IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0061 OF 2001S
(High Court Civil Action No. HBC 119 of 2001S)

BETWEEN:

REV. AKUILA YABAKI
VIJAY NAIDU
DOROTHY JANE RICKETTS

Applicants

AND:

THE PRESIDENT OF THE REPUBLIC
OF THE FIJI ISLANDS
THE ATTORNEY GENERAL OF FIJI

Respondents

Coram: Tompkins, JA
Henry, JA
Penlington, JA

Hearing: Tuesday, 20th May 2003, Suva

Counsel: Mrs. Gwen Phillips for the Applicants
Mr. J. J. Udit and Mr K.T. Keteca for the Respondents

Date of Judgment: Friday, 30h May, 2003

JUDGMENT OF THE COURT

This is an application under s.122(2)(a) of the Constitution for leave to appeal to the Supreme Court. The subsection provides:

> *"122. - (2) An appeal may not be brought from a final judgment of the Court of Appeal unless:*
>
> *(a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance;*

The proceedings relate to events which occurred subsequent to 19 May 2000, when a State of Emergency was declared following an armed takeover of Parliament. On 1st March 2001, this Court held that the 1997 Constitution remained the Supreme Law of the Republic (**Republic of Fiji v. Prasad**, [2000] NZAR 385). It also held that Parliament had not been dissolved, but rather prorogued on 27 May 2000. On 14th March 2001 the President dismissed Prime Minister Chaudhry, and appointed Ratu Tevita Momoedonu caretaker Prime Minister. Acting on his advice, the President dissolved the House of Representatives on 15 March 2001. The caretaker Prime Minister then resigned, and on 16th March 2001 the President appointed Senator Qarase as caretaker Prime Minister. Seventeen ministers and seven assistant ministers were also appointed between 15th and 19th March 2001. On 23rd March 2001 the present appellants and five other persons commenced these proceedings, which at trial sought the following four declarations:

> *"A. A declaration that the First Respondent, His Excellency the President of the Republic of the Fiji Islands (hereinafter "the President") acted in a manner inconsistent with the Constitution when he failed to summon Parliament after its prorogation on 27 May 2000.*
>
> *B. A declaration that the purported dismissal by the President of Hon. Mahendra Pal Chaudhry as the Prime Minister on the 14 March 2001 is inconsistent with the Constitution and is therefore null and void.*
>
> *C. A declaration that the purported dissolution of Parliament by the President on about 14 March 2001 is inconsistent with the provisions of the Constitution and is therefore null and void. Accordingly the Parliament constituted after the May 1999 General Elections exists and has not been dissolved.*
>
> *D. A declaration that the purported appointments of Hon. Senator Laisenia Qarase as Prime Minister and of other persons as Ministers of a caretaker Government for Fiji made on or about 15th, 16th and 19th March 2001 are inconsistent with the Constitution and each such appointment is null and void."*

In a detailed judgment delivered on 11th July under 2001, Scott J. granted declaration A, but refused the other three declarations. On appeal to this Court these three declarations were amended to seek the following:

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

There was no appeal against the grant of declaration A.

The appeal was dismissed on 14 February 2003. The majority of the Court (Barker and Ward JJA) noted that following a general election, Mr Qarase was sworn in as Prime Minister on 10 September 2001. He continues to hold this office.

In a joint judgment, the majority held that the issues raised in the declarations were now moot. They also declined to consider whether Scott J. was correct in applying the doctrine of necessity, which he held justified the actions under challenge even if he were in error in his interpretation of the relevant constitutional provisions. Such an exercise, the

Judges held, required an extensive consideration of factual matters. In a separate judgment, Davies JA held that the appeal lacked a subject matter suitable for judicial determination, and that the appellants were seeking an expression of the Court's view on academic questions in relation to which they had no special connection. He was critical of the formulation of the amended declarations. He joined in the dismissal of the appeal.

The appellants identified a series of questions of law which counsel contended were appropriate for Supreme Court consideration. On analysis they can be summarised as follows:

(1) Is the power of the President to dismiss a Prime Minister under s.109(1) of the Constitution confined to circumstances where the government has been defeated on a confidence vote?

(2) Must a person appointed as caretaker Prime Minister under s.109(2) of the Constitution be a current Member of Parliament?

(3) If there were Constitutional infractions arising from the exercise of the powers referred to in questions (1) and (2), does the doctrine of necessity apply?

(4) In respect of question (1) and (2), was their subject matter moot rendering declarations inappropriate?

Dismissal under s.109(1)

Section 109(1) of the Constitution provides:

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

The High Court held that the power was not limited in the way postulated in question 1, and that the President could act in exceptional circumstances if satisfied that a loss of confidence existed notwithstanding the absence of a vote from the House. Scott J. relied in part on a Privy Council decision in **Adegbenro v. Akintola** [1963] AC 614. Under the Constitution of Western Nigeria, the Prime Minister held office during the government's pleasure, but could not be removed from office unless it appeared to the governor the Premier no longer commanded the support of a majority of the members of the House of Assembly. It was held that a judgment as to support enjoyed by a Premier was left to the government's own assessment, and a resolution of the House was not a pre-requisite to the exercise of the power of removal. In the present case, this Court disagreed with Scott J. It identified important differences between s.109(1) of the Constitution and the corresponding provision of the Western Nigerian Constitution, and expressed the strong opinion that the power to dismiss did require defeat on a confidence vote. A declaration to that effect however was refused because the point was moot. As already mentioned, the Court declined to consider whether the procedure adopted by the President if not within the strict confines of the Constitution was justified under the doctrine of necessity.

It seems to us that s.109(1) is couched in careful and restrictive terms. The requirement is that the government has failed to get the confidence of the House, or has lost that confidence. Each envisages an identifiable step expressed by the House itself. We doubt whether the appellants' point is seriously arguable. Furthermore there are strong reasons against allowing the appeal to proceed on this issue. First, the appellants now have a clear expression of opinion from this Court endorsing their own contention. To have the further endorsement of the Supreme Court has no practical consequences.

Secondly, the terms of the declaration are undoubtedly subject to the criticisms levelled in this Court's judgments on the appeal. In particular, appropriateness now of declaring a particular dismissal as unconstitutional is highly questionable. The situation which existed in 2001 has now been overtaken, and counsel was unable to point to any benefits of significance which could arise from a declaration – which is a discretionary form of relief in any event. Guidance in respect of possible further events of a similar constitutional nature is already there.

The doctrine of necessity issue does not raise a question of significant public importance. Whether the doctrine will apply is necessarily fact dependent. To invite the Supreme Court to re-examine the facts presently before the Court would appear to be outside the ambit and intent of s.122(2)(a), particularly when there is a complete absence of any practical consequence ensuing. Whether the doctrine could properly be applied to what happened in 2001 is an enquiry unique to its own circumstances. We note that the appellants did not contend for any general proposition relating to the doctrine, but sought a ruling on its particular application.

Section 109(2)

Section 109(2) provides:

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

The High Court and the Court of Appeal both held that a caretaker Prime Minister appointed under s.109(2) did not have to be a current Member of Parliament. We found the argument to the contrary quite unpersuasive.

The subsection is concerned with a situation when there has been a loss of confidence vote and the Prime Minister has not resigned or advised a dissolution of Parliament.

The President may then appoint "a person" a caretaker for the sole expressed purpose of advising and therefore effecting a dissolution. The "person" need have no particular status for that purpose. Section 109(2) is to be contrasted with section s.107(1), which concerns appointment in a situation where there is another person who can form a government. It is also to be contrasted with s.108(1), which concerns appointment where a dissolution has been advised. In both those situations a continuing government is envisaged, whereas under s.109 dissolution is the objective. In the latter situation qualification as a Member of Parliament is unnecessary – in the two other cases, it obviously is necessary.

We see the argument to the contrary as virtually untenable. The question is not one which in those circumstances is appropriate to refer to the Supreme Court. As to the amended declaration D, which is directed to the appointment of Senator Qarase and other ministers as a caretaker government, we simply note that the appellants' contentions in that regard were, as with amended declaration C, confined to whether s.109(2) required an appointee to be a current Member of Parliament. No other submission in support of declaration D was traversed in argument.

Doctrine of Necessity

We have already held that the issue arising under the doctrine of necessity is not appropriate for referral to the Supreme Court in so far as it may relate to what we have identified as question 1. That conclusion would also apply to question 2, even if contrary to our views that question raised a reasonably arguable issue for s.122(2)(a) purposes.

Subject matter of proposed declarations is moot

We have earlier indicated that to pursue a declaration in respect of question 1 is of no practical value and does not justify referral to the Supreme Court. Question 2 is not itself a suitable candidate for the granting of leave because of the weakness of the argument supporting the proposed declaration. Whether that subject matter is moot is therefore largely irrelevant.

Conclusion

For the above reasons we are not persuaded that leave should be granted to appeal to the Supreme Court. The application is therefore dismissed. In the circumstances we make no order as to costs.

Tompkins, JA

Henry, JA

Penlington, JA

Solicitors:

Munro Leys, Suva for the Applicants
Office of the Attorney-General, Suva for the Respondents

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