

295/1

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO 23 OF 1992

(High Court Civil Action NO 53 of 1992)

BETWEEN:

JAMES MICHAEL AH KOY

APPELLANT

-and

THE REGISTRATION OFFICER FOR THE SUVA  
CITY FIJIAN URBAN CONSTITUENCY

RESPONDENT

Mr. B. Sweetman for the Appellant.

Mr. A. Rabo for the Respondent.

Mr. F. Jitoko as Amicus Curiae.

Date of Hearing : 18th May 1993

Date of Delivery of Judgement : 20th August, 1993.

JUDGMENT

KAPI JA

The Native Lands Act Cap 133 (hereinafter referred to as NLA) introduced a system of registration of land owning units amongst the indigenous inhabitants of Fiji. The record of registration is known as Vola ni Kawa Bula (hereinafter referred to as VKB). It contains entry of names of persons comprising the proprietary unit in respect of native land. The Native Lands Commission (hereinafter referred to as NLC) has the sole jurisdiction in determining or confirming eligibility for registration on the VKB. The question of who is eligible to be registered on the VKB is governed by custom, tradition and practice. A decision by the NLC on eligibility for registration

on VKB is final and conclusive and cannot be questioned in any court of law (ss. 100 (4), 156 (1) (a) Constitution of the Sovereign Democratic Republic of Fiji (hereinafter referred to as the Constitution).

The appellant was born in Fiji. His mother, an indigenous inhabitant of Fiji was also born in Fiji but his father, a Chinese was born in China.

In 1989, the appellant applied and was registered on the VKB by the NLC in accordance with custom, tradition and practice.

The electoral rolls in Fiji are based on ethnic groupings under s. 41 (2) (a) of the Constitution. Under this provision, voters are required to be enrolled under four separate rolls:

- (a) roll of voters who are Fijians;
- (b) roll of voters who are Indians;
- (c) roll of voters who are Rotumans; and
- (d) roll of voters who are neither Fijians, Indians nor Rotumans.

On the 4 September 1991 the appellant applied to be registered as a voter on the Fijian Roll for the Suva City Fijian Urban Constituency. On 13 February 1992 an objection to the appellant's inclusion on the roll was lodged by one Akariva Nabati. The ground of objection was that the appellant was not a "Fijian" within the meaning of section 156 (a) of the

3.

Constitution and therefore not entitled to be registered on the roll of voters for Fijians. The respondent sustained the objection on the basis that the appellant's father is not a Fijian and therefore not eligible to be registered on the Fijian Roll of Voters.

The appellant applied to the High Court for declarations:

- (1) that he is entitled to be registered on the roll of voters who are Fijians established by s. 41 (2) (a) of the Constitution.
- (2) that he is entitled to be registered on the Electoral Roll for the Suva City Fijian Urban Constituency.

The second declaration is dependent on the first.

The High Court refused both applications. The appellant has appealed against the decision of the High Court.

The central issue in this appeal relate to whether, the appellant is a "Fijian" within the meaning of s. 156 (a) of the Constitution. It reads:

*"156. For the purposes of this Constitution-*

*(a) a person shall be regarded as a Fijian if and shall not be so regarded unless his father or any of his male progenitors in the male line is or was the child of parents both of whom are or were indigenous inhabitants of Fiji and his name is registered or eligible to be registered in the Vola ni Kawa Bula and include persons who are registered or eligible to be registered in the Vola ni Kawa Bula by*

*virtue of custom, tradition and practice:*

*Provided that a person's registration or eligibility for registration on the Vola ni Kawa Bula shall be confirmed or determined as the case may be by the Native Lands Commission whose confirmation or decision shall be final and conclusive.*

*(b) a person shall be regarded as a Rotuman if, and shall not be so regarded unless, he is of Rotuman descent, whether through his male progenitors or female progenitors; the eligibility of a person under this subsection shall be determined or confirmed, as the case be, by the Council of Rotuma;*

*(c) a person shall be regarded as an Indian if, and shall not be so regarded unless, his father or any of his earlier male progenitors in the male line is or was the child of parents both of whom are or were indigenous inhabitants of the sub-continent of India:*

*Provided that where the identity of the father of any person cannot be ascertained, the male progenitors of that person may instead be traced through that person's mother."*

The problem of interpretation presented by this provision is not an easy one. This is clear from the judgement of the High Court. Where a court is faced with the task of construing the language of a provision of a constitution which is ambiguous in its terms, it must bear in mind certain principles of interpretation peculiar to constitutional documents. The ordinary rules of statutory interpretation are not entirely irrelevant but that they must be applied with caution. In Minister for Home Affairs and Anor -v- Fisher [1979] 3 ALL E R 21 Lord Wilberforce suggested that Courts must avoid what has been regarded as "austerity of tabulated legalism." The courts must bear in mind that constitutional documents purport to state fundamental

5.

principles relating to its citizens and their primary role is to ascertain the intention of the constitutional framers with regard to the subject matter in question. This calls for a generous and a purposive approach in their interpretation. I bear these principles in mind in interpreting this provision.

Section 156 deals with three ethnic groups - "Fijians", "Rotumans" and "Indians". In this case, we are concerned with "Fijians" only (s. 156 (a) of the Constitution).

It may be helpful to identify the different groups of persons referred to under s. 156 (a) of the Constitution. When read as a whole, the provision refers to the following groups of people:

(1) persons whose grand parents (through the father or any other male progenitors through the male line) both of whom are or were indigenous inhabitants of Fiji.

(2) where the father is not known, persons whose grand parents (through the mother's father or other male progenitors through the male line) both of whom are or were indigenous inhabitants of Fiji.

(3) persons who are registered or eligible to be registered on the VKB by virtue of custom, tradition and practice.

The first two groups of people would fall under what I will call the patri-lineal descent requirement. This requirement is fairly clear. The appellant does not fall within this group because his father is known and he was a Chinese.

The third group is determined by registration on the VKB by virtue of custom, tradition and practice. This group calls for a closer examination. The appropriate custom, tradition and practice applicable here is the appellant's mother's custom. The appellant's mother was registered on the VKB of the Tokatoka Vuniutorea, Mataqali Naibiti, Yavusa Naibiti of the Village of Waisomo Tikina of Tavuki in Kadavu (paragraph 12 of the affidavit).

The undisputed evidence of the relevant custom is provided in the affidavit of Ilaitia Kurukace Caginavanua sworn the 6th April 1992. I refer to the relevant paragraphs:

*"4. That in accordance with Fijian customs a person whose father or any of whose male progenitors in the male line is or was the child of parents both of whom are or were indigenous inhabitants of Fiji is eligible as of right to be registered in the Vola ni Kawa Bula.*

*5. That there are different customs for different provinces of Fiji governing the rules concerning the rights of a person to choose to be a member of either his father or his mother's unit.*

*6. That provisions for the entry of illegitimate children into the Vola ni Kawa Bula are provided for under Section 21 of the Native Lands Act. A true copy of page 11 of the Native Lands Act showing the Section referred to above is attached at Annexure IKC 1.*

5.

principles relating to its citizens and their primary role is to ascertain the intention of the constitutional framers with regard to the subject matter in question. This calls for a generous and a purposive approach in their interpretation. I bear these principles in mind in interpreting this provision.

Section 156 deals with three ethnic groups - "Fijians", "Rotumans" and "Indians". In this case, we are concerned with "Fijians" only (s. 156 (a) of the Constitution).

It may be helpful to identify the different groups of persons referred to under s. 156 (a) of the Constitution. When read as a whole, the provision refers to the following groups of people:

- (1) persons whose grand parents (through the father or any other male progenitors through the male line) both of whom are or were indigenous inhabitants of Fiji.
- (2) where the father is not known, persons whose grand parents (through the mother's father or other male progenitors through the male line) both of whom are or were indigenous inhabitants of Fiji.
- (3) persons who are registered or eligible to be registered on the VKB by virtue of custom, tradition and practice.

7.

7. That an illegitimate child whose mother is eligible for registration in the Vola ni Kawa Bula as of right but who is not himself eligible as of right, may be registered in the Vola ni Kawa Bula if such person has been accepted into his mother's mataqali in accordance with the custom, tradition and practice prevailing in the area concerned.

8. That customs such as that relating to the right of a person to be a member of his mother's mataqali are recorded in a book of record kept with the Commission, called the "Tukutuku Raraba", which contains statements taken on oath during the first investigation of the Commission in any particular area.

9. That customs for the Tikina of Tavuki in Kadavu where the plaintiff's mataqali comes under were recorded in the Tukutuku Raraba during the sitting of the Commission at Tavuku village on 25 the November 1929.

10. That during such sitting of the Commission the statement for Yavusa Nacolase given by Ratu Vilitati Lacabuka contained references to the right of a person to be entered in his mother's mataqali for the Tikina of Tavuki provided that her relatives are so desirous and had performed the necessary traditional customs. A true copy of the relevant part of the Tukutuku Raraba referred to is attached as Annexure IKC 2 and the translation is at Annexure IKC 3.

11. That in the case of a person whose father is a non-Fijian who is required to be entered into the mother's mataqali in any area of Fiji the Commission conducts a formal investigation to ensure that customs and traditions recorded in the "Tukutuku Raraba" and /or those in practice are fully complied with in addition to ensuring the following:

a. He is related through ties of cognate blood to a registered member of a mataqali (mother).

b. There is a general consensus by members of the mataqali for his entry to be a member.

c. he is well known to members of the mataqali and will have spent part of his lifetime living with them or constantly



visits their village.

d. He is familiar with and respects the customs and traditions of the Yavusa and the Vanua.

e. He does not belong to a religion, sect or cult, the practice of which are likely to cause ill will or disharmony amongst the village community.

f. The mataqali has set aside a parcel of land and fishing rights area from mataqali holdings for beneficial occupation by the new member and his descendants for their future use, maintenance and support.

g. The mataqali has set aside a house site "yavu" within the village precincts for him to build a home.

h. He is proved to be a useful member of the mataqali by his efforts and contributions of resources on communal and traditional obligations to the mataqali, the Yavusa and the Vanua.

12. That the plaintiff's mother was registered as of right in the Vola ni Kawa Bula of the Tokatoka Vuniutorea, Mataqali Naibati, Yavusa Naibati of the village of Waisomo Tikina of Tavuki in Kadavu.

13. That in accordance with the custom and procedures of the Commission as set out in paragraph 11 above and the fact that he also qualified as of right under Section 21 of the Native Lands Act mentioned at paragraph 6 above, the plaintiff too was registered from 1989 as a member of Tokatoka Vuniutorea, Mataqali Naibiti, of Yavusa Naibiti after the application for his registration."

According to this evidence, custom, tradition and practice in question requires that a person must have patrilineal descendants who are or were indigenous inhabitants of Fiji to be registered on the VKB as of right (see paragraph 4 of the affidavit). However, it goes much further and allows persons who

9.

do not have such patrilineal descendants to be registered on the VKB under certain circumstances (see paragraphs 7-13 of the affidavit).

The patrilineal descent requirement by s 156 (a) is different from the requirement of patrilineal descent in custom. The former is a constitutional requirement and relates to the definition of a "Fijian". It is subject to its own terms. The latter is a requirement under custom and relates to the question of eligibility to be registered on the VKB. It is subject to the principles of custom and the proviso set out under s. 100 (3) of the Constitution. This distinction is important.

Section 156 (a) is divided into two parts, namely the patrilineal descent requirement (which covers the first two groups of people I have outlined above) and registration on the VKB (the third group of people). These two requirements are literally expressed in cumulative terms. The trial judge simply read the provision literally and concluded that the two parts are cumulative.

Registration on the VKB was not part of the definition of the word "Fijian" in the 1970 Constitution. When the requirement for registration on the VKB was added to the definition of "Fijian" in the present Constitution, the Legislature intended that the principles of custom, tradition and practice in relation to registration on the VKB should be recognised and given effect to. This intention is made plain by the proviso to s. 156 (a).

The construction given by the trial judge has one major difficulty. While the patrilineal requirement under first part of s. 156 (a) is consistent with the customary requirement for the same for purposes of registration on the VKB, it is in conflict with the registration of a person whose father is known to be a non-Fijian but registered on the VKB by virtue of custom, tradition and practice. The trial judge was not unaware of this. He resolved this conflict by simply finding that the words following "include" really add nothing and have no meaning at all.

With respect to the trial Judge, in coming to this conclusion, he fell into error. This is particularly important because the terms of s. 156 (a) introduced the application of a customary principle. It was clearly the intention of the legislature to give full effect to this customary principles. The Court should adopt an interpretation that would give effect to this intention. I would construe this provision in the manner suggested by counsel for the appellant and the Solicitor General and that is that the patrilineal descent requirement in the first part is an alternative definition to registration on the VKB by virtue of custom, tradition and practice. Read in this way, there can be no conflict with the two parts. By introducing the concept of registration on the VKB in s. 156 (a) of the Constitution, the Legislature must have intended to include a much wider group of persons accepted as Fijians under custom.

This construction does not violate the words used by the Legislature. The effect of this construction is that the word "and" which appears after the words "...indigenous inhabitants of Fiji" is construed to mean "or". This is permissible under the ordinary rules of construction to give true meaning to a provision. Murdoch -v- British Israel Federation [1942] NZLR 600 and Attorney General for New Zealand -v- Brown (1917) AC 393.

The Constitution must be read as a whole to give it its true meaning. The construction I have adopted is consistent with other provisions of the Constitution. Section 42 (3) provides:

*"No person shall be qualified to stand for election as a member of the House of Representatives referred to in section 41 (3) of this Constitution in any constituency unless his name is registered or is eligible to be registered in the Vola ni Kawa Bula:*

*Provided that a person's registration or eligibility for registration in the Vola ni Kawa Bula shall be confirmed or determined as the case may be by the Native Lands Commission whose confirmation or decision shall be final and conclusive."*

Section 49 (6) is similarly worded:

*"No person shall be entitled to be registered as a voter on the roll of voters referred to in section 41 (2) (a) of this Constitution unless his name is registered or is eligible to be registered in the Vola ni Kawa Bula:*

*Provided that a person's registration or eligibility for registration in the Vola ni Kawa Bula shall be confirmed or determined as the case may be by the Native Lands Commission whose confirmation or decision shall be final and conclusive."*

inec  
cume  
fesc  
lren  
tuti  
l".  
und  
ist  
lth  
dist  
ls d  
quir  
out  
of p  
cunu  
ally  
e VKI  
s 1970

These provisions recognise and give full effect to registration of persons on the VKB in accordance with custom. In fact the very question of entitlement to register on the roll of Fijians established under s. 41 (2) (a) of the Constitution is addressed by s. 49 (6) of the Constitution. It simply requires registration on the VKB. The question of eligibility for registration is governed by custom and the decision of the NLC on this question is final and conclusive. Section 156 (a) of the Constitution is couched in similar terms with regard to registration on the VKB. A construction I have adopted of s. 156 (a) is in perfect harmony with these provisions and gives effect to the same principle. The appellant need only show his registration on the VKB to be registered on the roll of Fijians established under s 41 (2) (a) of the Constitution.

I would allow the appeal on this ground.

The trial Judge found an alternative basis for refusing the declarations sought. As I understand his ruling, he found that even if registration on the VKB is an alternative meaning of a "Fijian" under s. 156 (a) of the Constitution, the appellant was wrongly registered on the VKB and therefore such registration is invalid. The trial judge came to this conclusion on the basis that NLA had exceeded it's jurisdiction in that it wrongly applied s. 21 of the NLC. He concluded:

*"In my opinion the Commission in deciding that the Plaintiff was qualified as of right by the Native Lands Act to registration on the VKB made an error not as to customary law but as to the interpretation of section*

...  
 you, d ma the iji the ral

21. As is clear from the affidavit the Commission has been under the impression that section 21 enables it to register any illegitimate child. That is incorrect."

In the view I take of the result of this appeal, it is not necessary to consider the application of s. 21 of the NLA. Even if the trial Judge was correct on the application of s. 21, the NLC had decided in addition to s. 21 that the appellant was entitled to be registered on the VKB by virtue of custom, tradition and practice as a separate matter (see paragraphs 7-13 of the affidavit). Registration by the NLC based on custom, tradition and practice cannot be questioned by any court. On this issue, the Constitution, s. 100 (4) and s. 156 (a) is clear. The trial Judge acknowledged this when he said:


"The question that then arises is whether in registering the plaintiff on the VKB the Commission merely applied customary law. If it did then, and only then, is it's decision final and conclusive."

The fact that the NLC may have been wrong in applying s. 21 of the NLC (I do not find it necessary to decide this point) does not and cannot affect the registration of the appellant by virtue of custom, tradition and practice. The end result is that the registration of the appellant on the VKB by virtue of custom, tradition and practice still stands. He is a "Fijian" within the meaning of s. 156 (a) of the Constitution. Any definition of "Fijian" under any other statute must be read subject to the Constitution (see s. 168).

ad to  
of co  
ch-V-  
ral fc  
ion m  
uctio  
consti  
n sha  
as a  
ative  
is Con  
s name  
istere  
that  
ty for  
shall  
ase me  
i whos  
final a  
milarl  
on sh  
as a  
o in s  
on unla  
ible to  
la:  
hat a  
for r  
shall b  
se may  
whose

I would allow the appeal, quash the decision of the trial Judge and make the following declarations:

1. That the appellant is entitled to be registered on the roll for Fijians established under s. 41 (2) of the Constitution; and
2. That the appellant is entitled to be registered on the electoral roll for the Suva City Fijian Urban Constituency.



.....  
Sir Mari Kapi CBE  
Justice of Appeal

AWWA RUTV for person's

fect  
after  
mea  
onstl  
- Bri  
or Ne  
ist b  
n I h  
tutio  
I be  
me,  
refe  
itut.  
s reg  
in t.  
pers  
igist  
a cor  
be l  
confi  
conc  
orded  
be  
r on  
ion 4  
his 1  
regi

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO 23 OF 1992

(High Court Civil Action NO 53 of 1992)

BETWEEN:

JAMES MICHAEL AH KOY

APPELLANT

-and

THE REGISTRATION OFFICER FOR THE SUVA  
CITY FIJIAN URBAN CONSTITUENCY

RESPONDENT

Mr. B. Sweetman for the Appellant.

Mr. A. Rabo for the Respondent.

Mr. F. Jitoko as Amicus Curiae.

Date of Hearing : 18th May 1993

Date of Delivery of Judgement : 20th August, 1993

JUDGMENT

SIR EDWARD WILLIAMS

This appeal involves a question of considerable importance to the people of Fiji.

Shortly put the question is whether the appellant born in Fiji of a mother who is an indigenous inhabitant of Fiji and a father who was born in China, is a "Fijian" within the meaning of the Constitution of the Sovereign Democratic Republic of Fiji.

Again shortly and perhaps too simplistically put, the answer is in S.156 of the Constitution of 1990 (to use a short form for



the Constitution of the Sovereign Democratic Republic of Fiji  
(Promulgation) Decree 1900.

S.156 is as follows:-

"Meaning of "Fijian", "Rotuman" and "Indian"

156. For the purposes of this Constitution-

- (a) a person shall be regarded as a Fijian if and shall not be so regarded unless his father or any of his male progenitors in the male line is or was the child of parents both of whom are or were indigenous inhabitants of Fiji and his name is registered or eligible to be registered in the Vola ni Kawa Bula and include persons who are registered in the Vola ni Kawa Bula by virtue of custom, tradition and practice:

Provided that a person's registration or eligibility for registration on the Vola ni Kawa Bula shall be confirmed or determined as the case may be by the Native Lands Commission whose confirmation or decision shall be final and conclusive.

- (b) a person shall be regarded as a Rotuman if, and shall not be so regarded unless, he is of Rotuman descent, whether through his male progenitors or female progenitors; the eligibility of a person under this subsection shall be determined or confirmed, as the case may be, by the Council of Rotuma;
- (c) a person shall be regarded as an Indian if, and shall not be so regarded unless, his father or any of his earlier male progenitors in the male line is or was the child of parents both of whom are or were indigenous inhabitants of the sub-continent of India:

Provided that where the identity of the father of any person cannot be ascertained, the male progenitors of that person may instead be traced through that person's mother."

3.

Without drawing comparisons, it is fair to say that this appeal was well argued before us. Apart from counsel for the parties, the Solicitor General appeared as amicus curiae and assisted the Court with precise well reasoned submissions.

Were it not for the widely canvassed points of argument that commended themselves to counsel for the appellant and the respondent, this appeal could well have been determined by a review of S.156 alone.

The judgment appealed from was described by His Lordship Mr Justice M D Scott as an interim judgment for the respondent, given after hearings on the 3rd and 16th April 1992. His Lordship had been persuaded that the summons was one that ought to be tried speedily and forthwith gave an ex tempore judgment, for the respondent indicating that he would later publish his reasons. He did so on 24 April 1992.

His Lordship regarded the application as one seeking relief pursuant to S.113 of the Constitution. I am of the view that it was more appropriately one for a declaration of the appellant's rights under s.41(2) of the Constitution and of his right to be registered as a voter on the electoral roll for the Suva City Fijian Urban Constituency.

Both of those results will automatically follow if at all relevant times, he was (a) a Fijian within the meaning of S.156 of the Constitution; (b) his name had been duly registered in the

4.

Vola ni Kawa Bula; and (c) such registration had been duly confirmed by the Native Land Commission.

Such findings (if made) would render him eligible to be registered as a voter on the electoral roll for the Suva City Fijian Urban Constituency.

In my view all of these matters are consequential on a decision that he was a "Fijian" within the meaning of S.156.

The argument revolves around whether there are two legs in the first paragraph of subsection (a) i.e. does it cover only the "patrilineal test" or does it also include a separate class of person who for convenience, has been suggested, as falling within the VKB test.

The respondent says that the appellant did not come within either leg and so could not be regarded as a Fijian, but in any event, so he says, there is no VKB leg. His case is that (1) the words after the words "Vola ni Kawa Bula" where they first appear in s.156(a) are either merely part of the description of one coming within the "patrilineal" group of persons, or (2) they are mere surplusage and should be ignored. By whatever misadventure they got into the subsection they should nevertheless be ignored, be notionally excised by some form of major surgery or perhaps ignored by some form of bypass operation.

5.

One does not need to refer to authority to decide that if sense can be made out of the most abstruse words in a section, it should be attempted, provided it does not produce an absurdity.

Likewise it is unnecessary to consider cases where "and" has been held in a particular context to be read as "or".

No doubt subsection (a) could have been more delicately worded, but in my opinion the meaning is clear. The operative words were inserted to cover another group of people who live in Fiji, namely those who are registered (as was the appellant) or eligible to be registered in the Vola ni Kawa Bula by virtue of custom, tradition and practice.

A series of arguments were submitted as to why these words were, or might have been inserted in 1990. Interesting as all that might have been, nothing can detract from the clear words of the subsection.

The appellant's position is reinforced by the action of the Native Land Commission in confirming his registration in the Vola ni Kawa Bula.

The Commission's confirmation under the proviso in the subsection, was final and conclusive.

6.

I have had the advantage of reading the reasons for judgment of the President and of Sir Mari Kapi. I agree with the reasoning of each and the conclusions at which each has arrived.

I am in total agreement with the orders proposed by Sir Mari and would add, if it be necessary so to do, that the respondent should pay the appellant's costs of and incidental to the appeal to be taxed.

A handwritten signature in cursive script, reading "E. D. Williams", with a decorative flourish at the end.

.....  
Sir Edward Williams  
Justice of Appeal

160

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO 23 OF 1992

(High Court Civil Action NO 53 of 1992)

BETWEEN:

JAMES MICHAEL AH KOY

APPELLANT

-and

THE REGISTRATION OFFICER FOR THE SUVA  
CITY FIJIAN URBAN CONSTITUENCY

RESPONDENT

Mr. B. Sweetman for the Appellant.

Mr. A. Rabo for the Respondent.

Mr. F. Jitoko as Amicus Curiae.

Date of Hearing : 18th May 1993

Date of Delivery of Judgement : 20th August, 1993

JUDGMENT

PRESIDENT, MICHAEL HELSHAM

I agree with the conclusion reached by Sir Mari Kapi in this appeal, and with the reasons he gives for reaching it.

In my opinion it is not necessary to refer to so called learned decisions of numerous Judges on the subject of the interpretation of Acts of Parliament to approach this problem on the basis that meaning is to be given to what has been enacted through the words used, unless that is impossible. It is only in the most exceptional cases that an Act will contain words that are redundant, do no work, or are meaningless, so that they can

## 2.

be ignored. I doubt if it would ever be the case that in a Constitution there will be words that would fall into this category. That is merely common sense.

As Sir Mari points out, there are four categories of persons who are entitled to vote, Fijians, Indians, Rotumans and General Voters. So far as those qualified to vote as Fijians, there are three categories of persons whose entitlement is beyond dispute. They are:-

- (i) a person who has or had a father both of whose parents (i.e. such persons' grandparents) are or were indigenous inhabitants of Fiji, plus such person's registration or eligibility for registration in the Vola ni Kawa Bula;
- (ii) a person who has or had a male forebear on the spear side (as against the distaff side) both of whose parents are or were indigenous inhabitants plus such person's registration or eligibility for registration in the Vola ni Kawa Bula;
- (iii) a person, the identity of whose father cannot be ascertained, who has or had a male forebear on the distaff side both of whose parents are or were indigenous inhabitants.

## 3.

It must be inferred that a person in the third category also requires the qualification of registration or eligibility for registration in the Vola ni Kawa Bula.

Now, it can immediately be noted that these three categories all need registration, or eligibility for registration. That in turn means that unless the concluding words of s.156(a) of the Constitution refer to something or someone else, they may as well not exist. If all the three classes need registration or eligibility as part of their definition, why add the words "and include persons who are registered or eligible to be registered in the Vola ni Kawa Bula by virtue of custom, tradition and practice"? Registration is, after all, governed by custom, tradition and practice anyway. So, if they add nothing to what is already required to categorise a person as a Fijian for the purposes of the Constitution, you simply write them out from the Constitution - a bold step indeed!

It is not difficult, in my opinion to read the portion of s.156(a) here under review as reading:

*"(a) a person .... include persons who are registered etc...."*

or even:

*"(a) a person .... shall include persons who are registered etc..."*



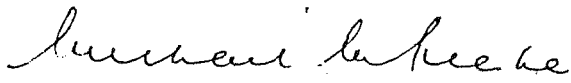
4.

The language is perhaps a bit clumsy, but read in such a way the words do not have to be ignored, as stated above.

I might add that the proviso, in its application to s.156(a), merely substitutes the necessary forebears in the situation to which it refers. That automatically picks up the requirement of registration without the aid of the second part of that subsection. This merely emphasises the fact that that part was intended to refer to something quite distinct from ancestry and to persons who do not need any qualification through ancestry.

Read in this way, the whole of s.156(a) is given a sensible and operative meaning instead of the last portion simply being written out of the Constitution by judicial decision.

I agree with the conclusion and orders suggested by Sir Mari Kapi.

  
.....  
Mr Justice Michael M Helsham  
President, Fiji Court of Appeal