IN THE FIJI COURT OF APPEAL 490

CIVIL JURISDICTION

CIVIL APPEAL NO. 55 OF 1993
(High Court Judicial Review Action N0. 9 of 1992)

BETWEEN:

RATU NACANIELI NAVA **Appellant**

-and-

THE NATIVE LANDS COMMISSION
THE NATIVE LAND TRUST BOARD **Respondents**

Mr. Q. B. Bale for the Appellant
Mr. S. Rabuka for the Respondents

Date and place of hearing : 2 November 1994, Suva
Date of delivery of judgment : 11 November 1994

JUDGMENT OF THE COURT

Ratu Nacanieli Nava and Ratu Viliame Bouwalu are cousins whose fathers were twin brothers. They belong to the particular family line which provides the principal chief in the **"Vanua Vidilo"** known as the **"Taukei Vidilo"**. The last Taukei Vidilo was Ratu Viliame Bouwalu's father (one of the twins) who died in January 1990. Since the death of the Taukei Vidilo, there has been a rivalry between the two cousins as to who should become the chief.

According to the customs and traditions of the Fijian people, the chiefly position is passed down through the

patrilineal line. When the position of chief could not be settled between the two cousins, the 84 year old Adi Asinate Naisogiri, the older sister of the last Taukei Vidilo, purported to resolve the issue by appointing Ratu Nacanieli Nava to the position of Taukei Vidilo.

Apparently this did not resolve the dispute. Subsequent to the appointment, Ratu Malelili Naulivou a descendant of one of the younger brothers of the chiefly line and a distant cousin of Ratu Nacanieli Nava and Ratu Viliame Bouwalu also made a claim to the chiefly position.

Ratu Viliame Bouwalu made an application to the High Court in Lautoka in which he sought a declaration that the appointment of Ratu Nacanieli Nava by Adi Asinate Naisogiri was invalid and of no effect. On 14 May 1990 all parties agreed that the question of who was rightfully entitled to the chiefly position should be determined by the Native Lands Commission (hereinafter referred to as the **"Commission"**) pursuant to s 17 of the **Native Lands Act** (Cap 133). The Commission carried out an inquiry into the matter on 21 August 1991. On 27 September 1991 the Commission handed down it's decision. The decision is recorded in the Fijian language. This has been translated into English and is annexed to the affidavit of Ratu Nacanieli Nava filed in the High Court (see record pages 102-116). In essence, the Commission inquired into the Fijian customs, traditions and usages in relation to who is the proper Taukei Vidilo in this particular case. After having

heard evidence from all interested parties, the Commission made the following findings:

> *"When we carefully consider their respective claims and rights to this chiefly position, the Commission finds that Ratu Viliame and Ratu Nacanieli have equal rights to the position by virtue of the fact that their fathers were twin brothers. Although there has been a suggestion that Ratu Jone Bouwalu was older than Ratu Jioji Nava, this is difficult to ascertain definitively, because they were twin brothers and it would be difficult to determine who was elder between the two. In relation, however, to their respective ages and their contributions to or participation in the affairs of their people, Ratu Nacanieli clearly has an edge over Ratu Viliame. Ratu Nacanieli is now of mature age and has played a substantial part in the development of the village as explained above. The only point against him is that he lacks the support of the majority of the members of the Tokatoka. His succession to this chiefly position has also been strongly supported by the Provincial Council and initially endorsed by this Commission on May 1 1990. Subsequently, Ratu Viliame disputed this selection or succession and took it to court. Publicity given to this later caused some problems within Namoli village. In November 1990 a great number of the members of the Tokatoka sent a petition to the Commission against the selection of Ratu Nacanieli to this chiefly position. This indicated to us in the Commission that Ratu Nacanieli's leadership was not well received within the Tokatoka or by his people and there is little point in installing a chief who is not liked and will not be supported by the people he is supposed to lead in the Yavusa. The Commission believes that if Ratu Nacanieli's selection had been generally accepted, it would not have created the dispute which has eventually brought it to this stage where there are three claimants for the position.*
>
> *In the circumstances the Commission has decided that a further time be given to Ratu Viliame and Ratu Nacanieli to prepare them*

for the position of leadership that awaits them in the future. The Commission thereby confirms that the chiefly position properly belongs to them (Ratu Viliame and Ratu Nacanieli), but the Commission is also satisfied that neither of them receives sufficient support from amongst the members of the Tokatoka at present. The Commission also places great weight on the chiefly duties which the late Ratu Jone Bouwalu (as Taukei Vidilo) occasionally allowed Ratu Malelili to perform.

In the circumstances it is the decision of this Commission that Ratu Malelili Naulivou should now assume the position of Taukei Vidilo but in an acting capacity or status only, and that this 'appointment' will be confined to him alone and will not extend to his children or his family. Along with his 'appointment' Ratu Malelili shall also be entitled to the rental income due and payable to the chiefly position of Taukei Vidilo as well as all the various privileges which are normally due to this chiefly position within the Yavusa and Mataqali Vidilo.

When Ratu Malelili's leadership ends, either because he resigns or he wishes to pass on their chiefly position to someone else, then the position will be assumed by either Ratu Nacanieli Nava or Ratu Viliame Bouwalu depending on who satisfies this Commission as commanding the majority support from the members of the Tokatoka."

On 13 May 1992, Ratu Nacanieli Nava filed judicial review proceedings in the High Court against the decision of the Commission. Ratu Viliame Bouwalu later joined the proceedings. Apart from other grounds, they claimed that the Commission went outside the customs and traditions of the chiefly Tokatoka Navitua in appointing Ratu Malelili Naulivou to hold the title Taukei Vidilo in an acting capacity. The application for leave for judicial review under O 53 r 3 of the **High Court Rules** 1988

was heard by Ashton-Lewis J on 17 July 1992. He refused leave for judicial review after a full consideration of the decision of the Commission. He held that the appellant did not have an arguable case. His ruling occupied 20 pages.

Ratu Nacanieli appealed against the decision to this Court. Ratu Viliame Bouwalu did not appeal and is not a party to this appeal.

Counsel for the appellant sought to argue that the trial judge should have granted leave for judicial review and allow the matter to proceed to a full hearing on the merits. It is not necessary to set out the grounds as in the end result, this appeal will be determined on a jurisdictional point raised by this Court, namely, that s 100 (4) of the **Constitution** protects a decision of the Native Lands Commission from being challenged in a court of law including judicial review by the High Court. The issue of ouster of jurisdiction was initially raised by counsel for the appellant at the hearing before the High Court (see record pages 246-248).

The trial judge made reference to this issue in the following passage:

> *"I am satisfied that the applicants do have standing to seek a Judicial Review in this matter and that notwithstanding Section 100 (4) (b) of the Constitution, the High Court can review the decision making processes of the Commission."*

He simply referred to s 100 (4) (b) of the **Constitution** and went on and reviewed the decision of the Commission without giving any detailed analysis of the provision. We consider that s 100 of the **Constitution** raises a fundamental jurisdictional issue which must be addressed. We gave notice to counsel and they have made submissions on the issue.

We set out below the full text of s 100 as follows:

> *"100.-(1) Parliament shall make provision for the application of laws, including customary laws.*
>
> *(2) In exercising it's powers under the preceding subsection, Parliament shall have particular regard to the customs, traditions, usages, values and aspirations of the Fijian people.*
>
> *(3) Until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji:*
>
> *Provided that this subsection shall not apply in respect of any custom, tradition, usage or values that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to the general principles of humanity.*
>
> *(4) For the purposes of this Constitution the opinion or decision of the Native Lands Commission on*
>
> > *(a) matters relating to and concerning Fijian customs, traditions, and usages or the existence, extent, or application of customary law; and*
> >
> > *(b) disputes as to the headship of any division or sub-division of the Fijian people having the customary right to occupy and use any native lands,*
> >
> > *shall be final and conclusive and shall not be challenged in a court of law."*

As far as we are aware, there is no case which has

definitively dealt with the meaning and application of s 100 (4) of the **Constitution**.

Both counsel in their submissions in the High Court on this point made reference to English cases which deal with statutory provisions aimed at restricting or eliminating judicial review. It is not necessary to examine these cases in any great detail for reasons that will appear later in the judgment. Many of the statutes considered in the English cases provide that some decision shall be final by use of clauses like **"final and conclusive"** and **"no certiorari"**. Professor Wade summarises the English authorities in his book **Administrative Law** (6th Edition, 1988) in the following paragraph at page 720:

> *"If a statute says that some decision or order 'shall be final' or 'shall be final and conclusive to all intents and purposes' this is held to mean merely that there is no appeal: judicial control of legality is unimpaired. 'Parliament only gives the impress of finality to the decisions of the tribunal on condition that they are reached in accordance with the law'.*
>
> *This has been the consistent doctrine for three hundred years. It safeguards the whole area of judicial review, including error on the face of the record as well as ultra vires."*

A similar doctrine has been developed in relation to **"No certiorari"** clauses in England.

The English courts in developing this area of the law have adopted a certain policy approach. Whether, or not, this policy decisions are appropriate and applicable in Fiji is a question we

do not have to decide in this case. We consider that the English cases are not relevant or applicable to the issue now raised before us for the following reasons. Fiji has a written Constitution. England does not. The Constitution is the supreme law of the country and it's provisions cannot be held ultra vires of any other laws (see s 2 of the **Constitution**). Further s 100 of the **Constitution** is more than an **"ouster clause"** as found in the English cases. We are here concerned with a constitutional provision which deals with a particular area of the law peculiar to Fiji, namely, customary law.

Section 100 (1) of the **Constitution** gives the mandate to the Parliament to make provision for application of customary laws. Section 100 (2) directs that in making provisions in an Act, the Parliament should have particular regard to the customs, traditions, usages, values and aspirations of the Fijian people.

Section 100 (3) is an important provision. It provides that Fijian customary law shall have effect as part of the laws of Fiji. Such a provision raises the status of customary law to the same status as other laws. Whatever this may mean in terms of the powers of the High Court in relation to other customary matters, the application of this provision is subject to **"Until such time as an Act of Parliament otherwise provides"**. In this case, we are considering an Act of Parliament, The Native Lands Act which delas with customary law.

The Parliament has passed the **Native Lands Act** (Cap 133) (hereinafter referred to as **"the Act"**) which deals with custom relating to native lands. This was an existing law at the time the present Constitution came into force but shall be construed as being passed in accordance with s 100 (1) of the **Constitution** (see s 168). This Act says that native lands shall be held in accordance with **"native custom as evidenced by usage and tradition"** (see s 3 of the Act). The Act recognises an authority charged with the responsibility of determining the existence of Fijian customs, traditions and usages and their extent and application of those principles with respect to native lands. This authority is the Native Lands Commission. Where there is a dispute over native lands, the Commission is given the power to resolve the dispute in accordance with custom (see ss 4, 6 (5) of the Act). This means that it is the responsibility of the Commission to inquire into the customs, traditions and usages of the Fijian people and declare their content and application with respect to native lands. We do not consider that the Commission can declare or create customary law as it sees fit of it's own accord (see s 3 of the Act).

The Act also gives the Commission power to resolve disputes arising between native Fijians as to the headship of any division or sub-division of the people having the customary right to occupy and use native lands (see s 17 of the Act).

The position under the Act is jealously protected by

allowing for special provisions for alteration of the Act under s 78 of the **Constitution**.

Section 100 (4) of the **Constitution** specifically deals with a decision or opinion of the Commission in respect of (a) the existence of Fijian customs, traditions and usages and application of customary laws; and (b) headship of any division or sub-division of the Fijian people having the customary right to occupy and use native lands under the **Native Lands Act** (Cap 133) and declares that such decisions **"shall be final and conclusive and shall not be challenged in a court of law"**. The intention of s 100 (4) is quite clear that once the Commission decides these matters, these decisions or opinions cannot be questioned or challenged in any court of law including the High Court.

Our attention has not been drawn to any other law which gives any power to the High Court to decide matters of custom in relation to native lands. The intention of the Parliament is clear that on matters of custom relating to native lands, the formal courts should not have any jurisdiction. The people most qualified to deal with these matters are the Fijian people themselves who are knowledgeable on matters of custom. The Parliament in it's wisdom charged the Native Lands Commission with this responsibility under the **Native Lands Act**. The Constitution under s 100 (4) renders the decisions and the opinions of the Commission in relation to matters set out under

s 100 (4) (a) and (b) to be final and conclusive.

In the present case, what the appellant sought to do in the High Court was to question or challenge the decision of the Commission on the content or the extent of the Fijian customs and their application to the chiefly position in this particular case. Section 100 (4) (a) and (b) of the **Constitution** clearly protects the decision of the Commission in both respects and the High Court has no jurisdiction to review the decision. We agree with both counsel who conceded that there is no way of getting around s 100 (4) of the **Constitution**. Therefore we conclude that the trial judge erred in law in proceeding to deal with the application for leave for judicial review. We find it unnecessary to deal with the grounds of appeal.

At this point we should make reference to a decision of the Chief Justice in the case of **Bulou Eta Kacalaini Vosailagi of Cuvu Nadroga and The Native Lands Commission and Ratu Sakiusa Kuruicivi Makutu of Cuvu Nadroga and Native Land Trust Board** (High Court Civil Action NO 19 of 1988) (Unreported Judgment of the High Court dated 22 June 1989). This was a decision handed down before s 100 (4) in the present **Constitution** came into force. It was a judicial review case under O 53 of the **High Court Rules** challenging the decision of the Commission made under s 17 of the **Native Lands Act** (Cap 133). There was a dispute as to who should be the person rightfully entitled to be the Ka Levu and Tui Nadroga in the Vanua Yavuasuna. The Commission decided that

501

Ratu Sakiusa Kuruicivi Makutu should occupy the chiefly title. Ratu Bulou Eta Kacalaini Vosailagi challenged the decision of the Commission on two grounds (1) that there was a wrong exercise of power by the Commission under section 21 of the **Native Lands Act** 1952 for the transfer of Ratu Sakiusa's name from his mother's Tokatoka in the Vola-ni-Kawa and (2) that the decison of the Commission was invalid on the basis that there was a real likelihood of bias on the part of the Commission. The learned Chief Justice upheld the submission of counsel for Ratu Vosailagi and set aside the decision of the Commission on the grounds of bias. Therefore the decision has no relevance to the issue argued before us. There are, however, passages which lend support to the conclusion we have reached in relation to questions of custom. The Chief Justice in making reference to matters of custom said at pages 6-7:

> *"At this point it should be made clear that this Court has no jurisdiction to decide the merits of the Ka Levu dispute. The Court has no function in that regard. The Court's function is to ensure that the process by which the Commission arrived at its decision in the inquiry under Section 17 (1) of the Act was done in accordance with the law. In other words, it is the decision-making process of the Commission as a statutory tribunal which is under review by this Court and not the merits of the decision itself."*

At page 20 the Chief Justice continued:

> *"As already noted it is not for this Court to decide the merits of the Ka Levu dispute. That decision belongs elsewhere. The function of this Court is to ensure that the*

Commission as a statutory tribunal acted in accordance with the law in relation to the inquiry held under Section 17 (1) of the Act. Whether the Commission came to the right or wrong decision according to Fijian custom and tradition is not for this Court to say."

The position is now put beyond doubt by s 100 (4) of the **Constitution**.

The end result of our decision is that the appeal now before this Court is dismissed. In relation to the continuing dispute relating to the Taukei Vidilo, we can only urge the parties to resolve the issue by resorting to means and ways according to the customs, traditions and usages of the Fijian people. One thing is clear, the formal courts can play no part in the matter.

In view of the fact that we have disposed of this appeal on a point raised by the Court, we make no order as to costs.

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Sir Moti Tikaram
President Fiji Court of Appeal

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Sir Mari Kapi
Judge of Appeal

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Mr Justice Peter Hillyer
Judge of Appeal