Moala & ors v Minister of Police (No.3)

Supreme Court, Nuku'alofa
Hampton CJ
C.1076/96

14 October 1996

Habeas Corpus - Parliament - contempt - due process
Constitution - due process - Parliament - contempt
Parliament - contempt - due process - Constitution

This was the third application for habeas corpus - see the reports immediately above. This time an attack was mounted, against the 30 days imprisonment, on the basis of Constitutional provisions.

Held:

1. The writ of habeas corpus does not in general lie in respect of a person in custody, duty committed by Parliament for contempt.
2. The court's concern was not whether there was a contempt or not. That was for the Legislative Assembly to decide. In England and Australia it is for the courts to judge of the existence in the House of a privilege, but given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and the warrant of the Speaker. If the warrant specifies the ground of the commitment then the court may determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant upon its face is consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.
3. Here the court had (as part of the return on the Writ of Habeas Corpus) an order or Warrant under the hand of the Speaker stating a contempt in general terms and that could not be gone behind.
4. Although this was a third application by 2 of the applicants and a second by the third, a fresh ground had been advanced (the constitutionality of the procedural processes) and only that aspect would be considered, because although decisions on such previous applications are not res judicata, continued applications should not be allowed to become an abuse on the process. And so the question of the effect of closure of Parliament (see judgment No.2) above reported) would not be ruled on again .
5. The court does not sit as a court of appeal from Parliament; the role of the Court was as a court of constitutional protection, based on cl.90.

6. Tonga has an unique Legislative Assembly (a mixture of Lords and Commons) created by a uniquely Tongan document, the Constitution.
7. The Legislative Assembly is created by the Constitution and it's members take oaths that they will act in accordance with and uphold the Constitution.
8. Although the Assembly shall make its own procedural rules, those rules must be in keeping with, and not contrary to, the Constitution.
9. Cl.90 provides that the Supreme Court shall have jurisdiction in all cases in law and equity arising under the Constitution and that plus the written Constitution itself, make the position in Tonga different to the position in the U.K. Parliament. If on a true construction of the Constitution, some event or circumstance is made a condition of the authentic expression of the will of the legislature, then the question whether the event or circumstance has been met is examinable in the Court, notwithstanding that the question may involve internal proceedings of the Assembly. The Assembly in Tonga does not have the privilege of supremacy over the courts enjoyed in the U.K.
10. The Supreme Court, in determining its jurisdiction to inquire into internal proceedings of the Assembly, must apply the English common law regarding the privilege of Parliament to determine the regularity of its own proceedings, provided of course the Assembly has not acted contrary to the provisions of the Constitution, for in such a case cl.90 gives jurisdiction.
11. Cl.70 contains two general categories of contempt, 1 class committed in the Assembly; the second outside it.
12. Clauses such as cls. 10, 11, 13 and 14 applied to a charge of contempt under cl.70 such as was brought here. They lay down a constitutional framework of minimum requirements, a constitutional protection of due process, for any hearing or trial: i.e. a formal written accusation setting out the charge and the grounds of; a trial or hearing only on that charge; a trial where the accused is brought into the presence of the accuser and hears the case against him or her; a right to give and call evidence; a lawful and fair hearing.
13. That view was reinforced by the Crown relying, in argument, on s.21, Interpretation Act.
14. In addition the Assembly had provided a framework for such a hearing, in its own rules (rr.88A - 88K inclusive), prescribed under cl.62 Constitution, to provide for a procedurally fair hearing that complied with the requirements of the Constitution as to hearings and the requirements of natural justice.
15. The summons or warrant issued to the applicants to attend the House did not properly state the offence charged, the grounds of the charge and the nature of the contempt. It did not give notice that it's recipient was charged with contempt under cl.70.
16. The House did not follow it's own rules of procedure particularly under R.88 D (a hearing before the select committee) and R.88 E (the Select committee of privileges to decide if a contempt has been committed and report to the House) but instead took up the process at R.88 G (i.e. issuing a warrant to have the person come before the House to answer the allegation made) and issued such a warrant, in sufficient in any event to give proper notice.
17. The procedures and hearing did not comply with the Rules designed to

accommodate the provisions of the Constitution and to provide fair hearings in contempt matters.

18. Therefore the applicants were deprived of their Constitutional protection of due process. The procedures adopted were unfair, not in accordance with the Constitution or the Rules and the applicants succeeded.

19. Orders made that their detention was unlawful and that each of them be released.

20. NOTE. The Privy Council decision in Fotofili v Siale is reported immediately following, as an appendix to this judgment, it not appearing to have been otherwise reported in Tonga.

(An appeal from this judgment is reported in [1997] Tonga LR)

Cases considered : Middlezex Sherrif's Case (1840) 11 Ada El 273
R v Richards exp. Fitzpatrick & Browne (1955) 92 CLR 157
re Tarling [1979] 1 All ER 981
Fotofili v Siale (1987) S.P.L.R. 339 & [1996] Tonga LR 227
Armstrong v Budd [1969] 1 NSW LR 649
Touliki Trading v Fakafanua & KOT [1996] Tonga LR 145

Statutes considered : Constitution
Interpretation Act s.21

Counsel for applicants : Mr Wilson & Mrs Taufaeteau
Hon. Minister of Police in person

Judgment

I will preface this judgment by saying that I have sat all day in relation to these applications and have determined that I should give a judgment and reasons for judgment tonight so that everyone can know the position, bearing in mind the importance of expedition or speed in relation to habeas corpus proceedings. However because of that very reason the judgment I am about to give may not be as fluent or as full as I might otherwise deliver.

I start by reminding myself of a general proposition or principle which I take from Halsbury Fourth Edition Volume 37 paragraph 584 "On the other hand the Writ of Habeas Corpus does not in general lie in respect of a person in custody ... who has been duly committed into custody ... by Parliament for a contempt or breach of privilege"; and the authority cited for that is the 1840 Middlesex Sherriff's case (1840) 11 Ad & El 273.

Secondly, I say at the outset that my concern is not as to the merits or the judgment as to whether there was or was not a contempt of the Legislative Assembly committed by the three applicants. That in my view, is for the Legislative Assembly to decide and I do not intend (nor as I apprehend it do I have the power, or would wish to take the power) to interfere in that. The statement of principle in that regard I take from a convenient summary in the High Court of Australia in the case of R v Richards: Ex parte Fitzpatrick and Browne, (1955) 92 C.L.R. 157. The extracts which I am going to refer to are at pages 162 - 163. It is a judgment of the High Court of Australia, delivered by no less an authority

than then Chief Justice Dixon. Page 162: "It is unnecessary to discuss at length the situation in England, it has been made clear by judicial authority. Stated shortly, it is this: it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by it's resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms. This statement of law appears to be in accordance with cases by which it was finally established, namely, the Case of the Sheriff of Middlesex".

Then the High Court of Australia went on to discuss a United Kingdom Privy Council decision which I will simply call the Glass case and cited from that case this passage, at page 163: "Lord Cairns says: "Beyond all doubt, one of the privileges - and one of the most important privileges of the House of Commons - is the privilege of committing for contempt; and incidental to that privilege, it has, as has already been stated, been well established in this country" - that is in the United Kingdom - "that the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a warrant, stating that the commitment is for contempt of the House generally, without specifying what the character of the contempt is". His Lordship a little later on, on the same page, describes the privilege in these terms: "the privilege or power, namely, of committing for contempt by a warrant stating generally that a contempt had taken place."

Here, on the Return to the Writ of Habeas Corpus, I have been given (and I had earlier been given as an exhibit to one of the applicants' affidavit), the order or warrant under the Hand of the Speaker in relation to these three men and in translation into English, it says:

"To the Minister of Police
Nuku'alofa,

The Legislative Assembly ordered to imprison (1) 'Eakalafi Moala, (2) Filokalafi 'Akau'ola, (3) 'Akilisi Pohiva for 30 days commencing 5:00 o'clock on the afternoon of 19 September, 1996 by virtue of the power vested inthe Legislative Assembly by Clause 70 of the Constitution and the judgment of the House on this day regarding their imprisonment.

They are not to be released until after the expiration of 30 days or otherwise ordered by Parliament for a shorter time.

I ask to immediately give effect to this order."

When I look at that order, and look at the terms of both the general propositions described in Halsbury and in the High Court of Australia in the passages I have just cited, I have come to the view that this indeed is an order or warrant under the hand of the Speaker, stating a contempt in general terms and it is one that I should not, and indeed cannot in my view, go behind.

My concern, therefore, in this case as I see it is the other part of the argument on behalf of the applicants, and that is really as to the process used leading to that judgment of the Legislative Assembly (to that order that I have referred to) and whether the process

was in keeping with the Constitution i.e. whether the events and circumstances leading to that judgment and order of the House were constitutional even although that may lead me into an inquiry into the validity of the Legislative Assembly's internal proceedings.

Before I go on to deal in a little more detail with that aspect, I should deal in these initial stages with a submission made by the Minister, the Honourable Mr Edwards, as to the fact that this is, in two of the applicants' cases, the third applicant, Mr Pohiva, his second.

In general terms the proposition is this. That although the decisions upon the previous applications are not to be taken as res judicata, concern has been expressed in the authorities that the continued application for Habeas Corpus should not be allowed to become an abuse on the process. In 37 Halsbury at paragraph 585, this passage is found, "A second or renewed application, still less successive applications, for a Writ of Habeas Corpus will not be allowed to be made by or in respect of the same person on the same grounds and whether to the same or any other court or judge unless fresh evidence is adduced in support of any renewed application." Amongst the authorities the case of Re Tarling, which was cited to me in argument, is mentioned in Halsbury, Re Tarling [1979] 1 All E.R. 981.

I stress one phrase in that quote. It is the words "on the same grounds." It seems to me that in these applications a fresh ground has been advanced and that is the constitutionality of the procedural processes. It is only that aspect, as I have said, that I will look at in detail in this judgment. I will not return to what seems to have been traversed in some detail in the second application (which was the first that Mr Pohiva was a party to) and that is the effect of the closure of the session of the Legislative Assembly. That has been argued; it has been ruled upon.

I should also mention one or two other preliminary matters. I am not here as a court of appeal sitting as it were on appeal from Parliament. My role here, as I understand it, is in effect as a Court of Constitutional protection, basing that role on a clause I will come to in the Constitution, Clause 90.

The Writ of Habeas Corpus issued last Friday has had return made to it by the Honourable Minister, that return saying, amongst other things, that the three applicants are held, detained under the Minister's control and supervision, at Hu'atolitoli prison pursuant to the Order of the Speaker (which I have already referred to) and pursuant to the decision of the Legislative Assembly under clause 70 of the Constitution. Clause 70 of the Constitution is at the heart of the matter and my judgment here requires consideration of the events and circumstances leading to the Order that was made in the Legislative Assembly.

Tonga has a unique Legislative Assembly. It is a mixture of what might be described as Lords and Commons. It is created by the Constitution, which is in itself a uniquely Tongan document.

Clause 30 provides that the government of the Kingdom is divided into three bodies, first, the King, Privy Council and Cabinet (Ministry), second the Legislative Assembly, third, the Judiciary. Clause 31 goes on to say that the form of Government in the Kingdom is a Constitutional Government.

The second arm, the Legislative Assembly, is the arm that initially I turn to look at because it is the actions of the Legislative Assembly that have been called into question.

Clause 56 spells out the powers of the Legislative Assembly. Clause 57 gives the

Assembly it's full title, the Legislative Assembly of Tonga. Clause 59 outlines the composition: "the Legislative Assembly shall be composed of the Privy Councillors and Cabinet Ministers, who shall sit as nobles, the representatives of the nobles and representatives of the people."

I also refer to clause 83 of the Constitution which sets out the oaths which must be take by members of the Legislative Assembly. Members of the Privy Council have to take an oath which amongst other things says that they "will keep righteously and perfectly the Constitution of Tonga". The Ministers' oath includes this, that they "will keep righteously and perfectly the Constitution of Tonga." The oath of the nobles and representatives of the people includes this, that they "will righteously and perfectly conform to and keep the Constitution of Tonga." So not only is the Legislative Assembly created by the Constitution, but its members take an oath-that they will act in accordance with, and uphold, the Constitution.

Clause 62, I refer to now and come back to later. Clause 62 prescribes that "the Assembly shall make its own rules of procedure for the conduct of its meetings." As a general rider, one would comment that the ability to make rules must have one overriding consideration, namely that those rules must themselves be in keeping with the Constitution and not contrary to provisions of the Constitution.

On behalf of the Respondent it has been argued in front of me that the Supreme Court of Tonga has no power to inquire into the proceedings of the Legislative Assembly, particularly in this matter. But for the reasons which I am about to embark on, I have formed a different view.

The third arm of government that was mentioned in clause 30 is the Judiciary. Clause 84 says "The Judicial power of the Kingdom shall be vested in the Court of Appeal, the Supreme Court, the Magistrate's Court and the Land Court."

Clause 90 is the important provision. It reads, "The Supreme Court shall have jurisdiction in all cases in law and equity arising under the Constitution and Laws of the Kingdom: and I stop there because I do not have to go further in relation to clause 90. That is, as I see it, the keystone of this judgment. It is that provision, appearing as it does in the written Constitution - those two things, the provision itself plus the written constitution - that make the position in the Kingdom of Tonga quite different to the position that applies in the Houses of Parliament in the United Kingdom.

In the case that has been cited to me of Fotofili and others v Siale which for convenience I will refer to the report in the (1987) South Pacific Law Reports page 339, and in particular to passages that appear at page 344 and then at pages 347 to 349. The passage at page 344 was in this court. A judge at first instance, having considered various authorities in both the United Kingdom and in other Commonwealth jurisdictions, and after having also considered various sections of the Constitution then said "Insofar as these statutory provisions are relevant to an issue raised before the court, the court is entitled to - indeed must - consider whether what has been done in the House is in accordance with Tongan Constitution and statute. No claim to privilege can alter that. That is clear on principle, and from a number of cases cited by counsel for the plaintiff."

In the Privy Council, these passages are to be found. At page 347, after citing Article 9 of the Bill of Rights of 1689, the Privy Council said this, "It follows that in England the validity of an Act of Parliament is not open to challenge on the ground that it's passage through the House was attended by any irregularity. The same is not true in Tonga where

there is a written Constitution. If, on a true construction of the Constitution, some event or circumstance is made a condition of the authentic expression of the will of the legislature, or otherwise of the validity of a supposed law, it follows that the question whether the event or circumstance has been met is examinable in the Court, notwithstanding that the question may involve internal proceedings of the Assembly. Again, a statutory provision can be examined and struck down if it is contrary to an express provision of the Constitution although its passage through the House was not attended by any irregularity. The position is then that the Assembly of Tonga, and indeed any parliamentary body based on a written constitution, does not have the privilege of supremacy over the courts enjoyed in the United Kingdom."

There follows then reference to the situation in the United Kingdom including the case discussed and argued before me, the Pickin case, which is rather different and distinguishable from the position here in Tonga. The Privy Council then went on, at page 349, as follows,

> "What then in the position in Tonga? The Constitution itself is silent on the role the courts might play in inquiry into proceedings in the Assembly and simply provides in Article 62 that "The Assembly shall make its own rules of procedure for conduct of its meeting"
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> "A court in Tonga faced with a plea that it should inquire into the internal proceedings of the Assembly will obtain no help from any Act or Ordinance in force in Tonga in determining its jurisdiction so to do. In such a delicate constitutional situation the Court would look for a clear mandate to proceed. We are of the firm opinion that in that situation the Civil Law Act (Cap 14) must be called in aid. That Act provides in short that in the absence of relevant provision under any Act or Ordinance of the Kingdom, the common law of England shall be applied. It follows that in determining it s jurisdiction to inquire into internal proceedings of the Assembly, it must apply the English common law regarding the privilege of Parliament to determine the regularity of its own proceedings, provided of course the Assembly has not acted contrary to the provisions of the Constitution in the course of those proceedings, for in such a case the Court is given jurisdiction by Article 90 of the Constitution, which reads,as far as is relevant:
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> "The Supreme Court shall have jurisdiction in all cases in law and equity arising under the Constitution and laws of the Kingdom... We conclude then that there is no jurisdiction in the Court to inquire into the validity of the Assembly's internal proceedings where there has been no breach of the Constitution."

It is those provisos which are the important ones in so far as this case in concerned. The question is whether there has been any breach of the Constitution. In argument I have been referred, as an example of such jurisdiction in such matters, to a case outside of Tonga, namely that of Armstrong v Budd, in New South Wales, Australia, reported in [1969] 1 NSW L.R. 649 where the Chief Justice of New South Wales said that the court had a jurisdiction to determine whether, in a particular case, the House had exceeded the power conferred on it by the constitution.

This matter as I have said relates to clause 70 of the Constitution. That is the clause that is referred to in the Order or warrant under the hand of the Speaker. Clause 70 says this: "If anyone shall speak or act disrespectfully in the presence of the Legislative Assembly, it shall be lawful to imprison him for thirty days and whoever shall publish any

libel on the Legislative Assembly, or threaten any member or his property, or rescue any person whose arrest has been ordered by the Legislative Assembly, may be imprisoned for not exceeding thirty days."

It seems to me reading that provision that there are two general categories of contempt referred to in clause 7 0. Those committed in the presence, that is in the face, of the Assembly and those in effect committed outside of the Assembly by some sort of publication or threatening or some other act which might be seen to impede or impair or interfere with the Assembly or a member of the Assembly. Now before I proceed further and examine what happened, I wish to look at some other provisions of the Constitution.

There is in the opening provision of the Constitution a considerable emphasis on the matters of liberty or freedom of the individual person. Clause one starts with a ringing declaration to that effect. In its first sentence which reads "Since it appears to be the will of God that man should be free a He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom be free forever." Those opening provisions of the Constitution were considered recently in the Court of Appeal of Tonga in the appeal case No.3/95 Touliki Trading Enterprises v the Kingdom of Tonga. From page 12, and following, this passage:

> The Constitution of Tonga opens (in the first sentence of cl.1) with a profound philosophical concept linking the inhabitants of the Kingdom with the whole of human kind as inalienably free and equal. The concept may be seen, not only as the fundamental basis of all that follows, but also as a constitutional guarantee against both slavery is concerned, cl.2 goes on to provide a more specific guarantee."

Then a little further on:

> "To see clause 1 of the Constitution as concerned with establishing the foundation of the Tongan State in such an affirmation is not to see it as less, but as more, important. The Constitution itself does not place first the possessions of Tongans, but their liberties. In subsequent clauses, the Constitution proceeds to deal with property, taxation, resumption and other significant matters affecting the organisation and activities of the State. But before doing so, it gives concrete application, in a series of clauses, to the basic statement with which it opens."
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> "Clause 2 directly forbids the institution of slavery, and makes a proclamation of freedom for all who live under the flag of Tonga." I leave out a small passage.
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> "Clause 4 reflects the equality implicit in cl.1 (we are all "of one blood") by requiring the general law of Tonga apply equally to all, while cl.5 establishes freedom of religious worship and practice subject to the law and peace of the land. Succeeding clauses protect freedom of opinion and speech," (I interpolate clause 7) "freedom to hold peaceable political meeting," (I interpolate clause 8), "freedom from arbitrary arrest," (clause 9), "(secured by the constitutionally guaranteed availability of Habeas Corpus), freedom from arbitrary punishment and freedom from double jeopardy. Each of these early clauses of the constitution is primarily concerned with the implication of the constitutional entrechment of human liberty. Only indirectly is any of them concerned with questions relating to property."

"It is in this context, after no less than five clauses securing the protection of Tongans against abuses of the State's power to institute criminal proceedings, that cl.14 is found in the Constitution. There follows cl.15 concerned with the fairness of trials and cl.16 ensuring a search warrant shall only be issued "according to law". In this context it is plain that cl.14 is not a provision about the resumption of citizens' property, or about planning restrictions or any other regulatory measures affecting the use of property. It is a constitutional guarantee against arbitrary criminal procedures leading to capital punishment, a fine or confiscation of property, or imprisonment. But the clause is not directed against legislative action, for its prohibition is "except according to law."

"In clause 17, the Constitution turns to the topic of government, while continuing to be concerned also withthe liberties of Tongans. Cl.17 requires the King to govern impartially and for the good of all."

I have set out that extract in full because that passage is, in my view, important. I come then to look, in the light of that commentary, at some of these provisions of the Constitution, these early provisions themselves. I do not intend to discuss clause 7, the freedom of the press or freedom of speech provision because that is, in my view, tied with the merits of the judgment made in the House of the Legislative Assembly and for the reasons I have already indicated I am not involved in this judgment in that aspect.

I come then to clause 10, ("accused must be tried"). "No one shall be punished because of any offence he may have committed until he has been sentenced according to law before a Court having jurisdiction in the case." I stress the words "according to law". In my view that includes in accordance with constitutional safeguards.

Clause 11, the relevant parts I will read are these;

"No one shall be tried or summoned to appear before any court or punished for failing to appear unless he have first received a written indictment (except in cases of impeachment or for small offences within the jurisdiction of the magistrate or for contempt of court while the court is sitting). Such written indictment shall clearly state the offence charged against him and the grounds for the charge. And at his trial the witnesses against him shall be brought face to face with him except according to law and he shall hear the evidence and shall be allowed to question them and to bring forward any witnesses of his own and to make his own statement regarding the charge referred against him ....."

It is the first 2 sentences of clause 11 to which I have particular reference. First to the requirement of a written indictment and I will deal withthe exceptions in a moment. An indictment being no more, in my view, than a written accusation in documentary form. And such a document to clearly state the offence charged and the grounds for the charge.

In my judgment that clause of the Constitution does have relevance to the proceedings under clause 70.

An exception is made for impeachment, ("except in cases of impeachment"). Impeachment is provided for under clause 75 of the Constitution and impeachment takes place before the Legislative Assembly. Indeed in clause 75 itself there is provision that the impeached person should be given a copy of the accusation in writing seven days before the day of trial. But leaving that aspect aside (and it is important because, again,

there is recognition of the need to formally give notice of the charge) the fact that impeachment is mentioned as an exception to clause 11 is recognition that the Legislative Assembly is indeed a Court. That would accord withthe long held view in the Common Law that the Legislative Assembly is "the High Court of Parliament", "the first and Highest Court in the Kingdom" as has been expressed from time to time and as can be seen and cited inthe Erskine May text. Indeed in the Fotofili case, to which I have referred, at page 348, there is a long citation from the Pickin case in the House of Lords in 1974 in the United Kingdom where reference is made to Parliament in the United Kingdom being "the High Court of Parliament."

I deal with another exception as well because it seems appropriate to me that I should. In clause 11 there is reference to an exception "for contempt of court while the court is sitting." Using the expression court in its widest meaning and as I have just referred as including the High Court of Parliament, that would except cases of contempt in the face of Parliament just as it would except cases of contempt in the face of this Supreme Court. So that exception would apply to charges of contempt under that first leg of clause 70 i.e. acting or speaking disrespectfully in the presence of the Legislative Assembly. A contempt in the face of the Assembly.

Here as I understand the position,such a contempt was not and could not be, facutally, alleged in the cases of the three applicants. It was a contempt under the second leg i.e. of publishing a libel (or when I come to it in the Tongan, an untruth or falsehood) about the Legislative Assembly (outside the Assembly). So I have concluded that that exception would not apply to the type of proceedings that were involved in this case.

I move on to some subsequent provisions of the Constitution. Clause 13 says, inter alia, "no one shall be tried on any charge but that which appears in the indictment, summons or warrant and for which he is being brought to trial ....."

Clause 14 ("trial to be fair"). "No one shall be intimidated into giving evidence against himself nor shall the life or property or liberty of anyone be taken away except according to law."

I stop there. I do not intend to deal with other provisions that have been raised by Mr Wilson for the applicants. Clause 15, for the reasons discussed in the course of argument, I do not see as being applicable in these circumstance and nor do I see clause 73, which was also mentioned by Mr Wilson in argument, as being applicable. Clause 73 contains the immunity of members of the Legislative Assembly from arrest and judgment while the House is sitting. That provision is not designed to cover a situation of contempt but rather to cover matters of arrest in civil suits and indeed being brought as a witness or summoned as a juror whilst the House is sitting.

In my judgment, those provisions which I have referred to can be seen as laying down, as it were, a constitutional framework of minimum requirements, a constitutional protection of due process, for any hearing or trial. A statement clearly setting out the offence charged and ground for the charge, i.e. a formal written accusation in effect. A trial or hearing that takes place only on that charge. A trial where the accused person is brought into the presence of the accuser or accusers and hears the case against him orher. A right for the accused person not only to call evidence on his or her behalf but to give evidence himself or herself if he or she so wishes. A trial or hearing not only to be lawful, but to be fair.

The fact that those minimum requirements should apply in a hearing under clause

70 is, in my judgment, reinforced by the prosecution's reliance on section 21 of the Interpretation Act (Cap. 1). Section 21 says this: "If upon the trial of any person for an offence against any law of Tonga it is manifest that the Tongan and English versions of the section which the accused person is charged with violating differ in meaning then, in deciding the question of the accused person's guilt or innocence, the court shall be guided by what appears to be the true meaning and intent of the Tongan version."

Here, that section has been raised (and was raised in one of the earlier applications for Habeas Corpus) in relation to the provisions of clause 70. In the English translation it says: "Whoever shall publish any libel on the Legislative Assembly." In the Tongan it provides in the equivalent place of the word "libel", the word "lohiaki'i". That word means, in English, not to libel but to lie or to deceive. The argument of the Respondents is that that meaning should prevail under section 21 (and Mr Wilson, as I understood him, accepted that meaning). That seems to me to be the clearest acceptance, therefore, that the hearing, these procedures under clause 70, in front of the Legislative Assembly were indeed a trial for an offence against a law of Tonga. Therefore as I have said those minimum requirements for a fair trial set out in the provisions of the Constitution which I have referred to are applicable.

Having set out that framework, I now look at the framework provided by the House itself in terms of its own rules. These are the Rules for Proceedings and Standing Orders of the Legislative Assembly of Tonga. Up until September of this year, as I understand it, the rules in relation to matters of contempt were those contained in provisions 84 to 88, Part XVII. Those rules give no assistance at all as to the procedures for the hearing of a matter of contempt before the House. They are more in the nature of prescribing types of conduct that may be seen as being contemptuous.

Obviously, given the commencement of these particular proceedings against these three applicants (and indeed on the chronology given to me it would seem that the proceedings may well have been afoot by then), the House decided that it should lay down some further rules as to the procedures to be followed in contempt proceedings.

I have been provided with a copy of those rules, apparently brought into being on or about the 12 September of this year. They are contained in rules 88 A to 88 K inclusive.

88 A is a general provision reflective of clause 70 of the Constitution and goes on to say that if the House resolves such action to be in contempt of the Legislative Assembly the person "shall be liable to the punishment under clause 70 or to such other punishment that House may resolve in accordance with the rules for proceedings relating to contempt."

88 B provides for the lodging of a complaint with the House. 88 C provides that a complaint so lodged is referred to a Select Committee of Privileges. 88 D provides that witnesses and evidence may be called before that Committee "and the alleged offender shall also attend to help the committee in its work" and may bring his counsel with him.

88 E after the evidence has been heard and after due consideration the Select Committee shall decide whether a breach of privilege or a contempt has been committed and report to the House accordingly with its recommendations. I should add I am not citing these in full, this is my summary of the provisions as I go through them.

88 F on receipt of the recommendation from the committee, the House "may decide to act upon it as it deems appropriate."

88 G if the House resolves that the alleged offender has breached the privileges or

had committed a contempt of the House it "may resolve that a warrant in the form set out below be issued and signed by the Speaker against that person setting out generally the nature of the contempt and requiring such person to come before the House at a time certain to answer the allegation made. Such a person may bring his counsel to help him."

88 H "After hearing the proceedings and the answers given, the House shall reach a decision by resolution and such a decision shall be given effect immediately." I and J are not relevant from this judgment's point of view. 88 K provides the form of the warrant which I will return to later.

560 It seems to me that those provisions prescribed under clause 62 of the Constitution are designed to accord with, to take account of, and to provide for the minimum requirements for a fair hearing or trial contained in the Constitution and as I have already referred to. They clearly allow a two stage process, first in front of the Committee of Privileges; then in front of the House; with appropriate notice at both stages and in particular at the second stage in front of the House (i.e. a warrant "setting out generally the nature of the contempt"). And processes designed to provide for a fair hearing as to whether a contempt has been committed, and as to the penalty to be imposed if indeed a contempt has been committed.

570 It seems to me, as I have said, that those provisions in the rules of the House, prescribed in terms of clause 62 of the Constitution, are indeed prescribed to provide for a fair hearing, procedurally fair, a hearing that could be seen to comply with not only the requirements of the Constitution as to hearings, but also the requirements of natural justice.

It is withthose two frameworks in mind, i.e. the framework contained in clauses 10 to 14 of the Constitution and the framework contained in rules 88 A to 88 K of the Rules of the House that I then look at what has taken place here.

The first applicant before me is the Editor and Publisher of a newspaper, the "Taimi 'o Tonga"; the second applicant is the Deputy or Assistant Editor of that paper and in 580 charge of marketing; the third applicant is the Number 1 People's Representative (in the Legislative Assembly) for Tongatapu.

Put shortly it is said that the People's representatives in the Legislative Assembly decided to seek the impeachment of the Attorney General. It is claimed that notice was given, to a clerk of the Assembly, of that motion to seek impeachment. I am not going to go in this judgment (because it is not relevant from my point of view) into what is said to have happened with that motion other than to say that some two weeks or so subsequent to that, and before any motion for impeachment was debated, let alone decided on, in the House, a copy of the motion for impeachment was made available by the third applicant 590 to the second applicant and thence to the first applicant and on the 4th of September 1996 an article was published in the Taimi 'o Tonga Volume 8 Number 36 commenting on that motion for impeachment and setting out the body of the motion.

It is that publication which has been said to be in breach of clause 70 of the Constitution. After publication, the Article was made the subject of a complaint under Rule 88 B of the Rules of the House. There is controversy as to the path followed that brought these three applicants in front of the Legislative Assembly on the 19th of September this year.

Two of the Applicants seem to claim that they did not receive any summons of any 600 sort. That is disputed by the Respondent. One of the Applicants, Mr 'Akau'ola, received

a summons and that is in the form that was annexed to his affidavit as exhibit D and also can be seen attached to the return to the writ of Habeas Corpus. It is interesting to note that form which the Respondent alleges was given to each of the three applicants follows the form of warrant that was referred to in Rule 88 G and prescribed in Rule 88 K of the House. That is the form that is referred to in 88 G as being a warrant signed by the Speaker setting out generally the nature of the contempt and requiring the person to come before the House. That is the form of warrant prescribed for use at, what I will describe as, the second stage of the procedures.

I propose dealing with this aspect on the basis that each of the applicants did receive, at some stage a copy of the summons similar to the one referred to by Mr 'Akau'ola. The English translation of the form that he received reads in this way:

"In the Legislative Assembly of Tonga
Nuku'alofa
No.2/1996

Summons

To, Filokalafi 'Akau'ola of Kolomotu'a, Nuku'alofa, Tonga

There is a complaint to the Legislative Assembly of Tonga regarding the newspaper "Taimi 'o Tonga" whereby you are the Assistant Editor and Advertising manager, published on volume 8 Number 36 on Wednesday 4 of September 1996. It publishes article on impeachment by the Legislative Assembly which is not correct and it is disrespectful to the Legislative Assembly.

You are hereby summoned to attend the Legislative Assembly at Nuku'alofa, Thursday 19th of September, 1996, at 10:00 o'clock in the morning.

And take notice if you fail to comply with the summons and you do not attend you will be committed to prison.

Dated Wednesday 11th of September, 1996
Chairman of the Legislative Assembly."

I will come back to the content of that form shortly but it is to be compared or contrasted with the form of the order or warrant which I have already referred to which was directed to the Minister of Police to take these men into custody pursuant to "clause 70 of the Consitutiton and the judgment of the House."

It is apparently a matter of controversy also as to what occurred before the House, but before I get that far I should refer to another matter that is relevant and is raised by Mr 'Akau'ola in his affidavit. I read this:

2. "On or about 11 September, 1996 I received a summons from the Legislative Assembly of Tonga ordering me to attend the Legislative Assembly on 19 September, 1996. Attached marked "B" is the Summons with it's English translation.
3. On 16 September, 1996 I wrote a petition to Parliament under clause 8 of the Constitution raising issues which I was not happy with regarding the said summons. Attached marked "C" is a copy of that petition and its English translation.
4. I never received any response from the Legislative Assembly regarding my petition."

Clause 8 of the Constitution allows for petitions to the Legislative Assembly. This is what this applicant was purporting to exercise. His petition, in English translation refers to a number of matters. It starts by referring to the summons which he has received:

> "Because of a complaint made .... regarding me alleging that I act disrespectfully to the Legislative Assembly."

It goes on then to say "This petition is for:

> 1. To require particulars of the charge against me in the summons as provided by clause 11 of the Constitution ..."

660 It sets out clause 11 and goes on;

> "There has been no decision by the Legislative Assembly about me before upon which I may be said to act disrespectfully to the Legislative Assembly
>
> 2. And if there is a prior decision then you have already adjudged me to be punished. The question would be by which authority allowed the Constitution to legalise the decision of the Legislative Assembly because clause 10 of the Consitution provides" and it then sets out clause 10.

He goes on then to say:

> "You have not specified any provision in law that I have breached and upon which I may be punished as for the said summons."

670 I leave that document there. In my view the author of it, the applicant Mr 'Akau'ola was clearly raising and seeking particulars as to what it was he was actually being charged with.

Whatever the position, on the 19th September, all three applicants appeared before the Legislative Assembly. Again it would seem it is a matter of some controversy as to some of what took place. The applicants allege that it was not until they were in front of the Assembly that they learnt that they were being charged with contempt under clause 70 of the Constitution.

The Applicants' respective accounts of what occurred are to be found in their 680 affidavits. Mr Moala's at paragraphs 6 to 18 of his affidavit. Paragraph 6:

> "It was only when I arrived at the meeting of the Legislative Assembly on the 19th September that I was advised that I was being charged under clause 70 of the Constitution of Tonga."

And he goes on to set out the explanations he gave to the Assembly; of how his lawyer then attended after he had give his explanations; of how he withdrew (or that he and his lawyer withdrew); that he was never advised that he was found guilty; that he was not given the opportunity to speak in mitigation before sentence was decided and passed.

Mr 'Akau'ola, paragraphs 6 to 22 of his affidavit, says somewhat similar things about 690 the procedure followed. As indeed does the lawyer who appeared for each of those two applicants in front of the Assembly.

The complaints that they make are that they were not told in advance that they were being charged with contempt; that they did not therefore have the opportunity to properly defend themselves and have a fair hearing; that the hearing itself was not fair in that it was a simple one part hearing and without the opportunity, if they were found guilty of contempt, for them to be heard on questions of penalty.

From the Bar, I have been told on behalf of the Respondents of this procedure said by the Respondents to have been followed. That a complaint having been made in terms 700 of Rule 88 B, that complaint was referred to the Select Committee of Privileges where

there was some general discussion. That it was decided to leave the matter to the House and it was returned to the House.

In terms of Rule 88 D there was no hearing before the select committee. No witnesses and evidence called. The "alleged offender", and those are the words used in Rule 88 D, was not summoned to attend to help the committee in its work. (The Rule says he shall also attend to help the committee in its work and the alleged offender may bring his counsel to help him).

That first step in the procedure, a first step that can be seen as ensuring a fair trial or a fair hearing, and that the alleged offender is put on full notice, did not take place. There was no hearing of such a nature.

Not only was 88 D therefore not followed nor was 88 E which says that "after all evidence has been heard and after due consideration the Select Committee of Privileges shall decide whether a breach of privilege or a contempt of the House has been committed and report accordingly to the House with its recommendations"

I am told that there were not only no hearing as I have already referred to, there was no decision as to whether there was a contempt committed or not. There were no recommendations made to the House. It was simply left or referred back to the full House for the House to deal with.

It seems that the House having had the matter referred back to it, (and if this may have been sufficient, which it is not) instead of holding, itself, a preliminary hearing as is contemplated in 88 C, D and E, simply took up the matter at 88 G and resolved to issue a warrant in the form prescribed in Rule 88 K.

So not only were the necessary Constitutional protections, required also in terms of the Rules of the House, disregarded but the House determined to start part way through the procedrues by issuing a warrant which, on the materials before me, I find insufficient in any event to put all three applicants on proper notice of the charge (and I am deciding this case on the supposed basis that the applicants were given those warrants).

But that warrant, in any event, was not sufficient to give all three applicants proper notice of the charge of contempt being brought against them. It did not properly state the offence charged and the grounds for the charge (as is reflected in clause 11 of the Constitution) and did not state what was required in 88G itself of the Rules, generally the nature of the contempt. The form of summons or warrant which I have read, exhibited to Mr 'Akau'ola's affidavit, contains no reference to clause 70, contains no reference to contempt. In my view it does not give any, or any proper, notice, to a recipient, in it's wording that that person was going to be charged with contempt under clause 70 of the Constitution.

In that context it is not insignificant then that the second applicant, Mr 'Akau'ola, should have written that petition I have referred to already which is attached to his affidavit and dated the 16th September, inquiring amongst other things as to the charge that he was actually facing. The words used in the summons;

> "... publishes an article on impeachment by the Legislative Assembly which is not correct and it is disrespectful to the Legislative Assembly".

were not in my judgment sufficient to comply with the provisions of the Constitution or indeed to comply with the provision of Rule 88 G.

Indeed there is some force to the submission made by Mr Wilson on behalf of the applicants that the reference in the summons or warrant to the word disrespectful could

well be misleading because that is a word that is used in the first part of clause 70 which is not the appropriate part given the factual situation here. (As an aside: there may be some force to what Mr Wilson has said, that given that reference to "disrespectful", and if that summons or warrant be seen as being sufficient in any event, (and I say it is not), that indeed on the material before me, these applicants were tried on a charge that did not appear in the summons or warrant itself. But that matter is a sidewind, is not crucial to my judgment in this matter).

On either account therefore of what took place here, both in terms of notice of charge and in terms of what took place, it is in my view clear that the procedures and the hearing did not comply with the Rules; and Rules which were properly made within clause 62 of the Constitution, which were designed to accomodate the earlier provisions of the Constitution as to fair hearings and were designed to provide fair hearings in contempt and breach of privilege matters.

It seems to me therefore, sitting as I have said in effect as a Court of Constitutional protection, a court which has the power (from the authority that I have referred to and from clause 90) to look into breaches of Constitutional matters, that these applicants were deprived of their Constitutional protection of due process. Even if one were to discount entirely their accounts of what took place (and I note the only affidavits before me on procedures are theirs) one is left with the situation of the Legislative Assembly, not complying with or not following its own rules designed, as I have said, to ensure the constitutional protections of a fair hearing.

The conclusion I have reached, therefore, is that the procedures adopted were unfair. They were not in accordance with the Constitution or with the Legislative Assembly's own Rules made under the Constitution. I have reached the view that the Applicants must succeed in the applications which they have made to me.

That being so, it follows that I determine that the detention of the applicants in these circumstances is not lawful and I make an order that each of them be released forthwith from detention.

(After hearing further arguments from counsel the question of costs was reserved, for memoranda of counsel to be submitted).