

**FIJI ISLANDS REVENUE AND CUSTOMS AUTHORITY v  
NEW ZEALAND PACIFIC TRAINING CENTRE LTD (ABU0034 of 2004)**

COURT OF APPEAL — CIVIL JURISDICTION

5 SCOTT, WOOD and FORD JJA

2, 11 November 2005

10 **Constitutional law — parliament — decree passed without parliament — High Court declared decree unconstitutional — Court of Appeal reversed High Court’s decision — whether decree constitutional — 1990 Constitution ss 8(1), 61, 62 — Constitution (Amendment) Act 1997 ss 45, 122(1), 175, 194(1), 195(1), 195(2)(e) — Value Added Tax Decree 1991.**

15 On 22 November 1991, the President of Fiji made the Value Added Tax Decree 1991 (the decree). There was no parliament at this time. In 1987, the 1970 Constitution was abrogated and the first general election held under the new 1990 Constitution had not yet taken place. The commencement date of the decree was 1 July 1992.

20 The Respondent educational institution (Respondent), failed to file VAT returns from 1999 to 2002 December. The Appellant sought a declaration in the High Court that the dispute between the parties should be referred to the VAT Tribunal (the tribunal) under s 51 of the decree. The High Court declared the decree unconstitutional. Neither party contested the decree’s constitutionality. The Court of Appeal reversed the High Court’s decision and declared the decree constitutional despite not being passed by the parliament. The Respondent applied for leave to appeal the Court of Appeal’s decision challenging the  
25 decree’s constitutionality.

**Held** — The constitutionality or otherwise of a decree was a matter of significant public importance. The other requirement before leave to appeal should be granted was whether it has been shown that there was some arguable ground for challenging the correctness of the judgment against which it is sought to appeal. The questions raised are wholly  
30 unarguable although of significant public importance.

The court stated in the case of Attorney-General v Marika Vuki Silimaibau that a decree not specifically repealed by s 195(1) of the Constitution (Amendment) Act 1997 (the 1997 Constitution) remained in force as if enacted or made pursuant to the 1997 Constitution. The decree, which was made by the President of Fiji on 22 November 1991, was not specifically repealed by the 1997 Constitution. Hence, the Court of Appeal’s  
35 decision was correct and the decree was constitutional.

Application dismissed.

**Cases referred to**

40 *Re Walton*; *Ex parte Reddish* (1877) 5 Ch D 882; *Marika Silimaibau and the National Farmers Union* (ABU 50/03; BV 04/16); *Maika Soqonaivi v State* [1998] FJCA 64; *R v Richards*; *Ex parte Fitzpatrick & Browne* (1955) 92 CLR 171; [1955] UKPCHCA 2, cited.

*Attorney-General v Marika Vuki Silimaibau* [2004] FJCA 17, explained.

45 *B. Solanki* for the Appellant

*S. Maharaj* for the Respondent

[1] **Scott, Wood and Ford JJA.** This is an application by the Respondent for leave to appeal to the Supreme Court. Section 122 (1) of the 1997 Constitution provides that this court may grant leave:  
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... on a question certified by it to be of significant public importance.

[2] The questions which the Respondent submits for certification are:

1. Whether the determination by the Fiji Court of Appeal is correct that the VAT Decree 1991 is constitutional and a valid law under the provisions of [the] Constitution (Amendment) Act 1997, despite not being passed by the Parliament.
2. Whether the determination by the Fiji Court of Appeal that the VAT Decree 1991 is constitutional and valid despite not being passed by the Parliament under the provisions of the Constitution (Amendment) Act 1997, including sections 45 and 175 is a correct determination.

[3] The two questions are effectively identical. The second merely supplies the references to two section numbers involved in the consideration of the issue.

[4] The facts are not in dispute and appear in detail in the judgment of this court published on 15 July 2005.

[5] The VAT (Value Added Tax) Decree 1991 (the decree) states that it was made by the President of Fiji on 22 November 1991. At this time Fiji was without a parliament. The 1970 Constitution was abrogated in 1987 and the first general election held under the new 1990 Constitution had not yet taken place. The commencement date of the decree was 1 July 1992.

[6] The Respondent, which is an educational institution, failed to file VAT returns for the period December 1999–December 2000. In due course, legal proceedings were commenced. These included a Notice of Motion filed by the Appellant seeking a declaration that the matters in dispute between the parties should be referred to the Value Added Tax Tribunal established by s 51 of the decree.

[7] In October 2004, the High Court (Byrne J) declared the decree to be unconstitutional. As pointed out by the Court of Appeal neither party to the proceedings in the High Court had in fact called the constitutionality of the decree into question.

[8] On appeal to the Court of Appeal the declaration of the High Court was set aside and the VAT decree declared constitutional.

[9] This was not the first time that the Court of Appeal reversed a finding by the High Court that a decree promulgated before the commencement of the 1990 Constitution was invalid. In *Attorney-General of Fiji and the Minister for the Sugar Industry v Marika Silimaibau and the National Farmers Union* (ABU 50/03; BV 04/16) the court explained that by virtue of ss 194(1) and 195(2)(e) such decrees, not being decrees specifically repealed by s 195(1) remain in force *as if enacted or made* pursuant to the 1997 Constitution.

[10] On this occasion the Court of Appeal observed that:

Despite the clear terms of [*Silimaibau*] the learned judge simply ignored it.

It also suggested that:

It is not easy to ascertain the basis upon which the learned judge held that the decree is unlawful .... The judgment is largely devoted to an attack on legislation by decree .... We do not deal with that issue because, with respect to his obviously strongly held views, it was not the issue in this case.

[11] The constitutionality or otherwise of a decree is clearly a matter of significant public importance. It is, however, settled that this is not the only question to be asked before leave to appeal should be granted. The second important matter which must be considered is whether it has been shown that

there is some arguable ground for challenging the correctness of the judgment against which it is sought to appeal (see for example, *Maika Soqonaivi v State* [1998] FJCA 64 and *R v Richards; Ex parte Fitzpatrick & Browne* (1955) 92 CLR 171; [1955] UKPCHCA 2).

5 [12] In para 8 of the Respondent's written submissions filed in support of its application on 14 October 2005 the Respondent sets out the grounds upon which this application should be granted. The first ground is that the court:

failed to consider the provisions of Sections 61 and 62 and the preamble Section 8(1) of the 1990 Constitution which was promulgated on 25 July 1990.

10 [13] The second ground is that the court failed to consider:

(i) that the validity of the decree "can only be determined under the provisions of the 1990 Constitution"; and

(ii) that the 1990 Constitution has no provision for legislation by decree.

15 [14] The first point to be made in answer to these grounds is that they are inconsistent with the questions for certification. These are concerned with the validity of the decree "under the provisions of the Constitution (Amendment) Act 1997", not the 1990 Constitution.

[15] Second, the submission that the validity of the decree "can only be determined under the provisions of the 1990 Constitution" is inconsistent with para I A 1 of the Respondent's written submissions filed on 10 May 2005 in the Court of Appeal prior to the hearing in July. This paragraph states:

I. *THE VAT DECREE 1991 IS UNCONSTITUTIONAL AND INVALID*

A. *THE CONSTITUTION*

25 1. This question is governed by the Constitution of Fiji, the Constitution Amendment Act 1997.

[16] The Court of Appeal answered the question in the negative. It is now submitted that the court erred by not answering a question not put to it. It seems clear to us that the Respondent is now seeking to raise a case in the Supreme Court which is entirely different from that argued in the Court of Appeal. Such a course is not permitted (see *Re Walton; Ex parte Reddish* (1877) 5 Ch D 882).

30 [17] In deference to counsel's written submissions we briefly consider whether the promulgation of the 1990 Constitution has any bearing on the legality of the decree. In the first place, we note that it is not correct to state that the 1990 Constitution "has no provisions for legislation by Decree": the 1990 Constitution was itself a schedule to the Promulgation decree 22/90. Second, the third paragraph of the promulgation decree states that the Head of State *until a parliament is convened* "shall have power to make laws ..." Third, s 14 of the promulgation decree repeals certain decrees but leaves others in place. Finally, s 168 provides that "laws which have not been brought into force by the date of the commencement of this Constitution may ... be brought into force on or after its commencement".

35 [18] Counsel's final oral submission referred to s 194(1) of the 1997 Constitution which specifically defines a decree to include:

A decree made by the President before the convening of the Parliament under the Constitution of 1990.

45 [19] Mr Maharaj suggested that the decree had not been "made" by the President in the circumstances specified by the section since its commencement date was after parliament had been convened. No authority was cited in support of this proposition.

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[20] The obvious main difference between decrees and acts lies in the way they are “made”. Under s 45 of the 1997 Constitution the power to “make” laws “vests in a parliament consisting of the President, the House of Representatives and the Senate”. Most of Fiji’s decrees, including the VAT decree, were “made” by a de facto President acting on the advice of a de facto cabinet holding office following the 1987 coup d’état.

[21] Apart from this important difference however, decrees and acts, both being laws, begin to operate in a similar manner. Thus, their commencement may be wholly or partly postponed. Some come with operation on the day they are published in the gazette, some on the day they are signed by the President. Both in the case of decrees and in the case of acts it is essential to distinguish between the “making” of the law, in other words its coming into being, and the commencement of the law’s operation. These are entirely separate events.

[22] The VAT decree commences with the following words:

In exercise of the powers vested in me as President ..... I hereby make the following Decree:

The decree concludes with the words:

Made this 22<sup>nd</sup> day of November 1991.

Penaia K Ganilau. President ....

In our view, the commencement date of an act or a decree is quite distinct from the date upon which it was made and therefore the submission that the decree was not made before parliament was convened on 29 June 1992 is unsustainable.

[23] We are satisfied that although the questions raised are of significant public importance, they are wholly unarguable. Accordingly, the application for leave to appeal to the Supreme Court is refused.

*Application dismissed.*