COMMODORE JOSAIA VOREQE BAINIMARAMA and 2 Ors v ANGENETTE MELANIA HEFFERNAN (ABU0034 of 2007)

COURT OF APPEAL — APPELLATE JURISDICTION

BYRNE J

12 June, 30 July 2007

Courts and judicial system — judges — judge allegedly has no power to hear and determine application — judge not appointed either Puisne Judge or Acting Puisne Judge of the High Court — doctrine of de facto officer applied to case — judge had professional qualifications and competence to sit as judge — no known irregularity in his appointment — no provision in Constitution limiting court business that an Acting Puisne Judge may undertake in his judicial duties — motion dismissed — Constitution s 132(3)(b) — Court of Appeal Act s 20 — Interpretation Act s 16 — Judicature Act 1908.

Practice and procedure — appeal — no final disposition of proceedings in Court of Appeal — substantive appeal not yet heard — no right of appeal from ruling of case to Full Court.

This was a motion for orders filed by the Respondent to the President of the Court of Appeal. One of the grounds mentioned by the Respondent's counsel was that Byrne J, who purported to hear and determine the Appellants' application, had no power to hear and determine that application. The Respondent claimed that Byrne J was not appointed either a Puisne Judge or an Acting Puisne Judge of the High Court in accordance with the provisions of the Constitution.

Held — (1) The doctrine of de facto officer applied to this case. Byrne J possessed the professional qualifications and competence to sit as a judge and there was no known irregularity in his appointment. He had no jurisdictional disability until finally determined otherwise by a court.

(2) There was no provision of the Constitution which limited the court business that an Acting Puisne Judge may undertake in his judicial duties.

(3) There would be no appeal to the Supreme Court as it would not finally dispose of the proceedings in the Court of Appeal because the substantive appeal was yet to be heard. Also there was no right of appeal from the ruling in this case to the Full Court.

Motion dismissed.

Cases referred to

Re Aldridge [1893] 15 NZLR 361; *Campbell v Wallsend Shipway & Engineering Co Ltd* (1977) Crim LR 351; *Coppard v Customs and Excise Commissioners* [2003] QB 1428; [2003] 3 All ER 351; [2003] 2 WLR 1618; *Dimes v Proprietors of Grand Junction Canal Pty* (1852) 3 HL Cas 759; 10 ER 301; *Middleton, Assignees of Hemingway (a bankrupt) v Barned* [1849] Eng R 747; 4 Exch 241; 154 ER 1200; *Native Land Trust Board v Narawa* Appeal No CBV0007/2002S; *Peniasi Kunatuba v State* HAM 66/2006; *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (2)* [2000] 1 AC 119; [1999] 1 All ER 577; [1999] 2 WLR 272; [1999] UKHL 1; *R v Gordon* [1789] 1 Leach 515; *Suresh Charan v Bansraj* Civ App No ABU0042/1999; *Zaoui v Attorney-General* [2005] 1 NZLR 577; [2004] NZCA 228, cited.

R v Te Kahu [2006] 1 NZLR 459; (2005) 22 CRNZ 133, considered.

A. K. Narayan, *C. T. Pryde* and *S. Sharma* for the Appellants

J. L. Cameron for the Respondent

[1] Byrne J. On 4 June 2007 I directed a stay of proceedings in the High Court in this action pending the determination of the Appellants' appeal against an interlocutory ruling of the High Court dated 20 April 2007, and that the time for service or hearing of the ex-parte motion on which I gave those directions be abridged to Monday 4 June 2007. My order was sealed on 5 June 2007.

[2] On 12 June 2007 I heard an application by the Respondent seeking directions on two matters only —

(i) whether my order of 4 June 2007 should be referred to the Supreme Court; and

(ii) whether it should also be referred to that court on the question of whether an order for costs should be made in favour of the Respondent in all proceedings to date.

[3] I ordered written submissions to be delivered as follows:

(i) Respondent's by 19 June 2007;

(ii) Appellants' by 26 June 2007;

(iii) reply by Respondent by 3 July 2007.

Thereafter I was to give my ruling on notice but I gave liberty to apply to any party on 24 hours' notice.

[4] Unbeknown to me the Respondent had applied to the then President of this court for orders:

(i) That the order dated 4 June 2007 be set aside and the Appellants' application be listed for an inter partes hearing before the court on the … day of June 2007. (no date was stated)

(ii) That the listing for mention before me on 12 June 2007 be vacated.

(iii) That the notice of appeal dated 26 April 2007 be struck out.

(iv) That the Appellants pay the Respondent's costs on an indemnity basis.

[5] Grounds were then mentioned as follows:

(i) That the making of the application and the granting of my Order were attended by such irregularity that the Order was made without jurisdiction and was a nullity not withstanding that it had been sealed by the court.

(ii) That the person who purported to hear and determine the application had no power to hear and determine it not having been appointed either a puisne judge or an Acting puisne judge of the High Court in accordance with the provisions of the Constitution.

(iii) That no sufficient grounds were advanced or existed for an abridgement of time for the hearing of the motion.

(iv) That having regard to the prejudice to the Plaintiff (Respondent) if a stay were granted and the hearing of the originating summons adjourned, and having regard to the public importance of the issues involved, there were no grounds for hearing the application on an ex parte basis and after hours.

(v) That the Appellants' application was in the circumstances frivolous, vexatious and an abuse of the process of the court.

(vi) That the issues sought to be reviewed in the notice of appeal would have become moot upon the hearing of the originating motion and to maintain the appeal in such circumstances would be frivolous, vexatious and an abuse of the process of the court.

[6] The motion was supported by an affidavit of Dorsami Naidu sworn on 8 June 2007 and an affidavit of Prem Lata Narayan which was affirmed also on 8 June 2007. It will be noted, that when the parties appeared before me on 12 June 2007 there was not even the hint of a motion being made at this time to the President of this court. The only questions which I was asked to decide were whether an appeal from my Order of 4 June, lay to the Supreme Court and whether that court should also decide whether an Order for costs should be made in favour of the Respondent in all proceedings to date.

[7] I was thus most surprised when I received submissions from leading counsel for the Respondent, Dr J L Cameron 19 June 2007 in which 13 of the 18 pages of the submission were devoted to an attack on the legality of my appointment as an Acting Judge of the High Court and, by virtue of that also an Acting Judge of the Court of Appeal.

[8] I would have thought that counsel of such experience as I understand his to be would at least have had the courtesy to inform me of the motion pending before the President of e court but that courtesy was denied me.

[9] When the matter eventually came before Ward P on 26 June 2007 he noted in the first paragraph of his ruling delivered on 28 June 2007 that the hearing before him was to allow counsel to address him on the sole question of whether he, as President of the Court of Appeal, had any power to intervene in a matter of which another Justice of Appeal was presently seized.

[10] As the learned President said in para 10 of his ruling, on 4 June 2007, an ex parte notice of motion was filed in this court seeking to stay the High Court proceedings due to start 2 days later. As the President was overseas at the time, it was listed, on the advice of the Acting Chief Registrar, to be heard by the President on 12 June after he returned. In para 12 of his ruling the President states

> Whatever the reasons for the late timing of the application, there would still have been time for the matter to be heard inter-partes.

He then refers to an alteration apparently made by me of the dates entered by the registry in the notice of motion. The hearing commenced at 4.30 pm and the Order was made at 5.30 pm.

[11] I adjourned the court at 5.35 pm.

[12] Nobody appears to have informed President Ward of why the application was made to me so late in the day, which I find strange. However in para 34 of p 13 of Dr Cameron's submission he considers that the hearing of the application at 4.30 pm was more than strange; he says "a hearing after hours was in the circumstances highly improper". Nothing could be further from the truth. As far as I personally am concerned what happened was that at about 4 pm on 4 June the Acting Chief Justice telephoned me and asked whether I could hear an urgent application in my capacity as a judge of the Court of Appeal for stay of an order made by a judge of the High Court. The Acting Chief Justice stated that there was no other judge available and I therefore agreed to hear the application.

[13] On p 13 of the Appellants' submission it is stated that Mr Sharma of Counsel who appeared with leading Counsel had lodged the papers with the Registry to issue before me. The file was then awaited in my Chambers. For reasons best known to the Registry staff the file was not brought in. Mr Sharma then sought leave of me to go to the Registry and when on his way, he was given issued copies of the application returnable for 12 June 2007, a date which would have defeated the whole purpose of the application to stay proceedings due to

commence on 6 June 2007. When Mr Sharma returned he gave this explanation to me and then handed over the issued copy of the application and supporting affidavit by one Ajay Singh, the Administrative Officer (Litigation) in the Office of the Attorney-General.

[14] Counsel for the Appellants impressed on me the urgency of the matter and I therefore agreed to hear it at about 4.30 pm and corrected the date, as it should have been issued for 4 June 2007 in terms of the appointment with me. I reiterate that there was nothing either sinister or dishonest in the way in which the application was brought before me. It is important to set the record straight.

[15] Although as I have said the Respondent listed six grounds on which it sought President Ward's decision, he, quite properly in my view, allowed counsel to address him on the sole question of whether he, as President of the Court of Appeal, had any power to intervene in a matter of which another Justice of Appeal was presently seized.

[16] The Appellants first urge me to restrict the Respondent to the submissions called for by me and to ignore any other matter not properly before me. Attractive though such a submission is and would be in normal circumstances, I consider that because of what I regard as numerous mis-statements of the law and facts in the Respondent's submissions I should endeavour to state the law as I understand it, and not as the Respondent would claim it to be. I also consider it important in the interests of confidence in the courts that I should perform a rather more detailed analysis of the Respondent's submissions than would otherwise be necessary. The first thing that must be said is that I have no doubt that the Respondent and her counsel were well aware of the circumstances of my appointment. Were it otherwise I am certain that they would not have engaged in the detailed discussion which took place between Dr Cameron and counsel for the Appellants as to the nature of the directions I should give on 12 June. recall that when I suggested a time-table for the delivery of submissions and that the first submissions by the Respondent should be delivered by 19 June 2007, Dr Cameron stated after a short pause that he would be able to meet that date. As my order then shows the other submissions were to follow within the next 2 weeks. In my judgment this amounts to a clear waiver of any right which the Respondent later claimed to have as to my qualification for considering the submissions.

A. Illegality

Other pending proceedings

[17] I have no doubt, because there has been much publicity in the media, that the legal profession here is fully aware of the fact that there are at least two actions pending in the courts concerning the legality of the events of 5 December 2006 and thereafter. The first case has been fixed for hearing for 2 October 2007 and it is expected to last about 1 month. As I understand it, that action is designed to determine the validity of the Interim Government.

[18] The other action is by the Fiji Law Society by way of Judicial Review No HBJ 184 of 2007/S. I was appointed the judge to hear any preliminary applications by the parties but not the substantive application because, as the Acting Chief Justice and I agreed, as both he and Shameem J being the interested party and one Respondent respectively are closely known to me, I could not hear the substantive application. I informed the parties of this some weeks ago and stated that the Acting Chief Justice and I agreed that some judge, without any

connection to Fiji, and from overseas should be appointed to hear the substantive application as well as the application for leave which the parties informed me will be strongly contested.

[19] Both these actions deal specifically with the legality and constitutionality of actions taken since 5 December 2005 by the Interim Government.

[20] In my judgment the presumption of legality applies to any actions or rulings which I have given since my reappointment as a judge on 16 April 2007. This presumption was only recently considered by Shameem J in a ruling she gave on 25 September 2006 in the criminal jurisdiction of the High Court: — *Peniasi Kunatuba v State* HAM 66/2006.

[21] Her Ladyship there had to consider a preliminary application made by the Defence that the Information was invalid on the ground that the Director of Public Prosecutions who signed it was not validly appointed. At p 3 of her ruling her Ladyship quoted in full the legal maxim which is known in both civil and criminal jurisdictions as "omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium". Frequently courts and lawyers refer to this presumption simply as the "omnia praesumuntur rite esse acta" presumption and omit the last phrase of it "donec probetur in contrarium" which means that until the contrary is proved any person who acts in an official capacity is presumed to have been duly and properly appointed and has properly discharged his or her official duties. Shameem J states that although the maxim is an old one and can be found to have been applied as early as 1789 (in *R v Gordon* [1789] 1 Leach 515), it was applied more recently in *Campbell v Wallsend Shipway & Engineering Co Ltd* (1977) Crim LR 351.

[22] Shameem J held that a presumption of validity applied to the appointment of Mr J Naigulevu as DPP and therefore she refused the application to quash the information.

[23] I also note the well-established rule that the law will presume in favour of honesty and against fraud — *Middleton, Assignees of Hemingway (a bankrupt) v Barned* [1849] Eng R 747 at 243; 4 Exch 241; 154 ER 1200 per Parke B. In my judgment therefore the doctrine of de facto officer applies to this case and if there should be any doubt later, for example because of the decisions in the Qarase or Fiji Law Society cases, the doctrine would aid the upholding of decisions given by any judges appointed by the President since 15 January 2007.

[24] The doctrine of de facto officer was applied recently in the New Zealand Court of Appeal case of *R v Te Kahu* (2006) 1 NZLR 459 at 473 (*Te Kahu*) where the Court of Appeal (NZ) said:—

> [55] Further, even if we were persuaded that the appointment of Neazor J was invalid (and we are not), it would not follow that all decisions made by him should be treated as void. We say this because, if otherwise in agreement with Mr Ellis, we would see the de facto officer doctrine as an answer to the challenge of the warrant.
>
> [56] We recognize that the consequence of *Millar v Dickson* included the setting aside of a very large number of convictions and sentences in Scotland. It is, however, important to recognize that the judgment of the Privy Council did not address the de facto officer doctrine. As well, the nature of the challenge (which was formerly addressed to the actions of the Lord Advocate in prosecuting cases before "non-independent" Judges) was seen as rendering the de facto officer doctrine irrelevant when the case was before the High Court of Judiciary (see 2000 JC 648 at [31]–[38] of the opinion of Lord Prosser and at [4] of the opinion of Lord Johnstone).

[57] In concluding that the de facto officer doctrine would apply if Mr Elli's argument was correct, we are content to rely on one reasonably old decision, *Re Aldridge* [1893] 15 NZLR 361 and one recent case, *Coppard v Customs and Excise Commissioners* [2003] QB 1428; [2003] 3 All ER 351; [2003] 2 WLR 1618. *Re Aldridge* concerned a trial held before Edwards J whose appointment to the Bench was later held to be invalid. This Court upheld the conviction and sentence on the basis of the de facto officer doctrine and its decision might be thought to be directly on point in the present context. Mr Ellis critised *Re Aldridge*, primarily be reference to its antiquity, but we note that it is seen as authoritative by Wade and Forsyth, Judicial Review (8th ed, 2000), pp 292–293.

[25] In *Coppard v Customs and Excise Commissioners* [2003] QB 1428; [2003] 3 All ER 351; [2003] 2 WLR 1618 (*Coppard*) the English Court of Appeal had to consider a situation where proceedings before the Queen's Bench Division were assigned to a circuit judge who is authorised to deal with business of the Technology and Construction Court. The Law Chancellor had overlooked exercising his statutory power to authorise the Circuit Judge to sit on the High Court although judges of the Technology and Construction Court routinely had been authorised to do so. The judge was otherwise qualified. This irregularity was discovered after the judge had found against the Claimant. The point of invalidity of appointment was taken as a ground of appeal and the Court of Appeal applied the de facto doctrine.

[26] At QB 1435; All ER 356 the court said: —

> We would hold that the de facto doctrine cannot validate the acts, nor therefore ratify the authority, of a person who, though believed by the world to be a Judge of the Court in which he sits, knows that he is not. We accept, on well known principles, that a person who knows he lacks authority includes a person who has shut his eyes to the fact when it is obvious, but not a person who has simply neglected to find out. We will call such a person a usurper.

[27] The court held that the judge neither knew nor ought to have known "in the sense that he was ignoring the obvious or failing to make obvious inquiries that he was not authorised to sit as a Judge of the High Court".

[28] The court further held that the doctrine would validate the authority of the judge in his office under the common law. At QB 1439; All ER 360f their Lordships said:

> … the doctrine cannot validate the authority of a usurper, for it will be a rare case in which an incompetent person who lacks legal authority does not know that he or she ought not to be sitting as a Judge. The freak case of a person without professional, competence or legal authority who believes despite his incompetence that he is authorised to sit as a Judge can be addressed if and when it arises. What matters to the present issues is that the de facto doctrine ratifies the authority only of persons believed by themselves and the world to possess the judicial power they are exercising. It does not protect people who have deluded themselves or others into thinking they have authority.

For these reasons and applying these principles I hold that my authority and acts are in any event valid on the basis of the de facto doctrine.

[29] I consider that it is reasonable to draw the following inferences on my reappointment as a judge:

(1) I do not lack professional qualifications and competence to sit as a judge.

(2) I was a judge of the High Court from May 1989 to December 2004.

(3) I do not know nor could I have known that, there is any irregularity in my appointment. I was appointed by the President on the recommendation of the Judicial Services Commission. Whether the Judicial Services Commission was properly constituted and subsequent procedures were regular or not are beyond the scope of issues calling for decision in this action. The two cases I have mentioned involve complex matters of law and fact and thus I can surely not to be accused of shutting my eyes to the obvious. I would expect that any decision will be appealed and further appealed.

[30] In para 20 of the Respondent's first submissions there is a reference to the Western Australia Supreme Court Act 1935 which in s 11AA(1) deals with the appointment of auxiliary judges. That section has no counterpart in Fiji but it supports the proposition that an appointment of an auxiliary judge can be made even where he would not satisfy the age requirement for a substantive appointment.

[31] The only relevant issue here is whether I can be appointed to be an Acting Judge after attaining the age of 65. The answer is provided in s 137(6) of the Constitution:

> The applicable retiring age under this Section does not apply to a person appointed as an acting Judge under Subsection 132(3).

[32] Section 132(3)(b) enables an acting appointment to be made when required:

> during all periods when an office of puisne Judge of the High Court is vacant …

[33] It is common for most judicial systems to have provision for the appointment of acting judges either before they be appointed full-time judges or after judges have retired.

[34] In *Te Kahu*, the Court of Appeal had also to consider the appointment of acting judges where they were over the age for appointment to substantive positions. The Court of Appeal had no hesitation in holding that under the relevant sections of the Judicature Act 1908 read in conjunction with s 16 of the Interpretation Act the power to appoint a former judge as an Acting Judge could be exercised more than once in respect of the same person. In this regard at [46] on 471 the court said:

> We deal first with the question whether successive appointments are permissible under Section 11A.
>
> Section 16 of the Interpretation Act 1999 provides:—
>
> > Exercise of Powers and duties more than once—
> >
> > (1) A power conferred by an enactment may be performed from time to time.
> >
> > (2) A duty or function imposed by an enactment may be performed from time to time.

There is no reason why this Section should not be applied in accordance with its tenor (see *Zaoui v Attorney-General* [2005] 1 NZLR 577; [2004] NZCA 228 at [96]). Mr Ellis characterised the Crown's reliance on s 16 as an "argument of desperation". But as Greenberg and Goodman (Eds), *Craies on Legislation*, 8th ed, 2004, notes at [12.3.1], the principle of interpretation that powers can be exercised from time to time "stands to reason".

[35] Section 35 of the Fiji Interpretation Act provides: —

> where any written law confers any power or imposes any duty, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion arises.

[36] In Fiji in contrast to the position in New Zealand stated in *Te Kahu* there is no time limitation for such appointments in our Constitution.

Membership of Court of Appeal

[37] In para 23 of the Respondent's first submissions an extraordinary and insolent assertion is made that the Appellants had ample time to bring an application before the President prior to him leaving the country. It is clearly inferred that the application to the Court of Appeal was deliberately delayed to have the matter "heard by a military appointee who might be more inclined to entertain an ex-parte application, and deliver a favourable decision, the effect of which would be further to delay judicial scrutiny of the emergency measure introduced by the Appellants in the imminent hearing of the originating summons". There is no doubt that the "military appointee" is myself and it is then alleged that I might be more inclined to entertain an ex-parte application and deliver a favourable decision. It imputes not possible but rather likely bias for which there is no foundation. For such a submission to be made by counsel of Dr Cameron's claimed experience is ill-becoming an officer of this court as I assume Dr Cameron to be. In my opinion it is a clear example of contempt and I am minded to deal with it. When the only legal argument left to a litigant is that the judge might be biased, it says little for the substance of any other arguments that litigant may have. I am told by the Appellants, and have no reason to doubt, that the Respondent was aware, that after the stay application, an informal application some days later was made as is the practice here for the recusal of Singh J. This was declined by the learned judge.

[38] An appeal was pending before this court. The Appellants as I said had two courses they could pursue at the same time. The recusal application could be pursued formally. The second was to move for a stay to a single judge of the Fiji Court of Appeal. I am told that the Appellants filed an application for stay to this court and that counsel were not aware until the papers were brought for filing that the President had left either that day or the day before to attend a Law Asia Conference in Hong Kong. The Appellants say that they pointed out to the Registry that any judge of the High Court in the absence of the President or any other Justice of Appeal could hear the application. The Registry therefore referred the matter to the Acting Chief Justice. He could not sit in this court because of the Constitution. As I have said the Acting Chief Justice told me that I was the only Judge available and so I agreed to hear the application. The Appellants' counsel say that their only reason for the delay in making the application was due to the recusal application and counsel decided after deliberation to apply for the stay in the Court of Appeal. They say counsel had in mind the unpleasantness of making a formal application for recusal.

[39] Put in a similar position I would have done the same thing. Making a recusal application is not the most enjoyable experience of being at the Bar when another option is available. It is not a question of courage but of practicality.

[40] Once again I repeat that counsel for the Appellants were at pains to impress upon me the urgency of the application and I had no reason to disbelieve them.

Ex-officio membership of the court

[41] The Respondent claims in para 24 of her submission that there is no provision under the Constitution for an Acting Judge appointed under the provisions of s 132(3)(b) to be a member of the Court of Appeal. Section 132(3)(b) deals with the appointment of "a person to act as a puisne Judge". There is no provision of the Constitution which limits the court business that an Acting Puisne Judge may undertake in his judicial duties. As I have said earlier it is common sense and desirable that acting judges having all the duties and responsibilities of substantive judges should be appointed to enable the courts to run efficiently. It has been recognised for many years that such appointments help to keep the machinery of Justice working and the effective disposal of cases ensured.

[42] In *Te Kahu's* case the court had to consider whether Neazor J was validly appointed as an Acting Judge. They held unanimously that he was and that, as an Acting Judge he had all the powers and jurisdiction of a permanent High Court Judge. I find no merits in the Respondent's submission on this question.

Disqualification on the grounds of presumed bias

[43] The Respondent claims in para 26 of her submission that even if my appointment had been attended with complete regularity, I would still have been disqualified from hearing the application since I have been appointed in controversial circumstances with the complicity of at least the third Appellant and I draw a Judicial salary as a consequence of that appointment. The use of the word "complicity" in my view is designed to import or imply some sinister aspect to my appointment. This it seems to me is in line with other submissions of the Respondent to which I have referred, the purpose of which it seems is to disparage and denigrate the circumstances of my appointment and my ability to preside in this case. This is a serious allegation to make and to have any credence I would require strong evidence. In my opinion it is pure assumption and sound arguments are not based on speculation or assumption. The Respondent then cites the well known cases of *Dimes v Proprietors of Grand Junction Canal Pty* (1852) 3 HL Cas 759; 10 ER 301 and the more recent decision of that House in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (2)* [2000] 1 AC 119; [1999] 1 All ER 577; [1999] 2 WLR 272; [1999] UKHL 1. Nobody has ever doubted my honesty and integrity as a judge and I have no intention of endeavouring even accidentally to have that position changed. Furthermore the facts of the cases cited are clearly distinguishable from those in the instant case. I have no personal interest in the outcome of this case. My duty is, as it always has been, to do justice without fear or favour and I believe I have succeeded in that aim throughout my time on the Bench. I think I can do no better than again quote from *Te Kahu* where the court discussed presumptive bias at [53] and said: —

> Mr Ellis sought to side step the impact of Section 11(4) by asserting that an Acting Judge was not independent — in effect, presumptively biased — and that this precluded such an Acting Judge exercising judicial functions. This argument to some extent echoes remarks in *Millar v Dickson* but it proves too much. The presumptive bias attributed by Mr Ellis to Acting Judges would, if Mr Ellis's argument is correct, be attributable to every single Acting Judge. But if we were to hold that someone appointed as an Acting Judge was, by that fact, presumptively biased and thus unable to exercise judicial functions, we would be flying in the face of the legislative scheme. Such a conclusion would be tantamount to finding that Sections 11A(4) and 11B are ineffective and this would be inconsistent with Section 4 of the NZBORA …

Procedural irregularity

[44] I have already mentioned the circumstances in which I came to be seized of this matter but must comment on what is again speculation by the Respondent in para 33 of her first submission. It is said that the President was overseas, but there is no reason why a hearing could not have been arranged before he left for Hong Kong. I ask simply, where is the evidence of this? I know of none. Then the Respondent speculates "that there would have been present in Suva High Court Judges who had been less controversially appointed, and who were available to hear the application during normal Court hours". No evidence of this has been proffered by the Respondent and I therefore reject this submission. Then the Respondent makes another submission which I find curious to say the least. It is said that the Respondent is not aware of whether the hearing was arranged by the Registrar of the Court, on by whom it was arranged, or whether any staff member from the Registry was even present at the hearing. It is then said "to have sought a hearing after hours was in the circumstances highly improper as was the conduct of the hearing which on the transcript was completed after 5.30pm". Perhaps the situation where Dr Cameron comes from is different from that in other jurisdictions but I very much doubt it. The law reports are replete with examples of applications being made after hours. One that comes to my mind, although the names of the parties now elude me, was an English case in the late 1990s when an application was made to a judge in Chambers at about 5.30 pm for an injunction to prevent the deportation of an African citizen to his country after he had been resident in England for some time before this. The Applicant claimed that he would be in fear of his life if he were deported to Africa and the judge granted a temporary stay and an injunction restraining the Home Office from deporting the Applicant until he was able to hear full argument on the matter. After the judge had made the order and gone to his home, at about 10 pm the Applicant's lawyers discovered that he had been taken by the English authorities to Heathrow Airport and was about to be placed on an aircraft which would fly him back to his home country. This was in clear breach of the judge's order and so he was asked if he could hear an application for an immediate stay of the deportation at his home. He agreed to do so. The application was made at approximately 11.15 pm and an order made. Unfortunately it was too late because by the time the order had been taken to the airport the plane conveying the Applicant had left England. Nothing was ever heard again of the Applicant.

[45] This submission seems to claim that judges work regular hours. I know of very few who do. Judges are the servants of the people not their masters and their duty is to ensure the administration of justice as far as possible even if this may come at a cost of some personal convenience. I will only add that applications can even be made by telephone and are sometimes on undertakings by Counsel to file papers later. Under s 20(1)(e) of the Court of Appeal (Amendment) Act No 13 of 1998 a judge of the court may exercise the power of staying execution or make an interim order to prevent prejudice to the claims of any party pending an appeal. The Respondent argues that the word "claim" in subs (e) should be construed narrowly. I disagree. In my judgment claims can include the issues raised in the appeal. In the instant case the Appellants claim that Singh J had misdirected himself and acted on erroneous assumptions. They submitted that unless the errors were corrected they would be prejudiced in the substantive action before Singh J and in my ruling I accepted the submissions.

Irrationality

[46] The Respondent claims that no fair reading of Singh J's decision could support their submission that he had reached a conclusive view on any of the questions before him. I have already referred to this in my ruling where I reject the submission and shall not repeat my reasons here.

[47] I have read the submissions in reply of the Respondent and find that they add little to what I have already said with some exceptions. They still contain not very thinly veiled imputations as to my integrity as the judge hearing this application. I would be the last to question the right of counsel to make vigorous submissions, either oral or written, but I consider many of Dr Cameron's submissions go beyond those bounds.

[48] The Respondent repeats her submissions on waiver and quotes as trite law the statement attributed to Lord Prosser in *Millar v Dickson* 2000 JC 648 at 664:

> I would accept that speaking generally, waiver cannot render intra vires an Act which is inherently ultra vires.

I will accept that as true but cannot accept the assertion by the Respondent that my actions are inherently ultra vires. As I have said that as yet to be proved. In my judgment the basic flaw in the Respondent's first and second submissions is that they do not refer once to the presumption of legality. In my judgment that is fatal to the Respondent's claim that I lack jurisdiction. Both the first and second submissions proceed on the assumption that I have been unconstitutionality appointed. I repeat, that has yet to be proved. The Respondent denies that there was unequivocal waiver of an objection to my hearing the application and says, "A waiver of jurisdiction to allow a hearing before a person not constitutionally appointed or competent would in any case be contrary to the public interest". I ask again, where is the proof that I was not constitutionally appointed and my answer at the risk of repetition is simply that there is none. In para 17 of the Respondent's reply counsel then resorts once more to what I can only term insolence. It is said, "There was a clumsy delayed application for recusal by the trial Judge, which was rightly refused. They then sought an ex-parte hearing of the present application in what was anticipated would be a more receptive forum". There is only one inference which can be drawn from the second sentence and that is that I was likely to be biased in favour of the Appellants. When counsel have to indulge in personalities and an attack on the integrity of the judge before whom they are appearing, it says little for the quality of other arguments they may have, and that is my general view of the Respondent's arguments in this case.

[49] In para 23 of the second submissions yet another example of the Respondent's wrong statement of the law occurs. It is said, "A decision of the New Zealand Court of Appeal, while persuasive is not binding on the Fiji Court of Appeal, whereas a decision on the Privy Council such as that in Millar v Procurator Fiscal (Scotland) … is binding". This submission ignores s 117(2) of the Constitution which states that the Supreme Court is the final Appellate Court of the State so that decisions of the Privy Council are not binding in Fiji. It is then submitted by the Respondent that I fall squarely within the description of a "usurper" the term used by the English Court of Appeal in *Coppard*. If that be so then at the present time there are Magistrates appointed by Decree in 2000 all sitting without objection from Dr Cameron or anyone else. If they are also usurpers then I am in good company.

[50] The Respondent's submission next questions my eligibility for appointment. She says that the Appellants rely upon the provisions of s 35 of the Interpretation Act in support of the proposition that there can be successive reappointments of an Acting Judge. It is then said "the difficulty in the present case is that Your Lordship's appointment has not been gazetted and the Respondent is accordingly unaware of the terms of the appointment". Obviously the Respondent and her counsel are unaware of the fact that it has never been necessary for appointments of judges to be gazetted in Fiji. The Respondent then repeats her claim that if the incompetence of the appointing authority is reasonably arguable, as it is submitted is the case, I should automatically disqualify and recuse myself. I do not agree, basing myself among other things, on the presumption of legality.

[51] It is then submitted that the further hearing of this case should be before a judge duly appointed under the Constitution by way of a permanent commission. If this be true, and I do not accept that it is, it must follow that on the occasions when Dr Cameron appeared for example before Mr Acting Justice Pathik of this court his Lordship lacked any jurisdiction but I know no case in which Dr Cameron has raised this point before my learned brother. In para 43 of the second submission the Respondent says "the submission is one not simply that there is a reasonable apprehension of bias, but that illegality of Your Lordship's appointment is that there is 'no Court' within the meaning of Section 29(2) of the Constitution".

[52] Again this is a presumption yet to be tested in a court and until a final decision is made on the question the Appellants naturally rely on the presumption of legality. I reject the Respondent's submission. Finally, and as another example of the impertinence shown in so much of the Respondent's submissions, it is said that "the fact that the Appellants' application was heard and determined in their favour taken together, with respect, the bizarre directions in respect of the inter-partes hearing gives rise to a reasonable apprehension of bias sufficient to warrant recusal and assignment to another Judge, even in the absence of the question of jurisdiction".

[53] Dr Cameron can not expect to escape criticism by his prefacing my directions as bizarre with the phrase, "with respect". No criticism of my directions was given by Dr Cameron at the time. It is regrettable that the doctor saw fit to file such submissions in the Court of Appeal. I consider them to be inappropriate and improper, especially as they come from counsel of his seniority.

Referral to the Supreme Court

[54] The present s 20 of the Court of Appeal Act as amended by Act No 13 of 1998 precludes an appeal or review of a single judge's decision to the full court. The amended s 20 has been the subject of rulings by Sir Moti Tikaram PA in *Suresh Charan v Bansraj* Civ App No ABU0042/1999 where at 3 his Lordship said:

> It is important to note that in Criminal matters the Parliament decided to retain the aggrieved parties' right for review by the Full Court in certain circumstances only.

The right of review in the amended s 122 of the Constitution gives the Supreme Court exclusive jurisdiction to hear and determine appeals from all final judgments of the Court of Appeal.

[55] In *Native Land Trust Board v Narawa* Appeal No CBV0007/2002S in a judgment of 21 May 2004 the Supreme Court observed that there is no discretion available under the Constitution to allow the Supreme Court to entertain applications for leave to appeal against decisions of the Court of Appeal which are not final. In my judgment in this case there can be no appeal to the Supreme Court from my decision as it will not finally dispose of the proceedings in the Court of Appeal because the substantive appeal is yet to be heard.

[56] However in my view also there is no right of appeal from my ruling in this case to the Full Court.

The way ahead

[57] The President of the court has already ruled that he cannot intervene. This is in accordance with the authorities. The way ahead is for the appeal to be heard by the Full Court on the interlocutory ruling of Singh J. For reasons which I have given above I do not consider, as submitted by the Respondent, that I should recuse myself and that the Appellants' application, should they wish to pursue it, should be made before a judge of the court appointed prior to 6 December 2006. This is because as I have said above I consider I have no jurisdictional disability until it is finally determined by a court that I have.

[58] I consider there is no evidence of prejudice or other pertinent matters on the authorities which will persuade me that the stay should not remain in place until the Appeal is heard. The Respondent seeks an order for her costs on an indemnity basis. As I have ruled against her on all but the question of Appeal to the Supreme Court I shall hear argument on this question before making any order for costs. I intend however to send a copy of this ruling to the Fiji Law Society.

Motion dismissed.