances prescribed by the Constitution. He may do so under s 109(2) for example. He may not do so under s 109(1). Nor is some external apprehension by the President, outside of a vote of no confidence in the House, that a Prime Minister has not have the confidence of a majority, a substitute for what is required by s 109(1). Thus, the case differs from *Abegbenro v Akintola* (above) where the Governor was not entitled to remove the Premier from office "unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly". There the Governor was held to have acted properly in dismissing the premier after the governor had received a letter from 66 out of 124 members stating they no longer supported the government. In that case, the Governor was entitled by the Constitution to act on such credible evidence as he thought proper. The Governor's power was not stated in another part of the Constitution as one where he was free to use his "deliberate judgment". That provision was explained by Viscount Radcliffe thus:

> The circumstance, which is perhaps one of the curiosities of the drafting of the complicated provisions of the Constitution, has given rise to the suggestion that it amounts to a recognition that the Governor's power of removal in section 33 (10) is not to be the product of his own judgment and, by a somewhat questionable step in the argument, is therefore to be understood as confined to an observation of votes recorded in the House. Their Lordships, however, would regard such a deduction as inadmissible. The explanation of the fact that the power of removal is not included in the functions mentioned in section 38 (1) appears to them to be the simple one that the only purpose in listing these functions is to except them from the statutory direction with which the subsection opens to the effect that in exercising his functions under the Constitution the Governor must act in accordance with the advice of the Executive Council. As the Executive Council is a Cabinet formed by the Premier and a group of his Ministers recommended by him it could hardly have occurred to the draftsmen of the Constitution that the Governor, in removing a Premier, would have to consult and act on the Executive Council's advice. The idea of his doing so is a contradiction in terms. If so, it could hardly have been felt that there was any need to make an exception of a function that was not regarded as capable as being affected by section 38 (1) at all.

The Fiji Constitution, by the prescriptiveness of s 109(1), denies the President such a right as that given to the Governor in Ankitola. Consequently, it did not matter that his soundings may have indicated a general lack of support for Mr Chaudhry or indeed that Mr Chaudhry himself supported a dissolution — albeit with himself as caretaker Prime Minister. The framers of the Constitution appear to have been at pains to circumscribe the President's power of dismissal of a Prime Minister and to have required the House and not the President to determine whether the Prime Minister has lost its confidence.

Under s 98 of the Constitution, the President, acting on his or her judgment appoints as Prime Minister the member of the House of Representatives who, in the President's opinion can form a government that has the confidence of the House. Section 109(2) permits the appointment by the President, acting on his order on judgment, of a "person" as a caretaker Prime Minister. We do not see it as mandatory for the caretaker Prime Minister to be a member of the House, although such an appointment is no doubt desirable. After all, the House is not sitting. The primary role of the caretaker Prime Minister is to advise the dissolution of the House. We do not disagree with Scott J's interpretation on this point.

Because of the application of the *Salem* principle to this moot case, we are not prepared to consider whether Scott J was correct or not in applying the doctrine of necessity. In our court's view, such an exercise would need to be undertaken before deciding whether the declarations — even in their amended form — should have been issued by the judge. In the words of Lord Slynn in *Salem* quoted earlier, the facts are by no means straightforward.

Because the elections have been held, it is too late to "turn the clock" back. The elections were duly held despite any constitutional irregularities which may have preceded them. The nation has returned to democratic rule.

Consequently, it is too simplistic to consider in isolation from the factual matrix the constitutional questions posed in this moot situation. They cannot properly be answered without a full review of the factual situation in Fiji in March 2001 following the *Prasad* decision. They cannot properly be decided without full consideration of numerous authorities on the doctrine of necessity. In other words, a decision on this moot case cannot be made without extensive consideration of factual matters. Therefore, the appeal does not fall within the *Salem* exception discussed earlier. There certainly are not "a large number of similar cases" pending to use Lord Slynn's words.

Since all members of the court are in agreement as to the result the court refuses to make any declarations and dismisses the appeal.

In the circumstances, all parties should bear their/his own costs.

Decision

(a) Appeal dismissed.
(b) No order as to costs.

Appeal dismissed.