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

CIVIL APPEAL NO. ABU0049 OF 2002S
(High Court Judicial Review No. 12 of 2002)

BETWEEN:

COMMANDER REPUBLIC OF FIJI MILITARY FORCES
RATU JOSEFA ILOILO, PRESIDENT REPUBLIC OF THE FIJI ISLANDS
THE ATTORNEY-GENERAL OF FIJI

*Appellants*

AND:

LT. COLONEL FILIPO TARAKINIKINI

*Respondent*

Coram: Sheppard, JA
Gallen, JA
Ellis, JA

Hearing: Monday, 11th August 2003, Suva

Counsels: Mr. W. Calanchini with Lt. Colonel Aziz Mohammed for the first Appellant
Mr. S. Banuve for the 2nd and 3rd Appellants
Mr. S. Matawalu for the Respondent

Date of Judgment: Thursday, 14th August, 2003

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DECISION OF THE COURT

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This is an appeal seeking an order that the Judgment of Byrne J in these proceedings, delivered on the 17th of September, 2002 be wholly set aside and seeking further consequential orders.

The basic facts are not seriously in dispute.

The Respondent Lt. Colonel Filipo Tarakinikini was commissioned in the then Royal Fiji Military Forces in 1981 as a second Lieutenant. Subsequently he

attended at both Sandhurst and the Senior Command Staff College in the United Kingdom. By May of 2000 he held the rank of Lieutenant Colonel.

On the 19th of May 2000 a coup occurred in Fiji under the leadership of George Speight and it is the contention of the appellant that this court is entitled to take judicial notice of the fact that those responsible for the coup published an extraordinary Fiji Gazette dated the 19th of May 2000 which purported to appoint Lt. Colonel Tarakinikini as chief of staff of the Republic of Fiji Military Forces.

On the 21st of November 2000 Lt. Colonel Koroi was appointed investigating officer to formally investigate allegations against Lt. Colonel Tarakinikini and other senior military officers for alleged involvement with the coup plotters prior to and during the events of May 2000.

In December of 2000 Lt. Colonel Tarakinikini was selected by the United Nations to take up the appointment of Training Officer, Department of Peacekeeping Operations for a fixed term of 12 months. The release of Lt. Colonel Tarakinikini for this purpose was requested by the Permanent Secretary for Home Affairs and Immigration for Fiji on the 8th of December 2000 and on the 11th of December 2000 the Permanent Secretary was advised that the release on secondment was approved by the Commander of the Republic of Fiji Military Forces.

By memorandum dated the 22nd of December 2000 Lt. Colonel Tarakinikini was advised by the headquarters RFMF that permission to leave Fiji to take up his appointment with the United Nations would be subject to the advice given to headquarters by Lt. Colonel Koroi.

Lt. Colonel Koroi interviewed Lt. Colonel Tarakinikini on the 4th of January 2001 and at the conclusion of the interview telephoned the Commander RFMF and, it is alleged, in the hearing of Lt. Colonel Tarakinikini advised the Commander that

the initial interrogation had been completed, and based on evidence then available Lt. Colonel Tarakinikini could be released to take up his appointment in New York.

It is alleged that all parties were aware that investigations of the allegations made were continuing but this is disputed. It is alleged by Lt. Colonel Tarakinikini that his departure to take up the United Nations appointment had been delayed by some 3 months on the pretext that there was a need for further investigation into the allegations. He eventually left to take up his appointment on the 19th of March 2001 and commenced work on the 21st of the same month.

Five (5) months later the United Nations requested an extension of Lt. Colonel Tarakinikini's secondment for a further term of 12 months. That request was refused by the Republic of Fiji Military Forces and a request for re-consideration was also declined.

It is alleged by Lt. Colonel Tarakinikini that during this period a number of allegations about him and his appointment were released to the media and it is his contention that he sought a full public inquiry into the events of the May 2000 coup and his position both professionally and on a personal level.

On the 27th of February 2002 Lt. Colonel Tarakinikini sent a letter to the Commander of the Republic of Fiji Military Forces the first appellant in these proceedings of which copies were sent to the office of the Prime Minister and the Ministry of Home Affairs. The letter is headed **RESIGNATION FROM THE RFMF.**

The letter covers 3 pages. It deals with a number of matters which Lt. Colonel Tarakinikini contended, gave rise to concern with regard to the RFMF. It is unnecessary to set out this letter in detail but there are two passages in particular to which reference should be made. The first occurs in the first paragraph which is in the following terms:

*"After careful considerations of my future with RFMF and that of my family it is with a sense of melancholy that I tender my resignation from the Fiji Military Forces to you as the incumbent commander of the Republic of Fiji Military Forces with effect from the 21st of March 2002. I will now embark to seek my destiny elsewhere. It is said that it takes more courage to leave an organisation that you love than it did to join in the first place. This is true!"*

The second occurs at the conclusion of the letter and is in the following terms:

*"I tender to you Sir my resignation effective from 21st March 2002 and I wish you for the sake of Fiji every success and all the very best in the remainder of your tenure in office."*

This letter was replied to by letter dated the 12th of March 2002 from the Commander of the Republic of Fiji Military Forces.

*"I have received your letter of resignation dated 27th February 2002. I have carefully considered your request and have decided that first you must return home as scheduled.*

*You will appreciate that my desire to have you returned is based precisely on the outcome of the formal Board of Inquiry conducted by Lt. Col. Evans on the alleged participation by some members of the RFMF during the events of May 2000. It is for this reason alone that your presence is imminent to provide answers to these allegations.*

*You must understand that the interest of the Nation and in particular the*

*RFMF is foremost and it is my intention to have the investigation completed as soon as possible.*

*In view of the above reasons, your request for release is not approved."*

On the 21st of March Lt. Colonel Tarakinikini replied. The letter is lengthy and we refer to two passages:

*"I sent my resignation letter to you on 27 February 2002 and I received your response on 18th March 2002. After receiving your*

*response I feel the need to highlight some issues in order to put matters that prompted my resignation in proper perspective. I list here the five issues that relate to my case and the resignation itself. The issues are:*

a. *the investigation into the May 2000 coup;*

b. *the extension of my contract with UNDPKO;*

c. *my resignation;*

d. *the allegations against me;*

e. *command.*

The letter concluded:

*"With all due respects, your response to my resignation aims to cast doubt on me and is evasive and manipulative in avoiding issues. It says nothing of substance and is silent on issues I raised as some of the reasons prompting my resignation. Section 194(2)(b) of the constitution provides me the absolute right to resign from the Force. I exercised this right in my letter of resignation dated 27th February. My resignation was formally accepted once received by you. Therefore it is effective no later than 18th March 2002 as that is the date of your reply."*

*"My resignation letter dated 27th February is, and has been since that date both lawful and irrevocable."*

On the 22nd April 2002 the legal advisers to Lt. Colonel Tarakinikini wrote to the Commander RFMF and indicated their client had forwarded his letter of resignation dated the 27th February and that the Commander had not followed the procedures contemplated by Regulation 21 of the Royal Fiji Military Forces Regulations 1949. They required the Commander to forward the letter of resignation to the President in accordance with that regulation. The letter asserted the Commander Royal Fiji Military Forces was the Commanding Officer of Lt. Colonel Tarakinikini for the purpose of the Regulation.

By letter dated the 8th of April 2002 Lt. Colonel Tarakinikini wrote to the President. The first paragraph of this letter was in the following terms:

> ***"out of protocol and deep respect for Your Excellency's high office and my personal and humble respect to your Excellency as President and Commander-in-Chief from whom I get my commission as an officer in the Fiji Military Forces I feel that I have an obligation to inform your Excellency of my resignation that took effect on the 21st of March 2002. I had submitted my resignation according to my constitutional right. Under Cap.81 regulation 21 my application to resign should have been transmitted to you as the authority appointing me to a commission. This has not been respected thus I am obliged to do so personally".***

On the 28th of April 2002 Lt. Colonel Tarakinikini wrote to the Acting Commander of the Republic of Fiji Military Forces indicating that he had had a discussion with the Attorney General regarding his resignation. The letter contained the following statement:

> ***"He also wanted to clarify whether I had resigned my commission or simply requested a posting from the regular force to the Territorial Force/Reserves as this seems to have been an ambiguity upon which RFMF had placed great importance".***

He went on to say that the contents and sentiments of his resignation letter were quite clear and concluded by saying:

> ***"If there are still any doubts about my intention please be informed that I had applied to resign my commission from the RFMF with effect from the 21st of March 2002."***

It is not now disputed that in fact at all material times Lt. Colonel Tarakinikini's commanding officer was Lt. Colonel Waqavakatoga. On the 10th May 2002 the letter of the 28th April 2002 from Lt. Colonel Tarakinikini to the acting Commander of the RFMF was forwarded by the Acting Commander to Lt. Colonel Waqavakatoga who treated it as a letter of resignation delivered under Regulation 21 of the RFMF Regulations. On the 31st day of May 2002 Lt. Colonel Waqavakatoga submitted to the Acting Commander his "submissions and sanctions" in accordance with Regulation 21.

In his affidavit of 5th June 2002 Lt. Colonel Naivakarua stated he was in the process of submitting the submissions to the Commander Royal Fiji Military Forces. In his affidavit of 5th June 2002 the Commander indicated his intention of forwarding the submission or receipt, to the President "with sanctions".

There is no dispute that the letter of resignation of the 28th April 2002 was forwarded to the President by the Commander and its receipt acknowledged.

We were informed that the President had taken no action pending the decision of this Court. Counsel were unable to indicate that Lt. Colonel Tarakinikini had been disadvantaged by the second letter activating the procedure rather than the first.

On the 8th of May 2002 Lt. Colonel Tarakinikini lodged ex parte an application for leave to apply for judicial review of the decision of the first appellant dated the 12th March 2002 refusing to accept Lt. Colonel Tarakinikini's notice of resignation.

Lt. Colonel Tarakinikini sought a series of orders as follows:

1. A **Declaration** that the decision of the First Respondent dated 12th of March 2002 purporting not to approve the applicant's notice of resignation, is null and void and of no effect.

2. An **Order** that **Certiorari** do issue quashing the said decision of the Respondent.

3. An **Order** that the First Respondent be estopped from denying that the Applicant has properly been cleared of all allegations during the investigations conducted by the Republic of Fiji Military Forces and

Fiji Police Force in terms of the letter of the Prime Minister dated 19th January 2001 to the Secretary of the United Nations.

4. An **Order** that **Mandamus** do issue requiring the first appellant to transmit Lt. Colonel Tarakinikini's resignation to the President for his decision.

5. Damages.

6. Costs.

7. Further or other relief as to this Honourable Court seems just and expedient.

By order dated 13th May 2002 it was ordered that:

1. Matter be dealt with inter parties.
2. Service of all relevant documents on the Attorney General for the Respondents.
3. Matter be adjourned to Wednesday 15th May 2002.

Affidavits were filed and the application was eventually heard by the Hon. Byrne J in May, July and August 2002 his decision being delivered on 17th September 2002.

Having considered the material before him and the statutory and regulatory provisions which he considered relevant the Judge came to the conclusion that Lt. Colonel Tarakinikini had made it abundantly clear he intended to resign from the Fiji Military Forces and that the first appellant had knowingly failed to forward the letter of resignation to the President in terms of the regulations. The Judge granted a

declaration quashing the decision of the first appellant refusing to approve the notice of resignation and directed that certiorari was to issue for that purpose.

He went on to hold that the ground that Lt. Colonel Tarakinikini's conduct was still being investigated did not constitute a valid reason for refusing to accept the resignation. He expressed the view that a charge of complicity in the events leading up to May 19th 2000 would be different. He stated it would be wrong to allow the Commander to request Lt. Colonel Tarakinikini to return to Fiji for further investigation in the possible hope that evidence might be found to implicate him.

The Judge found that requesting Lt. Colonel Tarakinikini to return for further investigation without charging him was "unreasonable in the "Wednesbury" sense and arbitrary."

The Judge also held that Lt. Colonel Tarakinikini had a right to claim damages for the tort of misfeasance in a public office but wished to hear further submissions before giving any decision as to the amount.

At common law an officer holding a commission in the armed forces of a country where the common law applies is not free to resign at will. The reason for this is the special nature of the service for which the officer concerned is commissioned. In the cases of ***Parker v Lord Clive*** 1769 4 Burr 2419, 98 E.R.267 and ***Vertue v Lord Clive*** 1769 4 Burr 2472 98 E.R.296 ***Lord Mansfield*** expressing the opinion of the court indicated the extreme disadvantage which could occur if army officers were free to resign whenever it suited them to do so. In the early cases the questions arose between officers employed by the East India Company under contract nevertheless the principle still applied. It was restated with respect to the Royal Navy in the case of ***Hearson v Churchill*** [1892] 1QB 144.

The question is discussed in some detail in the decision of the High Court of Australia in ***Mark v the Commonwealth*** 1964 111CLR 549.

It is accepted of course that the Common Law situation can be changed by statute which has been done in Fiji.

Section 87 of the Constitution provides that the President is the Commander-in-Chief of the Military Forces.

Direct provision is made for the Constitution of the Republic of Fiji Military Forces in Section 112 which provides that the force established by the Constitution of 1990 continued in existence.

Section 112 of the Constitution goes on to deal with the Commander exercising military executive command. The section is important and is in the following terms:

The Commander of the Republic of Fiji Military Forces is responsible for:

*(a) making appointments of members of the Forces;*

*(b) taking disciplinary action against members of the Forces; and*

*(c) removing members from the Forces.*

Section 194(5) states:

*"a reference in this Constitution to a power to remove a person from a public office includes a reference to*

*(a) a power to require or permit the person to retire from office.*

*".....Public Office means:*

*(a) an office created by, or continued in existence under, this Constitution;*

*(b) an office in respect of which this Constitution makes provision;*

*(c) the office of a member of a commission;*

*(d) an office in a state service;*

*(e) an office of judge;*

*(f) an office of magistrate or an office in a court created by the Parliament;*

*(g) an office in, or as a member of, a statutory authority; or*

*(h) an office established by a written law.*

There is specific legislative provision dealing with the Republic of Fiji Military Forces in "the Republic of Fiji Military Forces Act Cap.81" (which remains in force subject to the Constitution) Subsection 67 provides the Minister for Home Affairs may make regulations affecting the RFMF including the following:

(b) the terms of service, appointment, duties, promotion, seniority, transfer, leave, resignation and release from service of officers.

Pursuant to that section regulations were originally promulgated in 1949 but amended and brought forward under subsequent legislation. Those regulations contain regulation 21 which is important and provides as follows:

21 - (1) An application from an officer to resign his commission shall be forwarded by the Commanding Officer to the Commander for transmission to the Governor-General. When forwarding the application the Commanding Officer shall state if –

(a) all regimental claims have been paid;

(b) he is aware of any outstanding public claim against the officer;

(c) there is any objection to resignation being sanctioned;

(d) there is any special reason why such officer should not serve in the Reserve of Officers.

*(Amended by Order 7th October 1970*)*

(2) Where an officer is permitted to resign, the resignation shall not take effect, unless otherwise ordered by the Governor General, until the acceptance is notified in the Gazette. *(Amended by Order 7th October 1970*.)*

(3) a regular officer who has been trained at Government expense at the Royal Military Academy, Sandhurst, or at any other Commonwealth Military College or Academy who applies to be posted to the Reserve of Officers or to resign his commission shall refund to Government the following amounts:

Within one year of being commissioned.....$ 1,000
Within two years of being commissioned.....$ 800
Within three years of being commissioned.....$ 600
Within four years of being commissioned.....$ 400
Within five years of being commissioned.....$ 200

*(Inserted by Regulations 29th July 1952.)*

Lt. Colonel Tarakinikini directed his original letter to the Commander of the Republic of Fiji Military Forces. He did not in that letter indicate the statutory provision under which he purported to resign. In his letter of the 21st of March 2002 Lt. Colonel Tarakinikini indicated that he relied on the provisions of section 194 (2)(b) of the constitution and asserted that this provided him with an absolute right to resign from the force. That section provides as follows:

(2) a reference in this Constitution to a power to make appointment to a public office includes a reference to

(a) a power to make appointments on promotion and transfer to the office and

(b) a power to appoint a person to act in the office while it is vacant or its holder is unable to perform the functions of the office.

Lt. Colonel Tarakinikini probably meant to refer to subsection 4 which provides:

> ***"a person who has been appointed to an office established by this constitution may resign from the office by notice in writing signed by him or her addressed to the personnel authority by whom he or she was appointed and the resignation takes effect (a) at the time or on the date specified in the notice or (b) when the notice is received by the personnel authority to whom it is addressed whichever is the later".***

The legal advisers to Lt. Colonel Tarakinikini however indicated to the Commander that his application was made under the provisions of regulation 21 to which reference has already been made. That regulation clearly contemplates that resignation is an option open to an officer holding a commission in the forces but that resignation must be made in a particular way and the decision as to whether or not it is to be accepted is one to be made by the President. In view of the inappropriateness of a serving officer merely being released by the action of forwarding a resignation the regulation must mean that the procedures which it contemplates are to be followed and that the resignation cannot take effect until such time as it has been accepted by the President.

The first point which arises is a procedural one.

The appellant draws attention to the fact that the regulation requires a resignation to be considered by and commented on by the commanding officer of the officer who wishes to resign his commission. The commanding officer must forward it on to the Commander, whose obligation it is to submit it to the President. In both cases it can be assumed that information will be forwarded which will enable a decision to be made.

The decision must reflect the circumstances. It is plain that bearing in mind the history that a serving officer may not resign without permission and the wording of the regulation the decision is not one which is automatic.

In such case the person making the decision must be provided with the necessary information to enable the decision to be made and to be one which will not impede the effectiveness of the armed forces. It is no doubt for that reason that the regulation contemplates that the resignation will be forwarded through the chain of command.

This particular point was not dealt with by the judge in the high court who thought it enough that the resignation had arrived in the hands of the commander whose obligation it was to forward it on to the President. No doubt in the case of senior officers of whom Lt. Colonel Tararakinikini was plainly one the Commander will already be well aware of the position they hold and the effect on the armed forces of a resignation being accepted, but this cannot of itself justify moving outside the chain of command imposed by the regulation. A chain of command is an important matter in the armed forces and this is reinforced by the necessity for a considered decision to be given in the case of the resignation of a commissioned officer. There can be no doubt therefore that under the regulation the letter of resignation ought to have been forwarded to Lt. Colonel Tarakinikini's commanding officer who was Lt. Colonel Waqavakatoga. Since this was not done it is the appellant's contention that the regulation was not complied with and accordingly Lt. Colonel Tarakinikini was not and is not entitled to have the first letter of resignation referred to the President.

The problems have largely arisen in this case because the procedures contemplated by regulation 21 were not followed in respect of the first letter and consideration of that obscured the fact that the second letter did result in the procedures contemplated by regulation 21 being followed. The confusion

occasioned by two resignation procedures being extant at the one time has led to most of the difficulties in this case.

Lt. Colonel Tarakinikini in his first letter indicated at least an intention to resign but what should have been a relatively straight forward exercise was complicated by him including in the letter a great deal of material some of which was in context critical of the Commander to whom he addressed his letter. He further complicated the situation by addressing his letter to the Commander which delayed the procedures contemplated by regulation 21 since the letter would have had to be passed on to his commanding officer to obtain any comments relevant under the provisions of regulation 21.

The response of the Commander to this letter referred to delay in implementing the application and a comment at the conclusion of the letter which was construed as being a refusal to grant the resignation.

Subsequently Lt. Colonel Tarakinikini wrote a further letter again indicating a wish to resign and again forwarded it directly to the Commander. The procedure adopted in respect of this letter was different. The Acting Commander referred it to Lt. Colonel Tarakinikini's commanding officer and the commanding officer in due course forwarded it on with comments to the Acting Commander. The Commander then forwarded it on to the President who has acknowledged receipt. The President has not so far made any decision with respect to the request to resign and we were informed that this followed from the fact that he considered it undesirable to do so until the views of this court were known.

The Judge in the Court below considered first whether or not the first letter from Lt. Colonel Tarakinikini could properly be categorised as an application to resign in terms of regulation 21. He no doubt approached the matter in this way as it seems to have been argued before him at some length that the document was not a resignation at all, but no more than an indication that an application for

resignation would be made. The Judge came to the conclusion that it was properly to be categorised as an application to resign and accordingly he then concluded that it was the obligation of the Commander to forward it on immediately to the President with such comments as were appropriate under the provisions of regulation 21. The Judge therefore did not find it necessary to comment on the second application the procedure in respect of which could not be criticised and was not criticised before us.

The Judge did not refer to the fact that the procedure contemplated by Regulation 21 had not been followed, in that no comments had been obtained from the commanding officer. This is not in our view merely a matter of form. The regulation plainly contemplates that the commanding officer should have an opportunity to put forward material that may be relevant in considering whether or not the resignation should be permitted. We note also the submission made by counsel that the Commander could not have been expected in the circumstances of this case to merely forward on to the commanding officer the original letter as he did with the second letter because of the material it contained which was inappropriate in the light of the personal criticism it contained.

The Judge also considered it appropriate to rule that the response of the Commander to the first letter in so far as it indicated that the application was being declined was not within the parameters of regulation 21 because such a decision was a matter for the President. It was because of that conclusion that the Judge issued an order for certiorari in respect of what he saw as a decision which the Commander was not empowered to make.

There has been no criticism of the procedures adopted in respect of the second letter other than perhaps by implication. That relates to the observation that investigation of the alleged conduct of Lt. Colonel Tarakinikini is not a valid reason for refusing to accept the resignation.

We should make it clear we do not necessarily concur with the Judge in this conclusion. The material which the Commander makes available to the President must reflect all matters of concern to the Commander of the armed forces and will include the existence of material which may relate to conduct affecting the armed forces and their responsibilities to the State which it is appropriate to draw to the attention of the President.

In view of the fact that the procedures contemplated by regulation 21 are now, it is conceded, being followed in that there has been an opportunity for the commanding officer to comment and the application has with those comments been forwarded to the Commander and then in due course to the President as contemplated by the regulation it might be possible for us to conclude that it is unnecessary to consider certain other questions which were raised in connection with this appeal.

In particular we refer to the contention put forward on behalf of the appellant that regulation 21 has been at least amended and perhaps replaced by the provisions which appear in section 112 of the constitution considered in the light of the provisions of section 194.

This contention proceeds from the fact that the constitutional provisions are subsequent to those of regulation 21 in the light of which it must be considered.

Under the provisions of section 194 the power conferred on the Commander under section 112 to remove an officer is interpreted as including a power to permit a retirement from office.

It was accordingly argued that the Commander in the exercise of those powers is now entitled to make a decision which previously was the province of the President or that the President must endorse the views or decision of the Commander.

In the circumstances of this case we are prepared to consider that the question is not hypothetical since it arises in connection with the first application and since in any event it is important to the Commander and to RFMF to know the way in which questions of resignation must be dealt with.

Counsel argued that the powers conferred upon the Commander under section 112 of the constitution as interpreted by section 194(5) of the constitution were sufficient to allow the Commander to make decisions with regard to a submitted resignation or to delay forwarding the application to the President regardless of the provisions of regulation 21 which was now to be read as subject to the constitutional provisions.

We do not think that there is any necessary conflict between the constitutional provisions and the provisions of regulation 21.

Section 112(3) of the Constitution, as we noted, provides that the Commander of the Republic of the Fiji Military Forces is responsible, inter alia, for making appointments of members of the forces and for removing members from the forces. In the submission of counsel for the first appellant, s.112(3) has to be read in conjunction with s.194(5). This section, so far as relevant, provides that a reference in the constitution to power to remove a person from a public office includes a reference to a power to require or permit the person to retire from office. "Public office" is defined in s.194(1) of the constitution. There are eight lettered paragraphs contained in the definition. The definition is exhaustive. Only two of these paragraphs could be relevant here, para (b) and para (d). If para (b) is applicable, the office must be one in respect of which the Constitution makes provision.

Section 112(3) is not dealing with an office in respect of which the Constitution makes provision. Section 112(3) speaks only of appointments to and removals from the forces. The section is not referring only to those members of the forces who are officers. It is referring to other ranks as well. It is difficult to see how

in those circumstances the section could be said to apply to an office in respect of which the Constitution make provision.

Similarly it is difficult to see how s.112(3) could be referring to an office in a state service, the words of para (d) of "public office".. For this to apply it would have to be concluded that every member of the armed forces held an office in a state service. Certainly such a person is a member of a state service but it is difficult to see how that person could be the holder of an office in that service.

In all those circumstances we have reached the conclusion that section 112(3) is not affected by section 194(5). We think that conclusion is a practical one. It means that the longstanding practice of officers being appointed by the President by commission continues under the new Constitution. Officers who are appointed will receive commissions in the armed forces. Regulation 21 which has been in force for a considerable time will continue to operate it as has done in the past and the position will remain certain. If we were to accept the submission made by counsel for the first respondent, it would seem to us that a degree of uncertainty would follow because it would be a question whether appointments and removals should any longer be made by the President, however formally. It seems to us that the theme of the provisions of the Constitution is to confer responsibility for the forces on the Commander. It seems that he will have a large measure of control over who is appointed to those forces and who is removed from there. But ultimately it will be for the President, usually on the advice of the Commander, to make the actual appointment or permit a retirement in a given case.

In the light of those conclusions we now consider the appeal in this case.

First the Judge granted a declaration in terms of the first request for relief sought by Lt. Colonel Tarakinikini that the decision of the first respondent dated the 12th of March 2002 purporting not to approve the applicant's notice of resignation was null and void and of no effect.

The order made in the High Court accepted that the first letter initiated the procedure required by regulation 21. The Judge no doubt came to that conclusion because it seems to have been argued at length before him that the first letter was no more than an indication of an intention to resign rather than a resignation. Having rightly rejected that submission the Judge went on to consider whether what he categorised as a resignation had been properly dealt with in terms of the regulation. Because of that argument the attention of the Judge was understandably concentrated on the first letter of resignation to the exclusion of the second letter of resignation. Leaving aside the question of whether or not the first letter was intended as a resignation (a subject on which we agree with the Judge in the High Court) there are other considerations which have a bearing on whether or not the procedures of regulation 21 were set in motion by it. Regulation 21 contemplates that the application will be forwarded by the commanding officer to the Commander. That contemplates that the application will either be made to the commanding officer or will find its way to the commanding officer who forwards it on to the Commander before any action is required from the Commander. We agree that it is possible for the application to find its way to the commanding officer other than by a direct submission from the applicant, (that is what happened in the case of the second letter) but there is nothing to require the Commander to take any action until such time as he has received the application from the commanding officer with such comments as the commanding officer considers appropriate in terms of regulation 21.

Since the first letter never found its way to the commanding officer the procedures were never set in train and we note that there were reasons why it may have not been appropriate for the Commander to send the first letter to the commanding officer bearing in mind the contentious material contained in the application. It was not a mere request for the resignation to be considered.

In the event whatever the consequences of the correspondence which occurred with respect to the first letter this was all overtaken by the second letter

which was submitted by the Commander to the commanding officer. Having been received back with comments from the commanding officer it was then forwarded by the Commander to the President as contemplated by regulation 21.

In those circumstances we cannot see that there was a need for an order quashing the decision of the Commander with respect to the first letter since what occurred was in relation to an attempt to resign which had never reached the stage where any decision was required, whatever the Commander may have purported to do.

Nor was there any need for an order for certiorari as the procedures contemplated by regulation 21 were complied with in respect of the second letter. Certiorari was not appropriate where the preceding formality of reference to the commanding officer had not been complied with.

We cannot however leave the matter there. In his judgment the Judge in the circumstances as they were argued before him expressed the view that the Commander had no right to delay forwarding the application for resignation to the President on the ground that another proceeding investigating the conduct of the applicant had not been completed. He considered any decision to delay forwarding the application would be subject to examination as to whether or not it complied with the rules of natural justice.

The question of the application of the rules of natural justice to decisions relating to the conduct of the armed forces and the relationship of persons within those forces was not argued before us and we do not wish to comment upon it in the absence of such submissions and in a situation which has in the circumstances of this case become hypothetical since the Commander has forwarded the application to the President. We note however that any such argument must take into account the special nature of the armed forces of the State and also questions of security.

In any event the nature of the material including recommendations forwarded by the Commander to the President and the nature of the decision made by the President including whether or not he is required to make that decision on the basis of recommendation of the Commander or of any other relevant person or body is not raised by these proceedings since there is no evidence regarding such matters in relation to the second letter. We do not comment upon it other than to say it is by no means clear to us that the Commander cannot in recommending an outcome to the President indicate a concern that investigations which may have some relevance to the granting or declining of the application have not been completed.

The Judge was asked, and in this Court we were asked, to make a declaration that the Commander was estopped from denying that Lt. Colonel Tarakinikini had properly been cleared of all allegations during the investigations conducted before his departure to the United States to take up his post with the United Nations.

This declaration was sought on the basis that a copy letter was produced purporting to be from the Prime Minister to the United Nations to this effect. The letter was exhibited to an affidavit of Lt. Colonel Tarakinikini and was a copy purporting to be signed by the Prime Minister and addressed to the Secretary General of the United Nations. In the absence of more formal proof we could not be justified in granting the declaration sought. That would also have to be the subject of contestable evidence not at this stage before the court. We are also not clear that these proceedings are an appropriate vehicle for any such declaration but we do not express any concluded opinion on this aspect of the matter.

In his original application the applicant sought an order for mandamus requiring the Commander to transmit his resignation to the President. No doubt this referred to the original letter. In the circumstances of this case however his

application for resignation in the form of the second letter has been referred and there is no justification for the issue of a mandamus.

The applicant Lt. Colonel Tarakinikini also sought damages. In his decision the Judge in the High Court concluded that Lt. Colonel Tarakinikini had a right to claim damages for the tort of misfeasance in a public office.

Resolution of such a claim and entitlement to damages depends upon the filing of pleadings which define precisely the basis of the claim. There are no such pleadings in this case. The award of damages also depends upon the establishment of the right to recover them by evidence which has been the subject of appropriate testing.

There is no material in the case as recorded which could provide a justification for the granting of damages in respect of the tort referred to bearing in mind its establishment depends upon a proof of malice appropriate to the allegations concerned. It is wholly inappropriate for any such exercise to be conducted on the basis of affidavits.

Lt. Colonel Tarakinikini also sought an order for costs. In the circumstances of this case costs must depend upon a final outcome and it is inappropriate for costs at first instance to be assessed at this stage.

1. The appeal is therefore allowed and the order quashing the decision of the Commander, the first appellant, is itself quashed there being now no need for any such order.

2. The order for certiorari is quashed.

3. There is a direction that outstanding matters be remitted to the High Court with a direction that on the present state of the proceedings no

order for damages can be made and that no such order can be made in the absence of pleadings defining the basis of the claim and a hearing to resolve contested facts. Consideration will need to be given by counsel as to whether or not the present proceedings form an appropriate vehicle for the resolution of outstanding issues with regard to damages.

In the circumstances we do not consider that this is an appropriate case to order payment of costs in this Court.

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**Sheppard, JA**

FIJI COURT OF APPEAL

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**Gallen, JA**

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**Ellis, JA**

Solicitors:

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**Office of the Solicitor General, Suva for 2nd and 3rd Appellants**
**Messrs Sam Matawalu & Associates, Suva for the Respondent**