CHANDRIKA PRASAD v REPUBLIC OF FIJI & ATTORNEY-GENERAL (No. 5)

High Court Civil Jurisdiction
Gates, J
20 December, 2000
HBC 0217/00L

Stay of execution (2) pending appeal against declaratory orders of Judgment — A-G's locus standi to pursue appeal on behalf of interim government discussed — role of amicus curiae in assisting the court where competing regimes — Court of Appeal (Cap 12) s20(1)(e); High Court Rules O.15 r.18, O.41 r.1(8), r. 9(2)

The Attorney General for the interim government sought a stay of the judgment of 15 November, 2000 in which declaratory orders were made.

Held – (1) The court will require the assistance of *amicus curiae* where the state is a party and rival governments claim to represent the State. Attorney General of interim government allowed standing for the purposes of the stay application.

(2) Threshold tests on which application for stay will be considered: a successful litigant should not lightly be deprived of the fruits of his litigation. The applicant must show that special circumstances exist as to why a stay should now be imposed, whether state will face economic ruin if stay were not granted, whether the appeal would be rendered nugatory if stay were not granted, whether there is some prospect of success or whether grounds are destined to fail or obviously merely for purposes of delay, balance of justice and convenience.

(3) The court has no jurisdiction to stay the Constitution, the continuation of which is the essence of the declaratory orders made. The onus on those seeking to prove abrogation must bring cogent proof to court.

Application for stay pending appeal refused.

Cases referred to in Decision

Appl ***Lynotype-Hell Finance Limited v Baker*** [1992] 4 All ER 887
Appl ***Sewing Machines Rentals v Wilson*** [1975] 3 All ER 553
Appl ***In Re Kim Industries Ltd*** [2000] HBF0036/97L 7 July 2000
Appl ***State v H.E. The President & Ors ex parte I.I.A Khan*** [2000] HBJ007/00L
Cons ***Uganda v Commissioner of Prisons, exp Matovu*** [1966] E.A. 514
Cons ***Jilani v Government of Punjab*** [1972] P.L.D. (S.C.) 139
Cons ***Bhutto v Chief of the Army Staff and Anor***. [1977] PLD SC.1
Cons ***Mitchell & Ors v DPP & Anor*** [1986] LRC (Const.) 35
Cons ***Makenete v Lekhanya*** [1993] 3 LRC 13.
Foll ***The Registration Officer of the Suva City Fijian Urban Constituency v James Michael Ah Koy*** [1994] ABU 23/92 5 January, 1994.
Cons ***The Annot Lyle*** (1886) 11 P.D. 114
Cons ***Monk v Bartram*** [1891] 1 QB 346

Cons ***Attorney General v Emerson & Ors*** (1890) 24 QBD 56
Cons ***Winchester Cigarette Machinery Limited v Payne & Anor (No. 2)*** (1993) TLR 647
dist ***Atkins v Great Western Railway Co.*** (1886) 2 TLR 400
dist ***Barker v Lavery*** 14 QBD 769 (CA)

[Note: ref to in **Jokapeci Koroi & Anor. v Asesela Ravuvu & Ors** *[2001] HBC0007/01L Ruling of 10 January, 2001.]*

Anu Patel for the applicant/respondent
Savenaca Banuve and Janmai Udit for the respondents

20 December, 2000. **DECISION**

Gates, J

The Respondents have lodged an appeal against the judgment of this court on the originating summons, that judgment having been delivered on 15 November 2000. The Court of Appeal will now hear the appeal on 19th February 2001 and on succeeding days. The Respondents have filed a summons for stay of execution of the judgment pending the appeal. This was filed with the High Court on 20th November 2000 and an amended summons was filed the following day 21st November 2000. In these proceedings this is the 2nd such stay application pending appeal, the first was against two interlocutory orders. The present stay application is against the judgment on the substantive originating motion. For convenience I shall refer to this as stay application No. 2.

The application for stay is now made pursuant to section 20 (1) (e) of the Court of Appeal Act Cap. 2 [as amended by Section 9 of the Court of Appeal (Amendment) Act 1998], and it is made first to the High Court in accordance with Rule 26 (3) of the Court of Appeal Rules. Rule 25 dealing with the necessity for obtaining an order of stay has been repealed [see Court of Appeal (Amendment) Rules 1999 Legal Notice No. 150 P. 308], though by virtue of section 20 of the Act and Rule 34 this does not obviate the need for obtaining an order of stay from either the High Court or the Court of Appeal.

The Affidavits

The Respondents have filed 2 affidavits in support of their summons for stay, those of Alipate Qetaki the current Attorney-General:

1. sworn on 18 November 2000, and

2. sworn on 27 November 2000

The original applicant filed one affidavit in opposition to the stay, which he deposed to himself, swearing to it on 27 November 2000.

None of these affidavits comply with the High Court Rules, in that they have not been indorsed in accordance with Order 41 r. 9(2). That rule states:

> (2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court." (underlining added)

I have dealt with this irregularity, a breach of a mandatory provision, in two previous rulings. The first was a preliminary ruling **In the Matter of Kim Industries Limited** (unreported) Lautoka High Court Winding Up No. HBF0036/99L 7 July 2000 Pages 1-4; the second was in **The State v. H.E. The President and 4 Others Ex parte I.I.A. Khan** (unreported) Lautoka High Court Judicial Review No. HBJ007/2000L 12 October 2000 a ruling on transfer. The issue was fully canvassed in the **Kim Industries** case and referred to again in **H.E. The President and 4 Others**, in which the Attorney-General was a party, and on which the learned Attorney made comments to the Press concerning the decision. It can be assumed therefore that the Attorney-General had read the decision and had seen my comments on mandatory indorsement. Similarly counsel for the Applicant should have known of the requirement.

Order 41 rule 1 (8) provides:

> "Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn."

From this it is clear that the indorsement requirement of Order 41, rule 9(2) is intended to be something over and above the requirements of Order 41 r. 1(8), that is something over and above the signature of the deponent, the completion of the jurat, and the signature of the person before whom the affidavit is sworn. That is probably one of the reasons why the indorsement note has come to be placed on the backsheet of the affidavit. However I grant the necessary leave pursuant to Order 41 rule 4 for all 3 affidavits to be used in evidence in these proceedings.

In his first affidavit for the Respondents, Mr. Qetaki exhibits a copy of the Respondents Notice of Appeal filed on 17 November 2000 containing the Appellants' grounds. He deposes as to the initial timetable now set for the appeal in its interlocutory stages. He says he will pursue the appeal with "all due dispatch". This was somewhat in contrast to his reported comments to the Press, cuttings of which were exhibited in the Applicant's affidavit. The Attorney is reported as saying he considered that the rulings by the Court of Appeal would not be delivered until 2003 "so the case really is futile".

Various other press clippings with reported comments of the Attorney were also exhibited. These comments were more in the nature of bravado than of contempt, albeit inappropriate in themselves coming from a litigant in a pending matter, and even more so coming from no less than the Attorney-General. However delay would appear no longer to be an issue since a timetable has been set by the Court of Appeal for the expeditious disposal of this appeal.

Mr. Qetaki further deposes that "the appeal has merits, and there is a real prospect of the appeal being successful. If stay is not granted, the appeals will be rendered nugatory." A similar sentiment that the stay "is absolutely necessary to not render the appeal I filed on 17 November 2000 nugatory" appears in Mr. Qetaki's second affidavit. No facts are placed before the Court providing foundation as to why the State's appeal would be rendered nugatory. The court is left to make its own deductions in this regard from the facts it can find.

Has the present Attorney-General standing to pursue the Appeal?

In a preliminary objection Mr. Patel posed two questions: *a*

1. Is Mr. Qetaki deposing on behalf of the peoples of Fiji or is he doing so as Attorney-General in and for the interim administration?
2. Is the application for stay being made by the interim government, or is it by the State, the Republic of Fiji?

Mr. Banuve answered as follows: *b*

1. The Attorney-General is representing and deposing for the interim government which is discharging all the powers of government for this country, deposing for the government in effective control.
2. The application for stay is made by the Government of the day. *c*

At the originating summons hearing, a line of argument was put forward by the Attorney's counsel which essentially urged the legitimacy and legality of the interim administration. Though the locus standi of the applicant was challenged, no challenge was brought against the standing and appropriateness of the interim Attorney-General in appearing to defend the action for the State. This raises an interesting argument on standing, which from my reading of the constitutional *d* cases internationally, has not been raised before. It is a question I had posed in another constitutional case but it is not one on which an answer has yet been sought or ruled upon. The question amounts to this, who should appear for the State in such a case, the deposed Attorney-General, the usurping Attorney-General, or less partisan representatives (if they are genuinely permitted the freedom to be such) such as the Solicitor-General and members of his chambers, or an outside body such as the Fiji Law Society or the Human Rights Commission. Who is to *e* represent the State when competing rulers vie over political sovereignty?

Where power is usurped in a coup d'etat, not every public servant will be strong enough to withstand pressures from the usurpers and be able to maintain constitutional and professional independence. The court however is expected to remain aloof from the challenges to government and to rule independently, yet in order to do so judicially, effectively, and thoroughly, it must have the assistance *f* of something more than the arguments of the representatives of one only, or both of, the competing powers. This may be only a concomitant issue to Mr. Patel's preliminary challenge. His argument on the stay application goes further.

He says the appeal is being pursued not by the litigant, the State, but by one of the competing governments, the interim administration. That government he says, is not a party to the action, and that it has no locus to pursue the appeal. *g* That argument, if carried forward, would suggest that the deposed government in these proceedings similarly could not be heard. Till the appeal is determined there is a vacancy, he says, in the office of the Attorney-General. In these circumstances the case for the State should have been presented by the Solicitor-General acting independently of the Attorney-General for the interim administration.

What has been the attitude of the courts to representation for the State where there are competing regimes? None of the factual situations in earlier cases quite matches Fiji's present circumstances. In **Uganda v. Commissioner of Prisons,**

ex parte Matovu [1966] E.A. 514 the new Attorney-General appearing with the Solicitor-General was described by Sir Udo Udoma CJ at 527D as vigorously maintaining that the 1966 Constitution (as opposed to the 1962 Independence Constitution) was the legally valid Constitution after a successful Revolution. However the new Constitution had been put before, and passed by resolution of, the National Assembly, and though in law a revolution had taken place there had been swift democratic ratification also. The stance adopted by the Attorney-General was not questioned and the court stated at 539f

> "We are satisfied and find as a fact that the new Constitution has been accepted by the people of Uganda and that it has been firmly established throughout the country, the changes introduced therein having been implemented without opposition, as there is not before us any evidence to the contrary."

All the affidavits filed on behalf of the State consisted of those sworn to by Permanent Secretaries, Senior Officers of the Police or Armed Forces, the Attorney-General and the Secretary to Cabinet. These deponents were hardly representatives of the ordinary people of Uganda. Had the Constitution been seriously challenged, the court might have seen a need for less vigorous representatives to appear and to conduct the case for the State in order that the court might decide the issue of whether or not the revolution had been successful. In **Jilani v. Government of Punjab** [1972] P.L.D. (S.C.) 139 the Supreme Court of Pakistan had the assistance of learned Counsel as a*micus curiae* or as friend of the court in addition to Counsel for the Appellants and Counsel for the Attorney-General. At 182 Hamoodur Rahman CJ said:

> "The basic concept underlying this unalterable principle of sovereignty is that the entire body politic becomes a trustee for the discharge of sovereign functions. Since in a complex society every citizen cannot personally participate in the performance of the trust, the body politic appoints State functionaries to discharge these functions on its behalf and for its benefit, and has the right to remove the functionary so appointed by it if he goes against the law of the legal sovereign, or commits any other breach of trust or fails to discharge his obligations under a trust."

His Lordship's observations on trusteeship for the body politic has parallels for the representation of the State in court by advocates who must act with the neutrality of trustees towards the State's beneficiaries. In **Jilani's** case the *amicus curiae* tended to argue the case along similar lines to that of Counsel for the Appellants, that is in opposition to the Attorney-General's submission favouring a successful revolution.

Similarly in **Bhutto v. Chief of the Army Staff and Anor.** [1977] PLD SC.1; PLD 1977 SC 670 Counsel for the Punjab and the Attorney-General for Pakistan both urged the court to say usurpation of State power had not occurred at the hands of the new ruler, the Chief of the Army Staff, but that any actions he had carried out had been intended to oust the usurper (Bhutto) who had seized power in a massively rigged election. The Attorney-General largely agreed with counsel for the Punjab, though he felt constrained by the arguments he had placed before the court previously in **Jilani's** case where he had appeared as

amicus curiae. He urged the doctrine of necessity and asked the court to accept the Laws (Continuance in Force) Order 1977 as a super-constitutional document now regulating the governance of the country. There was no amicus curiae to assist the court in this case. Similarly there was none before the Court of Appeal in **Mitchell & Others v. DPP & Anor.** [1986] LRC (Const.) 35 though this case did not concern competing regimes, rather an Act passed by the former revolutionary regime which had subsequently been confirmed and validated by Parliament.

There was no *amicus curiae* either in **Makenete v. Lekhanya** [1993] 3 LRC 13. A former Minister of Health had been removed from office by the Chairman of the Military Council. The Deputy Attorney-General argued there had been a successful coup d'etat. Ackermann JA concluded at 65d:

> "But if, applying the correct legal test for recognition, the court is none the less satisfied that the government in question has discharged the onus of proving all the requisites (in regard to effectiveness, acceptance, duration and so forth) for being recognised as lawful, I cannot see how a court can withhold such recognition."

It is not clear from the report whether there was still a government in waiting. There is real doubt however over the force and effectiveness of the Appellant's line of challenge brought to bear on Cullinan CJ's decision in the High Court. This emerges from there being only one ground of appeal namely that the High Court had erred in holding that there had been a coup d'etat. Something more, surely, was required. Indeed the Court of Appeal listened to wider arguments.

In conclusion, the court will generally require the assistance of *amicus curiae* where the State is a party and rival governments claim to represent the State. On reflection an *amicus* would have been appropriate in this case. The Human Rights Commission has already given some assistance to the Applicant in this action and so might not, at least for this matter, be seen as an appropriately neutral friend of the court.

However it is unlikely to be shut out by a court. But the Fiji Law Society could have been approached to provide less partisan arguments as *amicus*. I would probably have allowed counsel to appear for the deposed government also, since at the time the action was filed the incarceration of the Cabinet and Government MPs which had occurred some 6 weeks beforehand still persisted, and the interim administration had not yet come into being.

Whether the interim government is entitled to take this matter on appeal on behalf of the State as opposed to, on behalf of itself the interim administration, is not a matter on which this court can rule in a stay application. Locus arguments and rights of audience could have been entertained at the stage of the hearing of the originating summons. That issue will have to be addressed to the Court of Appeal, and if it were thought that taxpayers funds had not been committed to State business as opposed to political business that would be a matter for the Auditor-General or for another suit.

I decline to deny the interim Attorney-General standing, or deny him direction or control of the appeal on behalf of the State for the purposes of this stay application.

Principles for Stay

a It is well known that the litigant once successful should not lightly be deprived of the fruits of his successful litigation: **The Annot Lyle** (1886) 11 P.D. 114 at 116 CA; **Monk v. Bartram** [1891] 1 QB 346. The power of the Court to grant a stay is discretionary: **The Attorney-General v. Emerson & Others** (1890) 24 QBD 56; and it is an unfettered discretion **Winchester Cigarette Machinery Ltd. v. Payne and Anor. (No.2)** (1993) TLR 647 at 648.

b If a stay was not granted by the Court at the time of making the order now appealed against, the applicant must show that special circumstances exist as to why a stay should now be imposed, and the successful litigant in effect held back from his remedy; **Tuck v. Southern Counties Deposit Bank** (1889) 42 Ch.D. 471 at 478 per Kay J; **Atkins v. G.W. Railway** (1886) 2 TLR 400; **Barker v. Lavery** (1885)) 14 QBD 769. In the **Winchester Cigarette** case (supra) at 648 Lord Justice Hobhouse put it "The appellant had to show some special *c* circumstances which took the case out of the ordinary.

There is no suggestion that as a result of these declaratory orders the State will face economic ruin if the stay were not granted **Lynotype-Hell Finance Limited v. Baker** [1992] 4 All ER 887. Nor is this a case where an award of money is to be honoured and paid over by the State which it has no hope of recovering if successful on appeal: **Atkins v. Great Western Railway Co.** (1886) *d* 2 TLR 400; **Barker v. Lavery** (1885) 14 QBD 769, CA.

In the **Winchester Cigarette** case (supra) at 648 Lord Justice Ralph Gibson said the modern approach to stay was:

> "...a matter of common sense and a balance of advantage.
>
> But in holding any such balance, full and proper weight had to be given by the court to the starting principle that there *e* had to be a good reason for depriving a plaintiff from obtaining the fruits of a judgment."

I shall deal with the grounds of appeal later as also the question of whether the appeal would be rendered nugatory if the stay were not granted.

Orders to be Stayed

f The declaratory orders of the court in the judgment were as follows:

1. The attempted coup of May 19th was unsuccessful.
2. The declaration of the State of Emergency by the President Ratu Sir Kamisese Mara in the circumstances then facing the nation, though not strictly proclaimed within the terms of the Constitution, is hereby granted validity *ab initio* under the doctrine of necessity.

g

3. The revocation of the 1997 Constitution was not made within the doctrine of necessity and such revocation was unconstitutional and of no effect. The 1997 Constitution is the supreme and extant law of Fiji today.
4. The Parliament of Fiji, consisting of the President, the Senate, and the House of Representatives, is still in being. Its incumbents on and prior to 19 May 2000 still hold office, that is Ratu Sir Kamisese Mara, who had stepped aside, and who remains President as originally

appointed by the Bose Levu Vakaturaga (Great Council of Chiefs); the Senators are still Members of the Senate; the elected Members of Parliament are still Members of the House of Representatives. The status quo is restored. Parliament should be summoned by the President at his discretion but as soon as practicable.

5. Meanwhile owing to uncertainty over the status of the Government, it will remain for the President to appoint as soon as possible as Prime Minister, the member of the House of Representatives who in the President's opinion can form a government that has the confidence of the House of Representatives pursuant to sections 47 and 98 of the Constitution, and that government shall be the government of Fiji.

It is noteworthy that none of the Respondents' grounds of appeal challenge Orders 1 and 2.

Grounds of Appeal

They are as follows:

1. THAT the learned Judge erred in law in holding that the Respondent had locus standi to institute proceedings challenging the validity of the Constitution Amendment Act 1997.
2. THAT the learned Judge erred in law in not hearing and disposing the Appellants interlocutory application under Order 18 Rule 18 of HIGH COURT RULES 1988 before proceeding to hear the Originating Summons.
3. THAT the learned Judge erred in law and fact in holding that the Constitution Amendment Act 1997 is still the supreme and extant law of Fiji
4. THAT the learned Judge erred in law and fact that the Parliament of Fiji, consisting of the President, the Senate and the House of Representative is still in being.
5. THAT the learned Judge erred in law and fact in holding that Ratu Sir Kamisese Mara is still the President of Fiji.

Of these grounds I doubt if Ground 2 can be argued. But Grounds 1, and Grounds 3, 4 and 5 are all capable of argument before an appeal court. I do not consider it necessary to apply strictly the threshold tests, that is, whether there is "some prospect of success" **Linotype-Hell** (supra) at 888g, or whether the grounds are obviously destined to fail or obviously merely for purposes of delay" **Sewing Machines Rentals v. Wilson** [1975] 3 All ER 553 at 555b or whether they are "wholly unmeritorious or wholly unlikely to succeed" (555c). The plain fact is that this case is of such constitutional importance that no impediment should be placed in its upward path to the Appeal Court for hearing and decision. The grounds for the most part would seem to fulfil the threshold tests and for that reason a stay can be considered.

Can Declaratory Orders be Stayed?

The High Court Rules deal with declaratory orders in the following way. Order 15 r. 18:

> "No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed."

A declaratory judgment is said to be:

> "A judgment which conclusively declares the pre-existing rights of the litigants without the appendage of any coercive decree" (see Osborne's Concise Law Dictionary 6th Edit.)

A declaration is not only "a formal statement intended to create, preserve, assert or testify to a right", it is also in this context "the decision of the court or a judge on a question of law or rights." (Osborne at 112). In spite of indications to the contrary, the court when granting declaratory orders authoritatively gives its imprimatur for a certain interpretation of an act or document declaring that interpretation to be correct. In doing so the court does not make laws or create rights. By its declaration the court pronounces upon rights which have already been in existence, some of long standing. (see P.W. Young on Declaratory Orders 2nd Edit.). On the question of stay the learned author (at para. 2408) has this to say:

> "Because of this, if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings. Thus, if it is held that the decision of a licensing authority is void and accordingly the licences issued are null and void, there is no procedure whereby the court can validate those licences pending the hearing of an appeal."

On declaratory orders 3, 4, and 5 I ruled upon the Constitution. The Constitution had a set procedural path for change. It was common ground that that was not followed. The doctrine of necessity did not apply to the Constitution's amendment (Order 3). It followed that all of the persons that comprised the Parliament of Fiji on or about 19th May 2000, H.E. The President, the Senate and the House of Representatives by virtue of the Constitution were still the lawful members of that Parliament (Order 4). The machinery was in tact for the President to appoint from that Parliament the member of the House of Representatives who in His Excellency's opinion could form a government that has the confidence of the House of Representatives, and that government shall be the government of Fiji (Order 5). These are no more than declarations as to rights and procedures under the Constitution, which affect the democratic rights of all citizens and inhabitants of Fiji.

The law having been in existence prior to the action and judgment, the court has jurisdiction to make declarations as to the interpretation of that law. The courts are not the Parliament and have no jurisdiction to suspend the operation of Acts of Parliament save in a very narrow jurisdiction which I shall deal with below. In **The Registration Officer for the Suva City Fijian Urban Constituency v. James Michael Ah Koy** (unreported) Fiji Court of Appeal Civil Appeal No. 23 of 1992 5th January 1994 Sir Moti Tikaram, then Acting President of the Court said at 8:

> "Whilst, therefore, it is true that conceptually there can be no stay order against a declaratory order nevertheless every such order should be considered in the light of its own nature and the facts and circumstances surrounding it. Traditionally it has been the invariable practice for the state, public officers and public authorities to take cognizance of declaratory orders and act accordingly without the necessity of any additional coercive orders."

In this stay application though, the single judge had no hesitation in refusing a stay pending appeal to the Supreme Court after the Court of Appeal had ruled that Mr. Ah Koy was entitled to the 2 declarations he sought. They were, that he was entitled to be registered on the roll of Fijians under section 41(2) of the Constitution and that he was entitled to be registered on the electoral roll for the Suva City Fijian Urban Constituency.

At page 9 of his decision Tikaram, Acting President, said:

> "Whilst the pending appeal undoubtedly involves a question of great public importance of a constitutional nature, the fact is that unless and until the Supreme Court overturns the Court of Appeal decision, that decision must stand and it binds the parties to the proceedings." (my underlining)

and further on :

> "Orderly functioning of democracy depends on the relevant authorities taking cognisance of and giving effect to Court Orders be they executive or declaratory in nature. Unless a case is made out to the contrary (and the onus is on the Applicant to show that exceptional grounds exist) the successful party must be allowed to enjoy the fruits of his success."

It is salutary to bear these principles in mind since they appear to have been forgotten. They derive from the above constitutional case put forward in argument by the Attorney's Counsel. In putting forward such a case on behalf of the Respondents, it is to be deduced that there is an acceptance by the Respondents of the rule of law, over and above mere personal interest.

Principles of Injunctive Relief

The court will try as far as possible to allow the litigant who is running a business and then displaced by another to carry on that business pending the determination of rights. The new claimant must wait outside as it were till the matter is resolved. The original occupant of longer standing suffers greater loss and disruption than the newcomer: **Carroll v. Tornado Ltd.** [1971] RPC 401; **Merchant-Adventurers Ltd. v. M. Grew & Co. Ltd.** [1971] 3 WLR 791 at 801. This approach to injunctive relief was referred to by Megarry J. in **Hounslow L.B.C. v. Twickenham G.D. Ltd.** [1971] 1 Ch. 233 at 268E:

> "Now in the present case, the status quo is that for a long while the contractor has been in occupation of the site. This is no case of someone forcibly entering the premises so that (as in Thompson v. Park [1944] K.B. 408) the status quo to be maintained is that which existed before the forcible entry."

Since Fiji has a rigid or inflexible Constitution (see judgment P.21) such Constitution would have to contain a specific section providing for suspension pending court interpretation. It has no such provision. The court would appear to have no jurisdiction conferred upon it therefore to take such a draconian step, namely to suspend the Supreme law.

What assistance is there in the reported cases? The two Canadian decisions cited by Mr. Banuve, **RJR-Macdonald Inc. v. Attorney-General of Canada** 111 DLR (4th) 385 and **Horsefield v. Registrar of Motor Vehicles** 118 CCC(3d) do not concern the validity of the Constitution. They deal with, in the former, a challenge to tobacco products legislation on the ground that it infringed the Canadian Charter of Rights and Freedoms; and in the latter, an administrative process provision in provincial legislation for the suspension of a driver's licence when the driver is found to have excessive alcohol in the blood was held inoperative as it was unconstitutional and offended against Section 7 of the Canadian Charter. The unchanging buttress for the rule of law in Canada, as it must surely be in Fiji, is the Constitution. Acts and Regulations may be found to be in conflict with the Constitution. Upon appeal the operation of a section of an Act or indeed all of the subsidiary legislation, whether it be the Administrative Drivers Licence Programme, the Traffic Regulations, or the Tobacco Products Control Act may, in appropriate cases, be stayed. In **R v. Secretary of State for Transport ex p. Factortame Ltd. (No.2)** (Case 213/89) [1991] 1 AC 603 H.L., the court was held to have power to make an order staying the operation of an Act of Parliament, in effect declaring it not to be effective until the outcome of a reference to the European Court of Justice, and to order an interim injunction. In a proper case a court may have to stay subsidiary legislation or in a rare case, an Act of Parliament. But there is no jurisdiction to stay the Constitution pending a final appellate ruling on interpretation. The validity and existence of the Constitution is the presumption. The onus is on those who seek to prove the opposite to bring to court cogent proof of the Constitution's abrogation. No assistance can be rendered to usurpers. They must reach the necessary thresholds with their evidence and establish their case.

Balance of Justice and Convenience

If a stay were granted it could be said that the Applicant living at the Girmit Centre Refugee Camp would suffer little loss till the appeal is determined. On the other hand, if a stay were not granted the State would be disrupted with the changes at the helm of government. Of course, the State has little interest in which government is in power. It is disinterested. It is non-partisan. It represents us all. However the discomfiture of the State should not weigh too heavily for at issue are fundamental rights and the Supreme law of the land, the dislocation of which could not be in the wider interest of the general public for whom the State stands.

The phrase "nugatory" was used by the Court of Appeal in **Wilson v. Church** [1879] 12 Ch.D 454. The headnote summarises the position taken by Cotton and Brett LJJs:

> "Where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the Court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the Court will not

> interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances."

I believe this matter is largely one way. The court has no jurisdiction to stay the Constitution, the continuance of which is the essence of the declaratory orders made. But in applying the principles of stay the balance of advantage lies with the original Applicant and those for whom he stands. Far greater disruption lies with not upholding the rule of law. On the other hand, if the State is to be governed by the interim administration, these ministers can all resume office as soon as the Appeal Court rules in their favour.

They are far fewer in number also than the Parliament they have replaced.

I decline to stay the declaratory orders and order costs to be paid by the original Respondents to the original Applicant in the sum of $500.

Application for Stay refused

Marie Chan