

# PACIFIC HUMAN RIGHTS LAW DIGEST

VOLUME 6



Pacific  
Community  
Communauté  
du Pacifique



# **PACIFIC HUMAN RIGHTS LAW DIGEST**

## **Volume 6**

**Edited by:**

**Chris Yuen**

**Prepared by the Regional Rights Resource Team  
of the Pacific Community**



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## INTRODUCTION

This is the sixth volume of the Pacific Human Rights Law Digest (PHRLD) produced by the Pacific Regional Rights Resource Team (RRRT) of the Pacific Community (SPC). The previous volume (Vol. 5) was released in September 2015.

Since our inception in 1995, RRRT has worked with, and engaged in training members of parliament, non-governmental organisations, law students, lawyers, magistrates and judges in the Pacific Islands region. Much of this training has focused on encouraging the use of conventions, international standards and constitutional bills of rights in the courts. In practice, RRRT has contributed to increased reliance on, and use of, these instruments by magistrates, judges and lawyers across the region.

The overall purpose of this Pacific Human Rights Law Digest is to disseminate, for use by Pacific law students, lawyers, magistrates, judges and human rights advocates, a collection of analysed, recent human rights case law that can be used as precedents in the courts and as tools for policy initiatives.

For those without ready access to the internet, the PHRLD provides a convenient source of contemporary case law. For those who do have internet access, the digest also serves as an inventory of the most significant human rights decisions to be found on the invaluable Pacific Islands Legal Information Institute website ([www.pacii.org](http://www.pacii.org)) and other online sources outside the Pacific region. (Readers who cannot access decisions that are reported in the PHRLD can request them from RRRT.)

The PHRLD is also a valuable resource for those outside the Pacific region who are interested in the development of human rights in this region.

The PHRLD is not just for lawyers, but also for human rights activists and other stakeholders. It is therefore not simply a compilation or compendium of cases with headnotes, as commonly found in law reports, but rather it is an analysed summary of judgments, highlighting significant human rights issues. SPC's RRRT has a vast network of local-level human rights defenders who are increasingly using the law as a tool for change in the areas of governance and human rights. The experience of this network of human rights actors is now reflected in the Diploma in Leadership, Governance and Human Rights, which is jointly sponsored by SPC's RRRT and the University of the South Pacific (USP), and is offered through 12 USP campuses in the Pacific region.

RRRT's ultimate objective is to help build a human rights culture that enhances the rule of law and democracy in the Pacific region. Promoting the use of human rights standards in law, practice and policy is part of RRRT's broad, long-term strategy for achieving that goal.



**About RRRT**

RRRT provides human rights training, technical support and policy services in the Pacific region. It is a programme of the Pacific Community (SPC), an international organisation that provides technical assistance, policy advice, training and research to 22 Pacific Island countries and territories.

RRRT has specific programmes in Fiji, Federated States of Micronesia (FSM), Kiribati, Nauru, Niue, Republic of the Marshall Islands, Palau, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, and works on request in all other SPC member countries and territories. With partners including governments and regional and civil society organisations, RRRT has been described as a 'cutting edge programme' in human rights capacity building due to its approach of tackling both systemic and socio-economic issues through interventions at the micro, mezzo and macro levels.

RRRT's goal is to enhance development for all Pacific peoples by increasing the observance of all human rights (civil, political, economic, social and cultural) and good governance. It seeks to achieve this goal, at the country level, by providing training, mentoring, links and support to community organisations through its networks of country focal officers, community paralegals and civil society partners. At the regional level, RRRT seeks to realise this goal by training lawyers, magistrates, judges and policy-makers to adopt and apply human rights principles and good governance practices in their work.<sup>1</sup>

Volume 6 of the Pacific Human Rights Law Digest is supported by the U.S. Department of State.

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1 Secretariat of the Pacific Community (2012) The Pacific Regional Rights Resource Team (RRRT) of the Secretariat of the Pacific Community proposal to AusAID July 2012–June 2015. Suva, Fiji.

## USING THE DIGEST

This is the sixth volume of the Pacific Human Rights Law Digest. As with previous volumes, it includes summaries of human rights cases and related cases from the Pacific region and elsewhere that illustrate important developments in the judicial application of human rights standards. Volume 6 has four parts.

**Part I** contains summaries of cases from various Pacific Island countries and territories (PICTs) that consider human rights principles and rights contained in the bills of rights of PICT constitutions or in international human rights instruments.

Although most cases contained in this volume are decisions handed down since the completion of Volume 5 of the PHRLD, some older decisions have been included when relevant. While the collection does not purport to cover all cases in the Pacific region that have dealt with human rights, it contains a representative sample of the range of current issues and the most important and interesting cases from the region.

**Part II** contains significant international human rights judgments, which discuss a range of fundamental rights and freedoms that are enshrined in bills of rights or human rights conventions. It gives particular attention to cases dealing with principles of contemporary importance in the Pacific region.

**Part III** contains significant and interesting cases relating to human rights issues relevant to sexual orientation, gender identity and expression and sex characteristics (SOGIESC). This part has been added following the 10th anniversary of the Yogyakarta Principles and the inclusion of supplementary principles in 2017. It is timely that these human rights issues should be considered, understood and discussed within the region. This part also continues the discussion of sexual reproductive health and rights in Volume 5, Part III.

Within each part, cases are arranged in alphabetical order, based on the subject matter of the heading. Each summary contains a brief set of facts, the key human rights issue or issues in the case, the main aspects of the decision and a commentary on the case. Each summary also lists the laws and international instruments considered by the court in deciding the human rights issues. The summaries do not include all the cases referred to in the full text of the judgment; rather they include only those cases that have a significant bearing on the human rights issue being discussed.

**Part IV** provides three sets of indexes for readers' easy reference: (i) an index by case name in alphabetical order; (ii) an index by country; and (iii) a keyword index with references to all six volumes of the PHRLD. These indexes will help readers locate relevant cases in various volumes.

## **ACKNOWLEDGEMENTS**

RRRT acknowledges the contribution of the late Joni Madraiwiwi, (former Chief Justice of Nauru) to previous PHRLDs. We also thank Mr Chris Yuen (former Senior RRRT Human Rights Mentor) for contributing his expertise and support to Volume 6.

We would also like to thank all SPC staff members who have assisted during the final stages of producing this PHRLD, and the staff of RRRT who contributed to compiling the cases that appear.

Volume 6 of the Pacific Human Rights Law Digest is supported by the U.S. Department of State.

## EDITORIAL REVIEW

### Overview

This is the sixth volume of the Pacific Human Rights Law Digest (PHRLD). As in previous volumes, Parts I and II include cases from courts in Pacific Island countries (PICs) and internationally. In Part III, the thematic part, we focus on human rights issues in relation to sexual orientation, gender identity and expression and sex characteristics (SOGIESC issues). Otherwise, the whole volume continues to include cases relevant to arrest and detention, children, cruel, inhuman and degrading treatment (collectively known as ill-treatment), custom, democracy and the rule of law, discrimination, fair trial, family law, freedom of expression, mandatory sentencing, movement, privacy, procedure, property, religion, violence against women, and workers' rights. In addition, human rights relevant to indigenous people have also been included in this volume.

### Selection of cases

As there are marked differences in the land mass and population of PICs, we have selected cases with a view to covering as wide a range of issues as possible and also to reflect the population size of a particular country. This volume includes over 60 cases, more than 40 of which are decisions of PICs. Due to specific historical reasons, some of these cases were decided by their respective Court of Final Appeal (CFA) outside the particular PIC. For example, the Judicial Committee of the United Kingdom's Privy Council continues to be Cook Islands' CFA and, until recently, the Australian High Court was the CFA of Nauru. Internationally, we have also chosen to include cases that represent a wide range of issues. We have included cases decided by the European Court of Human Rights (ECtHR) for litigants from countries such as Croatia, France and Russia, and one decided by the Inter-America Court of Human Rights for a matter that arose from Suriname. We have also included other cases from national jurisdictions, such as Australia, India, Germany, Italy, New Zealand, South Africa, Uganda, the United Kingdom and the United States of America. We hope that the way in which other jurisdictions adjudicated human rights issues and interpreted their respective constitutions will shed light on the development of jurisprudence in PICs. Importantly, protected basic rights – such as rights to freedom, life and liberty and rights to family life and property – enshrined in each country's constitution are very similar.

Quite a number of cases are from Papua New Guinea (PNG). Apart from having a larger population than other PICs, PNG also has constitutional provisions that allow the National Court to initiate human rights inquiries without specific litigants. As a result, two cases relevant to this court's initiation of human rights inquiries have been included. These factors have contributed to the inclusion of a larger number of cases from PNG in this volume. Similarly, there are quite a number of cases from Fiji, due not only to its population size, but also to its comprehensive constitutional provisions and judicial system.

### The interconnectedness of human rights issues

Inevitably human rights issues are interconnected and multifaceted. It is simply more convenient to organise cases under different headings and subheadings than to compartmentalise them. A keyword index has been included Volume 6 to provide another reference point for locating relevant cases for specific issues in both this and previous volumes.

There have been a number of cases under the heading Procedure. In truth, some of these cases could have come under Privacy or Arrest and Detention (such as the Solomon Islands case of *Rano v Commissioner of Police*). Also cases under the heading Children will include matters involving Detention (for example, the Fijian case of *State v SS (the Juvenile)* or Religion (such as the South African case of *YG v the State*). These are other examples, but they all demonstrate that human rights issues are interconnected and multifaceted. This interconnectedness of human rights issues should however be distinguished from the basis on which a violation could be examined. Courts have often declined to examine other human rights grounds when they have upheld a ground on which the claimant advanced. At times, courts might have subsumed issues that were not warranted. For example, as we have highlighted in our comments in two PNG cases (*Bau v Bine* and *Yasause v Keko*) and an Australian case (*Certain Children v Minister for Families and Children & Others (No 2)*), the grounds based on ill-treatment are different and distinct from the grounds of torture. We have also expressed concerns regarding the development of a horizontal application of human rights (as commented on in the PNG case of *Keoa v Keoa*) and the need to introduce the concept of

vicarious liability in public law (as commented on in another PNG case, *Lome v Sele*) when considering remedies.

This brings us to highlight two cases, one handed down by the CFA in India and another by a South African appellate court. *Puttaswamy v Union of India* is a decision handed down by a nine-member judge bench of the Indian Supreme Court, which resolved that privacy is a constitutional right under the protection of life and liberty, although the expression ‘privacy’ was not used in the constitutional provisions. Importantly, India’s highest court also fleshed out what privacy entails and showed the interconnectedness of freedom and rights to life and liberty due to human dignity. The South African appellate court in the criminal appeal case of *YG v the State* has provided us with significant insight into how children deserve respect and dignity as human beings and not merely as an extension of their parents. The court considered the rights of a child, traditional values and religion, and outlawed corporal punishment meted out to children in a family setting, which was justified by the common law defence of reasonable chastisement.

### **The thematic part**

Part III includes cases relevant to the human rights issues of sexual orientation, gender identity and expression, and sex characteristics (SOGIESC). Discrimination against people based on SOGIESC continues to be practised by individuals and establishments, resulting in violence or social exclusion. There is a general impression that SOGIESC issues are largely about a person’s sexual orientation that does not conform to social norms, traditions or religious values. To some extent, SOGIESC issues have been subsumed, and muddled by some, into the single issue of same-sex marriage. This is far from the truth. For the first time, PHRLD has allocated a whole part to bring readers cases relevant to SOGIESC issues. Inevitably, there are limited PIC cases because seven PICs still have legislation that criminalises same-sex conduct and there are hardly any laws that seek to fulfil a State’s positive obligation to facilitate a minority group of people in relation to their gender identity, expression and sex characteristics. While prosecutions based on consensual sexual conduct in private places are rare, these criminal laws do serve to legitimise discrimination against the sexual minority and nurture social disharmony. While opponents of decriminalisation of consensual sexual conduct would assert that SOGIESC issues are Western ideas and of foreign import, they cannot disregard the fact that sodomy law and the like are legacies of former colonial administrations, which have themselves abandoned these draconian and victimless laws in their own countries. Beyond the issues of consensual sexual conduct, which belong to the realm of private (not public) morality and private life, transgender and intersex people continue to suffer discrimination and social exclusion. Their issues are not necessarily and certainly not exclusively related to sexual conduct. Their plights are largely about not being accepted and respected as to who they are on matters of gender. At the heart of the problem is the fact that they do not conform to stereotypical male-female norms and the gender binary. Medical science and judicial reasoning have largely accepted that gender is manifested in both psychological and physical (anatomical, gonadal and hormonal) ways, which unsurprisingly are what human beings possess.

The case law included in Part III serves to show how different countries have developed their jurisprudence. It also serves to help the public, and human rights practitioners and judicial and legislative actors to garner understanding in relation to these issues. Part III is divided into two areas: the first is relevant to sexual orientation and gender identity, and the second to gender expression and sex characteristics.

The cases cover a wide range of matters. They include criminal law legislation and prosecution cases from Uganda (*Oloka-Onyango & Others v AG*) and an ECtHR Russian case (*Case of Bayev and Others v Russia*), matters in a school setting in Italy (*Sacred Heart Case*) and USA (*G.G. v Gloucester County School*), and cases exclusively relevant to intersex persons (a German case of *1 B v R* and an Australian case of *Re Carla*). We also have included two PIC cases – one relevant to a hate crime against a lesbian (Fijian case of *Veresa v the State*) and the other to child adoption (Vanuatu case of *In re MM, Adoption Application by SAT*).

RRRT extends its thanks to the U.S. Department of State for their support, without which this publication would not have been possible.

**Chris Yuen, editor**

## **PART I: PACIFIC ISLAND CASES REFERRING TO CONSTITUTIONAL BILLS OF RIGHTS, HUMAN RIGHTS CONVENTIONS, STANDARDS AND PRINCIPLES**

### **ARREST AND DETENTION**

#### **Police arrest and detention – 48 hour pre-charge detention limit – extension of time pending an investigation – Magistrate’s power – juvenile detention – constitutional rights**

- A magistrate does not have jurisdiction to extend the constitutional limit of 48 hours for pre-charge detention

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#### **State v Dhamendra**

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High Court  
Rajasinghe J

Fiji  
[2016] FJHC 386  
10 May 2016

#### **Law(s) and/or international instrument(s) considered**

Constitution of Fiji, articles 13, 41 and 101

Criminal Procedure Decree, s. 262(1)

Magistrates Court Act, s. 17

Criminal Procedure Code

Juvenile Act, s. 4

Convention on the Rights of the Child (CRC), article 37(b)

International Covenant on Civil and Political Rights (ICCPR), article 9 and General Comments No 35, article 9

#### **Facts**

On 31 March 2016, the police filed an ex parte (uncontested) application in the Magistrates Court (MC) seeking to extend the pre-charge detention of the respondents, comprising a couple and their child (a juvenile), who had been arrested previously for suspected offences involving theft and obtaining financial advantage by deception. Under the constitution, arrested suspects must be brought before a court for the first time not later than 48 hours after arrest or, if that is not reasonably possible, as soon as possible. The magistrate considered the police application but, without hearing from the respondents, granted an order extending the period of pre-charge detention of the respondents in police custody for another seven days. The High Court (HC) on its own motion reviewed the magistrate’s order for extension of pre-charge police detention. The HC sought submissions from the State, the respondents and the Fiji Human Rights and Anti-Discrimination Commission (as amicus curiae) on the issues raised.

#### **Issue(s)**

Whether the magistrate has jurisdiction to extend the period of pre-charge detention in police custody. If so, whether it was the correct procedure to grant such an order ex parte in the absence of the three respondents.

Whether the police and the magistrate correctly and appropriately applied the constitutional and procedural requirements as stipulated in the constitution and the Juvenile Act in respect of the juvenile respondent.

### Decision

The HC observed the human rights principles and considered that the constitution did not allow the police to detain the respondents beyond the limitation of 48 hours merely on the ground of continuation for further investigation.<sup>1</sup> The HC considered the Fijian constitutional framework, ICCPR clauses and jurisprudence in the United Nations, Europe, United Kingdom, India, New Zealand and Australia relevant to pre-charge police detention and was of the view that the interpretation of the limitation of pre-charge detention in police custody is founded on a restricted but purposive approach.<sup>2</sup> The HC then held that in the absence of specific legislation allowing the MC to extend the period of detention, the MC had no jurisdiction to do so beyond the limit under article 13(1)(f) of the constitution, i.e. 48 hours. It opined that the subsequent constitutional provisions that those being detained be informed of the reasons for the detention to continue (in s. 13(1)(g) and subsequently s. 13(1)(h)) should not be interpreted as conferring jurisdiction to the MC to extend the period of detention in police custody.<sup>3</sup> The jurisdiction to consider such an application to extend any detention by the police is in the HC, to which the MC should have referred the matter.<sup>4</sup> In relation to the juvenile respondent, the HC held that the police and the MC failed to consider the mandatory matters before a child was detained and held that her detention, and the extension of detention in police custody, were in violation of the rights of the child under the constitution. Accordingly, the HC reversed the order made by the MC.

### Comment

The HC judgment was delivered on 10 May 2016, which was some time after the grant of the *ex parte* application ordering the seven-day extension of the detention. The judgment does not reveal when the respondents were initially arrested nor whether the grant of the extension was on the expiry of the 48 hours. As the HC invited parties to make submissions before a decision was made, some delays in quashing the MC's order are conceivable, even if the matter had come to the knowledge of the HC in time and an oral ruling had been made prior to the written judgment. In other words, the respondents might have been unlawfully detained for a significant period of time without being charged.

The constitutional infringement in this case involved not only the extended detention period. The police also failed to show they had considered whether the juvenile should have been detained in the first place. When she was detained, the police had not considered detaining her in a separate facility away from adult detainees. Implicit in this decision is the fact that under the constitution, pre-charge police detention should be kept to a minimum for practical purposes, and in any event, to a maximum of 48 hours, after which the accused must be brought before a court or be released. Should a further period authorised by a competent court be justified, a suitable remand facility, as opposed to police custody, should be considered.

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1. At 24.

2. At 34.

3. At 38 and 39.

4. At 42.

## **Asylum seekers – their freedom of liberty – detention under ministerial direction – constitutional protection – amendments to the constitution – validity**

- The Supreme Court held that the amendments to the constitution were unconstitutional.

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### **Namah v Pato**

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Supreme Court  
Salika DCJ, Kandakasi, Kariko, Sawong and  
Higgins JJ

Papua New Guinea (PNG)  
[2016] PGSC 13  
26 April 2016

#### **Law(s) and/or international instrument(s) considered**

Constitution of PNG, articles 13, 14, 38, 39 and 42  
Constitution Amendment (no. 37) (Citizenship) Law 2014 (constitutional amendment)  
Migration Act

#### **Facts**

In 2012 and 2013, two memorandums of understanding were signed between Australia and PNG purporting to transfer asylum seekers, who arrived in Australia by boat, to PNG. By executive orders, the responsible minister of PNG exercised his powers under the Migration Act, allowing these asylum seekers to enter PNG without a visa and directing them to reside in a relocation centre. Asylum seekers began to be transferred to Manus Island against their will and were detained in the relocation centre. An opposition member of parliament sought legal action challenging the constitutionality of the detention of the asylum seekers, which the minister unsuccessfully opposed (see the same case name in PHRLD 5, at 131). In the meantime, constitutional amendments were made by introducing a new provision to enlarge the executive's authority to hold asylum seekers under the provisions in relation to the exception to the protected freedom of liberty. This decision is the substantive constitutional challenge in relation to whether the detention of asylum seekers in PNG was constitutional.

#### **Issue(s)**

1. Whether the detention of asylum seekers at the relocation centre on Manus Island was contrary to the constitutional rights guaranteed by s. 42 of the constitution.
2. To answer question 1, the court had to decide whether the relevant provisions in the constitutional amendment were valid.

#### **Decision**

The court unanimously held that while the constitutional amendment satisfied the formal requirements of the necessary debates and was supported by a three to two majority (under s. 13 of the constitution), it failed to satisfy the specific considerations that laws seeking to restrict guaranteed rights must specify the restriction, and such restriction must be justified (by the lawmaker) as required under the constitution (s. 38). As the amendment itself failed to specify the restriction of rights, and the respondent provided no evidence of consideration of matters required under the constitution before the passing of the amendment,



such an amendment was invalid and of no effect. Consequently, the qualification under the constitution (s. 42(1)(g)) in relation to the prevention of unlawful entry to PNG did not apply to the asylum seekers (not being unlawful entrants). Therefore, their detention was unconstitutional and unlawful.

### Comment

The leading judgment was delivered by Justice Kandakasi, who was quite critical of the manner in which the respondents' solicitors handled the settlement of agreed facts. In their failure to respond to the agreed facts outlined by the applicant, the court relied on the uncontested facts filed by the applicant. In a way, it is not surprising that the respondents could not settle with the applicant on the agreed facts. The arguments that the relocation centre on Manus Island was not a detention centre, and that the direction to have asylum seekers reside there was not by way of detaining them, were only abandoned by the minister at a late stage.<sup>1</sup> According to Justice Kandakasi, *in a bid to overcome...the issues raised in opposition to the arrangements, the PNG government...rushed through Parliament a constitutional amendment to s. 42 of the Constitution and introduced s. 42(1)(ga)*.<sup>2</sup>

Section 42(1)(g) of the constitution provides for one of the exceptions to the deprivation of a person's liberty, which is for the 'purpose of preventing the unlawful entry of a person into Papua New Guinea...'. Due to the effect of the executive order made under the Migration Act to allow a visa exemption for the entry of these asylum seekers, their entry into PNG was not unlawful and therefore there was no constitutional power to detain them in deprivation of their liberty. By way of the constitutional amendment, the government purported to introduce s. 42(1)(ga), which was in the following terms: '*ga) for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country or with an international organisation that the minister responsible for immigration matters, in his absolute discretion, approves*'. *The government framed its argument in the following steps: 1) s. 42(1)(g) as it stood, covered and permitted a law to authorise the detention of the asylum seekers, pending a processing of their asylum claims and thereafter their resettlement or deportation; 2) as an alternative to the first argument, s. 42(ga) had that effect*.<sup>3</sup>

Under the constitution, any amendment law purporting to restrict constitutional rights must be expressed as a law that is made for specified public interest purposes, such as defence, public safety, order, health, etc., which is reasonably justifiable in a democratic society (s. 38(1)). It must also specify the right or freedom that it regulates or restricts, and any amendment must be passed by an absolute majority (s. 38(2)). The burden of showing the amendment law complies with the requirements rests with the party relying on its validity (s. 38(3)). The government failed to comply with this constitutional requirement. Not only was the relevant amendment inserted in an amendment act that was for a different purpose (i.e. for the purpose of dual citizenship issues, thus dealing with citizens not asylum seekers, and having no logical connection to the restriction of the rights of non-citizens), it also failed to demonstrate that the introduction of s. 42(ga) into the constitution was justified in a democratic society.<sup>4</sup> The question as to whether a law is reasonably justifiable in a democratic society is to be determined by having regard to the constitutional and international human rights standards and jurisprudence, as provided under s. 39 of the constitution.

This decision has demonstrated the importance of the fortified entrenchment of the constitutional guarantee of basic rights. While the executive arm of the government had the absolute majority to amend the constitution, in the case of PNG, an amendment affecting fundamental human rights must still satisfy the entrenched requirements of justification before it becomes valid. A basic human right fortified in this way in PNG has shown how the judicial branch can effectively exercise its check and balance on the powers of the fused executive and legislative branches of the government, even in a State where the incumbent

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1 At 43.

2 At 20.

3 At 43.

4 At 50–52.

government has the absolute majority in parliament. In 2015, an Australian Federal Court Judge made a speech marking the anniversary of the Magna Carta, which suggested the PNG constitution had similarities to that great historical compact.<sup>5</sup> This SC decision may reinforce some of the parallels that were drawn in that speech.

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<sup>5</sup> See The Influence of the Magna Carta on Papua New Guinea Law, The Hon Justice Collier:  
<http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-collier/collier-j-20150625>

## CHILDREN

### Juvenile defendant – admission of guilt in a caution interview – absence of parent at interview – inducement – admissibility of evidence

- The evidence was not admissible due to the failure of police to ensure the juvenile defendant's father was present.

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#### State v SS (the Juvenile)

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Magistrates Court  
Wijesinghe, Resident Magistrate  
11 October 2017

Fiji  
[2017] FJMC 128

#### Law(s) and/or international instrument(s) considered

Convention on the Rights of the Child (CRC), article 37(a)  
International Covenant on Civil and Political Rights (ICCPR), article 14(3)(g)

#### Facts

There was a preliminary hearing on the admissibility of evidence obtained by the police at caution interviews involving a juvenile defendant, who was charged with rape in 2014. The juvenile denied the allegation at the police station when his father was present and admitted guilt at the reconstructed crime scene (at the juvenile's village home) in the absence of his father. During this caution interview at the reconstructed scene, his father was invited by another police officer to go elsewhere within the village. At the voir dire (pre-trial) hearing in 2017, the juvenile's legal representative sought to exclude the police evidence relevant to the admission made by the juvenile. The juvenile alleged that the interrogating officers at the reconstructed crime scene had '*promised him that they will/would speak on behalf of him in court had he said 'yes' to the allegation*', which he did.

#### Issue

Whether the admission of guilt at the police caution interview should be admitted.

#### Decision

The magistrate considered case law and international human rights principles in relation to evidence of admissions made by juvenile defendants, and ruled that it was unsafe to admit the evidence because the police failed to prove that voluntariness and general fairness existed at the caution interview.

#### Comment

The magistrate specifically quoted a passage in full from the General Comment 10 (2007) made by the CRC Committee, which provides that: '*There are many other less violent ways to coerce or to lead the child to a confession or a self-incriminatory testimony. The term 'compelled' should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child's development, the length of the interrogation, the child's lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as 'you can go home as soon as you give us the true story', or lighter sanctions or release are promised.*'<sup>1</sup>

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<sup>1</sup> At 14.

## CRUEL, INHUMAN OR DEGRADING TREATMENT (ILL TREATMENT)

### The prisoner felt unwell – requests for hospital visit denied – admission to hospital at a late stage resulted in death – negligence and human rights claims

- A seriously ill inmate's death occurred as a result of the negligence of prison officials and damages were ordered

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#### Bau v Bine

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National Court  
Cannings J

Papua New Guinea  
[2016] PGNC 137  
6 May 2016

#### Law(s) and/or international instrument(s) considered

Constitution of PNG  
Correctional Services Act  
Correctional Services Regulations

#### Facts

A prisoner died shortly after being admitted to hospital. The deceased fell ill at the end of 2008 or early in 2009. Numerous earlier requests by the prisoner to go to hospital were denied by the authority. Instead, the prison officials took him to the prison clinic where pain remedies and antibiotics were administered. About six months later, the deceased was admitted to hospital at which time he had several serious conditions, including a very bad bedsore on the buttocks and reduced consciousness, according to medical records at the hospital. He died after two weeks in hospital. The father of the deceased sued the prison commander and the Commissioner of the Correctional Service for negligence and violation of the deceased's constitutional rights based on s. 36(1) (against torture and ill-treatment), s. 37(1) (full protection of the law when in custody) and s. 37(17) (to be treated humanely and with respect when in custody) of the constitution. The plaintiff also named the State as the third defendant, alleging vicarious liability.

#### Issue(s)

Had the plaintiff established a cause of action in negligence?  
Had the plaintiff established a cause of action for breach of human rights?

#### Decision

The court upheld the claims of negligence and also upheld the breaches of human rights based on s. 37(1) and (17) only, and declined to consider s. 36(1) claims because the correctional officers who had refused the deceased's requests to be taken to hospital had not done so *deliberately or vindictively with the intent or effect of treating him as less than human*.<sup>1</sup> The court allowed the parties to agree on the amount of damages within 14 days of the judgment or have a separate trial for assessment of damages.

#### Comment

The analysis of s. 36(1) by the court was rather confusing. The relevant section of the constitution provides that: '36 FREEDOM FROM INHUMAN TREATMENT. (1) No person shall be submitted to *torture*

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1 At 38.

(whether physical or mental), or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person.' The court simply analysed as follows:

37. In *Kofowei v Siviri* [1983] PNGLR 449, a number of human rights breaches were found to have been committed against persons detained in custody but a claim based on Section 36(1) of the constitution was rejected. It was held that for a person's conduct to amount to torture or otherwise inhuman treatment of another person under Section 36(1):

- the conduct is committed without the consent of the recipient; and
- the conduct must be done with the intent and effect of treating the recipient as less than human

38. I follow the *Kofowei* approach here. Though the first criterion is satisfied, there is insufficient evidence that any of the correctional officers who refused Ronnie Bau's requests to be taken to hospital did so deliberately or vindictively with the intent or effect of treating him as less than human. His inherent dignity as a human person was not infringed. No breach of human rights under Section 36(1) of the constitution has been proven.

The case of *Kofowei v Siviri* involved civil proceedings against the police for brutality. In that case the court mainly focused on tort and statute law in relation to damages against the police's wrongful act but also considered s. 36(1), 37(1) and (17) as well as s. 42 (liberty of the person). It rejected damages based on s. 42 because damages of the same kind were awarded under the Arrest Act. After outlining ss 36(1), 37(1) and (17) of the constitution, the court considered the definitions of 'torture', 'cruel', 'inhuman' and 'dignity'. It cited a 1987 UK decision relevant to the definitions, and then said: '*In my view the treatment was cruel, it was inhuman and it was inconsistent with respect for the inherent dignity of the plaintiff far beyond the ordinary indignity and pain occasioned by individual assaults.*' The court then considered damages under the constitutional provisions.

That seemingly erroneous quotation aside, s. 36(1) of the constitution is worded in an alternative way, i.e. torture or 'ill-treatment'<sup>2</sup>. A high degree of severity of pain and suffering and an intentional and purposive act are required to sustain an act of torture, but this is not the case for other ill-treatment. Any act or omission, deliberate or inadvertent, could suffice to cause inhuman and degrading treatment.<sup>3</sup>

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2 Section 36(1): 'No person shall be submitted to torture (whether physical or mental) or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person' (added emphasis).

3 See General Comment No. 2 issued by the Committee of the Convention Against Torture: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fG C%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fG C%2f2&Lang=en)

## **Civil action for compensation by former partner – compensation sought based on human rights violation – ill treatment**

- The PNG National Court ordered the defendant to pay compensation to the victim in a family matter.

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### **Keoa v Keoa**

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National Court  
Cannings J

Papua New Guinea  
[2017] PGNC 263  
12 October 2017

#### **Law(s) and/or international instrument(s) considered**

Constitution of PNG, s. 36(1)

#### **Facts**

The applicant (A) and the defendant (D) were former domestic partners. A alleged that D assaulted or intimidated her over a period of four years in their domestic relationship. D admitted some allegations and denied others but said in his defence that his acts were provoked by A. A sought compensation for suffering based on the right of freedom from cruel treatment under s. 36(1) of the constitution.

#### **Issue(s)**

Had the applicant proven the factual allegations?  
Had the applicant proven any human rights breaches?

#### **Decision**

The court considered the 11 allegations based on the affidavit by A and the response by D and held that 9 of 11 allegations were sustained according to the civil standard of proof. The court then ruled that s. 36(1) of the constitution in relation to torture and ill-treatment was violated by D against A and ordered payment of PGK 10,000 for reasonable and exemplary damages.

#### **Comment**

This decision was quite unusual because it was a matter between two individuals in a family setting. There was no record of any history of criminal conviction or of reports made by A to the police. No mentions of tort law or statute law were made in relation to A's cause of action when the court held that the sustained allegations amounted to violation of s. 36(1) of the constitution. It then ordered compensation by D, as a private individual, by virtue of s. 58 of the constitution. No case law or precedent was cited by the court in support of its ruling. Sections 36(1) and 58 are part of Division 3 entitled 'Basic Rights' contained in Part III of the constitution, which is entitled 'Basic Principles of Government'. Evidently, the protected basic rights and compensation are directed to be applied between private individuals as right holders and the State as duty bearer, and not between private individuals. In some situations where private individuals were harmed by another, and the State failed to protect the victim[s] (such as failure to prosecute or prevent further harm), the State was held liable to pay compensation despite the fact that the State had not directly inflicted the harm. On the contrary, direct application of the compensation regime between private individuals under public law protection would undermine and defy the idea of the State being the duty bearer of human rights.

In an earlier Kiribati case, the High Court judge held that the fundamental rights of the constitution were owed by the government to the governed; no such duty was owed by an individual to another individual.<sup>1</sup> This view was criticised by a subsequent Kiribati court in 2009 as being too narrow, though the criticism was merely obiter.<sup>2</sup> In any event, in both cases the courts were asked to make a declaration based on the constitution, and compensation was not directly involved. Horizontal application of human rights is a developing concept, particularly in Europe, according to their respective constitutional contexts and the European Convention of Human Rights, influenced by the reality of increasingly powerful conglomerates in the private sphere. While constitutional rights can be used to clarify or tip the scale in interpreting laws of general application between private individuals and in criminal law, civil litigation between private individuals for compensation is better left in the specific branch of civil law, e.g. tort law. This kind of private civil action based solely and directly on constitutional rights might open the door to allowing the State to evade its responsibility as the human rights duty bearer.

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1 See *Teitinnang v Ariong* [1986] KIHIC 1; [1987] LRC (Const) 517 (7 April 1986).

2 See *Teriaki v Kauongo* [2009] KIHIC 27; *Civil Case 113 of 2009* (9 July 2009), which was discussed in PHRLD 4 at 43.

## **Prisoner – food in prison – complaints – same food daily – lack of balanced diet causing a decline in health – inhuman treatment – protection of the law**

- The National Court rejected a claim of inhuman treatment but ruled that the food supply was not in accordance with the law.

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### **Yasause v Keko**

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National Court  
Cannings J

Papua New Guinea  
[2017] PGNC 183  
18 August 2017

#### **Law(s) and/or international instrument(s) considered**

Constitution of PNG, article 36

Correctional Service Act 1995, s. 37

Correctional Service Regulation, ss 69–79, 123

International Covenant on Civil and Political Rights (ICCPR), article 7

#### **Facts**

The applicant was a prisoner at the Bomana Correctional Institution. He brought an action on behalf of detainees against the prison authorities and the State, complaining that the food provided at the prison did not conform to the minimum dietary standard imposed by law, which violated their human rights in relation to freedom from inhuman treatment and full protection of the law. The prisoners were provided with three meals a day. The meal content was routinely the same, with breakfast consisting of tea and dry biscuits, lunch of white rice and tinned fish or meat, and dinner of white rice and tinned meat. It was alleged that the prolonged consumption of this unbalanced diet had contributed to medical conditions such as constipation, indigestion and joint aches and had led to a high rate of premature death of detainees. The prison's acting Commanding Officer did not refute the evidence but responded that other supplementary food was in short supply due to budgetary constraints and hierarchical arrangements.

#### **Issue(s)**

What effect the supplied diet had on detainees.

Whether the detainees were subjected to cruel or inhuman treatment.

Whether detainees were denied the full protection of the law.

#### **Decision**

The court considered that there was insufficient evidence that the diet had led to poor health or illnesses. It also declined to accept that there was violation of s. 36 of the constitution in relation to freedom from inhuman treatment because *it cannot reasonably be said that subjecting the detainees to an unbalanced and non-variable diet is a course of conduct engaged in with the intent and effect of treating the detainees as less than human.*<sup>1</sup> However, the court then considered the various sections of the relevant regulations and ruled that the authority had failed to adhere to the minimum standard of food provision comprising different groups of food daily. Therefore the authority had failed to afford the detainees equal protection by the law. The court made orders requiring the authority to comply with the minimum standard by 1 January 2018.

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1 At 13.



### Comment

This complaint was not the first of its kind in PNG (See PHRLD 5, page 43). The judge, however, repeatedly rejected the complainant's claims on the ground of inhuman treatment. Relevantly, the court quoted its previous decision, holding that: *to amount to torture or otherwise inhuman treatment of another person, a defendant's conduct must satisfy two criteria:*

- *the conduct is committed without the consent of the recipient; and*
- *the conduct must be done with the intent and effect of treating the recipient as less than human.<sup>2</sup>*

Section 36(1) of PNG's constitution provides that, [n]o person shall be submitted to torture (whether physical or mental), or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person. The expressions, 'torture' and 'inhuman treatment' are not defined in PNG, but they are clearly expressed in the alternative, indicating they are different concepts. Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 'torture' is specifically defined in article 1, which has a high threshold test including purpose and intent. On the other hand, 'other acts of cruel, inhuman, degrading treatment or punishment' are included in article 16 of CAT, which specifically distinguishes these acts (commonly known as 'ill-treatment') from 'torture'. The CAT committee has also made general comments specifically highlighting that these acts, which do not amount to torture, are nonetheless to be prohibited to the same degree as torture, the prohibition of which is non-derogable.<sup>3</sup> Ill-treatment does not require purpose or intent, and an act or an omission will suffice to constitute ill-treatment. With these less stringent criteria in mind, the criteria that the PNG court have repeatedly put forward are inconsistent with what 'ill-treatment' is meant to be.<sup>4</sup>

In addition, case law has shown that the failure to adhere to the lawful minimum dietary standard was known to the authority, and that detainees over the years have continued to be subjected to this treatment. This repetition of substandard treatment in relation to the food supplied to detainees is sufficient to demonstrate that they were being ill-treated by the authority, whether done deliberately or through negligence.

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<sup>2</sup> At 12.

<sup>3</sup> See paragraph 3 of CAT General Comment No. 2:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskvE%2BTuw1mw%2FKU18dCyrYrZhDDP8yaSRi%2Fv43pYTgmQ5n7dAGFdDalfzYTJnWNYOXxeLRAIVgbwcSm2ZXH%2BcD%2B%2F6IT0pc7BkgqlATQUZPVhi>

<sup>4</sup> See also discussion in *Bau v Bine* elsewhere in this volume.

## **Assault by a uniformed policeman – inhuman treatment – Commissioner of Police and State liability – vicarious liability**

- The PNG National Court considered the vicarious liability of the Commissioner of Police and the State in police brutality claims.

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### **Lome v Sele**

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National Court  
Brown J

Papua New Guinea  
[2017] PGNC 184  
18 August 2017

#### **Law(s) and/or international instrument(s) considered**

Constitution of PNG, ss 36 and 37

#### **Facts**

The plaintiff (P) filed a complaint in court alleging a named police officer (D) violated P's human rights (s. 36 – inhuman treatment and s. 37 – protection by the law). A default judgment was entered pending assessment of damages. P provided evidence by way of three affidavits, one from P himself and the other two from two persons who claimed to be at the scene of the incident at the time. Allegedly, P was assaulted by D, who was in uniform when P was leaving his car intending to enter a nightclub with his two friends. The evidence indicated that shortly before the assault incident, P's car was stopped at a police roadside checkpoint where D was on duty. Evidence also showed that D, during the assault, had said: 'You lawyers think you are really smart...you must know that the police are all around the country'. The assault left P unconscious with injuries. P included the Commissioner of Police (C) and the State as defendants, claiming each was vicariously liable for the human rights breaches committed against him by the named police officer. C and the State conceded that D was in the police force but argued that P failed to prove that D committed any wrongful acts while on duty and claimed that the officer was acting within the lawful scope of his duty as a member of the police force. C and the State did not introduce evidence to rebut P's assault allegations but implicit in their argument was that the allegations against D relevant to the assault had nothing to do with the police force because it was not done while D was on duty. The only evidence the defendants provided was an affidavit from a senior police officer, who was not at the scene of the alleged incidents and who claimed that D was acting beyond the lawful scope of his duty, which prevented vicarious liability from arising.

#### **Issue(s)**

Has P proven the factual allegation?

Has P proven a cause of action against the named police officer?

Has P proven vicarious liability against C and/or the State?

#### **Decision**

The court, based on the uncontested evidence, ruled that P's factual allegation was sustained and that the named police officer violated P's rights under ss 36 and 37 of the constitution. The court rejected the submission by the State that vicarious liability did not arise when an employee was acting outside his lawful scope of duty. Instead the judge quoted his own previous decisions, supported by a previous decision of the

Supreme Court, and argued that it was not necessary to establish vicarious liability by reason of whether the relevant police officer was on duty or acting within his authorised scope of operations; it was sufficient if the officer was on duty purporting to act in the course of police duties.<sup>1</sup> The court then ruled that the State was vicariously liable for the breach of human rights against P. C, however, was not the employer of D, and therefore was not vicariously liable.

### Comment

There are a few questions that the judgment has not alluded to. The affidavit made by a senior police officer, which was submitted by C and the State purporting to exonerate them from their vicarious liability, would seem to have admitted that D had committed the wrong as alleged. If so, had the State/police prosecuted D, or had an internal investigation taken place in relation to the police officer's criminal conduct? The prosecution or internal investigation might not exonerate C and the State from vicarious liability, but it would be relevant to the issue. If the police/State was negligent or indifferent in relation to D's conduct under the circumstances, it would be relevant to consider their vicarious relationship. Otherwise, employers could be shielded from vicarious liability unjustly. In any event, this admission on the part of the police authority would likely be relevant to excluding D from the police/State's indemnity of liability as opposed to excluding the State's vicarious liability per se. The fact of the close proximity in time and location between D's duty and the alleged assault, when D was in uniform with a gun, would also be relevant to consideration of whether a vicarious relationship existed.

Presumably P sought to invoke constitutional action instead of tort action (personal injury caused by civil wrong) against D in order to hold C and the State liable, considering that D would not have the means to meet the damages sought. If so, vicarious liability would seem to be irrelevant because the State is the duty bearer of basic human rights, particularly in the event of an alleged breach committed directly by public officials.

Vicarious liability is a principle based on good policy ground in tort law. This is because, while the wrongdoing employee is directly liable, she/he may not be able to meet the resulting damages. Holding employers vicariously liable for employees' wrongful acts during the course of their duties would compel employers to ensure (by administration, control, training, etc.) that employees follow guidelines and instructions. The court in this case alluded to these policy reasons behind the common law doctrine of vicarious liability.<sup>2</sup>

However, this doctrine is only necessary in relation to tort law and when considering the quantum of damages. If a complainant seeks to rely on constitutional protection, the duty bearer of basic human rights is inevitably the State and, therefore, vicarious liability would seem irrelevant. However, awarding damages in a successful constitutional challenge is at the court's discretion. In fact, case law has shown that claimants can choose either avenue to seek monetary redress but not both.<sup>3</sup> Mixing these two branches of law may have the effect of diminishing a State's obligation as duty bearer to protect basic human rights as if the liability was merely vicariously held.

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1 At 15–20.

2 At 13.

3 See Vanuatu Court of Appeal case of Republic of Vanuatu v Benard [2016] VUCA 4, 15 April 2016 discussed elsewhere in this volume.

## CUSTOM

### Customary land – a land resources dispute – appeal – jurisdiction of the High Court

- The High Court does not have jurisdiction to consider customary land rights disputes other than non-custom related matters of law.

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#### Ambrose v Keioi

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High Court  
Brown J

Solomon Islands  
[2016] SBHC 172  
5 October 2016

#### Law(s) and/or international instrument(s) considered

Land and Titles Act, ss 254–257

#### Facts

The applicants had had a customary land dispute against the respondents on which the Malaita Local Court (LC) made a decision in 1989. An appeal was said to have been filed with the Customary Land and Appeal Court (CLAC), but no records of a hearing or decision were found. On 15 July 2014, the applicant filed an application in the High Court (HC) seeking equal rights to access customary land. On 26 November 2015, the respondents' representative applied to the HC to have the application struck out based on the argument that the HC lacked jurisdiction. Material before the HC suggested that the LC's decision clearly recognised the equality of rights between the conflicting parties, but the applicants were banished from the island by the tribal authority.

#### Issue

Whether the HC had jurisdiction to consider the application by the applicants.

#### Decision

The HC relied on the relevant provisions in the Land and Titles Act, which prescribed the exclusive original jurisdiction of the LC in matters of customary land disputes and in appeals to the CLAC. The HC only has limited appellate jurisdiction for appeals from the CLAC on points of non-customary law. The HC therefore declined to consider the application as it was beyond its jurisdiction. The proceedings were struck out.

#### Comment

This is a very short judgment, but from what was recorded it would seem that the aggrieved parties were banished from the relevant customary land, which consequently made it hard for them to survive. The HC undertook to investigate why the appeal had not been finalised by the CLAC and remarked that: '[T]he manner in which the tribal paramount body approaches the difficulties as shown by the statement of [the respondents] may be seen as threatening breach of an International Convention against Human Rights [sic] for the statement would appear to prevent the basic right to sustenance from one's own land. Underlying custom needs to recognise these principles of rights if in fact there is a risk. The HC struck out the proceedings nonetheless.

There is no further reported case in relation to this matter. It is not clear why the HC could not seek submissions from both parties in relation to a seemingly clear violation of human rights or constitutional rights on the part of a local tribal authority, quite apart from the customary land dispute.

It may have been for good policy reasons that the legislature excluded legal representation for customary land litigation (s. 255(6) of the Land and Titles Act). However, for a matter before the HC in which the litigants were not legally represented and a basic human rights issue was apparent, the HC could have enquired further, and exercised its original jurisdiction to consider the matter further, instead of having it struck out from the outset. Banishment as a customary practice must conform with the constitution or other statute law; otherwise, the tribal authority would be acting outside its jurisdiction (see discussion in PHRLD 5, page 45).

## **A woman in a custom land dispute – patriarchal lineage extinct – matriarchal lineage – exclusion of women by custom – constitutional rights**

- The Vanuatu Supreme Court upheld the Island Court’s decision to allow women to be included in customary land inheritance.

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### **Lapenmal v Awop**

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Supreme Court  
Fatiaki J

Vanuatu  
[2016] VUSC  
8 July 2016

#### **Law(s) and/or international instrument(s) considered**

Island Courts Act

Constitution of Vanuatu, article 5

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), article 2

#### **Facts**

A custom land dispute involving 11 parties was resolved by the Malekula Island Court (IC) on 15 October 2007. The IC allowed the sole female descendant (and her family) of the original owner of custom land to be the custom owner and relevant parties to continue to have rights to use the land subject to the authority of the declared owners. Some of the original claimants appealed the IC’s decision to the Supreme Court (SC). The grounds of the appeal were: 1) apprehended bias; 2) matrilineal vs patrilineal rights; 3) pre-independence decisions; 4) the IC’s site visit; and 5) the weight of evidence. Relevantly, the appellants (A) argued that the IC erred in custom law and fact in allowing a woman, and her family by marriage, hereditary rights to land by succession, which is contrary to the patrilineal custom. In this dispute, the female claimant was the only surviving direct descendant (the only surviving daughter) of the original custom owner, although there were (unidentified and indirect) male descendants.

#### **Issue(s)**

Whether apprehended bias tainted the IC’s decision.

Whether women can inherit custom land when the original custom land owner did not have male offspring.

Whether the pre-independence evidence is conclusive on custom land ownership.

Whether the IC’s decision otherwise erred as a result of not visiting the relevant land with the claimants and wrongly attributed the weight of evidence?

#### **Decision**

The SC carefully examined the IC’s decision, new evidence and submissions, and dismissed all grounds of appeal. In relation to the argument that custom land could only be passed on to a male descendant to the exclusion of females according to customary law, the SC considered the relevant provisions in the constitution, relevant clauses of CEDAW and a precedent of the SC.<sup>1</sup> The SC held that the IC was correct in its decision, which included an exceptional right of succession of the surviving daughter in the absence of any surviving sons.

#### **Comment**

Section 10 of the Island Courts Act provides that: ‘[s]ubject to the provisions of this Act an Island Court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order’. The SC

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1 Noel v Toto [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995).

was emphatic about the proviso that customary law must not be in conflict with any written law and went on to consider the constitutional provisions and CEDAW. The latter was considered to bind the Republic of Vanuatu as written law.<sup>2</sup> The provision that the rules of custom shall form the basis of ownership and use of land provided under article 74 of the constitution was to be considered alongside CEDAW and article 5 (equality) of the constitution. The SC cited relevant passages in *Noel v Toto*, which were directly on point :

'Does this mean that if custom discriminates with respect to land rights of women, the fundamental rights which are recognised in Article 5 do not apply? I do not think that this can be so. It is clear, as I have stated, that **the constitution aims to give equal rights to women. It permits a law which discriminates in favour of women. By not specifically permitting discrimination with respect to land rights, it must be that such discrimination cannot be allowed.**

Recently the parliament has adopted Human Rights Charters with respect to women's rights. the parliament is recognising rights of women as guaranteed under the constitution. **It would be entirely inconsistent with the constitution and the attitude of the parliament to rule that women have less rights with respect to land than men.**

This may mean that in determining land rights in future, there will be a change in the basis of determining land ownership. This does not mean that ownership will be decided otherwise than in accordance with custom. Custom law must provide the basis for determining ownership, but subject to the limitation that any rule of custom which discriminates against women cannot be applied. General principles of land ownership will not be changed. In interpreting the constitution, it must be presumed that when the constitution was adopted, it was known that custom law discriminated against women with respect to land ownership. This being so, if it was intended to make an exception from the prohibition against discrimination upon the ground of sex, the exception would have been specifically referred to. This was not done. **Therefore, I have no difficulty in ruling that when the constitution provides for the rules of custom being used as the basis of owner shipof land, this must be subject to the fundamental rights recognised in Article 5** (our emphasis).<sup>3</sup>

It is worth noting another IC decision in which the panel (Magistrates Macreveth, Niptik, Tasvalie and Malres JJ) also quoted *Noel v Toto* and observed the following:

*'Article 74 provides that the rule of custom shall form the basis of ownership and use of land in Vanuatu. Our understanding of that provision, is that it must be subjective to the fundamental rights recognised under Article 5. Section 10 of the Island Court Act Cap 167 also reminds us that when applying customary rules prevailing within the territorial jurisdiction of the court, it ought bearing in mind to ensure that it must not adopt and apply any customary rule that is in conflict with any written law and is contrary to written justice, morality and good order.'*<sup>4</sup>

One must bear in mind that while CEDAW and the equality provisions in the constitution have been adopted by courts to shape custom in land succession, these decisions were in situations where there was no direct male descendant and others sought to exclude women's inheritance rights entirely. It remains to be seen how courts will deal with custom when female litigants seek to challenge their male counterparts on an equal footing.

2 At 31–33.

3 At 37.

4 See *Gongi v Willie* [2015] VUIC 3; Land Case 2 of 1993 (5 August 2015).

## DEMOCRACY AND RULE OF LAW

### Parliamentary Privileges Committee suspended MP – political party sought court intervention based on constitutional rights – jurisdictional issue

- Courts do not have jurisdiction to consider the rights and wrongs of parliamentary procedures under standing orders.

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#### State v Social Democratic Liberal Party, ex parte Tikoca

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High Court  
Seneviratne J

Fiji  
[2017] FJHC 654  
31 August 2017

#### Law(s) and/or international instrument(s) considered

Constitution of Fiji, articles 17, 71 and 73

#### Facts

Due to comments made by an opposition member of parliament (MP) during a parliamentary budget debate in June 2016, the Prime Minister made a complaint to the Speaker on 26 September 2016. As a result, the matter was referred to the Privileges Committee (Committee) under parliamentary standing orders. The Committee investigated the complaint in relation to a breach of parliamentary privileges and reported back to the House of Parliament. The leader of the government then moved to endorse the findings of the Committee that the impugned MP should be suspended for the remainder of the term of parliament with immediate effect. The motion was debated, voted on and passed in parliament. The opposition party and the impugned MP asked the High Court (HC) to intervene by way of a judicial review of parliament's decision to suspend the MP on the basis that the parliament had no constitutional or lawful authority to suspend the MP from parliament. The government opposed the application and asked the HC to have it struck out because it disclosed no reasonable cause of action, was scandalous, frivolous or vexatious and was an abuse of the process of the court.

#### Issue

Whether the court has jurisdiction to consider this application for a judicial review.

#### Decision

The HC reviewed historical precedents dating back to the nineteenth century and recent Fijian case law, and considered that this judicial review application was not about statutory or constitutional interpretation of the law, but rather was an attempt to challenge a decision taken by the Speaker under standing orders. The HC opined that the issue of whether the court has power to interfere with the internal affairs of parliament was well settled. Courts have no jurisdiction over the internal matters of parliament.<sup>1</sup> In so far as the challenge was based on an MP's freedom of speech (an MP is protected by s. 73(2) of the constitution), the HC rejected that characterisation, saying it ignored the proviso in the same clause that such freedom was subject to parliament's standing orders, the making of which were within the power of parliament.<sup>2</sup> The HC concluded that even if the decision the parliament made under standing orders to suspend an MP was wrong, it could not be challenged in a court of law. The court therefore ordered that the application for leave for a judicial review be struck out.

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1 At 19 and 20.

2 At 22 and 24.



### Comment

The HC quoted dicta from various Commonwealth and Fijian courts substantially. In view of the fact that litigation of this kind continues to come before the courts in Pacific Island countries, and the relevance of common law precedents within them, some quotes may be helpful to clarify the applicable law in relation to the justiciability of a parliament's decisions:

'... Blackstone says: *'The whole of the law and custom of Parliament has its original from this one maxim, that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'* This principle is restated nearly in Blackstone's words by each of the judges in the case of **Stockdale v Hansard** (1839) 9 Ad. and E. 1). As the principal result of that case is to assert in the strongest way the right of the Court of Queen's Bench to ascertain in case of need the extent of the privileges of the House, and to deny emphatically that the court is bound by a resolution of the House declaring any matter to fall within their privilege, these declarations are of the highest authority. Lord Denman says: *'Whatever is done within the walls of either assembly must pass without question in any other place.'* Littledale, J. says: *'It is said the House of Commons is the sole judge of its own privilege; and so I admit as far as the proceedings in the House and some other things are concerned.'* Patterson, J. said: *'Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examine elsewhere.'* And Coleridge, J. said: *'That the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules or derogation from its dignity, stands upon the clearest grounds of necessity.'*<sup>3</sup>

'In the case of **Ratu Vakalalabure v Ratu Epeli Nailatikau and Two Others** [2005] FJHC 741, the High Court made the following observations:

*'In the end, the position is that howsoever the Parliament exercises its privilege in regulating its own internal concerns, no consequence can come to and be entertained by the Court, subject of course to the provisions of the constitution which specifically provide for the regulation of any of its specific proceedings. We must presume that Parliament, in regulating its own internal proceedings include decision that ensue [sic], it is discharging its functions properly and with due regard to the law of which it is after all, its primary source.'*<sup>4</sup>

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3 At 10.

4 At 16.

## **Parliament – procedure to present a bill to amend the constitution – opposing MPs sought restraining orders to prevent the Speaker from convening a parliamentary meeting – constitutionality**

- Procedures to convene meetings are a matter for the parliament as long as the procedure is not inconsistent with the empowering provisions.

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### **Speaker of Parliament v Kalsakau**

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Court of Appeal  
Lunabek CJ, Fatiaki, Aru, Sey, Chetwynd and  
Geoghegan JJ

Vanuatu  
[2016] VUCA 26  
22 June 2016

#### **Law(s) and/or international instrument(s) considered**

Constitution of Vanuatu, article 21

#### **Facts**

This appeal arose from an urgent constitutional petition filed by 14 members of parliament (MPs) in the Supreme Court (SC) challenging the Speaker of the House (Speaker) in convening an extraordinary meeting to vote on a bill purporting to amend the constitution. Article 85 of the constitution provides that: [A] bill for an amendment of the Constitution shall not come into effect unless it is supported by the votes of no less than two-thirds of all the members of Parliament at a special sitting of Parliament at which three-quarters of the members are present. If there is no such quorum at the first sitting, Parliament may meet and make a decision by the same majority a week later even if only two-thirds of the members are present. As the first meeting on 9 June 2016 did not have a quorum of three-quarters of MPs, the Speaker adjourned the meeting to 16 June 2016. On 10 June 2016, the 14 MPs filed the urgent constitutional petition in the SC seeking an interlocutory order to block the second meeting and asking the SC to make a declaration that the Speaker acted unconstitutionally by convening special sittings. On 14 June 2016, the SC handed down its decision (unreported) granting the orders and made a declaration accordingly. The Speaker appealed the SC's decision to the Court of Appeal (CA).

#### **Issue(s)**

Whether the Speaker acted within his powers in convening the special sittings.

#### **Decision**

The CA reiterated the sensitive interface between the courts and parliament and held that other than a breach of a constitutional right, the courts will not inquire into or adjudicate on issues arising in parliament. As the respondent MPs could not identify any constitutional rights that had been infringed, the CA allowed the appeal and quashed the decision of the SC.

#### **Comment**

As the CA commented, the only argument being advanced by the respondents was to the effect that they wanted the court to manage the day-to-day business of parliament.<sup>1</sup> Similar issues have been adjudicated by courts of other Pacific Island countries.<sup>2</sup>

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1 At 11.

2 See Republic v Carcasses [2009] VUCA 46; [2010] 2 LRC 264 (16 July 2009) and also Natapei v Speaker of Parliament [2015] VUSC 92; Constitutional Case 02 of 2015 (24 June 2015).

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**PNG citizenship law – automatic revocation of PNG citizenship – non-citizen directed to be removed – constitution prohibits a harsh and oppressive act**

- The PNG National Court declared a deportation order to be harsh and oppressive under the circumstances.

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**Tomscoll v Mataio**

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National Court  
Cannings J

Papua New Guinea  
[2016] PNGC 58  
26 February 2016

**Law(s) and/or international instrument(s) considered**

Constitution of PNG, ss 37 & 41  
Migration Act

**Facts**

The applicant was born in PNG before Independence Day and was a PNG citizen by birth at that time. However, she lost her PNG citizenship when she turned 19 years of age by operation of the constitution due to her dual nationality. She had lived in PNG most of her life and was earlier married to a PNG citizen. Her mother and three children are all PNG citizens. On 15 April 2015, soon after she was released from prison after serving a sentence for receiving stolen property, the relevant authority directed her to leave the country under the Migration Act. At the time, she had just turned 40 years of age. She applied to the National Court (NC) for a declaration that she was a PNG citizen and also for an injunction to restrain the authority from removing her from PNG.

**Issue(s)**

Whether the applicant was a PNG citizen.

If she was not a PNG citizen, should the defendants be restrained from deporting her?

What declarations and orders should the court make?

**Decision**

The NC held that she was not a PNG citizen because she had failed to renounce her British citizenship and by operation of the constitutional provisions she had lost her PNG citizenship when she turned 19 years of age. However, the NC held that, given her circumstances, the applicant was protected under the constitution and the authority purporting to remove her under the circumstances was harsh and oppressive, contrary to the relevant provisions of the constitution. A declaration and detailed orders were made by the NC requiring the authority to reconsider the applicant's citizenship application expeditiously.

**Comment**

The majority of the applicant's argument relied on the citizenship issue, which the NC rejected. However, the NC took note of the history of the applicant, whose mother was a PNG citizen and whose father was British. She had lived in PNG until she was 10 years old. She then went to the United Kingdom and subsequently to Australia for her education. She had spent most of her time in PNG apart from the period of about nine years

that she spent in the UK and Australia. She had been married to a PNG citizen but was now separated. She had two children from that marriage and later had another child as a result of being raped while in police custody. She had spent just over six years in prison after convictions for robbery and stolen property offences. She had just turned 40 years old and was close to her mother and daughters. The NC relied on s. 41 of the constitution, which prohibits any act that is done under a valid law but that is, in the particular case, harsh or oppressive or fails to satisfy the proportionality test applicable in a democratic society, having a proper regard for people's rights and dignity. The court opined that deporting the applicant under the circumstances would be within the legal authority of the minister but certainly unlawful under s. 41 of the constitution because it was harsh and oppressive. The NC not only ordered the parties to commence and facilitate the applicant's citizenship application but also to set dates to monitor the progress of the application as part of the formal orders.

As alluded to by the NC, acts done under a valid law had been ruled unlawful in a number of cases, including one decision of the Supreme Court.<sup>1</sup>

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<sup>1</sup> At 46. See also *Morobe Provincial Government v Kameku* [2012] PGSC 2; SC1164 (1 March 2012) in which a NC decision based on s. 41 of the constitution was affirmed by the Supreme Court.

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## Members of parliament – conviction – sanctions based on Leadership Code – rules against double jeopardy

- Sanctions under the Leadership Code are separate and distinct from criminal charges.
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### Tapangararua v Public Prosecutor

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|  |                |
|--|----------------|
| Court of Appeal                                | Vanuatu        |
| Lunabek CJ, Doussa, Young Aru and Geoghegan JJ | [2016] VUCA 10 |
|  | 15 April 2016  |

#### Law(s) and/or international instrument(s) considered

Penal Code, s. 73  
 Leadership Code Act, ss 27, 41, 42, 43 and 50  
 Constitution of Vanuatu, article 68

#### Facts

The first (A) and second (B) appellants and a number of other accused persons were charged with corruption and bribery of officials under the Penal Code. They were all members of parliament at the time. Relevantly, A pleaded guilty on 7 September 2015 and B pleaded not guilty. They were both tried and convicted by the Supreme Court (SC) on 9 October 2015. A was sentenced to a term of twenty months imprisonment, suspended for a period of two years. B was sentenced to a term of three years imprisonment. The Court of Appeal (CA) dismissed all appeals on 20 November 2015.<sup>1</sup> The Public Prosecutor (DPP) then invoked relevant sections of the Leadership Code, asking the SC to dismiss all defendants from office and disqualify them from standing for election or being appointed as a leader of any kind for a period of 10 years. The SC granted the application and ordered accordingly.<sup>2</sup> A and B appealed to the CA against the decision by the SC under the Leadership Code. A argued that he was no longer a leader as defined by the Code at the time when the relevant sections of the Leadership Code were invoked because his seat had become vacant 30 days after his sentence by operation of s. 3(1) of the Members of Parliament (Vacation of Seats) Act. A and B also argued that the Leadership Code punishments violated their constitutional rights.

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1 See *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015). Also note that unrelated to this appeal but subsequent to their conviction and sentence, the second appellant and 13 others were charged with conspiracy to defeat the course of justice (by fabricating a presidential pardon): *Kalosil v Republic of Vanuatu* [2016] VUSC 150; Constitutional Case 1850 of 2016 (11 November 2016) and *Pipite v Public Prosecutor* [2017] VUCA 13; Criminal Appeal Case 583 of 2017 (7 April 2017).

2 See *Public Prosecutor v Kalosil* [2015] VUSC 173; Criminal Case 762 of 2015 (7 December 2015).

### **Issue(s)**

Whether appellant A was a leader under the Leadership Code.

Whether the invoked provisions in the Leadership Code infringed the appellants' rights (of no double jeopardy) under article 5(2)(h) of the constitution.

### **Decision**

The CA reviewed the legislative scheme of the Leadership Code and the empowering provisions in the constitution and dismissed A's argument in relation to the definition of a leader. It held that A was a leader despite his absence from office of more than 30 days at the relevant time. The CA placed particular reliance on the DPP's submissions referring to section 50 of the Leadership Code Act, which specifically exclude a defence of this kind and provide that it is sufficient to establish that the criminal offence was committed when the accused was a leader. In relation to the argument based on article 5(2)(h), which relevantly prevents a person from being tried again for offences that could have been dealt with in a previous trial, the CA ruled that the sanctions under ss 41,42 and 43 of the code were separate sanctions conditioned on the appellants' criminal conviction or other serious breaches of the code and therefore there was no double jeopardy. The CA dismissed the appeals.

### **Comment**

The technical argument based on the definition of a leader obviously defied the rationale of the code because the whole idea of a Leadership Code, and its empowering constitutional provisions, is to uphold the high moral standard of leaders and to disqualify them from holding office and consequent benefits if involved in corruption, bribery, conflict of interest, etc. while in office. The arguments based on double jeopardy were also misplaced because the DPP was not invoking sections that would result in another criminal punishment (such as that under s. 40 of the Leadership Code) but rather sanctions that would take away some of their political rights and privileges as a result of their criminal convictions.

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3 See <http://www.bbc.com/news/world-asia-34600561> and <https://thediplomat.com/2016/01/snap-elections-in-vanuatu-after-corruption-scandal-in-parliament/>

This case, and a series of related criminal convictions of 14 members of the Vanuatu parliament, prompted wide media reporting and resulted in a snap election. The significance of these legal matters perhaps lay in not only the outcome but also the importance of the separation of powers and the balance and check the judiciary was able to exercise.

## **Tenants of public housing – eviction – arbitrary search and entry – full protection of the law**

- On the basis of human rights, the PNG National Court restrains the housing authority from evicting tenants.

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### **Naembo v National Housing Corporation**

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Supreme Court  
Cannings J

Papua New Guinea  
[2015] PGNC 194  
2 October 2015

#### **Law(s) and/or international instrument(s) considered**

Constitution of PNG

#### **Facts**

The applicant moved into a property in 1981 for which he signed a tenancy agreement with the National Housing Corporation (NHC). He was not given a copy of the agreement. No maintenance was carried out by the NHC after the agreement commenced. In 1985, the applicant wrote to the NHC asking if he could purchase the house. The NHC responded that it did not own the land and therefore could not sell the house. In October 2000, the NHC issued the applicant with an eviction notice. The applicant responded in November 2000 asking the NHC again if he could purchase the property under the government's 'give-away' scheme. He further asked the NHC to allow him 15 days to settle his rent arrears. The NHC did not respond and in December 2014 engaged the police to evict the applicant and his family from the house. The family has since moved back to the house but alleges that there were irregularities in the whole handling of the matter and that the intimidating and malicious conduct of the NHC violated their human rights. They asked the National Court (NC) to intervene by way of orders and compensation. The NHC did not respond and did not appear in court.

#### **Issue(s)**

Whether the applicant's allegations were proven and established a cause of action for breach of human rights.

What orders should be made?

#### **Decision**

The NC accepted the applicant's uncontested evidence and upheld that the NHC, aided by the police, violated the applicant's human rights under s. 44 (freedom from arbitrary search and entry) and s. 37(1) (right to the full protection of the law) of the constitution. It gave the applicant until 31 January 2016 to settle the rent arrears and granted orders to restrain the NHC, the police and all relevant people from taking any steps to evict the applicant without an order from the NC.

#### **Comment**

This case is virtually a case of a default judgment being granted in favour of the applicant. It shows that authorities continue to act with impunity and disregard for the law against their vulnerable counterparts. Complaints of human rights violations must have been common in PNG, as evidenced by the creation of a special court form to cater for Human Rights Enforcement Applications.<sup>1</sup>

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<sup>1</sup> At 8.



## Revocation of citizenship by officials – infringement of constitutional rights – compensation – damages assessment

- Assessment of damages for infringement of constitutional rights is not to be based on tort law principles.

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### Republic of Vanuatu v Benard

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|   |               |
|---|---------------|
| Court of Appeal                                 | Vanuatu       |
| Lunabek CJ, Von Doussa, Young, Fatiaki, Saksak, | [2016] VUCA 4 |
| Aru, Sey and Geoghegan                          | 15 April 2016 |

#### Law(s) and/or international instrument(s) considered

Constitution of Vanuatu  
Citizenship Act

#### Facts

The respondents (Mr Benard and his wife) came to Vanuatu in 1995 and were naturalised as Vanuatu citizens by the Citizenship Commission (the Commission) on 7 December 2007. On 20 November 2014, the Commission decided that Mr Benard's citizenship was granted contrary to s. 12 of the Citizenship Act. Thus, by a letter dated 26 November 2014, the Commission informed Mr Benard that his citizenship (and consequently that of his wife) was revoked. The letter did not provide specific details of the subsection that Mr Benard had contravened but nevertheless cancelled his Vanuatu passport. The Commission required him to liaise with the French embassy to obtain his French passport within 30 days, inferring that he was required to leave Vanuatu by that time. Mr Benard filed proceedings in the Supreme Court (SC), challenging the citizenship revocation on the grounds that it was without any valid basis in law or fact and was an abuse of power. During the initial stage of the proceedings, it became clear to the SC that the Commission was erroneous in its facts because records had not been maintained. A letter dated 25 May 2015 from the Secretary General to Mr Benard was presented to the SC. The letter stated that the decision to cancel their citizenship was revoked. However, that did not end the matter because this letter contained implied threats that unless the respondents made good certain defects, they would risk the same fate.<sup>1</sup> Consequently, the SC upheld their constitutional claims in view of the fact that the decision to revoke their citizenship had not followed proper procedure allowing Mr Benard to be heard, and was wrong in law and in facts, which infringed Mr and Mrs Benard's constitutional rights of freedom of movement, amongst other rights. The SC subsequently awarded pecuniary, non-pecuniary and exemplary damages.<sup>2</sup> The State appealed to the Court of Appeal (CA), challenging the SC's finding of infringement of freedom of movement because it was not a ground raised by the respondents. At the hearing in the CA, the State conceded that it could not possibly succeed on this ground.<sup>3</sup> However, the State challenged the damages awarded.

#### Issue(s)

Whether the SC erred in law in awarding exemplary damages to the respondents.

#### Decision

The CA considered s. 53 of the constitution in relation to compensation for constitutional infringement and referred to relevant case law. It ruled that the SC was wrong in approaching the issue of damages as if the

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1 At 14.

2 See *Bernard v Republic of Vanuatu* [2015] VUSC 188; Constitutional Case 11 of 2014 (8 July 2015) and *Bernard v Republic of Vanuatu* [2015] VUSC 143; Constitutional Case 11 of 2014 (12 October 2015).

3 At 17–22.

constitutional breaches were the subject of a common law assessment of damages. It reduced the total of VUV 6,000,000 (non-pecuniary and exemplary damages) to compensation of VUV 4,000,000 and did not disturb the pecuniary damages ordered by the SC.

### **Comment**

The CA identified the principles in assessing damages for constitutional infringement, which were said to be those found in a New Zealand Court of Appeal (NZCA) decision in 2000. The NZCA's decision said: *'The award is public law compensation not common law damages. The focus of the claim is on the breach of rights not on personal injury, and is similar to the approach adopted for exemplary damages claims. Such damages also focus on punishing the conduct of the wrongdoer rather than compensating the victim for the personal injury.'*<sup>4</sup> The CA went on to say that: *'[I]n assessing compensation to be paid for an established breach of a constitutional right, consideration of the nature of the wrongdoing that attracts the right to compensation must be of central importance. The more serious the malice or knowing conduct that renders the breach sufficiently serious to warrant compensation, the greater will be the need to make an award that adequately demonstrates that seriousness and will demonstrate the need for respect of the fundamental right or rights that have been infringed.'*<sup>5</sup> The CA also recognised that the sudden revocation of the respondents' citizenship without prior warning was a misuse of power and that the State's subsequent high-handed and unjustified threats in relation to the reinstatement of their citizenship must attract significant compensation to reflect the seriousness of its breach of their fundamental rights.<sup>6</sup> However, in the end, the CA did not explain why the totality of the SC's compensation was wrong regardless of its approach and why it warranted a reduction of VUV 2,000,000.

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4 At 23–33.

5 At 34.

6 At 37.

## DISCRIMINATION

### Employment contract – compulsory retirement based on age –age discrimination

- The imposition of a compulsory retirement age in individual and collective employment contracts is unlawful.

#### Raju v BSP Life (Fiji) Ltd

Employment Relations Tribunal  
See, Magistrate

Fiji  
[2017] FJET 6  
28 March 2017

#### Law(s) and/or international instrument(s) considered

Constitution (Amendment) Act, s. 38  
Human Rights Commission Act 1999  
Human Rights Commission Decree 2009  
Employment Relations Promulgations 2007, s. 77  
Constitution of the Republic of Fiji 2013

#### Facts

The applicant, who was an employee of the respondent company, was aggrieved by the action of the employer in compulsorily retiring him at the age of 55. The compulsory retirement was said to be in accordance with the relevant clauses under his employment contract dated 24 August 2010 and a collective agreement (Memorandum of Agreement) dated 9 June 2001 between relevant parties. The relevant provisions in the Memorandum of Agreement provided that: *'The employer may retire its employees in any category (salaried or service workers) or its employees in any category may voluntarily retire upon reaching the age of fifty five (55) years. Staff shall be given three months notice of impending retirement.'* The relevant clause in the employment contract provided that: *'Subject to the laws of Fiji, [the employer] may terminate your employment by retirement upon your attaining the age of 55.'* On 9 December 2016, the applicant lodged a complaint under the Employment Relations Promulgation (the Promulgation) and the matter was subsequently referred to the Tribunal. The applicant alleged that his compulsory retirement from employment was both unfair and unjustified and was a form of discrimination based on s. 77 of the Promulgation. The employer argued that s. 77(1)(d) of the Promulgation allowed such compulsory retirement and that the 2013 constitution had preserved that provision.

#### Issue

Whether the relevant clauses in both the individual employment contract and the Memorandum of Agreement were lawful.

#### Decision

The Tribunal examined the law at the time of the signing of the Memorandum of Agreement and ruled that the compulsory retirement clause was unlawful from the outset because it contravened both the anti-discrimination provisions of the then constitution (the 1997 constitution) and the Human Rights Commission Act 1999. The Tribunal considered that the critical issue was whether there was an 'employment contract imposing a retirement age' in place.<sup>1</sup> It rejected the notion that the meaning of 'imposing' referred to any

<sup>1</sup> At 19 and 20.

<sup>2</sup> At 22 and 24.

contractual clause voluntarily entered into. Instead it held that any lawful imposition must arise out of the law or administrative action that gave rise to the making of a contract.<sup>2</sup> In so far as the employment contract sought to compulsorily terminate the applicant's employment based on age, it was discriminatory in law and violated s. 77 of the Promulgation read together with the Human Rights Commission Decree 2009 and was therefore unlawful.

### **Comment**

This case examined a commonly held view that a compulsory retirement age in employment, as an exception to age discrimination, can be obtained through two distinct avenues, i.e. by legislation or by contract. In the Tribunal's reasoning, the expression in the Promulgation, '*subject to any written law or employment contract imposing a retirement age*' is to be understood as '*something that occurs... directly by statute or indirectly by way of contract*'; otherwise there would be no purpose in having any age discrimination law.<sup>3</sup> In other words, freedom of contract is subject to existing law and human rights enshrined in the constitution or other anti-discrimination legislation, which generally cannot be contracted out. This does not mean that employees cannot opt to retire at a specified age, but it prohibits employers from retiring employees compulsorily at an age when they are otherwise still capable of performing the work. The Tribunal left open the issue of whether the 2013 constitutional provisions relevant to the imposition of a retirement age (s. 26(8)) would have the effect of allowing age discrimination prohibitions to be contracted out.<sup>4</sup>

While this decision is relevant to statute interpretation in the Fijian context, the reasoning was compelling and the case law cited went beyond the jurisdiction of Fiji. Apparently the employer in this case did not seek an appeal.

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2 At 41–44.

3 At 43.

4 At 58.

## Evidence – sexual offence – warning of uncorroborated evidence – discrimination

- Nauru abolished the rule of practice in warning a jury of a complainant’s uncorroborated evidence in sexual offence matters.

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### Republic of Nauru v Saeed Mayahi

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Supreme Court  
Crulci J

Nauru  
[2015] NRSC 15  
5 August 2015

#### Law(s) and/or international instrument(s) considered

Criminal Code 1899

Constitution of Nauru, articles 2 and 3

Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

International Covenant on Civil and Political Rights (ICCPR)

#### Facts

This case arose from a criminal trial heard in the Magistrates Court (MC) involving a sexual offence. The MC referred a question to the Supreme Court (SC) for a decision involving the interpretation of the non-discriminatory provisions of the constitution and the rule of practice in warning a jury regarding uncorroborated evidence. Under the Criminal Code, corroborated evidence is required under some charges, but it did not include sexual offence charges.

#### Issue(s)

Is there a rule of practice in Nauru that a judge must give the jury a warning in sexual offence matters if the evidence of the complainant is not corroborated?

#### Decision

After reviewing the history of the development of the century-old rule and the Criminal Code, the SC ruled that the old rule of practice should no longer be used in Nauru because it went against the general tenets of the constitution and was based on a disparaging view of female witnesses as being inherently unreliable. The SC exercised its inherent powers to hold that *‘there will be no rule of practice or requirement that a corroboration warning is to be given in all cases involving complainants in sexual offence matters before the Courts in Nauru.’*<sup>1</sup>

#### Comment

The SC noted the submissions, which mentioned the abandonment of this evidentiary rule in the International Criminal Court and in other Commonwealth countries, including Canada, New Zealand, Australia, UK, Bangladesh, Namibia, Fiji and Solomon Islands, and also in USA. The reasoning of the Fijian case of *Balelala v the State* in 2004 (see PHRLD 1, at 4), which was also adopted in the Solomon Islands decision, *Teikamata v R* (see PHRLD 2, at 49) in getting rid of this rule, was quoted by the SC at length.<sup>2</sup> The SC decided that a rule of practice that was discriminatory by its very nature, that degraded a significant section of society, and that was discriminatory on the basis of sex, which offended the tenet of s. 3 of the constitution, had no place in Nauru.<sup>3</sup>

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1 At 25.

2 At 18 and 19.

3 At 20 and 23.

## FAIR TRIAL

### Charge of making a false statement – delays in charge and trial – permanent stay granted – appealed by the State

- A discretionary remedy for unreasonable delays in a criminal trial should be considered in sentencing, as opposed to permanently staying charges, unless such delays result in an abuse of the court's own process.

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#### Attorney-General v Li Jian Pei

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Court of Appeal  
Peterson, Blanchard and Handley JJA

Kiribati  
[2015] KICA 5  
19 August 2015

#### Law(s) and/or international instrument(s) considered

Penal Code  
Court of Appeal Act 1980

#### Facts

The charges against the respondent (R) and the second respondent (R2) related to events in 2007 and 2008 when R made a late birth registration claiming that he (R) was the son of a Kiribati citizen. The Parliamentary Committee and police did not begin to investigate the matter until May 2010. Charges of making false statements under the Penal Code were laid on 25 October 2011. By then, a potential witness, who was the aunt of R2, had died. R2 claimed that the family tree history was given to him by this aunt. The court did not hear the case until 2 October 2012 when the respondents made their first appearances. The case was called again for mention in April 2013. On 17 September 2013, the respondents applied for a stay based on delays causing a prejudicial effect contrary to s. 10(1) of the constitution, which requires criminal offences to have a fair hearing within a reasonable time. The charge was finally heard on 29 July 2014 and the presiding judge stayed the prosecution on 27 August 2014 on the basis that the respondents were prejudiced by the death of the vital witness. The Attorney-General appealed to the Court of Appeal (CA).

#### Issue

Whether the trial judge was correct in exercising his discretionary power to stay the prosecution.

#### Decision

The CA reviewed case law relevant to the court's discretion to intervene in proceedings based on an infringement of constitutional rights and also considered whether the death of a witness would make it impossible to have a fair trial. It came to the conclusion that the death of R2's aunt had not made the trial of the charges unfair.<sup>1</sup> The CA also considered the delay of nearly a year before the respondents' first appearance and held that this delay was excessive, and unreasonable under s. 10 of the constitution. However, the CA disagreed with a permanent stay of proceedings and after reviewing case law in dealing with remedies for an unreasonable delay in trial, ordered that the stay decision be quashed and directed that the case be

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<sup>1</sup> At 16.

set for trial speedily. The CA observed that in the event of a conviction, the trial court could exercise its discretion in determining whether a modest reduction in sentence should be given for the State's breach of s. 10 of the constitution.

**Comment**

This case has clarified that common law courts should be slow to interfere with proceedings by invoking constitutional rights if there are other common law remedies available to redress the unfairness. In addition, as long as unreasonable delays have not made a fair trial impossible in a criminal matter, remedies for such delays should be considered at the sentencing stage if there is a conviction. This case also reinforces the discretionary nature of remedies in violations of constitutional rights.

## **Evidence – constitutional right to confront witnesses – ‘confrontation clause’ – preliminary hearing – application of the right**

- The right to confront witnesses does not extend to the preliminary hearing.

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### **RMI v Antolok<sup>1</sup>**

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High Court  
Winchester J

Republic of the Marshall Islands (RMI)  
[2018] Criminal case no 2017-020  
6 February 2018

#### **Law(s) and/or international instrument(s) considered**

Constitution of RMI, article II, s. 4(4)  
RMI Rules of Evidence

#### **Facts**

A decision was handed down following arguments heard in chambers pursuant to the State’s motion seeking to either exclude the public and the defendant from the courtroom during the victim’s preliminary hearing testimony or, alternatively, allowing the victim’s preliminary hearing testimony to be introduced through other witnesses.

#### **Issue(s)**

Does the constitutional right to confront witnesses apply to preliminary hearings?

#### **Decision**

The court considered the relevant constitutional provisions, RMI Rules of Evidence and case law in the USA (as there was no RMI Supreme Court opinion on this point). It concluded that the admission of the victim’s testimony through the testimony of other witnesses at the preliminary hearing would not violate the defendant’s constitutional right to confront witnesses.

#### **Comment**

The relevant constitutional provisions state that, ‘[I]n all criminal prosecutions, the accused shall...be with the witnesses against him...’ This protection is often referred to as the ‘confrontation clause’. The US courts have on numerous occasions held that the confrontation clause is a trial right and that it does not extend to a preliminary hearing. The RMI High Court, however, did not opt to allow the exclusion of the accused but instead allowed the State to introduce the victim’s out-of-court statements through the testimony of witnesses to whom those statements were made.

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1 <http://rmicourts.org/wp-content/uploads/2018/02/170207-RMI-v-Antolok-Cr-17-20.pdf>



## Sentencing – riots – criminal conviction of suspended MPs – jail term increased by appellate court – decision quashed by court of appeal

- An appellate court cannot substitute a sentence without first finding error in the court below.

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### Cecil v DPP (Nauru)<sup>1</sup>

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High Court  
Kiefel CJ, Gageler and Keane JJ

Australia for Nauru  
[2017] HCA 46  
20 October 2017

#### Law(s) and/or international instrument(s) considered

Nauru (High Court Appeals) Act 1976 (Cth)  
Appeals Act 1972 (No. 1 of 1972 – Republic of Nauru)

#### Facts

On 16 June 2016, an incident of civil disorder occurred in the vicinity of the parliament of Nauru involving a crowd and three suspended members of parliament (the appellants). The appellants were charged with various riot-related offences and pleaded guilty. The District Court sentenced two of the appellants to a total of three months' imprisonment and the third to a total of six months. The DPP appealed to the Supreme Court arguing that the sentences were manifestly lenient. The Supreme Court (SC) increased the sentences to periods of between 14 and 22 months amongst the appellants. The appellants appealed to the High Court of Australia (HCA), which was then the court of final appeal under a bilateral treaty between Nauru and Australia.

#### Issue(s)

Whether the SC can substitute sentences on appeal without identifying any error in sentencing in the court below.

#### Decision

The HCA decided the case instantaneously at the same time that leave to appeal was granted. In a relatively brief judgment, the HCA unanimously ruled that the SC failed to first find error in the court below, which has been a well-established principle (citing two HCA cases in 1936 and 2013) in relation to how an appellate court can substitute the sentences from the court below. The HCA allowed the appeal and remitted the matters to the SC, differently constituted, for hearing according to law.

#### Comment

Soon after the HCA handed down this decision, it was reported that the bilateral treaty had been rescinded by the Nauruan government, which effectively ended the HCA's jurisdiction for Nauru.<sup>2</sup> The HCA

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1 The three cases joined are Cecil v DPP, Kepae v DPP and Jeremiah v DPP, which were dealt with jointly in the Supreme Court of Nauru: Republic of Nauru v Jeremiah [2017] NRSC 26, 2 May 2017. The full citation in the HCA is Cecil v Director of Public Prosecutions (Nauru); Kepae v Director of Public Prosecutions (Nauru); Jeremiah v Director of Public Prosecutions (Nauru) [2017] HCA 46.

2 See <http://www.abc.net.au/news/2018-04-02/nauru-now-without-court-of-appeal/9609524>

decision itself is not directly relevant to human rights. However, what has unfolded since is a matter of concern in that when a State does not have a final court of appeal, matters may be complicated and may thereby affect the convicted person's right to seek an appeal, which is a right protected under article 14(5) of the ICCPR. As the matter stands at the time of writing, a person convicted by the SC, as the court of first instance, would not have an avenue for appeal to a higher court.

The differently constituted SC decided the appeal on 29 March 2018 and considered that the court below erred in law in its application of the sentencing guidelines. It increased the sentences to between four and nine months amongst the appellants.<sup>3</sup> The appellants sought to appeal to the HCA but discovered that the HCA was no longer the final court of appeal for Nauru, which prompted them to make an application for a stay order back in the SC. The SC granted a temporary stay order and adjourned the matter until 22 June 2018.<sup>4</sup>

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<sup>3</sup> See *Republic v Cecil* [2018] NRSC 15; Criminal Appeal 101 of 2016 (29 March 2018).

<sup>4</sup> See *Director of Public Prosecutions v Jeremiah* [2018] NRSC 16; Criminal Case 101 of 2016 (6 April 2018).

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## Time limit to lay a charge – murder investigation – interrogation without a charge – ‘Speedy Trial’ Act – when should the thirty-day clock start?

- A thirty-day time limit for filing charges is not triggered by arrests unaccompanied by a criminal charge.

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### Mengeolt v Republic of Palau

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Supreme Court  
Rechucher, Michelsen and Maraman JJ

Republic of Palau  
[2017] PWSC 8  
30 March 2017

#### Law(s) and/or international instrument(s) considered

Palau National Code Title 18 (18 PNC), ss 101 and 403

#### Facts

On 5 December 2014, the appellant (A) and two others were charged with various crimes relating to the death of a named person in 2009. A was interrogated by the police on 9 October 2009, 1 July 2013 and 4 November 2014 but was released at the conclusion of each of the two earlier interrogations. A moved to have the charge dismissed based on the thirty-day time limit for laying a charge provided by the Speedy Trial Act, as it is commonly known. A argued that the time should run from the first or second interrogation, but the trial judge denied the motion, holding that an arrest without a charge does not trigger the thirty-day limit. A appealed to the Supreme Court (SC).

#### Issue(s)

Whether the clock only starts to tick from the specific arrest that results in a charge?

#### Decision

The SC unanimously ruled that the previous arrests unaccompanied by a charge did not trigger the time limitation required by the relevant provisions. Therefore, the charge was laid within the thirty-day limit counting from the time of the last interrogation. The trial court’s decision was affirmed.

#### Comment

The relevant provisions (s. 403(b) of 18 PNC) provide that, ‘[a]ny information or complaint charging an individual with the commission of an offence shall be filed within thirty days from the date on which the individual was arrested or served with a summons in connection with such charges’.

Central to A’s argument was the definition of ‘arrest’ which was provided in a different chapter of the same code to mean ‘placing any person under any form of legal detention by legal authority’, which the US act did not have. However, the SC rejected this argument on the basis of irrelevance and adopted the American court’s interpretation of its equivalent of the Palauan Speedy Trial act, which was said to be a copy of the same US act.

This SC decision clarifies Palau’s position in terms of the applicability of the thirty-day limit for laying a charge. It overturned an earlier decision in which the court accepted the reliance on the definition of arrest provided in the same code.

## Customary land dispute – independent tribunal – right to a fair trial – natural justice

- Personal connections between a judge and a litigant gave rise to apparent bias

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### Esekia v Land and Titles Court

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Supreme Court  
Nelson J

Samoa  
[2017] WSSC 145  
9 November 2017

#### Law(s) and/or international instrument(s) considered

Constitution of Samoa, article 9

#### Facts

The applicants and the third respondent had a dispute over customary land where a coconut oil business was carried out. The matter was heard before a panel of the Land and Title Court (LTC, first respondent) on 15 December 2008 comprising a named Vice-President of the LTC, two other judges and an assessor. Before the hearing, the Vice-President recused himself from sitting. It was common knowledge that the wife of the leader of the respondent party was the daughter of the Vice-President's first cousin. It was also revealed by the Vice-President that he knew the brothers and children of another respondent litigant. The matter was adjourned till 11 February 2009 to be heard by a panel chaired by a different Vice-President. For various reasons, the proceedings were delayed until 8 April 2013 when the matter again came before the same former Vice-President. However, the situation that led to his previous recusal had not changed. The leader of the applicants reminded the Vice-President of his earlier recusal, and discussion ensued. The Vice-President assured the applicants that he would give them a fair hearing, noting the matter would be further delayed if they insisted on his recusal. The applicants were not represented by lawyers and, apprehensive about further delays (at this time their leader was quite ill and it was uncertain how long he would survive), they abandoned the objection and the hearing proceeded. Judgment was given for the third respondent. The applicants sought a judicial review of the LTC's decision in the Supreme Court (SC). The Vice-President was joined as the second respondent. The applicants sought to rely on the constitutional guarantee of a fair trial by an independent and impartial tribunal as required under article 9 of the constitution. They claimed that the LTC panel was not an independent and impartial tribunal.

#### Issue(s)

Whether the original decision was tainted by apparent bias.

Whether the original hearing was a fair trial protected under article 9 of the constitution?

Whether the applicants waived their rights to a fair trial.

#### Decision

The SC considered that the Vice-President, having disqualified himself in 2008 for reasons of personal connections and requalified himself in 2013 in the absence of any material change, rendered the tribunal not independent and impartial in the mind of an objective observer. The way the Vice-President subsequently presented himself and glossed over the facts that led to his initial recusal, together with the apparent pressure that the unrepresented litigants were put under to proceed, could not have produced an inference of a waiver of their rights by the applicants. The SC also expressed doubt that the right to a fair trial under the constitution could be waived.<sup>1</sup> The SC quashed the original decision and remitted the matter for re-hearing expeditiously by a differently constituted panel of the LTC.

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<sup>1</sup> At 33–42.

**Comment**

Article 9 of the constitution provides that: '**9. Right to a fair trial** – (1) *In determination of his or her civil rights and obligations .....every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established under the law.*'

The SC took issue with the way in which the Vice-President 're-qualified' himself when the objection was raised, given the background facts were unchanged. It accepted the submissions that the Vice-President had attempted to water down the familial connection he had with one of the respondents and that he had also ignored the second reason for his previous recusal, namely that he was a neighbour of a close relative of another respondent party. The SC opined that the only option for the Vice-President should have been to recuse himself as he had done earlier. Instead, he told the anxious applicants of the indefinite delays they might face, which significantly disadvantaged the unrepresented applicants in making an informed decision. The respondents' main argument was a waiver suggesting that the applicants had had the facts before them and had had sufficient opportunity to raise objections over the hearing period. However, they had chosen not to raise objections until they lost the case. The SC dealt with this issue at length, rejecting the idea that the applicants had been keeping that option up their sleeves and citing a number of cases in support. Ultimately, it came down to the analysis that firstly the applicants were not represented by lawyers and had not had the opportunity or the knowledge to have the objection recorded, and secondly, they were lay persons who were understandably apprehensive about confronting a judicial officer who was to preside over their litigation. These were reasons for upholding that any inferred waiver was equivocal and ineffective. Also interesting in this case was the issue of whether a constitutional right could be waived as a matter of law. The SC felt it unnecessary to decide that question and left it for another occasion.

## **Right to access court – consultancy agreement – international organisation – diplomatic immunity – constitutional right to a fair hearing**

- The Samoan Supreme Court considered the tension between diplomatic immunity from suit and a constitutional right to a fair hearing.

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### **Johnston v Secretariat of the Pacific Regional Environment Programme**

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Supreme Court  
Sapolu CJ

Samoa  
[2017] WSSC 27  
13 April 2017

#### **Law(s) and/or international instrument(s) considered**

Constitution of Samoa, article 9

Diplomatic Privileges and Immunities Act 1978

Diplomatic Privileges and Immunities (Declared International Organisations) Orders 1998

Diplomatic Privileges and Immunities (Declared International Organisations) Amendment Order 2014

European Convention on Human Rights (ECHR), article 6

#### **Facts**

On 18 September 2013, the plaintiff (P) and the defendant (D) entered into a consultancy agreement in which P was to provide D with procurement and financial management services covering a period between 1 November 2013 and 1 August 2016. A dispute over payment arose in 2014 and discussion failed to resolve their differences. Mediation in accordance with the contractual terms also failed to reach an agreement. On 12 February 2014, D informed A that her services would not be required until the contractual issue had been resolved. On 30 May 2014, D informed P that the consultancy agreement would be terminated pursuant to a clause in the agreement. P took action in court, alleging D was in breach of contract based on both substantive payment issues and the way in which D terminated the contract. D sought to have P's application struck out on the grounds that D had immunity from suit as an international organisation and that there was no cause of action under Samoan law for unlawful termination and therefore the statement of claim disclosed no cause of action on that basis. As these proceedings were the first Samoan case to raise the issue of the immunity from suit of an international organisation, and because the decision in these proceedings could have implications for other international organisations in Samoa, the Supreme Court (SC) invited the Attorney-General (AG) to appear.

#### **Issue(s)**

Whether the relevant Samoan Immunity Order applied to D.

If so, whether there was a waiver of immunity.

Whether the application disclosed no cause of action and should be struck out.

#### **Decision**

The SC rejected P's contention that the 2014 Immunity Order did not have retrospective application and held that it applied to D. In considering the contractual terms of the consultancy agreement, which preserved final dispute resolution in Samoan courts in accordance with Samoan law, the SC considered a clear waiver on the part of D to have its right to immunity from suit as an international organisation waived. The SC could have disposed of the struck-out motion on that waiver decision alone but felt a need to respond

to P's detailed submissions in relation to the jurisprudence of diplomatic immunity and alternative dispute settlement mechanisms relevant to a person's right to be heard in court. After considering the European Court of Human Rights' (ECtHR) decision and the relevant human rights clauses in both Europe and Samoa, the SC expressed a view that as far as the present case was concerned, it was not enough for D to point to an alternative dispute resolution mechanism under the contract; it must also show that such a mechanism was reasonable or adequate under the circumstances: *'In other words, it is debatable whether the availability of mediation and conciliation as mechanisms of dispute resolution are reasonable alternative means of dispute resolution given the immunity which has been conferred on the defendant. The point about the reasonableness or adequacy of mediation and conciliation as alternative means of dispute resolution was not addressed or sufficiently addressed. In these circumstances, it would not be appropriate for the strike out motion to succeed on this basis. The matter is not plain and obvious to justify striking out or a stay of proceedings.'*<sup>1</sup> The alternative ground to strike out based on unlawful termination was not pursued because that was not what P's claim had relied on.

### **Comment**

The SC in this decision only had to decide whether the application should be struck out; therefore, it did not have to discuss the substantive contractual terms as to who was right or wrong. In discussing the ECtHR's approach in reconciling municipal law to give international organisations immunity from suit, and the human rights protection (civil rights and obligations to be heard before a court or tribunal) provided under article 6 of the ECHR, the SC quoted at length from a German case that went to the ECtHR in 1999.<sup>2</sup> The relevant provisions in article 6 of the ECHR are similar to article 9 of the Samoan Constitution, which provides for the right to a fair trial. A right to a court hearing had been held to be an integral part of the right to a fair trial under article 9 of the Constitution.<sup>3</sup> The ECtHR's approach was to allow municipal law to limit this civil right as long as the limitation was proportional to the aim it sought to achieve (i.e. allowing independent international organisations to pursue or strengthen their cooperation in certain fields of activities within their competence). It was on this analysis that the SC rejected D's submission that there was an alternative dispute resolution within the organisation that was provided under the contract. The SC was concerned as to whether the alternative means of mediation and conciliation had been shown to be a reasonable and adequate mechanism for dispute resolution. Implicit in this decision is that the contractual clause sought to exclude a party's right to take court action in a dispute before exhaustively engaging in the dispute resolution mechanism provided under the contract and that the opposing party therefore had to show that the contractual dispute mechanism was a reasonable and adequate alternative.

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1 At 54.

2 At 50–53.

3 At 47.

## FAMILY LAW

### Family conflict – police involvement – prosecution – ‘family violence’ – ‘placing another family or household member in reasonable fear of imminent bodily injury’ – vagueness

- The definition of ‘family violence’ is unconstitutionally vague.

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#### People of Guam v Shimizu

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Supreme Court  
Torres CJ, Carbullido and Maraman JJ

Guam  
[2017] GUSC 11  
5 September 2017

#### Law(s) and/or international instrument(s) considered

Guam Code Annotated, Title 9, Chapter 30

#### Facts

The appellant (S) was upset after working in her elderly mother’s yard without being supplied with the soda and cigarettes she had requested. S’s daughter, who was at the scene and was concerned, telephoned her Aunt (J), who is S’s sister. J drove there after she received the call and asked S, ‘Sister, what’s going on?’ S responded, ‘You’re not my sister...Get out of my face.’ J said, ‘No, you need to get out of here’. S responded, ‘No, get out or else I’ll kill you...Matter of fact, I’ll kill all of you.’ S then proceeded to look through her handbag. At this point, J told her niece to call the police. Then they both went inside and locked themselves in until the police came. The police arrived and searched S but no weapon was found. The police charged S with two counts of family violence for placing J and her own daughter in fear of bodily injury under s. 30.20 of the family violence provisions. S was found guilty on both counts. She filed a motion for a judgment of acquittal notwithstanding the verdict, arguing that Guam’s family violence statute is unconstitutionally vague and over-broad. After the trial court denied S’s motion, an appeal was filed in the Supreme Court (SC).

#### Issue

Whether the relevant statute was unconstitutionally vague and too over-broad to be a valid law.

#### Decision

The SC considered the definition of ‘family violence’ provided by the relevant statute and unanimously concluded that the specific provision (30.10(a)(2)) was unconstitutionally vague: *‘It provides neither fair notice to ordinary citizens of what conduct is prohibited or permitted, nor minimal guidelines to govern law enforcement.’*<sup>1</sup> The relevant provisions were therefore invalid.

#### Comment

Section 30.10 defines ‘family violence’ as follows:

*(a) Family violence means the occurrence of one (1) or more of the following acts by a family or household member, but does not include acts of self-defense or defense of others:*

*(1) Attempting to cause or causing bodily injury to another family or household member;*

*(2) Placing a family or household member in fear of bodily injury.*

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1 At 41.



Police sought to rely on s. 30.10(a)(2). The trial court reasoned that S's conduct amounted to a 'true threat' that did not enjoy First Amendment protection. On appeal, the SC said whether or not S's statements constituted a 'true threat' was irrelevant if the statute was unconstitutional on its face. It cited a USA Supreme Court decision that held: '*[i]f on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.*'<sup>2</sup>

In Guam, imprecise laws can be attacked on their face under two different doctrines: over-broadness and vagueness. The courts will first examine over-broadness, which is relevant to the First Amendment (freedom of speech). In this case, the court was not persuaded that the impugned statute was over-broad. The vagueness test requires a penal statute to define an offence with *sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.*<sup>3</sup> Importantly, it is not about whether ordinary people would understand the normal meaning of a particular word, but rather about what conduct is covered and what is not.<sup>4</sup>

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2 At 17.

3 At 24.

4 At 30.

## **Domestic violence – family protection legislation – contempt of court – sentencing**

- Convictions were quashed due to procedural irregularities.

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### **Namri v Public Prosecutor**

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Supreme Court  
Geoghegan J

Vanuatu  
[2017] VUSC 113  
21 July 2017

#### **Law(s) and/or international instrument(s) considered**

Family Protection Act  
Judicial Services and Courts Act  
Criminal Procedure Code  
Constitution of Vanuatu, article 5(2)

#### **Facts**

The chronology of events leading to this appeal is as follows:

8 April 2016 – A family protection order was applied for by the wife against the appellant.

12 April 2016 – A family protection order was granted against the appellant.<sup>1</sup>

10 May 2016 – The magistrate adjourned the hearing pending the appearances of both parties' chiefs.

12 May 2016 – The parties appeared before the magistrate and the appellant punched his wife in front of the magistrate. The magistrate convicted the appellant of offences on the spot under s. 21 of the Family Protection Act (which relates to a breach of a family protection order punishable by a maximum of two years imprisonment) and s. 16(1) of the Judicial Services and Courts Act (contempt, which is punishable by a maximum of two months' imprisonment summarily). The magistrate sentenced the appellant to serve five months' imprisonment for both convictions, with immediate effect.<sup>2</sup> Subsequently, the appellant was granted bail pending an appeal.

26 March 2017 – The appellant again assaulted his wife with a hammer while she attended church.

27 March 2017 – The appellant was arrested.

28 March 2017 – The appellant was brought before the Magistrates Court and remanded on bail on charges of intentional assault.

31 March 2017 – The appellant was brought by police from his property to appear before the same magistrate who had sentenced him on 12 May 2016. He was convicted of breaching a family protection order and sentenced to three months' imprisonment on the spot. There was no record of an assault charge actually being laid and heard.

The appellant sought to appeal against all convictions. The State conceded that the convictions entered by the magistrate based on the Family Protection Act were unlawful, but the contempt conviction on 12 May 2016 was correctly entered.

#### **Issue(s)**

Whether the convictions in relation to a breach of a family protection order could stand.  
Whether the summary conviction of contempt of court was correctly entered.

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1 Extrapolated from paragraph 11.

2 At 4.

**Decision**

The court held that the conviction based on a breach of a family protection order could not stand because of the failure to institute the criminal charge according to law and the failure to provide the appellant with a fair hearing, which is a right protected under the constitution. The manner in which the conviction came about was arbitrary and could not stand. Similarly, the conviction for contempt of court, which was instantaneously handed down by the magistrate without the appellant being heard or being able to consult a lawyer, could not stand despite his blatant act of punching his wife inside the Magistrates Court, witnessed by the magistrate. The court ordered that all convictions be quashed. In quashing the conviction for contempt, the court's reasoning also relied on the fact that the magistrate failed to record and hand down discrete terms of imprisonment for contempt and for breach of a family protection order or assault. The blanket imprisonment term of five months made it impossible to discern whether the contempt charge went beyond what was legally allowed. It is incumbent on a judicial officer to provide reasons for a decision.<sup>3</sup>

**Comment**

The court was appalled by the manner – including incomplete records and lack of proper procedures – in which the Magistrates Court handled these matters. Had the prosecution properly instituted the charges, and had the Magistrates Court conducted a fair hearing of the respective charges, the accused would have received his just deserts. Not only does the respective criminal procedure legislation require these proper procedures, but the constitution also specifically protects the right of everyone to a fair hearing as a fundamental right. Section 5(2)(a) of the constitution provides that *everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence*. The court left it to the Public Prosecutor to determine whether or not charges should be laid in relation to the offences.

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3 At 28.

## MANDATORY SENTENCING

### Death penalty revived in 1991 – offenders pending execution – delays in implementation – human rights issues – enquiry under s. 57(1) of the PNG Constitution

- Failure to set up an Advisory Committee on the Power of Mercy resulted in a human rights violation.

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#### In re Enforcement of Basic Rights under s. 57 of the Constitution of the Independent State of PNG

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National Court  
Cannings J

Papua New Guinea  
[2017] PGNC 266  
12 October 2017

#### Law(s) and/or international instrument(s) considered

Constitution of PNG, s. 57(1)  
Human Right Rules 2010, rule 8  
Correctional Service Regulations

#### Facts

**PNG revived the death penalty in 1991 but thus far has never carried it out.<sup>1</sup> Pending its implementation, prisoners who have been sentenced to a death penalty are subjected to strict custodial conditions, which have raised some human rights issues under the constitution.** On 26 May 2015, a National Court judge (Cannings, J) initiated a proceeding by way of issuing Form 126 of the National Court Rules according to Court Rule 8, which was created for the purpose of initiating human rights inquiries under s. 57(1) of the constitution. The purpose of the inquiry was to consider the human rights of prisoners sentenced to death in PNG. The judge summoned the Principal Legal Adviser of the National Executive, the Public Solicitor, the Public Prosecutor, the Commissioner of the Correctional Service and the Registrar of the National Court to appear. In the inquiry, a representative of the Attorney-General submitted that the court lacked jurisdiction to initiate an inquiry, citing the Supreme Court's decision (discussed elsewhere in this volume).<sup>2</sup> This is a decision of substantive inquiry.

#### Issue

Does the court have jurisdiction to conduct this inquiry?

What are the human rights of prisoners who have been sentenced to death and have those rights been breached?

What are the roles of the Advisory Committee on the Power of Mercy vis-a-vis relevant prisoners' human rights, and what are appropriate orders?

#### Decision

The National Court (NC) has jurisdiction to initiate this inquiry under s. 57(1) of the constitution. The reasoning of the Supreme Court on this point was *obiter dicta*, which does not bind the NC. The NC identified 14 prisoners whose constitutional rights have been breached due to the delay in the implementation of their sentences and because of the dysfunction of the Advisory Committee on the Power of Mercy (lack of committee members). The Court ordered the National Executive Council to facilitate the appointment of members of the Advisory Committee on the Power of Mercy and to ensure staff arrangements were made

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1 At 32 and 44. See also <https://www.thenational.com.pg/8-death-row/> viewed on 20 April 2018.

2 Independent State of Papua New Guinea v Transferees [2015] PGSC 45; SC1451 (5 August 2015).

by 1 January 2018. Failure on the part of the National Executive Council to act accordingly would enliven a stay order on the execution of any prisoner who had been sentenced to death.<sup>3</sup>

### Comment

The substantive inquiry itself was not too controversial, although the Attorney-General subsequently indicated that he would ask the Supreme Court to clarify some issues.<sup>4</sup> The NC found that 14 of the 23 people who had been sentenced to death had exhausted their judicial avenues and were still waiting for the implementation of the death penalty. The NC also identified relevant human rights provisions in the constitution that were applicable to these prisoners, including freedom from inhuman treatment and harsh or oppressive acts.<sup>5</sup> The NC then examined the regulations relevant to the identified prisoners, which required them to be placed in a cell alone, to be observed at all times, etc., and concluded that the plight of the prisoners, pending the implementation of the death penalty, was the responsibility of the Advisory Committee on the Power of Mercy. The Committee has the statutory mandate to make recommendations to the executive arm of the government, which in turn has the power to consider a pardon, remission or commutation of a sentence. As there has been no functional Advisory Committee and no death penalty has been carried out, the prisoners have been in the same situation for a prolonged period of time. The long delay in the implementation of the death penalty and the dysfunction of the Advisory Committee have meant that the prisoners have had no effective opportunity to invoke their right to the full protection of the law by applying for consideration of the power of mercy.<sup>6</sup> Another human rights concern was the apparent failure of the Correctional Service to ensure that the prisoners were given special care and treatment in accordance with the regulations.

It remains to be seen whether the government will re-establish a functional Advisory Committee on the Power of Mercy or challenge the NC's jurisdiction to initiate the enquiry in the first place.

There have been similar problems in the Solomon Islands (SI), which led to an appeal being heard in its Court of Appeal in 2014 (see PHRLD 5, page 67). That case has since gone to the Privy Council (PC) but in vain, due to the PC's opinion that, by implication of the SI Constitution, the PC no longer has jurisdiction to adjudicate matters arising from SI since its independence.<sup>7</sup>

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3 At 82.

4 <https://www.thenational.com.pg/power-mercy-committee-act/>

5 At 45 and 53.

6 At 76.

7 See *Bade v The Queen*, pre-trial submissions 8 June 2016:  
<https://www.jcpc.uk/cases/docs/jcpc-2016-0041-judgment.pdf>

## **Mandatory life sentence – fair trial – sentencing – mandatory minimum term to be served – tariff guidelines**

- It is mandatory for sentencing judges, not government ministers, to fix a minimum non-parole period in imposing a life sentence.

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### **Ludawane v Regina**

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Court of Appeal  
Goldsbrough P, Ward and Hansen JJA

Solomon Islands  
[2017] SBCA 23  
13 October 2017

#### **Law(s) and/or international instrument(s) considered**

Correctional Services Act 2007  
Correctional Services regulations 2008  
Constitution of Solomon Islands, article 10

#### **Facts**

In July 2010, the appellant pleaded guilty to murder consequent to brutal assaults he committed against his own child over a period of five consecutive days. The appellant accused his child of stealing a melon and money. In October 2010, the sentencing judge sentenced the appellant to mandatory life imprisonment with a minimum eight-year term to be served before parole could be considered. In 2014, regulations pursuant to the Correctional Services Act were made, which allowed an application to the Parole Board for life prisoners after they had served at least 10 years. This effectively extended the minimum term to be served by the appellant to 10 years. The appeal against his sentence was filed in April 2017. The judgment did not provide details of the grounds of the appeal. It is conceivable that the appeal might have been intended to trigger the parole application earlier than the minimum 10 years now prescribed under the 2014 regulations. As the life sentence was mandatory, the appeal was necessarily about the minimum term to be served before a parole application could be considered.

#### **Issue(s)**

Whether the minimum period of eight years to be served before parole could be applied was adequate.

#### **Decision**

The Court of Appeal (CA) unanimously upheld that the minimum term to be served of eight years was manifestly inadequate in view of the relationship between the appellant and the victim, and the brutality that occurred over five days. The CA also took into consideration the United Kingdom tariff guidelines. The UK guidelines considered three starting points for a non-parole period, i.e. 12 years (less serious – normal starting point), 15/16 years (very serious – higher starting point) and very serious (30 years or more). The CA considered that the appellant's non-parole period ought to have been placed between the two higher starting points. On that basis, the minimum of eight years set by the sentencing judge was manifestly inadequate. The CA allowed the appeal, but effectively the appellant was worse off.<sup>1</sup>

#### **Comment**

There were no tariff guidelines in the Solomon Islands for judges to consider in setting a minimum non-parole period for those sentenced to life. The CA had to consider the historical development of case law

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1 At 24 and 33.

and guidelines in the UK where human rights protection for offenders under the European Human Rights Convention was almost identical to the relevant provisions in the Constitution of the Solomon Islands. Ultimately, the CA had to decide whether the minimum non-parole period set by the sentencing judge was correct.

The CA discussed whether the 2014 regulations, which effectively fixed a minimum non-parole period of 10 years for prisoners who were sentenced to life, were inconsistent with a well-established common law principle based on a UK House of Lords 2002 decision (the Anderson case).<sup>2</sup> In part, the Anderson principle considered that setting a non-parole period is part of the sentencing duty of the trial judge and is within the protection of a fair trial. Relevantly, the Anderson principle requires that when sentencing an offender to a mandatory sentence of life imprisonment, it is incumbent on the sentencing judge (not the minister) to fix a minimum term of imprisonment that the offender must serve prior to consideration of parole.<sup>3</sup> Due to the specific facts of the appellant's case, and the fact that this issue was not raised on appeal, the CA felt it unnecessary to rule on that point. However, the CA confirmed the applicability of the Anderson principle in Solomon Islands, given the identical terms of the relevant constitutional provision regarding a fair trial.<sup>4</sup> The CA opined that the potential conflict between the 2014 regulations, which set a minimum of 10 years, and the Anderson principle did not arise because the CA had increased the non-parole period in this case to 18 years.<sup>5</sup>

Given that the UK guidelines being adopted have a minimum of 12 years as a starting point, and the Solomon Islands regulations set a minimum 10 year period, there is little potential for real conflict.

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2 See *Regina v Secretary of State for the Home Department (Respondent) ex parte Anderson (Fc) (Appellant)* <https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd021125/ander-1.htm>

3 At 11–15.

4 At 14.

5 At 26 and 30.

## MOVEMENT

### **Freedom of movement – acquitted defendant in immigration detention – deportation ‘stopped’ due to pending appeal by the State – whether freedom of movement was infringed**

- The Court of Appeal considered whether movement could be restricted for an alien who was acquitted after trial but was awaiting the State’s appeal.

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#### **State v Hurtado**

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Court of Appeal  
Brown J

Fiji  
[2015] FJCA 171  
14 December 2015

#### **Law(s) and/or international instrument(s) considered**

Constitution of Fiji, article 21  
Immigration Act 2003

#### **Facts**

The accused (D) was charged with serious drug offences that could result in life imprisonment if he was convicted. On 17 November 2015, the High Court acquitted D, although three of the four assessors returned a guilty opinion.<sup>1</sup> This acquittal was immediately appealed by the State and appeal papers were also served on the Director of Immigration (DM) in view of the fact that D was held in immigration detention at the time. The matter was listed before the Court of Appeal (CA) at the request of the State as a matter of urgency and on 18 November 2015 the CA ordered D to appear on 23 November 2015. In the meantime, the CA made interim orders directing the DM not to deport D from Fiji pending further court orders. The State subsequently submitted that the ‘stop’ order should be extended as a rational and proportionate measure to ensure that the State’s appeal was not rendered nugatory. It also submitted that freedom of movement under the constitution did not apply to D because he had been in Fiji unlawfully. D’s lawyer argued that there was no reason for the stop order because the DM was empowered to deport D as soon as practicable under s. 15 of the Immigration Act. D also raised his constitutional right to freedom of movement.

#### **Issue**

Whether the interim stop order should be extended.

#### **Decision**

The CA upheld the application of the extension of the stop order on the basis that, being an intermediate appellate court, it had inherent jurisdiction to ensure that the State’s appeal was not rendered nugatory or ineffectual.<sup>2</sup> The CA also ruled that freedom of movement did not apply to an unlawful non-citizen and this limitation of freedom extended to the right to leave Fiji at the choice of an unlawful non-citizen.<sup>3</sup> In so far as the Immigration Act was concerned, the CA held that the DM was correct to consider the stop order when considering the deportation of D under the act.

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1 See *State v Hurtado* [2015] FJHC 888; HAC073.2014S (17 November 2015).

2 At 23 and 24.

3 At 26.



### Comment

As it turned out, the appeal against D's acquittal was decided by the CA nine months after the event.<sup>4</sup> The appeal was upheld and the matter was remitted for retrial before a differently constituted bench. D was eventually convicted (unreported)<sup>5</sup> and sentenced to 17 years imprisonment.<sup>6</sup> This final outcome should not distract from the possible injustice that would have resulted had D's acquittal been upheld. This stop order application did not occur in a situation where D was waiting for a trial. Rather, it was a case where the accused had been charged, tried and acquitted by a competent court. Quite apart from the constitutional right against double jeopardy, which was done away with by statute law in Fiji, this decision warrants further analysis.<sup>7</sup>

The CA opined from the outset that it was significant that the right of appeal by the State in respect of acquittal is identical to the right of appeal by the convicted accused under the statute law, but it did not further explain why this significance was relevant to this stop order application.<sup>8</sup> The only inference of the noting of this significance from the balance of the CA's judgment was that the State could not escape a convicted accused person's appeal hearing; therefore the same should apply to an acquitted defendant. If that was what was intended, then it certainly defies how the criminal justice system operates. Clearly the State was concerned that if the acquitted defendant was at large or outside Fiji before the appeal was heard, it would render the appeal nugatory because even if an appeal was upheld the State might not have been able to bring D to justice. It was on this assumption that the CA felt compelled to exercise its inherent jurisdiction to facilitate the continuation of D's immigration detention for the sake of ensuring that D would be available in Fiji in custody at the appeal hearing. This seemingly pragmatic approach ignored the fact that an acquitted person, unlike an accused person pending trial, is a free person until the appellate court overturns that acquittal. It also purported to equate a right of appeal with an obligation to appear in court to defend an appeal.

Suppose that D was not held in an immigration detention centre at the time – the CA could not have ordered him to be taken into custody pending the State's appeal, quite apart from his constitutional right to freedom of movement. By granting a stop deportation order, the CA was in effect placing an acquitted person on remand. The ruling about the DM's entitlement to consider this stop order was redundant because the DM could not possibly have acted otherwise without flying in the face of a court order to stop deportation. Without the order, the DM could have had statutory discretion to consider when D should be deported. There is no compulsion for a deportation to happen immediately. If there had been another criminal prosecution pending (which was indeed the case because on 26 January 2016, D was convicted and sentenced for another offence),<sup>9</sup> the DM could legitimately have delayed the deportation. In addition, it is one thing for the prosecution to inform the DM and seek assistance, but quite another for the CA to step in to do the work that belonged to the executive, who should have had the duty to explore other options, such as continuous surveillance and/or seeking assistance from a foreign government or from Interpol. The CA's grant of a de facto remand order under the circumstances would have jeopardised its neutrality by leaning towards the predisposition of a successful appeal

4 See *State v Hurtado* [2016] FJCA 115; AAU00148.2015 (30 September 2016).

5 There was a media report that D was found not guilty by the assessors in the 2017 retrial: <http://fjisisun.com.fj/2017/06/21/assessors-find-colombian-national-not-guilty-of-drug-find/>

6 See the sentencing report: *State v Hurtado* - Sentence [2017] FJHC 446; HAC073.2014 (27 June 2017).

7 See s14(1)(b) and s6(5) of the Constitution. In another acquittal matter handed down by a Magistrates Court, the Chief Justice referred the magistrate's decision to the High Court for review; the High Court quashed the magistrate's acquittal decision opining (perhaps incorrectly) that the matter should have at best been discharged because, 'If a person is acquitted, this means that the case cannot be appealed due to double jeopardy rules (i.e., they can't be tried twice for the same crime).'

8 See *State v Yakub* [2016] FJHC 11; HAR2.2015 (20 January 2016) at 44 to 49.

9 At 9.

9 A few weeks after this 'stop' order decision, D was also charged and convicted of providing false information or misleading answers under the Immigration Act and sentenced to 12 months imprisonment: *State v Hurtado* [2016] FJMC 6; Criminal Case 2033.2015 (26 January 2016).

In so far as D's constitutional right under s. 21 was excluded due to his unlawful immigration status in Fiji, it should be noted that D became an unlawful non-citizen, not through his own fault, but because during his remand period his tourist visa ran out.<sup>10</sup> The immigration authority could and should have considered granting him a criminal justice or similar visa pending his trial when his tourist visa expired. Instead, it allowed it to run out and let him become unlawful by default. The eventual conviction would seem to have justified the way the CA decided this application, at the cost, however, of making inroads into the criminal justice system.

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<sup>10</sup> At 27.

## PRIVACY

### **Tax documentation – confidential information leaked to the public domain – publication of confidential information – interlocutory restraining orders – freedom of expression – protection of reputation – public interest consideration**

- After considering the balance of convenience and public interest, interlocutory restraining orders relating to a company’s confidential tax information were discharged.

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#### **Friendly Islands Satellite Communications Ltd v Pohiva**

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Court of Appeal  
Moore, Blanchard, Hansen and Tupou JJ

Tonga  
[2015] TOCA 14  
16 September 2015

#### **Law(s) and/or international instrument(s) considered**

Revenue Services Administration Act 2002, s. 57

#### **Facts**

The appellant (Tongasat) was the exclusive agent for the Kingdom of Tonga in the management of its satellite orbital slot positions. A letter dated 1 February 2013 from the Commissioner of Revenue’s office to the tax agent for Tongasat informed Tongasat that its objection to a 2010/2011 income tax assessment had been disallowed, resulting in income tax of just over \$12 million currently being owed. On 11 August 2014, copies of this letter were separately slipped under the doors of the Tonga Public Service Association Inc. (Tonga PSA) and a newspaper (Kele’a), which subsequently published articles in print, releasing the letter and making comments about Tongasat’s unpaid tax and relevant operational issues. Tongasat took action in court against seven defendants, including the Tonga PSA, Kele’a and some of its own management personnel. The action included defamation and breach of confidentiality. On 26 August 2014, Tongasat sought (ex parte, i.e. uncontested) and was granted interlocutory restraining orders preventing further publication and dissemination of its confidential tax documents. However, the interlocutory restraining orders were subsequently discharged by the Chief Justice (CJ) on 12 November 2014. Tongasat appealed to the Court of Appeal (CA), alleging the CJ erred in discharging the interlocutory orders. Tongasat’s challenges were on the grounds of s. 57 of the Revenue Services Administration Act (which deals with the confidentiality of tax documentation) and equitable principles.

#### **Issue**

Whether the CJ was correct in discharging the interlocutory restraining orders.

#### **Decision**

The CA agreed with the CJ’s understanding of the confidentiality provisions in s. 57 in that they did not mean to provide a broad secrecy provision binding tax officers and the public alike.<sup>1</sup> In the absence of allegations of an unlawful act in obtaining the impugned documentation on the part of the defendants, s. 57 did not assist the appellant’s argument for the continuation of the restraining orders against the respondents.

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<sup>1</sup> At 13, 21 and 22.

The CA quoted the CJ, who was satisfied that, as a general principle, a court should only restrain rights of free expression where there are clear and compelling reasons to do so.<sup>2</sup> The CA rejected Tongasat's submissions that the level or nature of the protection of taxation information differs from the protection afforded other confidential commercial information. In relation to considerations of the balance of convenience, the CA considered the alleged future harm against the considerations of freedom of speech, and the right of the public to be informed of matters of real and substantial public interest, and held that the CJ had not erred. The appeal was dismissed.

### **Decision**

The case attracted wide media attention and public interest. A member of the Tongan royal family was a Director of Tongasat and there was also an allegation of foreign aid money wrongfully ending up in Tongasat.<sup>3</sup> Ironically, the substantive tax assessment dispute between the tax office and Tongasat, which triggered this breach of confidentiality law suit, also ended up in the CA and in March 2018 the CA ruled in favour of Tongasat.<sup>4</sup> In any event, the legal position in so far as considering interlocutory restraining orders is concerned, means basic principles continue to apply, i.e. they include consideration of whether there is a serious issue to be tried, the weighing up of irreparable harm and public interest and the balance of convenience, which includes whether damages instead of restraining orders should be considered. The confidential tax information of a high-profile company will not be treated differently from any other commercial confidential information when assessing where the balance of convenience lies.

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2 At 15.

3 At 31, also see

<http://kanivatonga.nz/2017/10/princess-pilolevu-tongasat-amid-companys-ongoing-battles-court/>

4 See *Friendly Islands Satellite Communications Co Ltd (TONGASAT) v Minister of Revenue and Customs* [2018] TOCA 6; AC 13 of 2017 (26 March 2018).

## PROCEDURE

### **Police search warrant – lawyer’s office searched and files seized – breach of solicitor/client privilege – validity of search warrant – whether constitutional rights were breached**

- A search warrant was validly issued so there was no need to decide on the consequences of an invalid warrant.

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#### **Rano v Commissioner of Police**

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Court of Appeal  
Goldsbrough P, Lunabek and Young, JJA

Solomon Islands  
[2016] SBCA 19  
14 October 2016

#### **Law(s) and/or international instrument(s) considered**

Criminal Procedure Code  
Penal Code Act  
Police Act  
Evidence Act  
Constitution of Solomon Islands, article 9

#### **Facts**

The police received a complaint alleging that a fabricated document was filed in the local Land Court by a lawyer representing a client in land dispute litigation. Following an investigation and an interview with the client of the impugned lawyer, a search warrant was issued and the police raided the lawyer’s office and seized documents and files relevant to the allegation of fraud. A charge was laid against the lawyer. It was later withdrawn and the lawyer was acquitted. The lawyer then sought legal action in the High Court (HC) against the police, seeking compensation on the basis of the validity of the search warrant that led to the unlawful search and seizure, which violated his right to privacy and property. It also alleged that the search and seizure based on an invalid search warrant breached client/lawyer privilege in relation to communication. The HC ruled that the search warrant was invalid, but that the police had acted lawfully within their powers and therefore no violation of constitutional rights had resulted. The lawyer appealed to the Court of Appeal (CA), arguing that the HC was wrong in holding that the search warrant was valid until it was quashed and not that it was invalid from the outset. The police cross-appealed the HC decision, arguing that the search warrant was valid.

#### **Issue**

Whether the search warrant granted was invalid.  
If it was invalid, whether it was invalid ab initio or invalid until it was quashed by the court.  
Whether relevant files and documents seized by the police are protected under client/lawyer privilege relating to communication.

#### **Decision**

The CA unanimously upheld the cross-appeal and dismissed the appeal, holding that the search warrant was validly issued regardless of the wrongly identified number of the relevant section of the Penal Code. It had satisfactorily outlined the suspected crime of fraudulent evidence in accordance with the requirements laid down in the relevant provisions of the Criminal Procedure Code. While both parties focused their

submissions on whether the search warrant was invalid until quashed, the CA did not need to decide that point. In relation to client/lawyer communication privilege, the CA held that privilege was not applicable under the circumstance because the relevant files and documents were not communications between client and lawyer relating to the criminal charge. Even if it was applicable, the privilege would not extend to documents prepared in furtherance of the commission of a fraudulent or corrupt act.<sup>1</sup> The CA quashed the HC decision and reversed the cost order on a standard basis. There was no cost order in the CA due to the respondent's late cross-appeal being challenged by the appellant.

### **Comment**

It is significant that both the HC and the CA reasoned that the protection of client/lawyer privilege was available in common law and statute law, but that this protection was about issues of admitting evidence in court and did not extend to a police search warrant issued by a competent court.<sup>2</sup> In a way, this protection is a shield to ensure public confidence in seeking advice from lawyers, which is vital in a free and democratic society. It certainly will not shield people intending to avoid being investigated or charged when suspected of committing a crime.

This decision leaves open the issue of whether an invalidly issued search warrant is invalid from the outset or whether it only becomes invalid when it is declared by a court to be so. Also, what of the consequence of the seized documents and the claims of human rights breaches? The HC opined that a search warrant only becomes invalid when it is so declared by a court. The CA did not need to address that issue but thought a practice developed elsewhere was worth considering; namely, where a seized document is before a court, there must be a decision on whether it is a privileged document or not. If it is privileged, it will be returned to the lawyer; otherwise it will be retained by the investigation authority.<sup>3</sup> Another aspect that practitioners should be aware of is that the privilege is the client's and not the lawyer's. Thus, the client may claim it but may also choose to waive it.

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1 At 33–35.

2 See paragraphs 17 to 22 of the HC decision: *Rano v Attorney General* [2016] SBHC 93; HCSI-CC 111 of 2014 (27 June 2016) See also paragraphs 33 to 37 of the CA's decision.

3 At 36.

## Evidence – driving under the influence of alcohol causing death and injury – evidential alcohol test without breath screening – right to liberty – whether evidence is admissible

- Evidence was not illegally obtained and the right to liberty was not breached.

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### Rex v 'Inia

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Supreme Court  
Cato J

Tonga  
[2016] TOSC 7  
11 March 2016

### Law(s) and/or international instrument(s) considered

Traffic (Amendment) Act 2010

### Facts

Two police officers attended the scene following a traffic accident that resulted in human injury, and arrested the driver on a charge of reckless driving. Due to crowd anger and violence against the driver, one police officer took the accused to the police station without first conducting an alcohol breath screening at the scene, while the other stayed at the scene to stop the crowd from damaging the driver's car. The accused driver was then taken for an evidential breath test (without first undergoing any breath screening at the police station), which returned a reading double that of the legal alcohol limit for driving. The accused was later charged with driving under the influence of alcohol, causing death and injury. At the trial the accused's lawyer opposed the evidential breath test result being admitted, arguing that it was obtained in contravention of the standard procedure, i.e. without first conducting breath screening. The court adjourned the trial for a ruling on the essential question of whether the evidence could be admitted. During the course of the argument the court also sought submissions on *whether a failure to follow procedure correctly that was not the product of deliberate police malpractice or abuse but a genuine mistake in procedure should inevitably mean that evidence is excluded.*<sup>1</sup>

### Issue

Whether the evidential breath test was legally done and admissible.

Whether evidence obtained not in accordance with standard procedure but without abuse of power should be automatically excluded as evidence.

### Decision

The court held that the evidential breath test was lawfully obtained because the empowering act allows this test to be performed without first conducting a breath screening when the latter cannot be carried out for any reason (s. 25B(1)(c) of the Traffic Act). The court accepted that for the safety of the driver he was lawfully taken away from the scene without first undergoing breath screening, and that as he was under arrest for reckless driving, he was lawfully detained, and the subsequent evidence was obtained in accordance with the law. The accused was sentenced to a three-year prison term with the last twelve months suspended.<sup>2</sup> The court also rejected the submission that strict adherence to procedure was required before the evidence obtained could be admitted, citing an Australian High Court decision. The court found that

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1 At 19.

2 See separate judgment in Rex v 'Inia [2016] TOSC 16; CR29.2015 (9 May 2016).

there was no deliberate disregard of the law on the part of the police, nor was there material abuse of the accused's right to liberty because he was arrested at the time. It opined that it was a proper balance between the public interest in the prosecution of the crime and individual liberty.

**Comment**

This case shows that admissibility of evidence in a trial is a matter of discretion for the trial court and that failure to follow procedure does not automatically make the evidence inadmissible. This stance should be contrasted with decisions in jurisdictions where the Fourth Amendment of the American Constitution is applicable, such as in Guam, where the evidence from a roadside breath test was excluded by the court because the roadside police checkpoint was not set up in accordance with procedural guidelines (see PHRLD 5, at 19).

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3 At 19 and 20. The relevant HCA decision was about the admissibility of evidence from a voluntary alcohol test obtained under circumstances where the law does not authorise it: *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54 (14 June 1978).



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## Police search warrant application

- A warrant application was denied by the court due to inadequate form and substance.

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### In re Search Warrant for FSM Telecommunications Corporation

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Supreme Court  
Yamase CJ

Federated States of Micronesia  
[2016] FMSC 16  
9 May 2016

#### Law(s) and/or international instrument(s) considered

FSM Criminal Rules 41

#### Facts

On 2 January 2016, a captain of the Crime Unit of the FSM police force filed a single document entitled 'Application and Affidavit' in the court, seeking a search warrant enabling the police to carry out a search of a commercial entity named 'FSM Telecommunications Corporation (FSMTC)' and seize its electronic records. Evidence of a ship registry, showing a ship named FSM, was produced with the application. In the affidavit, it was stated that a criminal offence had probably been committed in violation of Title 32, Chapter II of the FSM Code. The warrant sought to enable search and seizure of all the email records and phone records of FSMTC without limitation on time or content. The court refused the police application for a search warrant and this decision was the written record of the court's decision.

#### Issue

Whether the search warrant should be granted.

#### Decision

The court denied the warrant due to irregularities in the application. First, the application document was not submitted by the assistant attorney supported by the FSM police investigator's affidavit of probable cause, which was the customary practice. However, under the Criminal Rule the court has the authority to issue a search warrant 'upon the request of a police officer or an attorney for the government'. Therefore, this irregularity was not in itself fatal. Secondly, the submitted document was in truth an affidavit only, although it was entitled 'application and affidavit'. Thirdly, the affidavit failed to provide the court with a specific statute that was believed to be the probable cause of police action. Instead it cited an entire chapter of the FSM Code. Fourthly, the document did not include the usual four drafts that a judicial officer can sign to expedite a search. Finally, it failed to specify the particulars of the emails in terms of subject, address or specific matter, which would turn a specific search into a general search of the office file systems and computer databases.

#### Comment

The court noted that the police search warrant application must be sufficient in both form and substance. In relation to the irregularity of not specifying a statute, the court noted that while this was not essential to the validity of a search warrant, it was customary practice. The crucial part that urged the court to deny the warrant was the matter that dealt with electronic records. The court cited other official documents holding that the Fourth Amendment was intended to make general search warrants impossible and that a warrant could not stand if it was too broad or vague. It also cited US case law which held that '*Wholesale seizure... has been characterized as the kind of investigatory dragnet that the Fourth Amendment was designed to prevent*'. In conclusion, the court required that in relation to an email search, the search should be limited

by subject line, address line or to specific matters, except on rare occasions when all the records contain evidence of a crime. Even then, the warrant request must specify the time limitations on the search.

## Inquiry initiated by the National Court – constitutional provisions – the Court’s own initiative to protect human rights – procedural fairness

- A National Court can initiate enquiries into human rights issues under the constitution

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### Independent State of PNG v Transferees

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Supreme Court  
Sakora, Gavara-Nanu and Ipang JJ

Papua New Guinea  
[2015] PGSC 45  
5 August 2015

#### Law(s) and/or international instrument(s) considered

Constitution of PNG, s. 57(1)  
Human Right Rules 2010, rule 8

#### Facts

In 2014, a National Court judge (Cannings, J) initiated an inquiry into the human rights issues of asylum seekers under s. 57(1) of the constitution. The judge issued summonses requesting officials to appear and appointed an expert to appear to provide evidence. During the inquiry, officials opposed the manner in which the inquiry was being run and asked the judge to dismiss himself based on grounds of apprehended bias and natural justice. On completion of the inquiry, which found that the detention of the asylum seekers was unconstitutional, the officials filed an application to stay orders made under that inquiry. A separate National Court heard the case and granted a temporary stay (see PHRLD 5, at 133) pending a final appeal to be heard in the Supreme Court (SC). The officials alleged that the judge erred in law and fact when he was a party to the proceedings, acting as the prosecutor, witness, counsel and judge in the proceedings. The appeal also relied on grounds of apprehended bias when the judge appointed an expert who was his personal friend without first disclosing this fact and, when the fact was known, declined to dismiss himself from the proceedings.

#### Issue

Whether the judge had power under s. 57(1) of the constitution to initiate an enquiry of this kind. Whether the judge breached rules of natural justice evidenced by the way in which he conducted the enquiry. Whether there was apprehension of bias regarding the appointment of the judge’s personal friend as an expert in the inquiry.

#### Decision

The SC unanimously upheld the appeal, holding that the manner in which the inquiry was conducted breached the rules of natural justice and that there was a case of apprehension of bias in the judge’s appointment of a personal friend as an expert. As the constitutionality of the inquiry was not one of the grounds of the appeal, only Justice Gavara-Nanu specifically considered that issue. His Honour considered that s. 57(1) only referred to the enforcement of human rights, as its heading suggested, and would only involve a court’s discretion to make appropriate declarations or orders, such as excluding evidence if it was obtained in breach of a constitutional right in a criminal trial, but was not a power for a court to commence proceedings of its own volition.<sup>1</sup> For this reason, Justice Gavara-Nanu declared the relevant Court Rules (Rule 8 and Form 126) made in relation to a court’s initiation of human rights inquiries ‘to be unconstitutional such that it should be struck out.’<sup>2</sup>

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1 At 35–39.

2 At 40.

### Comment

To better understand this decision and its subsequent development, it is necessary to set out the relevant section of the constitution and Court Rules made to give effect to the constitutional provisions.

Section 57(1) of the constitution states:

57. ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS: ‘(1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any of the Parliament, either on its own initiative or on an application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable to fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.’

Rule 8 of Human Rights Rules 2010 is part of the PNG Court Rules, which relevantly provide that:

8. Commencement of proceedings by the Court

- 1) Where a judge observes, or is informed by the Registrar, the Sheriff or one of their officers, of facts which may constitute a breach of basic rights, the Court may commence proceedings on its own initiative.
- (2) Where the National Court commences proceedings on its own initiative in accordance with Section 57 of the Constitution.

It is obvious that at the time that the judge (Cannings J) started the 2014 inquiry under s. 57(1) of the constitution, there existed Court Rules specifically made for such proceedings (contrary to comments made in PHRLD 5, which erroneously believed that there were no rules and suggested that the judge’s approach was a practical one).

This SC decision has not ruled out similar initiation of an inquiry under s. 57(1) by the National Court because Justice Gavara-Nanu’s reasoning in this decision was treated as *obiter dicta* in a 2017 decision (discussed elsewhere in this volume) by the same National Court judge.<sup>3</sup>

In view of the fact that the SC upheld this appeal on the grounds of apprehended bias and breach of natural justice rules, and not the jurisdictional issues based on s. 57(1), Justice Gavara-Nanu’s reasoning on that point was considered as *obiter dicta*. There are two further points worth noting in this regard. First, what Justice Gavara-Nanu declared (see footnote 2 above) was not part of the formal order, and His Honour’s choice of expression, ‘should be struck out’, also showed a tentative intention. Secondly, if a decision on that point was mandatory, the CA should have allowed the parties to make submissions before making a ruling. It would be ironic not to do so in a case where the core issue was rules of natural justice, particularly in a court where an adversarial, not inquisitorial system was used.

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3 See Enforcement of Basic Rights under Section 57 of the Independent State of Papua New Guinea, In re [2017] PGNC 266; N6939 (12 October 2017).

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## Ombudsman's preliminary report – Leadership Code – prosecution of MPs – constitutional challenge to the Leadership Code and ombudsman's report

- The ombudsman must comply with the rules of natural justice before compiling a preliminary report against leaders.

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### Nari v Republic of Vanuatu

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Supreme Court  
Fatiaki J

Vanuatu  
[2015] VUSC 132  
8 October 2015

#### Law(s) and/or international instrument(s) considered

Leadership Code Act, s. 21

Constitution of Vanuatu, articles 5, 6, 16, 47 and 62

#### Facts

Seven applicants and ten others were charged with an offence of corruption and bribery of an official contrary to the Penal Code, and the acceptance of loans contrary to the Leadership Code. The prosecutions were in part due to a preliminary report furnished by the ombudsman to the prosecutor following the ombudsman's inquiry. The applicants unsuccessfully sought to have the information that led to the charges laid against them under the Leadership Code dismissed. The appeals against these preliminary challenges to the information were pending in the Court of Appeal (CA). Instead of waiting for the outcome of the appeals, the applicants sought a constitutional challenge in the Supreme Court (SC), alleging that s. 21 of the Leadership Code was unconstitutional, and that the way in which the ombudsman prepared his preliminary report was also unconstitutional.

#### Issue

1. Whether section 21 of the Leadership Code Act breached the applicants' fundamental rights and freedoms under article 5(1)(K) of the constitution.
2. Whether there was a breach of article 62(4) of the constitution in the preparation of the ombudsman's special preliminary report.
3. Whether section 21 of the Leadership Code Act (Cap 240) was unconstitutional because of its vagueness and uncertainty and whether it was in breach of article 5(1)(d).<sup>1</sup>

#### Decision

The SC dismissed issues 1 and 3, holding that that s. 21 of the Leadership Code was constitutional and valid. On issue 2, the judge pointed out that in so far as the challenge was on the basis of article 62, it did not apply to the applicants. His Honour, however, went on to consider whether the ombudsman had acted correctly in preparing the preliminary report.<sup>2</sup> After considering the requirements relevant to the ombudsman's investigation on the conduct of a leader provided under the Leadership Code, and the Ombudsman Act itself, His Honour held that the ombudsman should have allowed the applicants to be heard before he completed his inquiry. Under the relevant law, it was not sufficient to provide a copy of the preliminary report to the applicants for comment. The applicants should have been given an opportunity to be heard

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1 At 4.

2 At 37 and 38.

during the inquiry. For this reason, the SC declared that the ombudsman's preliminary report was null and void and of no effect and it directed that a copy of the SC's judgment be made available to the trial judge as a matter of urgency.

### **Comment**

According to the SC's judgment, the judge posed a preliminary question in relation to whether this application was an abuse of process while an appeal on essentially the same question was afoot, and asked both parties to make submissions.<sup>3</sup> However, while His Honour outlined his analysis of common law treatment in respect of that preliminary issue, he decided to reserve that question until after he had determined the substantive issues.<sup>4</sup> In the end, the judge did not answer that preliminary question. This SC decision subsequently affected the way in which the criminal trial court went about the charges based on the Leadership Code as it refrained from dealing with charges under the Leadership Code based on the result of this constitutional challenge.<sup>5</sup> When the conviction and sentence on corruption and bribery went to appeal, the CA was critical of both the trial court and the judge in this constitutional application for their handling of the matters, which ultimately led to the prosecution withdrawing the charge based on the Leadership Code (because of the possibility of double jeopardy).<sup>6</sup> The CA said that Justice Fatiaki, in the constitutional application, should not have made a substantive determination of breach in the case management hearing. It expressed a preliminary view that it was an error to treat the ombudsman's enquiry as a prerequisite to the laying of a charge under the Leadership Code. It also believed the trial judge should have proceeded to determine the charges despite the ruling on the validity of the ombudsman's report.

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3 At 10.

4 At 11–19.

5 See *Public Prosecutor v Kalosil - Judgment as to verdict* [2015] VUSC 135; Criminal Case 73 of 2015 (9 October 2015) at 17–20.

6 See *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015) at 95–99.

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## PROPERTY

### Tenancy – rent in arrears – eviction based on distress of rent – Human Rights Commission assisted tenants

- Arbitrary eviction of tenants, with disregard for the rights of a child, resulted in the award of damages against the landlord.

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#### Proceedings Commissioner v Kant

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High Court  
Amaratunga J

Fiji  
[2017] FJHC 407  
2 June 2017

#### Law(s) and/or international instrument(s) considered

Constitution of Fiji, ss 39(1), 41 and 45(4)(e)  
Human Rights and Anti-Discrimination Act 2009, s. 28(1)  
Distress for Rent Act  
Property Act, s. 89

#### Facts

The first applicant was a tenant who, with her family of five children and four adults, occupied a property owned by the respondent under an agreement that began in May 2015. The agreement was initially for a period of one year, but as late as April 2017, the respondent continued to receive rental payments though admittedly the tenant was in arrears with the rent to the sum of \$2200. In the late afternoon of 7 April 2017, the respondent locked the house through his ‘caretaker’ when the family was away and a child of the applicant was left alone outside the house. The tenant made a complaint to the Human Rights Commission (the second applicant), which wrote to the landlord informing him that the arbitrary eviction had breached section 39(1)(2) (freedom from arbitrary eviction) of the constitution. The respondent replied saying that he had lawfully exercised his rights in distress of rent and that he had nothing to do with the tenant’s family being deprived of food, clothes and shelter. The applicants asked the court to intervene and sought an interim order allowing the tenants to repossess the property according to the status quo. On 5 May 2017, the court granted an interim order, unopposed, allowing the repossession. The court also ordered a stay of any execution of purported distress for rent by the respondent and his agents pending this hearing.

#### Issue

Whether the purported eviction was an eviction of a person from home and whether it was done in an arbitrary manner.

#### Decision

The court considered that the locking of the property was done to evict a person from home as it was done without the concurrence of the tenants and when they were not inside. Since neither the Distress for Rent Act (which allows only the landlord in person, or a bailiff certified by a court, to take such action) nor the Property Act (a proper notice is required under the landlord re-entry provisions when a valid lease is afoot) applied, the eviction was arbitrary and unlawful. The court also considered that the relevant provisions in the Property Act allowing a landlord re-entry only referred to non-home properties, citing the constitutional right that prohibits arbitrary eviction from a person’s home. The court also dismissed the respondent’s arguments based on a legal technicality and the applicability of constitutional redress, and held that the

respondent had breached the first applicant's and her family's constitutional rights by arbitrarily evicting them from their family home, and treating a child inhumanly (by locking the child out).<sup>1</sup> The court ordered the respondent to pay \$25,000 in compensation and stayed the purported distress for rent permanently. The orders were granted without prejudice to the respondent's right to institute an action for eviction.

**Comment**

This is an interesting case in that the court granted a permanent stay order for distress of rent eviction. The decision may have been due to evidence that showed the property was on land held under Crown Lease though no consent had been obtained from the Director of Lands. The judgment did not explain whether consent to build or to enter into a lease or some other consent was required to validate the tenancy agreement. It may also have been due to the fact that the purported tenancy agreement had expired.<sup>2</sup>

It is also interesting to note how the court read down the relevant provisions in the Property Act to exclude its application in this case.<sup>3</sup>

The court was clearly appalled by the timing and manner in which the respondent chose to lock the property and purported to evict the family when most of them were away attending a funeral.<sup>4</sup> The respondent's treatment of the seemingly relatively poor family and removal of household items in apparent disregard of the court's previous interim orders,<sup>5</sup> might also have been factors that influenced the court's decision.

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1 At 50.

2 At 2 and 7.

3 At 34–39.

4 At 40, 41, 44 and 48.

5 At 5.



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## RELIGION

### **Parliament House – Christian values – cultural decorations – national cultural property – dismantling and removal of objects from Parliament House must stop – an injunction**

- The National Court ordered the Speaker to stop damaging and removing totem poles and masks in the Parliament House precinct.

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#### Somare v Zurenuoc

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National Court  
Cannings J

Papua New Guinea  
[2016] PGNC 124  
30 May 2016

#### **Law(s) and/or international instrument(s) considered**

Constitution of PNG, s. 45  
National Cultural Property (preservation) Act  
Copyright and Neighbouring Rights Act  
Universal Declaration of Human Rights, article 18

#### **Facts**

At the end of 2013, some cultural decorations at Parliament House were damaged, dismantled and/or removed on the authority of the Speaker of the National Parliament (the Speaker). The objects included a row of 19 masks attached to the lintel (horizontal support) at the base of the facade of Parliament House (these masks were damaged, dismantled and removed) and a set of conjoined totem poles in the Grand Hall of Parliament House (these totem poles were substantially damaged and dismantled). The Speaker was of the view that these objects contained unworthy images, particularly nude images, and carried offensive and inappropriate messages portraying spiritual beings that were contrary to Christian beliefs. The Provincial Governor, who was also an MP, the Grand Chief Sir Michael Somare, commenced the proceedings, which occasioned an interim order to halt the project, but the action was subsequently dismissed by the National Court (NC).<sup>1</sup> He then joined with the Director of the National Museum and Art Gallery and commenced proceedings in March 2014, seeking to restrain the Speaker from further damaging, dismantling and removing similar cultural objects, and requiring the restoration of those that had been damaged and removed. The matter came before the NC again in May 2015. The grounds for the action included that the damage, dismantling and removal of those objects was a violation of the right to freedom of conscience, thought and religion guaranteed under s. 45 of the constitution, and a breach of the National Cultural Property (preservation) Act and Copyright and Neighbouring Rights Act. The Speaker argued that the plaintiffs lacked legal standing in their action and that the action lacked evidence that anyone's religious right had been infringed. He also argued that the objects were not 'national cultural property' and that there was no breach of copyright under relevant statute law.

#### **Issue**

Whether the plaintiffs had legal standing to commence the proceedings.  
Whether there was any breach of the right to freedom of conscience, thought and religion under the constitution.

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<sup>1</sup> At 45.

Whether there was any breach of the National Cultural Property (Preservation) Act.  
Whether there was any breach of the Copyright and Neighbouring Rights Act.

### Decision

The NC went through the events leading up to the decision by the Speaker to order the dismantling and removal of the said objects. It ruled that the plaintiffs, in their respective personal capacities, had a sufficient interest including a special interest in the matter. Therefore they had legal standing to take action against a public official in the matter.<sup>2</sup>

In relation to the constitutional right to freedom of thought, conscience and religion, the NC rejected the Speaker's contention that he was simply enforcing the constitutional dominance of Christianity and that PNG is a Christian nation. Despite the mention of Christianity in the preamble to the constitution, the NC held that the statements in the preamble did not have the effect of neutralising the constitutional imperative created by s. 45 of the constitution: that freedom of conscience, thought and religion is an enforceable human right.<sup>3</sup> The creation, curation and prominent public display in Parliament House of objects of cultural decoration are a manifestation and propagation of indigenous Papua New Guineans' traditional religious beliefs and customs, which are specifically protected under s. 45(5) of the constitution.<sup>4</sup> The Speaker's argument that his powers to remove the cultural decorations came under s. 108 of the constitution to uphold the dignity of parliament was rejected by the NC. It held that such powers did not extend to taking steps that offend against human rights.<sup>5</sup> Consequently, the Speaker's act was done in breach of s. 45 of the constitution and without proper authority.

The challenge based on the National Cultural Property (preservation) Act was also upheld, and the NC rejected the Speaker's argument that the cultural objects were not declared to be so by a National Gazette. A declaration was simply to put the issue of whether any collection, object or thing was national cultural property beyond doubt, but it was not a prerequisite.<sup>6</sup> The NC held that the Speaker had acted without lawful justification or excuse and was in breach of the act.<sup>7</sup>

The challenge based on the Copyright and Neighbouring Rights Act was also upheld because the makers of these objects, or their descendants, were not consulted nor did they agree to such transformation and mutilation.<sup>8</sup>

The NC made declarations and ordered the repair, return or replacement of the cultural objects within six months.<sup>9</sup>

### Comment

It is interesting to note that the judge in the NC made the following additional observation: '...that the Speaker has fundamentally misunderstood the proper place of Christianity in the constitutional fabric of Papua New Guinea. He has elevated Christianity to a position it does not deserve. He has imposed his own personal view of Christianity on the parliament and its members and the people of Papua New Guinea. He appears to have taken the view that if any of Papua New Guinea's indigenous cultures is in conflict with his notion of Christianity, it should be quashed.'<sup>10</sup>

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2 At 54–60.

3 At 74–78.

4 At 63–69.

5 At 81 and 81.

6 At 96.

7 At 103.

8 At 113.

9 At 119.

10 At 116.

This decision should be also contrasted with decisions discussed elsewhere in this volume in relation to the non-justiciable nature of parliamentary procedures and its daily business. While the subject matter occurred inside the physical location of Parliament House, it did not involve parliamentary procedure. This matter was a high-profile case at the time and attracted widespread media reporting, but the restoration of these objects did not occur until recently, despite court orders.<sup>11</sup>

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<sup>11</sup> See <http://www.abc.net.au/news/2017-10-18/png-new-speaker-to-restore-evil-carvings/9063176>

## FREEDOM OF EXPRESSION

### Article published in a newspaper – charge of sedition – elements of crime – freedom of speech and limitation of freedom

- A sedition case involving freedom of speech and the media.

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#### Waqabaca v State

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High Court  
Rajasinghe J

Fiji  
[2018] FJHC 203  
19 March 2018

#### Law(s) and/or international instrument(s) considered

Crimes Act, s. 65

Constitution of Fiji 2013, article 7 and 17

International Covenant on Civil and Political Rights (ICCPR), article 19

European Convention of Human Rights (ECHR), article 12

#### Facts

An article written by the defendant (D) and published in a Fijian language newspaper included a passage that the prosecution (P) considered to be inciting communal antagonism, contrary to s. 65(2) of the Crimes Act. On 13 October 2016, a charge was laid against D and four others. P later amended the information and introduced five separate counts of sedition (under s. 67 of the Crimes Act) and sedition-related charges against D and four others. The agreed English translation of the relevant passage is: *'Muslims are not the indigenous of this country. These are people that have invaded other nations for, example, Bangladesh in India, where they killed, raped and abused their women and children. Today they have gone to the extent of having a part in the running of the country'*. The criminal matter has gone through a number of stages so far. On 7 December 2017, D applied to the High Court (HC) seeking various orders including a declaration that the relevant passage does not constitute hate speech and is within the definition of freedom of speech protected under s. 17 of the constitution. He also sought a permanent stay of the sedition charge proceedings. The Attorney-General (AG) filed a motion to have the constitutional challenge struck out. During the hearing of this constitutional challenge, D's counsel withdrew most of the applications save a declaration that the relevant passage fell within the constitutional protection of freedom of speech.

#### Issue

Whether the constitutional challenge should be struck out.

#### Decision

The HC considered the procedural and technical issues. It held that the constitutional challenge did not disclose any reasonable cause of action and was an abuse of process and therefore should be struck out. As D's counsel conceded that P had authority to charge A with sedition, the argument of a violation of freedom of speech by P would be vacuous because no violation of that right against D by P or by the State had arisen.<sup>1</sup> Also, a challenge based on the lawfulness of the impugned passage could be raised in, and

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<sup>1</sup> At 27–31.

indeed be central to, the substantive criminal proceedings. Thus a constitutional redress application of this kind was an abuse of process. The HC struck out the application and ordered costs against the applicant.

### Comment

In one of the relevant criminal proceedings, the HC was asked by parties to clarify the legal test to be applied for seditious intention under s. 66(1)(v) and the main elements of the offence of sedition under s. 67 of the Crimes Act.<sup>2</sup> D submitted that P must prove an intention to incite violence to disturb or be in defiance of the government's authority. P submitted that the statute itself provided a complete statement of seditious intention and, therefore, prior common law interpretation of seditious intention had no application. The HC considered the arguments and ruled that inciting violence was not required to establish seditious intention under the act. It then considered the case law, international instruments and the constitution, and concluded that the prosecution must prove that the accused had acted (the physical element) in a way to promote feelings of ill will and hostility between different classes of the population of Fiji and then prove that the alleged act had a tendency or possibility or effect of creating public disorder, or disturbance of law and order, or subverting the authority of the government (the fault element). Seditious intention is defined under s. 66(1) and as applying in this case, if the above physical and fault elements are proven, D can be presumed to have had the necessary seditious intention when he wrote and submitted the alleged article for publication, under s. 66(2) of the act.

Fijian sedition offences originated from obsolete English law with Fiji making its own legislative modification. Countries such as the United Kingdom, Australia and New Zealand have long since abandoned these offences. In recent years, a number of prosecutions have been successfully mounted by the Fijian authority, resulting in conviction and jail sentences. Two high-profile cases involving some 30 individuals who were trying to establish a Christian state within the territory of Fiji have been decided.<sup>3</sup> The case here is not one that involves radical actions like the Christian state cases, but is one that arose directly from the publication of an article. Human rights organisations have publicly asked the Fijian authority to discontinue this case, suggesting that it was politically motivated.<sup>4</sup> On 22 May 2018, the HC handed down its decision acquitting D and others.<sup>5</sup>

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2 See *State v Waqabaca* [2017] FJHC 932; HAC361.2016 (11 December 2017).

3 See *State v Niudamu* [2017] FJHC 691; HAC129.2015 (22 September 2017) and *State v Tasere - Sentence* [2017] FJHC 918; HAC140.2015 (29 November 2017). The latter sentences are subject to appeal: <http://www.abc.net.au/news/programs/pacific-beat/2017-12-04/group-convicted-of-sedition-to-appeal-sentence-fiji/9224926>

4 See <https://www.amnesty.org/en/latest/news/2017/03/fiji-drop-politically-motivated-sedition-charges-against-the-fiji-times/>

5 See *State v Waqabaca* [2018] FJHC 400; HAC361.2016 (22 May 2018).

## WORKERS' RIGHTS

### Public servant – termination of service – dispute – administrative resolution process – denial of process – court remedy

- The Supreme Court does not have jurisdiction to hear a substantial dispute but ordered the administrative resolution process to be reopened.

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#### Eperiam v Federated States of Micronesia

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Supreme Court  
Carl-Worswick J

Federated States of Micronesia  
[2016] FMSC 14  
23 March 2016

#### Law(s) and/or international instrument(s) considered

Constitution of FSM, part XI  
National Public Service System Act (PSSA), title 52  
FSM Civil Rule, s. 12(H)(3)

#### Facts

The plaintiff (P) was employed by the Department of Health and Social Affairs for several years. On 8 August 2014, P received a letter of termination. On 17 September 2014, an ad hoc committee commenced hearing the case in relation to the resolution of the termination dispute. This process was established under the PSSA. Before the administrative process was completed, the parties entered into a settlement agreement resulting in P continuing to work for the department as a contractor. Thereafter, P sought to finalise the administrative dispute process, but the government sought to exclude her based on the argument that she was no longer entitled to the process since she was no longer a civil servant. P sought action in the Supreme Court (SC). Under the PSSA, the SC cannot entertain a PSSA dispute until all administrative remedies have been exhausted, and without its final decision the SC has no authority to hear the dispute.

#### Issue

Whether the SC had jurisdiction to entertain the complaint.  
Whether P was/is entitled to continue with the administrative process under the PSSA.

#### Decision

The SC reviewed the development of the employment of P and the history of the dispute. It ruled that an aggrieved employee was entitled to the administrative process regardless of his or her current employment status as long as the dispute existed at the time P left, or the termination itself was the reason P left the public service system. While the SC is prevented from entertaining the substantive dispute without it having been exhaustively decided by the administrative process, it can make a declaration ordering the process to be completed and recorded. The SC made a declaration accordingly.

#### Comment

The SC found no difficulty in resolving the government's argument. The government's action in offering a contract when terminating the long-term employee's position would seem to have been unjust in so far as it

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1 At 27–31.

purported to exclude P from any avenue for dispute resolution. It would seem that over recent years, FSM government departments/agencies have terminated employees or long-term contractors under practices that the court does not condone.<sup>1</sup>

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<sup>1</sup> See another case handed down by the FSM Supreme Court discussed elsewhere in this volume.

## **Contract worker – work performed – denial of payment by the government for want of contract – constitutional rights to property – due process**

- Work done but not paid for constitutes an interest in property. The government cannot deprive persons of property without due process of law.

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### **Linter v Federated States of Micronesia**

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Supreme Court  
Carl-Worswick J

Federated States of Micronesia  
[2016] FMSC 37  
5 August 2016

#### **Law(s) and/or international instrument(s) considered**

FSM Constitution, articles IV, 3, 10  
FSM Code 701, s. 11

#### **Facts**

The two plaintiffs worked as liaison officers for a government department (department) under successive ‘part-time special services contracts’ over 10 years. The first plaintiff (Joel) worked from 1995, whilst the second plaintiff (Linter) worked from 2000. In practice, their successive contracts would be renewed sometime after the work had begun and they would be paid after the work had been completed, sometimes with delays of up to eight months. Their daily work was recorded on time sheets submitted by the plaintiffs to the department, although they worked alongside and sometimes in consultation with personnel of the congress. Their work involved the implementation of projects that had been passed by law. They were on hourly rates. Work ceased altogether in April 2015. The dispute regarding work done yet unpaid involved the period between October 2014 and April 2015. They claimed against the department, alleging that the failure to pay them violated their constitutional right to property without due process, engaged them in involuntary servitude, and failed to afford them equal protection of the law. They also claimed unpaid money on the grounds of violation of their civil rights under statute law.

#### **Issue**

Whether the unpaid money constituted property.

Whether the government department’s action amounted to deprivation of property and whether the deprivation occurred without due process.

Whether the plaintiffs’ civil rights had been violated under statute law.

#### **Decision**

The court upheld the plaintiffs’ claims based on deprivation of property without due process, which was protected under the constitution. The court also upheld the claims of violation of civil rights under statute law. The court felt it unnecessary to rule on claims of involuntary servitude and equal protection of the law. In coming to its decision, the court held that unpaid salary is interest in property, which the government withheld without due process and without affording the plaintiffs an opportunity to contest the matter. The



government's contentions against the plaintiffs on the basis of the nature of the work and the accumulated work hours were rejected by the court based on past performance. The court ordered the department to pay money owed and costs.

**Comment**

This is an interesting case in that a claim against the government for disputed payment of work done by contract workers could successfully be mounted in litigation based on the constitutional right to property. Article IV, s. 3 of the FSM Constitution provides that, '*A person may not be deprived of life, liberty, or property without due process of law, or be denied equal protection of the law.*'

Central to the plaintiffs' success was the acceptance of the evidence of past experiences in performance, including customary delays in entering into contracts, submitting time sheets and making payments. If the defendant had not been a government department, the dispute would need to have been resolved under contract law or another branch of law. It is also interesting to note that the government did not dispute the work done (except the number of hours), but rather argued that the work was done for the congress (legislature) not the department (executive government) and that the direct involvement of congress in projects under legislation was unconstitutional. The court duly rejected these arguments.

## **Superannuation scheme – unconstitutionality – scheme without government guarantee and entrenchment – discriminatory towards migrant workers**

- The provisions of the Superannuation Fund Act were ruled to be constitutional in relation to Cook Islands citizens. However, provisions that disentitled migrant workers from the refund of employers' contributions on their departure from the country were discriminatory and constitutionally invalid.

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### **Arorangi Timberland Limited and others (appellants) v Minister of the Cook Islands National Superannuation Fund (respondent) (Cook Islands)**

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Privy Council  
Lord Neuberger, Lord Mance, Lord Clarke,  
Lord Sumption and Lord Toulson

United Kingdom for Cook Islands  
[2016] UKPC 32  
17 November 2016

#### **Law(s) and/or international instrument(s) considered**

Constitution of the Cook Islands (CCI), articles 40(1), 64(1) (c) and (2)  
Cook Islands National Superannuation Fund Act 2000 (2000 Act)  
International Covenant on Economic, Social and Cultural Rights (ICESCR)

#### **Facts**

This case involved a long history of litigation between an employer and the State of Cook Islands in relation to the constitutionality of the State's superannuation scheme under the 2000 Act. In the court of first instance, the constitutional challenge was upheld on the basis that it impermissibly infringed a personal right to own property protected under article 64 of the constitution. The Court of Appeal reversed that finding (reported in PHRLD 5, page 79). The appellants took the matter to the Privy Council (PC).

#### **Issue**

Whether the superannuation scheme requiring compulsory contribution by employees and employers impermissibly infringed constitutional rights to own property.

Whether the superannuation scheme, relevant to migrant workers, was impermissibly discriminatory.

#### **Decision**

The PC unanimously ruled that the 2000 Act in relation to its application to Cook Islands citizens satisfied the proportionality test and therefore was constitutionally valid. The majority (Lord Sumption in dissent) held that the provisions in relation to migrant workers, in which migrant workers would be disentitled to the refund of their employers' contributions on their departure from the Cook Islands, were discriminatory and constitutionally invalid.

#### **Comment**

The decision of the majority in relation to migrant workers was largely based on the rights of migrant workers enshrined in international instruments and jurisprudence. It cited decisions handed down by the Grand Chamber of the European Court of Human Rights, the treaty committee's comments on the ICESCR, and also statements made in United Nations reports.<sup>1</sup> It then came to the conclusion that such discriminatory treatment of migrant workers was both an anomaly and unfair. Importantly, the majority rejected the Cook Islands Court of Appeal's proposition that the constitutional right to equal treatment

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<sup>1</sup> At 74, 79 and 80.

or non-discrimination *was offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's purpose.*<sup>2</sup> The majority said if that was ever the law in the Cook Islands, it certainly cannot be now. It rejected this proposition without referring to the Cook Islands' constitutional provisions because this analysis was inconsistent with the broadly accepted test of proportionality in considering the constitutional validity of legislative provisions. The majority considered that the State failed to justify why the disadvantaged migrant workers should be further discriminated against.<sup>3</sup>

The majority's approach was in stark contrast with the reasoning of the dissenting Law Lord, who ended his analysis by dismissing the international human rights treaty as part of the municipal law of the Cook Islands.<sup>4</sup> The dissenting Law Lord held that the superannuation benefit was meant to be withdrawn on retirement so the way that the provisions allowed early withdrawal for migrant workers was not discriminatory. This view seems to have ignored the reality of the nature of migrant workers and the Cook Island's policy of not having migrant workers remain in the Cook Islands for a prolonged period before they are compelled to depart.

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2 See 84. The italicised part was a quote from a Cook Islands' Court of Appeal decision, which the Privy Council re-quoted and disapproved of.

3 At 87–90.

4 At 100.

## **Industrial dispute – union considering industrial action by striking – employer sought injunction – whether an employee’s right to engage in a strike is intrinsically illegal in PNG**

- The National Court ruled that industrial action by striking is not intrinsically illegal, citing constitutional rights and a 2015 Supreme Court decision.

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### **PNG Ports Corporation Ltd v Papua New Guinea Maritime and Transport Workers Industrial Union**

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National Court  
Cannings, J

Papua New Guinea  
[2017] PGNC 107  
29 May 2017

#### **Law(s) and/or international instrument(s) considered**

Constitution of PNG, ss 32, 42, 47 and 48  
Industrial Relations Act  
Harbours Act  
Protection of Transport Infrastructure Act

#### **Facts**

The plaintiff (P) was the PNG Ports Corporation Ltd, which is a government-controlled corporation responsible for operating PNG’s maritime ports. P commenced proceedings in July 2014 when the PNG Maritime and Transport Workers Industrial Union, the defendant (D), was preparing to conduct a secret ballot to see whether a strike should take place. A strike took place in 2015, which resulted in closing down the ports of Lae, Port Moresby and Rabaul for two days (30 June and 1 July 2015). An interim injunction was granted restraining further strike action. This decision related to the substantive relief sought by P, including a permanent injunction to restrain P’s employees from engaging in industrial action. P sought to rely on the relevant provisions of the Harbours Act and the Protection of Transport Infrastructure Act. D maintained that industrial action, including strikes, in PNG is lawful.

#### **Issue**

Whether a strike is intrinsically illegal in PNG.

Whether the Harbours Act and the Protection of Transport Infrastructure Act rendered industrial action, including strikes by employees of P, illegal.

#### **Decision**

The National Court (NC) alluded to an observation by the Supreme Court (SC) that ‘[a]t common law, a strike can be an actionable conspiracy. That denies the existence of a right vested in workers to take concerted industrial action. It is generally regarded in both international labour relations and domestic industrial relations as a fundamental right of employees to withdraw their labour. The old common law rule has, by and large, been abrogated by statute.’<sup>1</sup> After reviewing the constitution, case law and the relevant provisions advanced by P, the NC ruled that P failed to show that strike action by D or its members was intrinsically illegal. On the contrary, the effect of the SC’s decision was that employees in PNG *have an implied right, subject to any express prohibition imposed by law, to engage in non-violent industrial action taken in the context of a genuine industrial dispute.*<sup>2</sup> The NC went further to say that such an implied right

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1 At 30 and 31. See PNG Forest Product Ltd v PNG Forest Products & Workers Union [2015] PGSC 36; SC1441 (7 July 2015) at 8.

2 Ibid.

stems from the constitution as an element of the right to freedom (s. 32), freedom from forced labour (s. 43), freedom of assembly and association (s. 47) and freedom of employment (s. 48).

**Comment**

This case further reinforces the rights of employees to industrial action, including strike action, whether the employer is a private entity or a government-controlled corporation. The judge said that there might be a specific law that declares a strike illegal or expressly prohibits strikes, '*such as that provided in s. 55 of the Public Services (Management) Act 2014 or provision in a contract of employment (regarded as a statement of the private law regulating the terms of an employer-employee relationship)*'.<sup>3</sup> The above quoted passage may warrant further analysis. The consequence of breaches of s. 55 of the above act could result in summary dismissal without regard to the procedures prescribed in the same act (as provided by s. 55(2)). If the right to industrial action is an implied right under the constitution, it is arguable that such a right may not generally be allowed to be contracted out.

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3 At 29.

## PART II: INTERNATIONAL CASES REFERRING TO CONSTITUTIONAL BILLS OF RIGHTS, HUMAN RIGHTS CONVENTIONS, STANDARDS AND PRINCIPLES

### ARREST AND DETENTION

#### **Resettled refugees – alleged people smuggler – extradition order sought – whether unjust or oppressive for the court to surrender the person without first referring the matter to the minister**

- The Court of Appeal considered whether a person's 'immigration status limbo', which would result in arbitrary detention in the requesting State, would warrant a referral to the minister before surrendering a person to that State.

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#### **Maythem Kamil Radhi v the District Court at Manukau and the Commonwealth of Australia**

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|--|-----------------|
| Supreme Court                            | New Zealand     |
| William Young, Glazebrook and O'Regan JJ | [2017] NZSC 198 |
| Ellen France and McGrath JJ (in dissent) | 26 June 2015    |

#### **Law(s) and/or international instrument(s) considered**

Extradition Act 1999, ss 30, 32, 48 and 49

#### **Facts**

The appellant (Radhi) was an Iraqi refugee living in New Zealand with his wife and three children. The Australian government sought to extradite him for trial on offences of people smuggling, which occurred in 2001 and involved asylum seekers being smuggled from Indonesia to Australia by boat. The NZ Court granted the order to surrender Radhi, who unsuccessfully challenged the extradition order. At this point, he applied to the District Court to have the matter referred to the minister based on compelling and extraordinary circumstances. This application also failed in the District Court, the High Court and the Court of Appeal. He appealed to the Supreme Court (SC).

#### **Issue(s)**

Whether the circumstances warranted the court of first instance referring the matter to the minister before surrendering the appellant to Australia.

#### **Decision**

By a three to two majority, the SC ruled that because of the compelling and extraordinary circumstances of the appellant (the probability of facing arbitrary detention in Australia), it would be unjust or oppressive to surrender him to Australia before the minister had the opportunity to consider the matter (to consider whether to seek the Australian government's undertaking, or having a prior mechanism in place, to reduce the risk of the applicant being subjected to arbitrary detention in Australia at the end of the judicial process).

**Comment**

According to the SC, the substantial delay in this case was mainly due to the fact that the issue of eligibility to surrender a person and the issue of whether to refer the matter to the minister had not been considered in tandem by the District Court as the court of first instance.<sup>1</sup> The essential consideration that influenced the majority of the SC's decision (i.e. the appellant's opportunity to return to NZ when the trial/sentence was over) was not squarely raised in the courts below. The SC thought that it would be unjust or oppressive not to give the minister an opportunity to consider making prior arrangements to avoid a situation where the appellant would be in immigration limbo, i.e. not able to return to NZ and administratively detained in Australia for a prolonged period at the end of the trial or prison term, if convicted. The minority in the SC held a more restricted view of the statutory considerations of referring a matter to the minister, confining them to be whether there was anything that would affect the appellant's immediate well-being (such as health) if he were to be surrendered.

It is important to note that under Australian immigration law, a person could be administratively detained indefinitely if the person has no place to return to at the end of his judicial process. The possibility of such an outcome for the appellant in this case influenced the majority's decision because such an outcome is not consistent with the protections of the NZ Bill of Rights nor with international human rights standards.

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<sup>1</sup> At 30 and 32.

**CHILDREN****Children in detention – youth justice centre established within a high security adult prison – rights of the child – use of capsicum spray on juveniles – justifiability of its use**

- The establishment of a youth detention centre within a high-security adult prison and the use of capsicum spray were limits to the rights of the child.

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**Certain Children v Minister for Families and Children and Others**

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Supreme Court  
Dixon J

Victoria, Australia  
[2017] VSC 251  
11 May 2017

**Law(s) and/or international instrument(s) considered**

Children Youth and Families Act 2005 (Vic.)

Control of Weapons Act 1990 (Vic.)

Charter of Human Rights and Responsibilities Act 2006 (Vic.)

**Facts**

A series of incidents occurred in a Youth Justice Centre (YJC) in Victoria, Australia, in mid-November 2016 that led to a shortage of detention facilities, both for juvenile remand and detention. At the end of November, the state government, in response to this problem, established another YJC within an adult prison location. The decision to do so was made by exercising executive powers under the Children Youth and Families Act (CYFA). The transfer of children to the facility soon followed. Representatives of detained children applied to the Supreme Court (SC), challenging the legality of the establishment of this new facility and the transfer of children to it. The SC upheld the challenges in view of the minister's failure to take into account mandatory and relevant considerations when establishing the new YJC. It ordered the government to transfer children already there to other lawfully established facilities. The SC also declared the government's decisions unlawful based on the Charter of Human Rights and Responsibilities Act (HRA). An urgent appeal by the government to the Court of Appeal (CA) was unsuccessful and the CA ordered the transfer of the children to other facilities by 4 p.m. the next day. On the day the CA's judgment was published, the government re-established the same YJC within the adult prison in order to keep the children there. The government later also made a decision under the Control of Weapons Act (CWA) authorising certain prison staff to possess and use capsicum spray. The children involved took proceedings to the SC against the re-establishment of the YJC within an adult prison, the transfer of children there and the decision authorising the use of capsicum spray.

**Issue**

1. Whether the decisions to establish the new YJC, to transfer children there and to authorise the use of capsicum spray were made within the powers given under the CYFA and CWA.
2. Whether procedural fairness should have been afforded to the relevant children before they were transferred to the new YJC.
3. Whether the establishment of the new YJC, the transfer of children there and the authorisation of the



use of capsicum spray were limits to the rights of the child under the HRA and if so, whether the limitations were reasonable in a democratic society.

4. Whether the authorities gave proper consideration to relevant human rights.

### Decision

1. The grounds relied on by the applicants based on the CYFA (jurisdictional fact finding) were all rejected.
2. The issue of procedural fairness also failed.
3. The SC considered that the decision to establish the new YJC in an adult prison and the transfer of children there had the effect of limiting their rights under the HRA, namely, the right to be treated humanely while deprived of liberty and also the rights of the child. In relation to the authorisation of the use of capsicum spray, its use limited the same rights and rights not to be subjected to cruel, inhuman and degrading treatment. The authorities failed to justify the limitation of the said rights with the exception of the use of capsicum spray.
4. The authorities failed to give proper consideration to these human rights issues in making decisions to establish the new YJC in an adult prison, to transfer children there and to authorise the use of capsicum spray.

Due to the nature of the challenge (by way of judicial review), the unlawfulness of the authorities' actions under the HRA did not in itself invalidate their actions because the remedies were discretionary.<sup>1</sup> The SC, however, exercised its discretion and granted restraining orders. The SC made declaratory orders pronouncing the unlawfulness of the relevant actions. It also made restraining orders to prevent the authorities from detaining children in the new YJC and ordered the return of the relevant children to their original facilities. It also ordered relevant agencies to stop using capsicum spray in the new YJC unless written guidelines, with due regard for the human rights of all involved, had been issued.

### Comment

The series of decisions in this matter showed how the executive arm of the government could and did proceed to get around a court decision where the executive had discretion to do so.

One observation made in the decision is worth mentioning. In coming to the decision to reject the applicants' argument that the decisions to establish the new YJC and to transfer children there had engaged s. 10 of the HRA (protection from torture and cruel, inhuman or degrading treatment), the judge of the SC said: '*I am not persuaded that the decision to use [the high security adult prison cell], given its built environment, can be construed as a decision that **deliberately** imposed severe suffering or amounted to **intentional conduct** to harm, humiliate or debase a detainee. The plaintiffs did not establish any inappropriate purpose on the part of the decision maker that might engage the s. 10(b) right. The decision maker's purpose was to deal with an accommodation crisis within the youth justice system. The decisions did not amount to a denial of humanity and that was not the purpose of them, or any of them.*'<sup>2</sup> (emphasis added). The prohibition under s. 10(b) is about not being treated or punished in a cruel, inhuman or degrading way in which, unlike torture, intention is not an element. Indeed, under the international Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, ill-treatment (a collective default expression excluding torture) can be caused by action or omission. Whether a treatment or punishment is cruel, inhuman or degrading is also measured by the attributes of the recipient, such as being a child. An act or omission that may not amount to ill-treatment of a healthy adult may nonetheless do so when it involves a child.

1 At 178 and 570–588.

2 At 256 and also at 289, the judge said, '...the decision was not made for the purpose of causing harm or humiliation. The fact that ...[the new YJC is located within the high security adult cell]... does not even begin to approach the level of suffering inherent in the notion of cruel, degrading or inhuman treatment contemplated by s. 10(b) of the Charter.'

## **Child – corporal punishment by parents – assault – common law defence of reasonable chastisement – constitutional rights of a child**

- The common law defence of reasonable chastisement by parents who otherwise would be guilty of assault is not consistent with the rights of the child, which are protected under the constitution and domestic and international law.

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### **YG v the State<sup>1</sup>**

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High Court  
Keightley and Francis JJ

South Africa, Gauteng Div., Johannesburg  
A263/2016  
19 October 2017

#### **Law(s) and/or international instrument(s) considered**

Constitution of South Africa  
Children's Act  
Convention on the Rights of the Child

#### **Facts**

The appellant (father) was convicted of the assault of his 13 year-old son and on a separate occasion of his wife. The father alleged the child had used an iPad to watch pornography. When the child denied this allegation, the father disciplined him by punching his thighs and kicking him, which caused injuries. The child reported the incident to the police and the father was charged. In court, the father disputed the degree of violence and pleaded reasonable chastisement as defence. He also told the court that they were a Muslim family and that the child knew that pornography was strictly forbidden. The trial court ruled that the violence went beyond reasonableness and therefore the defence of reasonable chastisement did not apply. The father was convicted, but the court postponed the passing of a sentence for five years and granted leave to appeal. The father appealed to the High Court (HC) against the conviction. The HC invited government departments and relevant civil societies to make submissions on the issue of the constitutionality of the common law defence of reasonable chastisement.

#### **Issue**

Whether the HC should decide the constitutional issue of the common law defence.  
If it should, whether the common law defence is constitutional.

#### **Decision**

The HC decided that in the interest of justice and the best interest of the child, it should consider the constitutional issue. It declared that the common law defence of reasonable chastisement was not compatible with the constitution, the Children's Act and international law in protecting the rights of the child. The declaration would not have retrospective effect. Based on the facts, the HC dismissed the appeal.

#### **Comment**

One of the civil societies that were invited to make submissions was a non-profit company, FORSA, which engages in advancing freedom of religion in South Africa. FORSA's interest in the matter lay in the more than six million believers in the country who believe that the scriptures command reasonable and appropriate correction of their children.<sup>2</sup> It argued that the constitutional issue should not be considered in this

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1 <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPJHC/2017/290.html&query=ZAGPJHC/2017/290>

2 At 17.

case as it did not arise because the father was found to have used unreasonable force.<sup>3</sup> The HC rejected that submission and considered that the constitutional issue would have important practical implications for how the State deals with charges of assault involving parents and their children in the future. It also said that the court has a constitutional duty to develop the common law in line with the constitution and cannot place children's rights in jeopardy until the legislature takes action.<sup>4</sup> Whether the court's observation and ruling will become binding remains to be seen, but the reasoning of the HC in declaring that the common law defence is unconstitutional is compelling.

The HC considered the Constitutional Court's (CC) decisions in relation to corporal punishment in the settings of a school and a correctional institute, which were not directly relevant to the common law defence of reasonable parental chastisement in a family setting. However, the HC considered these decisions in the light of physical violence meted out to children in the name of chastisement and discipline. Whether it happened in school, a correctional institution or in the family did not alter the basic idea of bodily harm meted out to children in the name of discipline. The HC quoted the CC in relation to the critical mind shift in the relationship between child discipline and the protection of the law: *'Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents...foundation to the enjoyment of the right to childhood is...to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.'*<sup>5</sup> The problem with administering reasonable chastisement is the arbitrary nature of the standard because what appears to be reasonable to one child may be traumatic to another. The court also rejected the submissions that the common law defence ought to be retained as a religious exemption allowable under the constitution. The submissions were based on the argument that many believers believed that reasonable chastisement was done in obeying the reasonable tenets of their faith. The HC responded that if doing away with the defence would indeed interfere with the parents' religious freedom, it was permissible to require religious parents who believe in corporal punishment to be expected to obey the secular laws rather than permitting them to place their religious beliefs above the best interests of their children.<sup>6</sup>

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3 At 23.

4 At 28.

5 At 46.

6 At 84 and 85.

**DISCRIMINATION****Mental disability – parents with disability – restriction on parental authority – stereotypes – protection of family life**

- The European Court of Human Rights considered whether restriction on parental rights by Russian authorities interfered with family life unjustifiably and whether the domestic courts were discriminatory in handling this case.

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**Kocherov and Sergeyeva v Russia<sup>1</sup>**

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|   |                   |
|---|-------------------|
| European Court of Human Rights (ECtHR)        | Council of Europe |
| Guerra, P                                     | 16899/13          |
| Nicolaou, Keller, Dedov, Lubarda, Vlanova and | 29 March 2016     |

**Law(s) and/or international instrument(s) considered**

European Convention on Human Rights (ECHR), articles 8 and 14

Russian Family Code of 1995

Convention on the Rights of Persons with Disabilities, (CRPD) articles 5 and 23

Convention on the Rights of the Child, (CRC), articles 3 and 9

**Facts**

The two applicants are a father (born 1966) and a daughter (born 2007). The father (F) had a mild mental disability and lived in a care home between 1983 and January 2012. In 2007, F married a woman (W), who had been deprived of her legal capacity on account of her mental disability, and this marriage was voided in September 2008.

On 30 May 2007, W gave birth to their daughter (D), who was placed in a children's home. In February 2012, F was discharged from the care home and relocated to his flat under a social tenancy agreement. During the time between D's birth and F's discharge from the care home, F visited D regularly. At the end of 2011, just before F was discharged from the care home, he indicated to the children's home that he would take D into his own care once he had been discharged and had moved to his flat. A report issued by a panel of experts (dated 10 October 2011), which determined to discharge F, described him as a fully focused, sociable person with reduced intelligence. It also described F as well presented, readily engaging in conversation, with the ability to read, write and do arithmetic, and that he would be able to support his daughter financially. They concluded that his state of health would enable him to fully exercise his parental authority. The children's home and other government agencies opposed F's assumption of full parental authority and sought judicial intervention preventing him from taking D to his flat. The District Court (DC) heard the case and handed down a judgment against F on the grounds of D's safety and F's and W's mental disabilities. F and D appealed to the City Court (CC), which upheld the DC's decision on 17 July 2012. They then unsuccessfully sought to further appeal domestically. On 17 January 2013, F and

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1 <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-161760%22%5D%7D>

D appealed to the ECtHR. F and W remarried in November 2013 after W's legal capacity was restored by a court in September 2012. The complaints to the ECtHR were on the grounds of the State's violation of article 8 (protection of family life) and article 14 (non-discrimination) of the ECHR. In the meantime, F filed another application in the DC applying to remove the parental restriction and on 23 April 2013 the DC gave judgment in favour of F. On 20 May 2013, F took D from the children's home to his flat where they have been living ever since.

### Issue

Whether the application was admissible.

Whether the application was lodged within the time limitation.

Whether the Russian authorities violated articles 8 and 14 of the ECHR when the restriction on parental authority was placed on F.

### Decision

The ECtHR unanimously held that the application was admissible and that it was lodged within the time limitation. It also unanimously held that the State violated F's and D's protection under article 8 of the ECHR, but in a six to one majority ruled that, having ruled on the violation under article 8, there was no need to consider the article 14 violation. The ECtHR considered the evidence presented by the parties, mainly the reasoning (or lack of reasoning) of the DC and CC when restrictions placed on parental authority were decided/affirmed. The ECtHR was critical of the domestic courts' reasoning, which failed to consider evidence in relation to the development of the father/child relationship, instead seizing on outdated information. The DC made no reference to the expert panel report and other evidence in relation to F's ability to look after D physically, mentally and financially, but just focused on his diagnosis of disability. Based on these findings, the ECtHR concluded that the reasons relied on by the domestic courts to restrict F's parental authority over his daughter were insufficient to justify interference because it was not proportionate to the legitimate aim pursued.<sup>2</sup>

### Comment

It was disappointing that the majority did not feel the need to consider article 14 in terms of violation based on discrimination. The reasoning of the domestic courts taken as a whole depended entirely on stereotypical views of the reasons with mental disabilities. Only one judge (Keller J) felt the need to consider this a human right violation because the discriminatory aspect was fundamental in this case and the practical effect would likely be a higher amount of damages granted.<sup>3</sup> Justice Keller opined that, *'Taken as a whole, the domestic argumentation demonstrates that the authorities based their conclusions on generalised ideas about disabled parents, rather than on the first applicant's actual ability to care for his child or the concrete facts of the case. The domestic authorities' reasoning thus clearly indicates the presence of a stereotyped assumption about the parenting inabilities of mentally disabled persons, as well as a tendency to ignore the evidence in the first applicant's favour.'*<sup>4</sup> Further, the domestic courts' discriminatory views were evidenced by the fact that Russian law does not provide a ground for restricting parental authority based on a person's prolonged stay in a care home nor does it require proof of child-rearing ability or housekeeping skills, yet both considerations were crucial in this case according to the reasoning of the domestic courts.<sup>5</sup>

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2 At 120.

3 At 2 and 12.

4 At 7.

5 At 8.

## ENVIRONMENTAL DEFENDERS

### **Protesters and environmental activists – police powers to direct, remove and arrest protestors on forestry land – Tasmanian law and implied constitutional freedom**

- The Tasmanian law seeking to prevent interruption of forestry operations unreasonably burdened the implied freedom of political communication.

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#### **Brown v Tasmania**

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High Court  
Keifel CJ, Bell, Keane, Gageler, Nettle JJ  
Gordon and Edelman JJ (in dissent)

Australia  
[2017] HCA 43  
18 October 2017

#### **Law(s) and/or international instrument(s) considered**

Workplaces (Protection from Protesters) Act 2014, ss 6, 11 and 13 and Part 4

#### **Facts**

The Tasmanian Government passed an act called the Workplaces (Protection from Protesters) Act (the Act) in 2014, which purported to address illegal protest action in workplaces that prevents or hinders lawful business activities, including forestry logging operations. The Act empowers the police to direct, remove and arrest protesters and has created offences not only for the relevant protest but also in relation to a person's presence in 'business premises' or a 'business access area' within a period of four months after a police direction has been given on a previous occasion. The applicants were environmental activists, who on two separate occasions were arrested and charged under the Act while carrying out activities against logging. The first applicant (Brown) was a former Senator and a long-time environmental campaigner, who was arrested when he was filmed speaking about environmental issues against a background that showed preparations being made for logging. A police officer directed him to leave the area and arrested him when he failed to leave. The second applicant was charged after refusing to follow a police direction to leave an area on a different date and under different circumstances. They applied to the High Court (HC) by way of a special case stated asking the HC to consider the validity of the Act, arguing it had impermissibly burdened the implied freedom of political communication under the Commonwealth Constitution. The charges against the applicants were subsequently dropped by the police, but the Tasmanian Government defended the validity of the Act.

#### **Issue**

The HC was asked to answer the following questions:

1. Do either or both of the plaintiffs have standing to seek the relief sought in the amended statement of claim?
2. Is the Act, either in its entirety or in its operation in respect of forestry land or business access areas in relation to forestry land, invalid because it impermissibly burdens the implied freedom of political communication contrary to the Commonwealth Constitution?
3. Who should pay the costs of the special case?

## Decision

Before the hearing, the government conceded that the applicants had standing so the first question did not need to be answered. The majority (five to two) answered the second question in the affirmative, holding that parts of the Act (the police powers and offences created), in their operation in respect of forestry land or business access areas in relation to forestry land, were invalid because they impermissibly burdened the implied freedom of political communication contrary to the Commonwealth Constitution. The defendant was ordered to pay the plaintiffs' costs.

In the leading judgment (Keifel CJ, Bell and Keane JJ jointly), the majority considered that the definitions of 'business premises' and 'business access area' were wide in relation to their applications in the context of forest land. This wide coverage defied the enforcement officer's ability to know whether the protestors were within the relevant area at the time of their impugned protest or of their impugned presence on relevant land. In combination with the offences that the Act created, some of which only require a person's subsequent presence to be convicted, the effect of the relevant sections of the Act would deter lawful environmental protest to a significant extent. While the purpose (to prevent protests that prevent or hinder lawful business activities including forestry operation) of the Act was legitimate, the means (powers to direct, remove and arrest, and the offences) to achieve that purpose were not justified because they were not reasonably necessary. Consequently, the impugned legislative provisions were invalid.

## Comment

There are three separate judgments written by the majority of the five Justices. Justice Gageler in essence concurred with the leading judgment, whilst Justice Nettle thought the law was reasonably necessary but invalidated the relevant provisions based on the analysis that they did not strike an adequate balance because they went far beyond what was required to achieve the legislative purpose.<sup>1</sup>

To understand this decision, one has to understand that there is no Bill of Rights in the Constitution of the Commonwealth of Australia. The implied freedom of political communication is not a personal right, but rather an implied freedom under the Commonwealth Constitution, which is necessary to uphold a system of representative and responsible government as provided under the constitution. This implied freedom protects the free expression of political opinion, including peaceful protest, and operates as a limit on the exercise of legislative power.<sup>2</sup> The enquiry into whether a legislative provision is invalid based on this freedom is found in the answers to three questions, namely: *1) Does the law effectively burden freedom of political communication? 2) Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government? And 3) Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?*<sup>3</sup> In other words, the implied freedom seeks to protect the system of government the constitution provides, and not a personal right per se.

Justice Gordon (in dissent) focused on the kind of protest the law aimed to prevent and considered the burden on the implied freedom was minimal<sup>4</sup> except for one subsection (s. 8(1)(b), which provides a blanket four-day exclusion from a business access area after a person has been previously directed by a police officer to leave), and ruled that the Act was otherwise valid.

Justice Edelman (in dissent) took a markedly different view in that His Honour considered the Act was directed at independently unlawful conduct prior to its enactment; thus the Act does not impose a burden on freedom of political communication.<sup>5</sup> For further comparison of how this implied freedom was

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1 At 290–295.

2 At 88–90.

3 At 156.

4 At 426.

5 At 566 and 567.

analysed by the HC, see its earlier decision of *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) in which the same implied freedom was the basis of a challenge, but the HC (by a majority) ruled that the impugned Act (Election Funding, Expenditure and Disclosures Act 1981 (NSW)), which sought to cap and limit political donations to provide a level playing field for electorates, was valid.



## FREEDOM OF EXPRESSION

### Army reservist made public comments in his private capacity – ordered to remove comments – defiance – dismissal – implied freedom under constitution? – not a personal right

- Army regulations confer broad discretion to remove a defiant army reserve serviceman who declined to follow an order to remove homophobic comments, made publicly in his private capacity.

#### Chief of the Defence Force v Gaynor

Full Federal Court  
Perram, Mortimer and Gleeson JJ

Australia  
[2017] FCAFC 41  
8 March 2017

#### Law(s) and/or international instrument(s) considered

Commonwealth of Australia Constitution Act (Cth), ss 61, 68 and 116  
Administrative Decisions (Judicial Review) Act 1977 (Cth)  
Defence Act 1903 (Cth)  
Defence Force Discipline Act 1982 (Cth)  
Defence Legislation Amendment (First Principles) Act 2015 (Cth)  
Ref. 85 of Defence (Personnel) Regulations 2002 (Cth)

#### Facts

An army reserve officer (R) posted various comments on social media expressing his antipathy to the overt tolerance or support of homosexuality or transgender behaviour in the Defence Force. In addition, he published views that were highly critical of adherents of Islam and also of the policy to recruit women into the frontline service of the armed forces. As a result, a reprimand was sent to him from a senior army officer asking him to remove the relevant material. R did not comply, which triggered disciplinary procedures and consequently R was dismissed from the army. R took the matter to the Federal Court, challenging the dismissal as being unlawful, both as a constitutional matter (implied freedom of political communication among other grounds) and also under administrative law. The court upheld his application based on the analysis that the dismissal action had infringed R's freedom of political communication and that it failed the proportionality test. The court set aside the army's dismissal decision. The Defence Force appealed to the Full Court of the Federal Court.

#### Issue

The Full Court had to decide:

1. Whether the impugned regulation upon which the dismissal relied had infringed the implied freedom of political communication.
2. Whether the proportionality test should be applied to the regulation itself or could be applied to the exercise of the discretionary powers by the executive, pursuant to the regulation.
3. Whether the judge correctly applied the proportionality test.
4. Whether the decision to dismiss was incorrectly made under administrative law.

### Decision

The Full Court unanimously upheld the appeal, setting aside the decision of the court below. The Full Court held that implied freedom was not a personal right and thus the proportionality test was applied on the wrong level. The decision to dismiss R also passed the administrative law tests.

### Comment

While this decision was specific to Australia and its Defence Force, some concepts about rights and freedom may have a wider impact. The Full Court reasoned that the implied freedom of political communication, derived under common law and the constitution, is not a personal or individual right. The measuring yardstick was not whether an individual's rights had been violated disproportionately, but rather whether the law has an effective burden on freedom in the federation generally that fails the proportionality test. The Full Court said: 'The proposition that the implied freedom does not involve, nor does it recognise or confer, any personal rights on individuals in the same way the First Amendment to the US Constitution does, is an observation which has been made repeatedly in almost every case dealing with the freedom of political communication. In *Unions NSW* at [36], the plurality explained the difference in the following terms:

*'In addressing this question, it is important to bear in mind that what the Constitution protects is not a personal right. A legislative prohibition or restriction on the freedom is not to be understood as affecting a person's right or freedom to engage in political communication, but as affecting communication on those subjects more generally. The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus, the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?'*<sup>1</sup>

Ultimately, the Full Court considered that the impugned regulation (reg. 85 of the Defence (Personnel) Regulations) that conferred a broad discretion satisfied the proportionality test in that it was suitable, necessary and adequately in balance, taking into account the overall purpose of the regulations.<sup>2</sup>

R sought special leave to appeal to the High Court, but this was declined.<sup>3</sup>

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1 At 48 of the judgment.

2 At 107 of the judgment.

3 See <http://classic.austlii.edu.au/au/cases/cth/HCATrans/2017/162.html>

## INDIGENOUS PEOPLE

### **Indigenous peoples' rights – land and natural resources – mining, environmental protection and conservation – restriction of access to traditional land – land title granted to non-indigenous people – non-recognition of collective legal personality – failure to consult**

- The rights and freedom of persons include not only indigenous people individually but also collectively in relation to their collective personality to take legal action and hold custom land interests.

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#### Case of the Kalina and Lokono Peoples v Suriname<sup>1</sup>

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Inter-American Court of Human Rights  
Sierra Porto President, Caldas Ventura Robles,  
Garcia-Sayan, Vio Grossi & MacGregor Poisot and  
Perez JJ

Organization of American States  
Series C No. 309  
25 November 2015

#### **Law(s) and/or international instrument(s) considered**

American Convention on Human Rights (the Convention), articles 3, 13, 21, 23 and 25

#### **Facts**

The Kalina and Lokono peoples are known as the 'Lower Marowijne Peoples'. They are one of the indigenous peoples of Suriname and currently number between 1700 and 2000. The relevant territory in which these peoples have traditionally lived and carried out their customary activities (food gathering, hunting, rituals, etc.) comprises an area of about 134,000 hectares. Between 1966 and 1986, three separate nature reserves were established in this area for conservation purposes. However, a mining licence had been granted within one nature reserve prior to its establishment, and exploration and mining activities had been carried out but had ceased in 2009. Over time, the government had also granted land titles to non-indigenous people under an urbanisation programme in the forms of freehold and long-term and short-term leases to individuals within the relevant territories parallel to the Marowijne River, which was considered important and sacred to the existence of the Lower Marowijne Peoples. For years, these indigenous people had appealed to the government to recognise their collective rights to land as indigenous people, but administrative requests were disregarded and court actions failed. The court did not recognise the legal personality of collective indigenous people. The Lower Marowijne Peoples complained to the Inter-American Human Rights Commissions (the Commission), which upheld their claims and asked the government to respond. The government failed to respond despite the fact that it asked for an extension of time more than once. The Commission and the representatives of the indigenous peoples complained to the Inter-American Court of Human Rights (the Court).

#### **Issue**

Whether indigenous peoples have rights to legal personality under the American Convention on Human Rights.

Whether indigenous people have rights to collective property and rights to participate in public affairs under the Convention.

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<sup>1</sup> <http://www.forestpeoples.org/sites/default/files/news/2016/02/full%20judgment.pdf>

### Decision

The majority (six to one) held that Suriname's domestic laws failed to recognise the collective exercise of the juridical personality of indigenous and tribal peoples and thus violated article 3 of the Convention. Such failure also violated articles 1 (rights and freedom of all persons), 21 (property rights) and 25 (judicial protection) of the Convention. The majority also held that the State of Suriname, in failing to recognise the collective property rights of indigenous people and their right to political participation relevant to land use, violated articles 21 (property rights) and 23 (political rights) of the Convention. The substantive remedies included compensation and an order that publication and announcement of a summary of this judgment be made. The Court also set a timeline for the State to make legislative change to recognise indigenous peoples' rights.

### Comment

The court considered the history of Suriname, facts surrounding the indigenous peoples' claims and case law relevant to Suriname. It also observed indigenous peoples' rights based on relevant international treaties together with the opinions of various organisations before making its relatively lengthy judgment. The State did not seriously contest the claims, although it raised issues and doubted the facts in relation to the territory and settlement of the relevant indigenous peoples. The State did, however, move the court to take into account the formidable impact and the possible adverse changes to the country's economic well-being if the Commission's and the indigenous peoples' claims were upheld, including the consequent restitution to be made. The State went so far as to claim that because 85 per cent of Suriname's economy was dependent on natural resources, the government needed to control them to provide for all its citizens.<sup>2</sup> Ultimately, it asked the court to provide guidance as to how the country could accommodate international human rights standards in relation to the recognition of the rights of indigenous and tribal peoples.<sup>3</sup>

The court required the State to make laws to recognise the collective legal personality of indigenous peoples and to set up a mechanism to enable indigenous peoples to participate in consultation in relation to natural resources and land use matters affecting their livelihood and continued existence. The court also asked the State to act to delimit, demarcate and grant collective title of the territory for the members of the Kalina and Lokono peoples and to ensure their effective use and enjoyment of the relevant land. The court will monitor full compliance with the judgment.

This was a rather protracted matter and the decisions of the court will take some years to implement. It is hoped that this decision will see the Suriname government take positive action to fulfil its obligation to recognise its indigenous peoples' rights in accordance with the Pan American Convention as well as the relevant human rights treaties.<sup>4</sup>

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2 At 277.

3 At 250.

4 The full judgment is over 100 pages long. An official summary of the judgment and a media report may facilitate readers' understanding of background facts:

See <http://www.forestpeoples.org/sites/default/files/news/2016/02/Official%20Summary-Judgment%20Case%20of%20Kali%C3%B1a%20and%20Lokono-Nov%2025%202015.pdf> and <https://www.forestpeoples.org/en/topics/inter-american-human-rights-system/news/2016/02/indigenous-peoples-suriname-win-important-cas>

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**LEGAL AID****Legal aid application – reasonable prospect of an outcome – prisoner already serving life imprisonment for other offences – limited resources – declined, based on reasonableness**

- The court considered the close connection between legal aid and human rights and the proper construction of the law regarding the reasonableness of providing legal aid.

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**Bayley v Nixon and Victoria Legal Aid**

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Supreme Court  
Bell J

Victoria, Australia  
[2015] VSC 744  
18 December 201

**Law(s) and/or international instrument(s) considered**

Legal Aid Act 1978 (Vic), ss 24, 35

Charter of Human Rights and Responsibilities Act 2006 (Vic.), s. 38

**Facts**

The applicant was a 44 year-old who at the time of applying for legal aid was serving a life sentence (involving rape and murder) with a non-parole period of 35 years. In three subsequent trials (also involving sexual offences), he was further convicted and sentenced to 18 years imprisonment to be served concurrently with his life imprisonment with a new non-parole period of 43 years. Advised by senior counsel, he appealed the convictions of the first and third trials and the sentences imposed in all three trials. He applied for legal aid assistance in these appeals (he had received legal aid in the trials). The legal aid applications were refused and he asked for an independent review of the refused applications under the Legal Aid Act (LAA). The review was conducted by an independent reviewer (a retired judge), who considered the merits of the criminal appeals and reached the opinion that the appeals for the first and third trial convictions would be successful, which would likely result in a new, shorter non-parole period. However, the independent reviewer refused the application on the basis that it was unreasonable to provide legal aid assistance under the circumstances. The applicant sought a judicial review of this refusal in the Supreme Court (SC), arguing that the decision was unreasonable, was based on irrelevant considerations and failed to comply with the Charter of Human Rights and Responsibilities Act (CHR).

**Issue**

Whether the decision to refuse to provide legal aid assistance under the circumstances was (legally) unreasonable.

Whether the decision to refuse to provide legal aid assistance under the circumstances violated the provisions in the CHR.

**Decision**

The SC examined the material available before the independent reviewer and decided that the decision to refuse the application was legally unreasonable because the law from which his discretionary power came could not have allowed such an outcome. The material before the reviewer showed that he was of the opinion that a successful appeal of the convictions would result in a reduction of the applicant's

non-parole period, with the hope of parole towards the end of his expected life. With this clear benefit in mind, the reviewer came to a negative outcome for the applicant without explaining why. He made the decision arbitrarily and in a manner that was legally unreasonable. The decision was quashed on that ground and therefore there was no need to consider the challenge based on the CHR.

**Comment**

While the decision did not require the SC to consider the human rights issue based on the CHR, the court did make a connection between legal aid assistance and human rights when analysing the LAA and CHR framework. The SC said: *'Legal aid is closely connected with human rights. For the poor and disadvantaged who are most vulnerable to having their human rights infringed, legal aid can be indispensable for obtaining redress against the infringement and vindication of their rights through the legal process. VLA and independent reviewers are public authorities under the Charter (s. 4(1)(b)) and, under s. 38(1) of the Charter, must act compatibly with and make decisions giving proper consideration to the human rights in the Charter... Drawing upon articles 14(3) and (4) of the International Covenant on Civil and Political Rights,[24] sub-ss 25(2)(d), (e) and (f) and (4) of the Charter make provision in relation to the provision of legal assistance to persons charged with a criminal offence and the review of convictions and sentences by a higher court.'*<sup>1</sup>

The SC was also emphatic in pointing out that considerations to provide legal aid in a limited funding environment should apply equally to every application. The character of the applicant should not be a relevant consideration, regardless of what crimes the applicant has committed.<sup>2</sup>

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1 At 36 and 38.

2 At 55 and 56.

## PRIVACY

### Privacy – a common law right or a constitutional right? – constitutional protection of life and personal liberty – privacy as an element of personal liberty

- The Supreme Court of India unanimously upheld that privacy protection is a facet of the protection of life and personal liberty under the constitution.

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#### Puttaswamy v Union of India<sup>1</sup>

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Supreme Court  
 Jagdish Singh Khehar CJ,  
 Dr Chandrachud, Agrawal, Abdul Nazeer,  
 Chelameswar, Bobde, Nariman,  
 Abhay Manohar Sapre, Sanjay Kishan Kaul JJ

India  
 Writ Petition (CIVIL) No 494 of 2012  
 24 August 2017

#### Law(s) and/or international instrument(s) considered

Constitution of India, articles 19, 20(3) and 21

#### Facts

The Aadhaar project sought to collect every Indian national's personal details with a view to building a database of personal identity and biometric information (eye scans and fingerprints) and issuing a 12 digit identity number for each national. Registration under this project became mandatory for filing tax returns, opening bank accounts and conducting many financial or property transactions. A judge (now retired) took action in the Supreme Court (SC) in 2012, challenging the constitutionality of the Aadhaar project on the grounds of the violation of constitutional rights to personal privacy. The Indian government argued that there is no constitutional right to privacy. The case initially was heard by a three-judge bench in 2015. Due to conflicting precedents, later a five-judge bench decided to have the matter heard by a nine-judge bench. In July 2017, a nine-judge bench of the SC heard the case.

#### Issue

Whether privacy is a constitutional right or is merely a common law right in India.

#### Decision

The court unanimously upheld that privacy is a constitutionally protected right that emerges primarily from the guarantee to life and personal liberty (article 21) and that it entails personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.<sup>2</sup> Having resolved this issue, the SC sent the matter back to the original three-judge bench to decide on its merits.

#### Comment

This decision provides important insights into constitutional guarantees of fundamental rights and personal freedom. The nine-judge bench delivered six separate judgments, with the leading judgment written by Justice Dr Chandrachud representing three other judges including the Chief Justice. Decisions in the Indian SC prior to this case were divided in their opinions as to whether the right to privacy is one of the fundamental rights under the constitution. One of the reasons to consider that it was not a constitutional

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1 [http://sci.gov.in/supremecourt/2012/35071/35071\\_2012\\_Judgement\\_24-Aug-2017.pdf](http://sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf)

2 Pp 262–265 of the joint judgment delivered by Justice Dr Chandrachud on behalf of three other justices.

right was because the expression 'privacy' was not used in the constitution. All the judges in this decision, however, considered that privacy is an unalienable part of liberty and freedom. Therefore it is one of the fundamental constitutional rights. More importantly, the court also made a detailed analysis of what privacy entails after considering the philosophical origins of the expression, international jurisprudence, and national and international constitutional interpretations of privacy. This analysis is significant in the Pacific context because some constitutions in Pacific Island countries do not explicitly mention privacy as a protected fundamental right, but they guarantee rights to life and liberty similar to those of the Constitution of India. The ambit of privacy rights in the Pacific is still developing. India's highest court has acknowledged the evolving nature of a constitution. The SC opined that: *Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament.*<sup>3</sup> *The contemporary understanding of human existence plus scientific development will shape the ambit of privacy. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.*<sup>4</sup>

Since this decision, the Indian Supreme Court has decided to reconsider whether its criminal law in relation to anti-homosexual conduct is constitutional in an unrelated matter.<sup>5</sup> This decision will likely be handed down by the end of 2018.

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3 At p. 262.

4 At p. 263.

5 See <https://www.theguardian.com/world/2018/jan/08/india-to-rethink-colonial-era-law-criminalising-gay-sex>



## RELIGION

### Visiting rights to children – the mother and children live in an Ultra-Orthodox Jewish community – the father lives as a transgender person – the mother opposed the father having direct contact with the children

- The UK appellate court provides guidance in analysing competing interests for children when there is a probability that they will be ostracised by the religious community they live in if direct contact with the father is allowed.

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#### In the matter of M (Children)

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|---|-----------------------|
| Court of Appeal (Civil Division)              | United Kingdom        |
| Sir James Munby, President of the Family Div. | [2017] EWCA Civ. 2164 |
| Lady Justice Arden and Lord Justice Singh     | 20 December 2017      |

#### Law(s) and/or international instrument(s) considered

Children Act 1989, s. 1(1)(a)  
Equality Act

#### Facts

The appellant (A) is the father of five school-aged young children. The family has always lived in a small Ultra-Orthodox Jewish community, but A left the family and the community in 2014 to live elsewhere as a transgender woman. A wanted to have direct contact with the children, but their mother refused any contact initially. Later she agreed to allow the father to have indirect contact. A asked the court to grant him orders for direct contact with the children. In the High Court (HC) the judge refused direct contact because evidence showed that there was a real probability that the children would be ostracised by the religious community in which the family lived if direct contact was allowed. A appealed to the Court of Appeal (CA).

#### Issue

How was the court to approach the evaluation of welfare for a child in a case where religion was a dominant feature?

#### Decision

The CA quashed the HC's decision, holding that it erroneously considered the religious community's probable reaction and failed to focus on the paramount issue of the welfare of the children based on reasonable views in a tolerant and democratic society. It remitted the case to the HC for reconsideration.

#### Comment

Central to the decision was how a court should perform its duties as the 'judicial reasonable parent'. The CA emphatically outlined the presumption that contacts between parent and child are a fundamental element of family life and are almost always in the interests of the child.<sup>1</sup> The CA was quite critical of the primary judge's failure to address head-on the human rights issues when he noted the religious community's practices, which clearly had elements of discrimination and victimisation.<sup>2</sup> The court also expected the HC to consider whether there would in fact be unlawful discriminatory conduct (under the Equality Act)

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1 At paragraph 56.

2 At 78 and 100.

in the community (including in the school that the children attend) if direct contact orders were granted, and to what extent such unlawful conduct should be given weight in assessing what the best interests of those children were.<sup>3</sup> When dealing with the argument of religious freedom, the CA reasoned that if the religious practices manifested themselves in unlawful discriminatory conduct, that was not what the law sought to protect. When religious practices clash with the expectation of a tolerant, democratic and broad-minded society, compromise must be made. In other words, when considering where the best interests of a child lie when religion is a dominant feature, religious practices that seek to discriminate against people on prohibited grounds should be confronted and not submitted to.

It is also important to note that the CA acknowledged changing societal attitudes and values, which determinately shape the mind of a reasonable man or woman in a contemporary society, which in turn affects how a court develops its jurisprudence.<sup>4</sup>

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3 At 98.

4 At 34–50.

## PART III: CASES DEALING WITH ISSUES OF SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION AND SEX CHARACTERISTICS (SOGIESC)

### SEXUAL ORIENTATION AND GENDER IDENTITY

#### Ugandan Anti-homosexuality Act – constitutionality of the act – issue of quorum when the act was purportedly passed

- Under the constitution, an act of parliament can only be passed by parliament when there is a sufficient quorum and the quorum is a matter of fact.

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#### Oloka-Onyango and Nine Others v Attorney-General

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Constitutional Court  
Kavuma DCJ,  
Nshimye, Mwangusya, Opio, Bossa JJA/CC

Uganda  
[2014] UGCC 14  
1 August 2014

#### Law(s) and/or international instrument(s) considered

Constitution of Uganda, articles 137(1) and (3)(A) and (B), (4)  
Constitutional Court (Petitions and Reference) Rules

#### Facts

In 2014, the Ugandan parliament passed a government bill that purported to broaden the ambit of, and increase the penalties for homosexual offences. The act, which criminalises homosexual conduct with a maximum of life imprisonment, was rushed through parliament. A group of people including academics and human rights advocates (the applicants) took action in the Constitutional Court, challenging the constitutionality of the substance of the act and the legality of the procedure in which the bill passed through parliament.

#### Issue(s)

Whether the act was validly passed by parliament with the quorum required under the constitution.  
Whether the applicants have the burden of proof of the alleged lack of a quorum.  
Whether the act, if validly passed by parliament, violated constitutional guarantees.

#### Decision

The court unanimously held that the bill did not validly pass through parliament due to the lack of the quorum required under the constitution. The burden of proof generally rests on the applicants, but the Court Rules allowed the court to take judicial notice when the applicants' evidence was not challenged by the respondent. The purported act was ruled to be invalid because there was not a sufficient quorum in parliament when it was voted on. There was no need to determine the constitutional challenges of the substantive content of the bill.

### **Comment**

In court, the government did not argue that there was a sufficient quorum when parliament cast its votes on the bill. It simply argued that the applicants failed to discharge the burden of proof regarding the alleged fact of the lack of a quorum. It also suggested that what Hansard recorded was not sufficient proof of the lack of a quorum. The court rejected these arguments and relied on Court Rules in dealing with the evidence.

The significance of this decision is less in the law but more in the fact that in the current international human rights climate, such harsh anti-human rights legislation is still being introduced in some countries and appears to be at the forefront of an incumbent government's agenda. A few years have passed and there are still attempts to revive this voided legislation in Uganda.<sup>1</sup> Reportedly, this kind of anti-human rights pursuit in Uganda is influenced by foreign religious groups.<sup>2</sup>

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1 <https://www.sbs.com.au/topics/sexuality/agenda/article/2017/06/28/ugandan-government-wants-bring-back-harsher-anti-gay-laws>

2 <https://www.amnestyusa.org/anti-homosexuality-bill-could-mean-a-death-sentence-for-lgbt-people-in-uganda/>

## Russian anti-homosexual law – prohibition of LGBTI activism – demonstration and protests – activists fined – constitutional appeal unsuccessful – appeal to ECtHR

- The ECtHR ruled that laws, and their implementation based on a predisposed bias against homosexuality, violate rights of freedom of speech and non-discrimination before the law.

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### Case of Bayev and Others v Russia<sup>1</sup>

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European Court of Human Rights (ECtHR)  
Jaderblom, President  
Guerra, Keller, Dedov, Polackova, Serghides,  
Schukking, JJ

Council of Europe  
67667/09, 44092/12, 56717/12  
20 June 2017

#### Law(s) and/or international instrument(s) considered

European Convention on Human Rights (ECHR), articles 10 and 14

Russian Federation Constitution, articles 19 and 29

Legislation ('ban on propaganda of non-traditional sexual relations aimed at minors') of various Russian regional legislations

#### Facts

This decision involved three separate applications before the European Court of Human Rights (ECtHR), challenging the decisions of various Russian Courts, including decisions of the Federation Constitutional Court on administrative offences handed down against three Russian nationals based on their respective laws of a 'ban on propaganda of non-traditional sexual relations aimed at minors' (the ban).

In 2009, the first applicant held a static demonstration in front of a secondary school in Ryazan, holding two banners that stated: '*Homosexuality is normal*' and '*I am proud of my homosexuality*'. In 2012, the second and third applicants held a static demonstration in front of the children's library in Arkhangelsk. The second applicant was holding a banner stating: '*Russia has the world's highest rate of teenage suicide. This number includes a large proportion of homosexuals. They take this step because of the lack of information about their nature. Deputies are child-killers. Homosexuality is good!*' The third applicant was holding a banner stating: '*Children have the right to know. Great people are also sometimes gay; gay people also become great. Homosexuality is natural and normal.*' These were the actions that led to their respective convictions and fines under the ban.

#### Issue

Whether the applications are admissible.

Whether the convictions and fines violated ss 10 (freedom of expression) and 19 (discrimination), and if so, what should be the remedies.

#### Decision

The ECtHR unanimously held that the applications were admissible. Six of the seven judges (Dedov in dissent) held that the ban limited freedom of expression and was discriminatory. The State of Russia failed to show that such a ban was justifiable in a free and democratic society, thus violating article 10, and article 14 read in conjunction with article 10 of the ECHR. The ECtHR ordered the State of Russia to pay monetary compensation to the applicants.

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1 <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-174422%22%5D%7D>

### Comment

The State of Russia conceded that the relevant law interfered with a person's freedom of speech but argued that this interference was justified on 1) protection of public morals, 2) protection of public health and 3) protection of the rights of children and their parents.

The majority reiterated that, *'in order to determine the proportionality of a general measure, it must primarily assess the legislative choices underlying it, regard being had to the quality of the parliamentary and judicial review, of the necessity of the measure, and the risk of abuse if a general measure were to be relaxed. In doing so it will take into account its implementation in the applicants' concrete cases, which is illustrative of its impact in practice and is thus material to the measure's proportionality'*.<sup>2</sup>

In considering the justification based on public morals, the government advanced its argument that an open manifestation of homosexuality was an affront to the majority of the Russian public, who held traditional family values. The majority considered that the government's reasoning was premised on a predisposed bias against homosexuality and the homosexual minority. It also found it unacceptable for the government to attempt to draw parallels between homosexuality and paedophilia. While popularity in matters of public morals may be a factor in determining a State's margin of appreciation, the majority emphatically pointed out that there was a difference between giving way to popular support in favour of extending the scope of the convention guarantees and a situation where that support was relied on to narrow the scope of the substantive protection.<sup>3</sup> The court therefore rejected the grounds of the protection of morals.

Similarly, the majority rejected the government's assertion in relation to unsubstantiated claims that freedom of speech by the homosexual minority would have an adverse impact on public health. They noted that, on the contrary, the dissemination of information about sex and gender identity issues would help to raise awareness and promote protection from risks, which should be part of public health policy.<sup>4</sup>

In relation to the government's claims of the rights of children not to be enticed into a 'homosexual lifestyle', the majority reasoned that the government failed to substantiate its case, let alone scientifically show that a person's sexual orientation or identity was susceptible to change under external influence. In relation to parents' rights to protect their children's education, the majority did not consider the applicants went beyond that boundary and said it would be unrealistic to expect that parents' rights would have automatic priority in every situation.<sup>5</sup>

For the above reasons, the majority ruled that the impugned law and convictions failed to show a justification; therefore, it did not need to carry out a full proportionality analysis.

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2 At 63.

3 At 70.

4 At 72 and 73.

5 At 74–82.

6 At 89.

For similar reasons, the majority also considered that the impugned law and actions violated the non-discriminatory provisions under article 14 read together with article 10 in relation to discrimination based on sexual orientation. The majority added that the State's margin of appreciation was a narrow one when it came to consider treatments based on one's sexual orientation.<sup>6</sup>

The dissenting judgment was highly critical of the majority's judgment, but its analysis appeared to have been based on a pejorative view of homosexuality and it conflated the issues of sexual orientation and sexual offences.

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6 At 89.

## **Teacher – Catholic school – alleged to be a lesbian – renewal of employment denied – discrimination and defamation suit**

- A Catholic school was found to have discriminated against a schoolteacher based on her sexual orientation and also to have defamed her. A defence based on religious freedom was rejected.

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### **Sacred Heart Case<sup>1</sup>**

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Labour Court  
Cuccaro J

Rovereto, Italy  
Tribunale Di Rovereto  
21 June 2016

#### **Law(s) and/or international instrument(s) considered**

Legislative Decree 216/2003, article 4

#### **Facts**

The application, which was made by a female teacher and a union, joined by a civil rights association, alleged that a school, where the female teacher used to teach, had discriminated against her and defamed her based on her sexual orientation. It was alleged that the relevant conduct violated anti-discrimination legislation. The female teacher was asked to attend a meeting with her superior close to the end of her repeated fixed-term contract. During that meeting, the superior confronted the teacher, saying that the school had heard about her same-sex relationship and demanded that she deny it or to do something about it because the school was a Catholic school and had to protect children. The teacher declined to answer the questions and chose to end the meeting, which resulted in her ongoing fixed-term contract not being renewed. There were some media reports about this incident, which formed the basis of the defamation claims. The teacher claimed that she was discriminated against based on an alleged sexual orientation and asked for an offer of a permanent position or, in its place, pecuniary damages, non-pecuniary damages and the publication of the judgment in the media.

#### **Issue**

Whether the conversation and subsequent non-renewal of her employment contract and the media discussion amounted to discrimination based on sexual orientation and defamation prohibited by law. Whether the remedies sought were appropriate.

#### **Decision**

The court upheld the claims and ordered pecuniary and non-pecuniary damages but declined to order the offer of a permanent position by the school. The court awarded pecuniary damages equivalent to her one-year contract salary plus interest, and also ordered non-pecuniary damages be paid to her and the other applicants. In addition, the court ordered the publication of the judgment in two local papers.

#### **Comment**

The court rejected the school's claim that the choice not to renew the employment contract fell within the safeguard in anti-discrimination law based on religious reasons. Instead it ruled that there had been a clear case of sexual discrimination when assessing the teacher's professionalism. The nature of the profession

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1 The summary is based on website content with auto English translation and other media reports:  
<http://schuster.pro/tribunale-di-rovereto-ordinanza-21-giugno-2016-caso-sacro-cuore/>  
<https://www.catholicregister.org/home/international/item/22575-catholic-school-in-italy-fined-for-firing-gay-teacher>  
<https://www.hrlc.org.au/human-rights-case-summaries/italian-court-upholds-freedom-from-discrimination-on-basis-of-sexual-orientation>.



(i.e. teaching art in school) did not call for the (religious) exception allowed in law, citing a case in the European Court of Human Rights. The court also ruled that the school's public discussion in the media justifying its position in not renewing the applicant's contract, which compelled her to publicly disclose her sexuality, injured her honour. However, the court decided that pecuniary and non-pecuniary damages were appropriate and declined to order the school to offer her a permanent contract, the reason being that she had never been on a permanent contract previously.

**An immigration matter – same-sex couple – the meaning of family member – treatment of non-married couples – different sex couples and same sex couples – margin of appreciation**

- The then Croatian Aliens Act discriminated against same-sex relationships.

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**Case of Pajic v Croatia<sup>1</sup>**

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European Court of Human Rights  
Karakas, P, Vucinic, Lemmens, Gritco, Turkovic,  
Mourou-Vikstrom and Ravarani JJ

Council of Europe  
68453/13  
23 February 2016

**Law(s) and/or international instrument(s) considered**

European Convention on Human Rights (ECHR), articles 8 and 14  
Aliens Act (Croatia)

**Facts**

The applicant (Pajic) was a Bosnia and Herzegovina national who was educated in Croatia and had lived there for 17 years. She had formed a stable same-sex relationship with a Croatian national (DB) for two years. Pajic later wanted to return to Croatia to establish a household and start a business with DB. The application was lodged in 2011, based on family reunification under the Aliens Act, but was refused. An appeal to the ministry was refused in 2012 because the expression of ‘immediate family member’ in the act did not include a same-sex relationship. Further complaints to the Administrative Court and the Constitutional Court were similarly dismissed in 2013. Pajic then took action in the European Court of Human Rights (ECtHR), alleging discrimination on the grounds of her sexual orientation in obtaining a residence permit in Croatia, contrary to articles 8 and 14 of the convention.

**Issue**

Whether the application was admissible.

Whether the Alien Act was discriminatory on the ground of sexual orientation and interfered with rights to private and family life.

If so, whether the discrimination was justifiable.

**Decision**

The court unanimously upheld that the application was admissible and that the law was discriminatory based on sexual orientation and that the discrimination was unjustifiable.

**Comment**

The subsequent change of law in Croatia in 2014 allowing same-sex partners to apply for residence as a family member makes the practical effect of this decision less significant. However, the reasoning of the ECtHR in coming to its decision is still worthwhile. The State of Croatia argued that the concept of family and immigration matters should be given a wide margin of appreciation and be left to the member States to decide for themselves. It also argued that the applicant had not lived with her partner for three years; therefore the case could not be compared with the treatment of non-married different-sex couples, who were

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1 <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-161061%22%5D%7D>

required to show a minimum of a three-year relationship as a threshold requirement. The court noted the generally wide margin in allowing a member State to decide its immigration matters, but distinguished the difference between a State's immigration law in controlling the entry and residence of aliens generally, and laws that were discriminatory based on a person's sex or sexual orientation. Different treatment based on sex or sexual orientation must show 'particularly convincing and weighty reasons' by way of justification and thus the margin is narrow.<sup>2</sup> The court reviewed the case law and considered that the concept of family had evolved within member states, and that there was no reason to deny same-sex couples the same family life status as different-sex couples, even if they had not co-habited due to social or professional reasons.<sup>3</sup> Ultimately, the law then and the domestic, administrative and judicial decisions denying the applicant's applications were based not on how long they had lived together but rather on the legal impossibility of same-sex partners seeking family reunion. This blanket ban on same-sex partners was discriminatory based on sexual orientation and unjustifiably interfered with private and family life.<sup>4</sup>

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2 At 58 and 59.

3 At 65–68.

4 At 75–78.

## **Gender record change – required to have a medical diagnosis followed by irreversible appearance surgery – whether these requirements violated a person’s privacy**

- The ECtHR ruled that the requirement for surgery violated a person’s right to a private life because of its high risk of sterility.

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### **Case of A.P., Garçon and Nicot v France<sup>1</sup>**

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European Court of Human Rights (Fifth Section)  
Nubbberger, President  
Potocki, Vehabovic, Grozev, Ranzoni, Mits and  
Huseynov JJ

Council of Europe  
79885/12, 52471/1, 52596/13  
6 April 2017

#### **Law(s) and/or international instrument(s) considered**

European Convention of Human Rights (ECHR), articles 8 and 14

#### **Facts**

These complaints came from three French transgender persons. They all unsuccessfully sought to have their registered birth gender marker of ‘male’ in French official records changed to ‘female’. The first applicant was born in 1983 and had undergone transgender treatments. Her gender reassignment surgery was carried out in Thailand and she produced the relevant medical certificates. The State required her to undergo assessments by experts in France at her own cost, but she refused to do this. The second applicant was born in 1958 and produced a certificate provided by her psychiatrist stating that she was a transgender person. She also claimed to have undergone genital reconstruction surgery. The French authority required medical certificates stating that she had a transgender disorder and consequent irreversible appearance treatments. The third applicant was born in 1952 and claimed to have lived as a woman for a long time. She produced documents reflecting her gender status as a woman in her daily life (receipts and other correspondence, etc.) despite the fact that her official documents (passport, etc.) remained unchanged. Her application was also refused.

The applicants had gone through the appeal processes in France but were all rejected at various stages before different courts and tribunals. At the relevant time, French law required applicants for gender marker change to provide recognised certificates showing that the applicant had been diagnosed with having a transgender disorder and had had irreversible appearance treatment/surgery. They applied to the European Court of Human Rights (ECtHR), arguing that the State violated their rights under the ECHR. The ECtHR heard the three cases together. Before the ECtHR’s decision, French law changed and irreversible appearance surgery was no longer a mandatory requirement.

#### **Issue**

Whether the then requirements (i.e. being certified as having had a transgender disorder, having completed irreversible change-of-appearance surgery, producing relevant documentation) put in place by the French government were in violation of the relevant protections under the ECHR, especially a State’s positive obligation to protect private life.<sup>2</sup>

#### **Decision**

The majority (six to one) held that refusing the applicants’ requests for a change in civil status on the ground that they had not provided proof of the irreversible nature of the change in their appearance

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1 <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-172913%22%5D%7D>

2 At 99 and 100.

amounted to a failure by the State to fulfil its positive obligation to secure their right to respect for their private lives, and was in violation of article 8 of the ECHR.<sup>3</sup>

The court unanimously decided that the change of gender marker, based on the condition of a diagnosis of a transgender disorder, was not an issue that had consensus within States. Therefore, the margin of appreciation was a wide one, such that the State of France was allowed to decide its own legitimate aim. The refusal for the second applicant on this ground did not therefore violate the convention.

Finally, the court unanimously decided that the issue of an obligation to undergo a medical examination by assigned experts was a matter that went into the probity of the evidence presented in which the court gave a State very considerable room to manoeuvre, provided that it did not act in an arbitrary manner. Consequently, refusing the first applicant's request on that ground did not violate the convention.<sup>4</sup>

### Comment

Principle 3 of the Yogyakarta Principles provides that: ‘...[e]ach person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.’

There may be various ways to realise this principle in its entirety. Gender identity developed by an individual continues to be subjected to the approval of medical professionals and the State’s authority as far as the ECtHR is concerned.

Essentially, the ECtHR considered the then French requirement of irreversible appearance surgery as similar to sterilisation, due to the high risk of such a consequence, and gave the State a narrow margin of appreciation in deciding that issue. As to the other requirements, the State was given a wider margin to make laws for itself.

While the court accepted that the State of France had a positive obligation to maintain reliable civil status records, it had to consider whether the measures relied upon balanced the legitimate aim. There were two substantive requirements under the law for a change of a person’s gender marker to be accepted. The court considered the requirement of ‘irreversible change of appearance’ first. The majority pointed out that change of appearance referred to a superficial change, whilst the expression ‘irreversible’ tended to necessitate radical transformation, thus making this requirement ambiguous. While this requirement was not a legal question but a medical one, the reality seemed to have disadvantaged the applicants. The majority examined French law and its reform proposal, noting that on 17 January 2017 its law was amended to prohibit refusal of change based on lack of medical treatment, surgery or sterilisation. The majority also noted various submissions made by international organisations, which overwhelmingly supported the view that medical treatment requirements should not be included as mandatory grounds for any request for a change of gender registry. Based on this background information, the majority considered that the requirement of ‘irreversible change in appearance’ would require the applicant to undergo treatment that would result in sterilization or would have a high probability of sterility. Based on the ECtHR’s earlier decision in *YY v Turkey*,<sup>5</sup> the court said that the margin of appreciation for the State in the present case was a narrow one.<sup>6</sup> The majority then decided that the French law at the material time caused a dilemma for applicants who

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3 At 135.

4 At 149–154.

5 That decision ruled that compulsory sterility prior to gender reassignment treatment violated the convention: <https://hudoc.echr.coe.int/eng?i=001-152779#%7B%22itemid%22:%5B%22001-152779%22%5D%7D>

6 At 123.

wanted to change their gender identity in the civil record: they faced either having their application declined or having a treatment that equated to sterilisation or had a high probability of such an outcome. Therefore, it ruled that refusal based on this requirement (as it did in the second and third applicants' cases) amounted to failure to fulfil the State's positive obligation to secure their rights to respect for their private lives and was in violation of article 8 of the convention. The dissenting judge felt the court should have deferred its decision in relation to the margin of appreciation to the Grand Chamber due to its importance.

The tension between the legitimate aim of the State to maintain a reliable national civil status record and the protection of the private life of an individual continues to play an important part in shaping laws in this area. Advocates for human rights welcomed the decision but were disappointed that the court did not go further to end the societal and legal pathologisation of transgender persons.<sup>7</sup> It is of interest to note that in this area of law, another predominately conservative Catholic country, Malta, has been leading the way. In 2015 it passed progressive and inclusive legislation that allowed transgender persons to amend their official records by simply making a declaration, amongst other non-discriminatory measures.<sup>8</sup> Three years on, the concerns and the fear that were imputed in the legislative debate process have not eventuated. On the contrary, there are more positive signs in the country as observed by a human rights advocate.<sup>9</sup>

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7 See <https://strasbourgobservers.com/2017/05/05/a-p-garcon-and-nicot-v-france-the-court-draws-a-line-for-transrights/#more-3688>

8 See Gender Identity, Gender Expression and Sex Characteristics Act: [https://meae.gov.mt/en/Public\\_Consultations/MSDC/Pages/Consultations/GIGESC.aspx](https://meae.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/GIGESC.aspx)

9 See <https://www.hrw.org/news/2017/06/19/lgbti-rights-malta-learns-rewards-progress>

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## Rape – hate crime - sentencing – homophobic element – an aggravating factor

- In the sentencing appeal, the High Court judge made pertinent remarks on the rights of persons to choose their sexuality.
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### Veresa v the State

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Court of Appeal  
Gamalath, Goundar and Perera JJA

Fiji  
[2017] FJCA 107  
14 September 2017

#### Law(s) and/or international instrument(s) considered

Penal Code, ss 149 and 150  
Criminal Procedure Act 2009, ss 190 and 256

#### Facts

This was an appeal against the sentence for a conviction of rape. The evidence showed that the perpetrator was the brother of the victim and the offence was a result of homophobic sentiment against a lesbian. The accused was convicted of rape and sentenced by the Magistrates Court (MC) to eight years of imprisonment partially suspended (weekend detention only with weekdays performing community work, and no parole period). The DPP appealed the order for the partial suspension to the High Court (HC). The HC quashed the sentence and replaced it with 17 years of imprisonment with a non-parole period of 15 years. The accused appealed to the Court of Appeal (CA).

#### Issue

Whether the HC had the power to impose a higher jail term beyond that allowed by the MC under the law. What was the appropriate sentence?

#### Decision

The appeal was allowed in part and the CA quashed the HC's decision. The CA also considered that the partially suspended sentence ordered by the MC was not authorised by law. The CA reinstated the original eight-year jail term without suspension, with a minimum seven-year non-parole period, but with the four-and-a-half years already served to be deducted from the total term.

#### Comment

The HC decision was quashed because the law only allowed the HC in its appellate jurisdiction to substitute the sentence that a Magistrates Court could impose within its jurisdiction (i.e. a maximum of 10 years), as opposed to its power in a matter remitted to the HC for sentencing. The HC purported to exercise that remittal power, which allowed it to go beyond the maximum penalty allowed by the Magistrates Court, ignoring the fact that once the magistrate had imposed the sentence for the conviction, its power had been spent (*functus officio*). Thus, the purported remittal power for sentencing no longer existed.

The technicality of this appeal aside, this case was one that involved a homosexual hate crime in a family setting. According to the CA's records, the accused told the victim that he would do something to her to make her forget that she was a lesbian and he then proceeded to sexually assault her. In the trial, the accused denied the charges and alleged that the victim was lying, but the magistrate convicted him due to the overwhelming evidence against him. Unfortunately, the magistrate considered that this was more a case of one-off incestuous rape (the accused was the elder brother of the victim and also happened to be a police

officer involved in the physical training of police recruits) than a case of hate crime. In sentencing, the magistrate remarked that: *'...It is seen that act was done to get rid of homosexual behaviour of the victim (according to the accused) and get affection to men and natural behaviour of sex. It should be noted that there is no single injury in genital areas and the victim was tuned up and ravished before the act. This act was to get affection for natural behaviour of sex. This act was suggested to him by his alcoholic mind. Thus, superficially this is a grave, cynical crime but attended alcoholic circumstance says that it was not done for lust but to chasten the victim from homosexual behaviour. This was a random act and it was not premeditated.'*<sup>1</sup>

By contrast, the HC judge sitting on the appeal made the following remarks when considering the aggravating factors: *'Almost as seriously aggravating was the accused's homophobic wish to 'correct' what he perceived to be his sister's divergent sexual 'journey'. To impose one's own perception of what is normal in a sexual context and to deny another the right to choose his or her own sexual orientation is a denial of a basic human right. It may have been thought noble in the past to insist on sexual conformity but in these days when we see many countries allowing civic recognition to, and even marriage of same sex partners, then nobody (and especially not one's sibling) has the right to dictate what another's sexuality should be.'*<sup>2</sup>

It is hoped that discrimination motivated by homophobic sentiments, and indeed matters in violation of a person's rights in respect of sexual orientation, gender identity and sex characteristics, will as a norm be deemed as one of the aggravating factors when courts consider relevant crimes in the future.

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1 See DPP v Veresa [2013] FJMC 73; Criminal case 1560.2007 (25 January 2013) at 10.

See also DPP v Veresa [2012] FJMC 167; Criminal Case 1560.2007 (17 July 2012) in relation to the trial.

2 See State v Veresa [2013] FJHC 361; HAC259.2013 (29 July 2013) at 12.



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## Child adoption – applicant in a same-sex relationship – conflict between applicable laws – custom taken into account

- An application to adopt a child by a person who was in a same-sex relationship was refused.
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### In re MM, Adoption Application

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Supreme Court  
Harrop J

Vanuatu  
[2014] VUSC 78  
3 July 2014

#### Law(s) and/or international instrument(s) considered

Constitution of Vanuatu, article 95(2)  
Adoption Act 1958 (UK)  
French Civil Code, articles 343–359

#### Facts

The applicant, a French national who lives in a same-sex relationship and resides in New Caledonia, applied to adopt a child in Vanuatu. The couple had been living with two dependent children, who were the biological daughters of the applicant's partner from a previous relationship. The partner agreed to the adoption and was willing to be the second father of the adopted child in the same way the applicant had been to his own daughters. A preliminary approval to adopt a child was obtained from the New Caledonian authority and was followed by a favourable report from a social worker. An opportunity arose for the applicant to adopt an infant girl. Her mother (a single parent) and her cohabiting relatives had agreed to the adoption. There was no specific legislation in Vanuatu in relation to adoption. Therefore, article 95 of the constitution kicked in, allowing the court to consider the application based on pre-independence laws. The court invited the Attorney-General to assist in deciding the application.

#### Issue

Whether the French or the English adoption law should apply in a situation where Vanuatu has not yet legislated its own adoption law.

How to resolve the choice of law when there is a conflict (direct or indirect) between the applicable laws? What was the effect of the proviso (in article 95(2) of the constitution) about customary practices when applying these pre-independence laws?

#### Decision

The application was refused because it failed to satisfy custom, which was evidenced by a sworn affidavit from the President of the National Council of Chiefs (that adoptions by same sex couples were not tolerated by custom).

#### Comment

This adoption application was not contested, but the court invited the Attorney-General, as *amicus curiae*, to make submissions. Vanuatu is not party to the Hague Convention; therefore, inter-country adoption of this kind was dealt with by the court at its discretion. As Vanuatu has not legislated for child adoption, the court exercised its power under article 95(2) of the constitution, which provides that: *'[U]ntil otherwise provided by parliament, the British and French Laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.'*

The French Civil Code was silent as to whether a single male could adopt a female child, but the United Kingdom Adoption Act specifically provided that: '*An adoption order shall not be made in respect of an infant who is a female in favour of a sole applicant who is a male, unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order.*' The applicant sought to rely on the French law for this application. The court reasoned that pre-independence French and English law became Vanuatu law from the day of independence, so the choice of applicable law was a matter for the court, not the individual. It further considered that the more specific UK provisions relevant to the present case should take precedence over the more general and non-specific French law. The court noted that there were no special circumstances advanced by the applicant that would justify the granting of this application by a sole applicant. It then went on to consider custom, treating the application as if it was submitted by the same-sex couple, i.e. the applicant and his partner. The court asked the Attorney-General *to provide evidence and make submissions about the attitude which custom would have to this application.*<sup>1</sup> As it transpired, a sworn statement from the President of the Vanuatu National Council of Chiefs was submitted. The statement said that the council was opposed to same-sex marriage based on custom, Christian principles and concern for the continued sustainability of clans/tribes. It then stated that: '*...the adoption of a ni-Vanuatu child by a gay person is not tolerable because it could cause moral impacts on the child concerned because of the situation of same sex household or marriage does not suit the context of social living in Vanuatu.*'<sup>2</sup> The applicant's opposition to the consideration of this opinion was overruled. In the end, the court opined that the uncontradicted evidence from the President that this application would not be tolerated by custom was *fatal to this application because the applicant [is] homosexual.*<sup>3</sup>

In its concluding paragraph, the court emphasised that the outcome was solely based on the determination of legal points and had nothing to do with its merits or an assessment of the best interests of the child.

Had the court been concerned only with the legal points, the matter could and should have ended when it ruled that there were no exceptional circumstances to justify the granting of the application. Instead the court then treated the application for all practical purposes as though it were an application by the applicant and his partner. By so doing, the court could have considered the matter as if it were an application by any couple (married or de facto, same sex or heterosexual), focusing on the best interests of the child, which is the paramount issue in an adoption application. But the court did not do this. While the court was enthusiastic in inviting the Attorney-General to assist, its focus was merely on the sexual orientation of the applicant rather than on the best interests of the child. It could have invited the applicant to make submissions on any exceptional circumstances after its ruling was based on the specific, applicable UK legislative provision. But the court did not do this either.

It is also regrettable to note how the court considered the effect of the constitutional proviso in relation to custom when pre-independence laws were applied. With due respect, taking account of custom does not equate to accepting a value judgment stated by a body comprising chiefs and based on a discriminatory viewpoint. The way in which the court dealt with custom appeared to have the effect of displacing written law in favour of custom. For instance, even if the applicant had had exceptional circumstances justifying the grant, the opinion of the chiefs would still have been taken as fatal in refusing the application. Taking due account of custom wherever possible in the context of pre-independence law should better be understood as giving the court some guidance when written laws are either silent, ambiguous or in conflict with each other. In the present case, the applicable written law was abundantly clear for a sole applicant. A better view would seem to be that 'due account of custom' would have been taken in weighing where the balance lay in considering the best interests of the child, or taken into account when considering 'exceptional circumstances' under the English law.

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1 At 51.

2 At 52.

3 At 55.

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## Children – transgender student – school toilets segregated by sex – the meaning of ‘sex’ – gender identity

- A ruling was sought on the right of a transgender student to use school toilets assigned to the gender with which the student identified. Associated issues of privacy were also considered.

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### GG v Gloucester County School Board

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The Fourth Circuit Court  
Niemeyer, Floyd JJ and Davis SJ

USA  
No. 15-2056  
19 April 2016

#### Law(s) and/or international instrument(s) considered

Constitution of USA, Title IX and the Equal Protection Clause  
Code of Federal Regulations, 106.33

#### Facts

The case involved a transgender student in a Virginia High School, who was born with female genitalia but identified himself and lived as a male person. He had had hormonal treatment but had not had sex re-assignment surgery. The school administration accommodated his desire to use the boys’ toilets but, when the arrangement was known by others, the school board convened a meeting and changed its policy, which meant that he could no longer use the boys’ toilets. He could either use the girls’ toilets or a few, newly established, unisex single-user facilities. He opposed this new arrangement because he felt he was stigmatised and discriminated against. He sought an opinion from the Department of Education, which issued an opinion letter (to the student) at the beginning of 2015. The letter sought to interpret how the relevant regulation should apply to transgender individuals. The department required schools to treat transgender students in a manner consistent with their gender identity. The school board declined to change its policy and the student took action in the District Court, challenging the school board policy on the basis that it violated his constitutional rights. He also sought a preliminary injunction to halt the policy pending the completion of the lawsuit. The District Court declined to give weight to the department’s interpretation of the regulation and ruled in favour of the school board, holding that the expression ‘sex’ in the legislation referred to anatomical sex only and the student was therefore a girl, and striking out her constitutional (Title IX) claims. The court also declined to grant a preliminary injunction halting the school board’s policy. The student appealed to the Fourth Circuit Court. In the appeal, the student also asked the appellate court to send the case back to a different judge if it resulted in a remittal.

#### Issue

Whether the expression ‘sex’ used in the law should be understood as referring to anatomical sex only or whether it also includes ‘gender identity’ as the department opined.

Whether a preliminary injunction pending the completion of the lawsuit should be granted.

Whether a different judge should be assigned in the event of a remittal.

#### Decision

The majority (Floyd J and Davis SJ) held that the opinion of the department in understanding ‘sex’ as referring to ‘gender identity’ was not plainly erroneous and therefore due weight should be given in construing the meaning of ‘sex’, as a matter of law. As the court below had failed to do so, it vacated its decision to strike out the claim and remitted the matter for further consideration. The majority also reversed the decision to not grant a preliminary injunction but declined the student’s request for a change of judge. The minority (Niemeyer J) wrote a strong dissent but agreed not to change the judge below.

### **Comment**

The majority acknowledged that the practical effect of allowing the department's interpretation of the regulations might cause issues of privacy, but it declined to take those issues into consideration when there was no constitutional challenge to the validity of the regulations. They opined that the privacy issues were matters for the consideration of the executive, noting that the political branch may change regulations or opinions on regulations from time to time.

On the contrary, the dissenting judge was highly critical of the way in which the majority decided the matter, considering the result unworkable and illogical. The dissenting judge opined that the privacy of others should be respected and be considered by the court because the anatomical makeup of male and female dictated that allowing transgender students to use toilets that did not conform to their anatomical sex would intrude on the privacy of those who did conform. At the heart of the dissent judgment was the underlying denial and rejection of the corresponding dignity of transgender people. The privacy issue in communal toilet usage is not exclusively about exposing oneself to others who have different genitalia but is also about privacy concerns generally. That distinct issue should be considered elsewhere, as suggested by the majority.

The school board sought to appeal to the Supreme Court, but in the meantime the matter was complicated by a change of federal administration. The Trump administration rescinded the pro-transgender student opinion issued by the Obama administration (in the department's 2015 opinion letter), resulting in the matter being sent back by the Supreme Court on 6 March 2017 to the Fourth Circuit Court for reconsideration. At the time of writing, the Fourth Circuit Court had not reconsidered the matter.<sup>1</sup> In the meantime, the student has since left the high school. The application for a preliminary injunction therefore became redundant and was withdrawn. Instead a permanent injunction has now been sought.

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<sup>1</sup> See <https://wtop.com/virginia/2017/08/aclu-moves-ahead-with-lawsuit-against-va-school-districts-transgender-bathroom-ban/>

## Children – gender dysphoria – second-stage treatment – competence to give consent

- In Australia, stage 2 treatment for gender dysphoric children no longer requires the Family Court’s authorisation. Consent can be provided by a child who is competent to give consent or by the child’s parents, as per statute law for medical or dental treatments.

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### Re Kelvin

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Full Court of the Family Court  
Thackray, Strickland, Ainslie-Wallace,  
Ryan and Murphy JJ

Australia  
[2017] FamCAFC 258  
30 November 2017

### Law(s) and/or international instrument(s) considered

Commonwealth of Australian Constitution Act, s. 51(xxxvii)  
Children and Young Persons (Care and Protection) At 1998 (NSW), ss 174, 175  
Commonwealth Powers (Family Law – Children) Act 1986 (NSW)  
Family Law Act 1975  
Minors (Property and Contracts) Act 1970 (NSW), s. 49

### Facts

In this case, the Full Court was asked to answer a set of questions relevant to an application by the father of an adolescent (16 years of age at the time), who was diagnosed as having gender dysphoria and who agreed to stage 2 treatment for gender dysphoria. The father sought a declaration in the Family Court that the child was competent to consent to the administration of stage two treatment. In the alternative, the father asked the court to authorise the treatment.

At the time of the application, the case law (Re Jamie)<sup>1</sup> in Australia was that stage 2 treatment of gender dysphoria for a child required a court’s intervention unless the child, not the parents, was competent to give consent. The issue of competence was a matter for the court, not the medical professionals. Re Jamie was a Full Court decision that was said to have followed an earlier High Court decision (Marion’s case),<sup>2</sup> which involved non-therapeutic sterilisation of a child who could not provide consent due to disability. It was against this legal background that the Family Court found the child competent to give consent to the treatment, but it declined to make the declaration sought pending determination by the Full Court of the questions stated.

### Issue

The Full Court (FC) was asked to answer a number of questions. Relevantly it was asked to determine whether stage 2 treatment for children diagnosed with gender dysphoria required court intervention, as required in Re Jamie, and if so, whether the question of competence must be determined by the court when a child, who is medically confirmed to be competent to give consent according to case law requirements, and parents and medical professionals all agree to the treatment.

### Decision

The FC unanimously declined to follow its earlier decision of Re Jamie and answered the essential questions in the negative, i.e. court authorisation for stage 2 treatment for children diagnosed with gender

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<sup>1</sup> Re Jamie [2013] FamCAFC 110; (2013) FLC 93–547.

<sup>2</sup> Secretary, Department of Health and Community Services v JWB and SMB [1992] HCA 15; (1992) 175 CLR 218 (‘Marion’s case’).

dysphoria was not required and it was not mandatory for the court to decide whether the relevant child had competence to give consent.

The majority of the FC declined to rule that *Re Jamie* was plainly wrong, but instead declined to follow it based on advancements in medical science; the factual background that currently existed meant it was not desirable to follow its earlier decision. Two justices of the FC (Ainslie-Wallace and Ryan JJ) handed down their own joint judgment, considering that *Re Jamie* was plainly wrong, mainly because it erroneously relied on the HC decision in *Marion's* case, which dealt with non-therapeutic treatment, not therapeutic treatment.

### **Comment**

It is encouraging that the FC accepted that science – in particular, medical science – has moved at a pace the judiciary needs to keep up with. The FC acknowledged that the latest medical evidence had changed since the decision in *Re Jamie*. The relevant medical condition of ‘gender identity disorder’ has now been termed ‘gender dysphoria’. The court also acknowledged that the associated treatment risks have been reduced. This line of analysis influenced the majority’s decision in so far as gender dysphoria treatment was concerned.<sup>3</sup> While the FC’s decision affects only a narrow band of stage 2 treatment in children diagnosed with gender dysphoria, the decision does have an impact on the wider issue when court authorisation/intervention, in the place of the parents, is required. Before this case, Australia was said to be the only jurisdiction in the world to require transgender young people to seek court authorisation to access stage 2 treatment.<sup>4</sup>

This decision was said by some human rights lawyers to be a landmark decision removing barriers for transgender young people to seek stage 2 treatment.<sup>5</sup> However, they were dissatisfied with the fact that the majority judgment did not go far enough, but embraced a proportionality test in deciding whether a treatment is therapeutic or non-therapeutic, which might cause confusion and further litigation.<sup>6</sup>

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3 See paragraphs 152–166 of the judgment.

4 See note 3 above. See also paragraphs 12–16 of the judgment in relation to stage 1, 2 and 3 treatment of gender dysphoria.

5 See <https://www.hrlc.org.au/human-rights-case-summaries/2017/12/20/family-court-of-australia-clears-the-way-for-young-trans-people-to-access-hormone-treatment-without-court-authorisation>

6 See note above.

Subsequent to this decision, another Family Court has declared that, where the subject child has been diagnosed as suffering from gender dysphoria, and where treating practitioners have agreed that the child is Gillick competent, and where it is agreed that the proposed treatment is therapeutic and where there is no controversy, no application to the Family Court is necessary before stage 3 treatment for gender dysphoria can proceed.<sup>7</sup>

These decisions were specific in the Australian legal landscape. However, the underlying rationale (by characterising treatment as being therapeutic to avoid judicial intervention) still creates a tension with the Yogyakarta Principles in which a person's developed gender identity is not in itself to be considered a medical condition.<sup>8</sup>

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<sup>7</sup> See *Re: Matthew* [2018] FamCA 161 (16 March 2018).

<sup>8</sup> Relevantly, Principle 18 provides that ‘...Notwithstanding any classifications to the contrary, a person’s sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.’

## Marriage – same-sex marriage – is it a fundamental right or a matter for the legislature?

- The Supreme Court of the USA, by a majority of five to four, held that same-sex marriage was a fundamental right under the constitution.

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### Obergefell et al. v Hodges

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|--|------------------|
| Supreme Court  | USA              |
| Kennedy, Ginsburg, Breyer, Sotomayor, Kagan JJ       | 576 U. S. (2015) |
| Roberts CJ, Scalia, Thomas and Alito JJ (in dissent) | 26 June 2015     |

#### Law(s) and/or international instrument(s) considered

Fourteenth Amendment to the Constitution of the United States

#### Facts

This appeal involved fourteen same-sex couples and two men whose respective same-sex partners had died. They either petitioned to be allowed to be married in their state or to have their marriages (registered in states that allowed same-sex marriage) recognised in the state in which they currently resided. In each case, their respective District Court upheld their petition, but the matter collectively was appealed by the respective states to the Sixth Circuit Court of Appeal, which upheld the states' appeals. The petitioners appealed to the Supreme Court.

#### Issue

Whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex.

Whether the Fourteenth Amendment requires a state to recognise a same-sex marriage licensed and performed in a state that does grant that right.

#### Decision

By a five to four majority, the US Supreme Court answered both questions in the affirmative and reversed the Court of Appeal's decision. In other words, the Supreme Court has now interpreted the US constitution in a way that protects same-sex marriage as a constitutional right.

#### Comment

The majority judgment was delivered by Justice Kennedy joined by Justices Ginsburg, Breyer, Sotomayor and Kagan. It mainly focused on the 'due process clause' of the Fourteenth Amendment. The majority examined the evolution of the institution of marriage over time. While they acknowledged that it was always between two persons of the opposite sex, it noted that it was initially an institution based on parental arrangement, but that over time it became a voluntary contract between a man and woman. It also noted that a woman in a marriage was considered coverture of the husband in a male-dominated society, but that coverture was no longer recognised when the notion of equality and women's rights were understood. Justice Kennedy reflected the past wrong and said: '[T]he nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.'<sup>1</sup> He then advanced four principles and traditions (from the jurisprudence of previous Supreme Court decisions) that underscored a right to marry as a fundamental right.

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1 At p. 11.



The first is the right to personal choice regarding marriage, which is inherent in the concept of individual autonomy. Secondly, the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The third is that it safeguards children and families and therefore draws meaning from related rights of childrearing, procreation and education. Finally, marriage is a keystone of our social order and remains a building block of national community. Just as a couple vows to support each other, society pledges to support the couple, offering symbolic recognition and material benefits to enhance the union.<sup>2</sup>

The Court went on and said the right to marry is fundamental as a matter of history and tradition. Apart from ancient sources, rights rise also *from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.*<sup>3</sup>

The dissenting justices each wrote their own judgment in support of each other's dissenting views. They mainly disagreed with the seeming legal activism of the majority, which allegedly took the American 'due process of law' doctrine to an unwarranted level. Chief Justice Roberts's view mainly focused on the argument that marriage has been and should continue to be between a man and a woman until the legislature chooses to amend that definition. It was no business of judges to change that definition in the guise of a fundamental right that was never supported by precedents. Justice Scalia and Justice Thomas concurred. Justice Alito argued that the constitution had never envisaged a right of this kind.

While human rights advocates generally welcomed the Supreme Court's decision, scholars have been more cautious and have raised concerns that the decision based on an elevated dignity of marriage may undermine other non-married relationships.<sup>4</sup>

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2 At p. 12–16.

3 At p. 19.

4 See for example *The Respectable Dignity of Obergefell v Hodges* by Yuvraj Joshi: <https://scholarship.law.berkeley.edu/clrcircuit/79/> and *Obergefell v Hodges and Nonmarriage Inequality* by Melissa Murray: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2873916](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2873916)

## GENDER EXPRESSION AND SEX CHARACTERISTICS

### **Civil status registration – intersex person – ‘male, female or (if impossible) leave blank’ – sought amendment of record to ‘inter/diverse’ or ‘diverse’**

- Compelling a person who does not fit the typical female and male gender binary to be genderless violates that person’s constitutional rights.

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#### **1 B v R<sup>1</sup>**

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Federal Constitutional Court  
Vice-President Kirchhof  
Eichberger, Schluckebier, Masing, Paulus Baer,

Germany  
Federal Constitutional Court 2019/16  
10 October 2017

#### **Law(s) and/or international instrument(s) considered**

The Basic Law (the Constitution) of Germany  
Civil Status Act

#### **Facts**

This was a constitutional complaint made by a person whose official gender entry at birth was female. The complainant (C) has an atypical set of chromosomes (described as Turner syndrome) and permanently identifies with neither the female nor male gender. C sought to have this registration replaced either with ‘inter/diverse’ or just ‘diverse’. The registry office rejected the request due to the fact that German Civil Status Law allows a child to be assigned either a female or male gender in the birth register; if this is impossible, the law authorises that no gender entry is to be made. The complainant filed a complaint in the Local Court, which was rejected. The matter was subsequently appealed to the Constitutional Court.

#### **Issue**

Whether the Civil Status Act and the registry office violated the complainant’s rights of personality and were discriminatory when no entry was the only option for C under the circumstances.

#### **Decision**

The Constitutional Court (seven to one majority) upheld C’s appeal and ruled that the relevant provisions in the Civil Status Act violated the complainant’s rights of personality and also were discriminatory based on a person’s sex. The court considered that the general rights of personality provided under article 2(1) in conjunction with article 1(1)GG of the Basic Law protect the freedom to develop one’s personality, which includes the protection of one’s gender identity.<sup>2</sup> Due to the fact that registration of a person’s gender is required under the law, it follows that this registration is part of a person’s legal identity and is crucial for a person to develop personality. The no-entry option is not an option for the complainant because the complainant is not genderless but rather of a gender that is outside the female-male binary. If the law compelled a person in C’s circumstances to accept being genderless, that would be an interference with a person’s general rights of personality.<sup>3</sup> As the Basic Law does not require civil status to be exclusively

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1 [http://www.bverfg.de/e/rs20171010\\_1bvr201916en.html](http://www.bverfg.de/e/rs20171010_1bvr201916en.html)

2 At 38–40.

3 At 47.

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binary in terms of gender, this interference of right is not for a legitimate aim and is therefore not justified. The court asked the legislature to amend the Civil Law Act accordingly by end of 2018.

### **Comment**

Other justifications advanced by the government, such as financial considerations and third person interests, were rejected by the court. The court actually went so far as to say that the legislature was free to completely dispense with a gender entry in matters under the Civil Status Law.<sup>4</sup> The court also held that the compulsion to register as male or female or leave the entry blank also violated the relevant constitutional right based on non-discrimination on grounds of a person's gender, recognising that the right extends to people who do not fit the male or female gender binary. The court acknowledged that the constitutional legislature in 1949 did not have a further gender in mind but said that it did not preclude interpreting the constitution in such a way that these persons are included in the protection against discrimination, given today's knowledge of other gender identities.<sup>5</sup>

The observation of the German Constitutional Court raises an interesting question as to the significance of a gender entry in official records. Increasingly, legislation is being written in gender-neutral language and the notion of equality before the law regardless of gender has been improving over the decades. Taken together, these factors diminish the absolute need to identify a person by gender. A person's marital status was once considered to be a mandatory factor in official dealings, but it is no longer considered to be as important. In fact, at times, it is considered inappropriate to ask for a person's marital status.

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4 At 52.

5 At 61.

## **Child – sex characteristics at birth did not conform to male or female anatomy – medical intervention – whether court intervention is necessary**

- A court order authorising medical intervention in a case of intersex variation was not necessary because it was a ‘therapeutic’ treatment, but nonetheless a court order was granted.

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### **Re: Carla (Medical Procedure)**

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Family Court  
Forrest J

Australia  
[2016] FamCA 7  
20 January 2016

#### **Law(s) and/or international instrument(s) considered**

Family Law Act 1975 (Cth)

#### **Facts**

The applicants were the parents of a five-year-old child who was born genetically male, but with a sexual development disorder medically termed ‘17 beta hydroxysteroid dehydrogenase 3 deficiency’ (a kind of intersex variation). Aided by favourable medical advice, the parents jointly made application to the court for orders authorising them to consent to further medical intervention (two prior operations were carried out in 2014, apparently without the need for court orders) to allow the child to continue to live life as a female in the way that she identified herself and was being raised. The relevant medical intervention involved the removal of the child’s male gonads, which would certainly render the child infertile.

#### **Issue**

In view of an earlier Family Court decision (in *Re Lesley (Special Medical Procedure)*)<sup>1</sup> with almost identical medical facts, in which the court considered an application was necessary, the applicants not only asked for the court’s approval but also asked whether such an application was necessary.

#### **Decision**

The court not only granted the order allowing the parental consent for the medical procedure, but also considered the decision in *Re Lesley*. Contrary to that decision, the court considered that an order was not necessary under the circumstances because the relevant medical intervention was characterised by the court as for therapeutic purposes.

#### **Comment**

Advocates for intersex people’s rights reacted to this decision quite strongly. They were concerned that the court’s oversight of medical intervention for intersex infants and children had now been deferred to their parents, who might consent to irreversible medical intervention due to the stigma associated with intersex children.<sup>2</sup> Advocates argued that the best interests of the child would dictate that any less intrusive, available alternative should be preferred. Others went as far as suggesting that this decision was a case of violence committed by the state.<sup>3</sup>

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1 *Re Lesley (Special Medical Procedure)* [2008] FamCA 1226.

2 See

<https://www.hrlc.org.au/human-rights-case-summaries/2017/4/21/queensland-family-court-approves-sterilising-surgery-on-5-year-old-intersex-child>

3 See comments made by Morgan Carpenter of Intersex Human Rights Australia on 8 December 2016:

<https://ihra.org.au/31036/re-carla-family-court/>

Clearly, laws and policies regarding medical intervention for intersex people, especially those who do not have the capacity to give informed consent themselves, are contentious and developing. The main criticisms of this decision were that the court relied on information about gender stereotypes and uncritically accepted outdated medical data and evidence from the treating doctors. Based on the dated data in relation to cancer risk without medical intervention, the court accepted that the procedure was ‘therapeutic’ and court sanction was therefore not necessary.

Whether a procedure or surgery is for a therapeutic or a non-therapeutic purpose is not always a clear-cut matter, and judicial guidance seems elusive. However, the answer to that question is legally crucial in deciding whether or not a court’s intervention is needed. This area of law will continue to be contentious, but from a human rights perspective, it is worth noting a 2016 media release by UN experts to mark Intersex Awareness Day. The experts urged governments to act to end violence and harmful medical practices on intersex children and adults. In relation to who should decide about medical intervention, the experts opined that: *Intersex children and adults should be the only ones who decide whether they wish to modify the appearance of their own bodies – in the case of children, when they are old or mature enough to make an informed decision for themselves.*<sup>4</sup> How the law in this area develops may, to a large degree, hinge on how the judicial and medical actors can align their views with other stakeholders, including human rights experts. It is hoped that better information and education from a human rights perspective will lessen social stigmatisation and discrimination against intersex people. This will in turn facilitate informed decisions by parents or judges for those who are unable to make their own decisions.

In upholding the rights of LGBTI people, the Yogyakarta Principles urge States to take all necessary legislative, administrative and other measures to ensure that no child’s body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration.<sup>5</sup>

The principles, which were supplemented at the end of 2017, relevantly provide that no-one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless it is necessary to avoid serious, urgent and irreparable harm to the person concerned.<sup>6</sup> In Malta, legislation has made it *unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor when treatment can be deferred until the minor can give informed consent.*<sup>7</sup>

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4 See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>

5 See Principle 18 of the Yogyakarta Principles: <https://yogyakartaprinciples.org/>

6 See

Principle 31 of the Yogyakarta Principles plus 10: [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf)

7 See s. 14 of the Gender Identity, Gender Expression and Sex Characteristics Act 2015:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1> and

Gender-based Violence and Domestic Violence Act 2018: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=29057&l=1>

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The Pacific Human Rights Law Digest (Volume 6) is a collection of recent human rights case law from across the Pacific for use by legal practitioners, magistrates and judges, policy makers and advocates as precedents and tools for policy initiatives.

This edition highlights a sample of cases that relate to constitutional bill of rights, human rights conventions, standards and principles. An additional section in this edition has a particular focus on cases dealing with sexual orientation, gender identity and expression and sex characteristics (SOGIESC).

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