Privy Council Appeal No. 37 of 1981

The Attorney-General – – – – – – *Appellant*

v.

Director of Public Prosecutions – – – – – *Respondent*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH OCTOBER 1982

Present at the Hearing :

LORD FRASER OF TULLYBELTON

LORD SCARMAN

LORD LOWRY

LORD BRIDGE OF HARWICH

LORD BRIGHTMAN

[*Delivered by* LORD FRASER OF TULLYBELTON]

This appeal raises two issues relating to the Constitution of Fiji. The first is whether a direction by the Governor-General, bearing to have been made in accordance with section 76(1) of the Constitution, assigning to the Attorney-General certain responsibility in relation to the office of the Director of Public Prosecutions (" D.P.P. ") is unconstitutional. The D.P.P., respondent in the appeal, seeks a declaration that the direction was unconstitutional. The Attorney-General, the appellant, maintains that it was valid and constitutional. The second issue is whether the respondent is entitled to bring the present proceedings against the Crown, as he has done, in the name of his office, or whether he ought to have brought them in his personal name.

In the Supreme Court of Fiji, the proceedings were heard by three learned judges sitting together, instead of by a single judge as usual, because of the nature and importance of the question. The majority (Tuivaga C.J. and Williams J.) held that the direction was unconstitutional and granted a declaration to that effect. Mishra J. dissented. The Court of Appeal (Gould V-P., Spring J.A. and Chilwell J.A.) dismissed an appeal from the majority decision. The matter now comes before this Board.

Their Lordships think it right to make two preliminary observations. First, they were informed by counsel, and have seen from perusal of the documents which are before them, that unfortunate personal differences arose between former holders of the offices of Attorney-General and D.P.P. in Fiji in or about 1979. The former Attorney-General concerned ceased to hold office more than a year before the direction now in question was made, and happily there are no such personal differences between the present holders of these important offices. Their Lordships are of course in no way concerned to enquire into the differences formerly

existing, or to take notice of them in any way, except as a matter of history which may partly explain why the present proceedings came to be instituted.

Secondly, their Lordships are not concerned with questions of whether the issue of the direction was necessary or expedient. These are political questions which are not justiciable. Further, their Lordships recognise that there is a possibility, as Mishra J. pointed out in his dissenting judgment in the Supreme Court, that the power assigned to the Attorney-General might be abused, just as there is a possibility of any power being abused. As a general proposition, that is true, but it has nothing to do with this appeal. The sole question for the courts, and now for this Board, is whether the direction was validly made in accordance with the Constitution.

The present Constitution of Fiji came into effect on 10th October 1970: see section 4(1) of the Fiji Independence Order 1970. It is framed on the Westminster model. The Constitution is the Supreme Law of Fiji—section 2. Provision is made for a Governor-General who is to be appointed by Her Majesty and is to be Her Majesty's representative in Fiji—section 27. Executive authority is vested in Her Majesty and, save as otherwise provided in the Constitution, it may be exercised on her behalf by the Governor-General, either directly or through officers subordinate to him—section 72. Section 73(1) provides as follows:—

> "73.—(1) There shall be a Prime Minister, an Attorney-General and such other offices of Minister of the Government, not exceeding such number, if any, as Parliament may prescribe, as may be established by the Governor-General, acting in accordance with the advice of the Prime Minister."

The assignment of responsibilities to particular Ministers is dealt with by section 76(1) which is in the following terms:—

> "76.—(1) The Governor-General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for the conduct (subject to the provisions of this Constitution and any other law) of any business of the Government, including responsibility for the administration of any department of the Government."

It was under this subsection that the direction in question was made. The effect of assignment of responsibilities to Ministers is dealt with by section 82 which provides as follows:—

> "82. Where any Minister has been charged with responsibility for the administration of any department of the Government, he shall exercise general direction and control over that department and, subject to such direction and control, any department in the charge of a Minister (including the office of the Prime Minister or any other Minister) shall be under the supervision of a Permanent Secretary or of some other supervising officer whose office shall be a public office: . . . ."

The Constitution makes specific provision for certain public offices including that of D.P.P. The main section dealing with the office of D.P.P. is section 85 which includes the following provisions relevant to this appeal:—

> "85.—(1) There shall be a Director of Public Prosecutions whose office shall be a public office.
>
> (2) Power to make appointments to the office of Director of Public Prosecutions shall vest in the Judicial and Legal Services Commission:
>
> . . . .

(3) A person shall not be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a judge of the Supreme Court.

(4) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do—

(*a*) to institute and undertake criminal proceedings before any court of law . . . .

(*b*) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(*c*) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(5) The powers of the Director of Public Prosecutions under the preceding subsection may be exercised by him in person or through other persons acting in accordance with his general or specific instructions.

(6) The powers conferred upon the Director of Public Prosecutions by paragraphs (*b*) and (*c*) of subsection (4) of this section shall be vested in him to the exclusion of any other person or authority . . . .

(7) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

. . . ."

Subsection (7) of section 85 contains the constitutional provision on which the respondent primarily relies in this appeal. Their Lordships agree with the Court of Appeal that this subsection amounts to a constitutional guarantee of independence from the direction or control of any person in the exercise by the D.P.P. of his powers under the preceding subsections of section 85. Similar constitutional guarantees are given to the Supervisor of Elections (section 43(4)), the Auditor-General (section 126(4)) and the Ombudsman (section 177(1)). The independence of the D.P.P. is further safeguarded by other sections in the Constitution. One of these is section 109(2) which provides that any person holding the office of D.P.P., and certain other similarly protected offices, may be removed from office only for inability or misbehaviour, and only after an elaborate procedure has been followed. Another is section 124 which provides that the salaries of the holders of the offices therein specified, including that of Governor-General, judge and D.P.P., are to be charged on the Consolidated Fund and that the salary and tenure of office of any such holder shall not be altered to his disadvantage after his appointment. The Attorney-General on the other hand, although he must be a person qualified to practice as a barrister and solicitor in Fiji (section 73(3)(*a*)), holds a political office and he is the principal legal adviser to the Government (section 76(2)). He is entitled to attend and take part in the proceedings of either House of Parliament, notwithstanding that he is not a member of that House (section 60).

On 28th January 1981 the Governor-General, acting on the advice of the Prime Minister, gave directions in writing pursuant to section 76(1) of the Constitution to the holders of all 18 Ministerial offices then existing, assigning to each of them responsibility for the conduct of particular business of the Government and responsibility for the administration of particular Ministries and departments of the Government. In each case the business and the Ministries and departments for which each Minister was to be responsible was set out in a schedule to the direction and subjected to such limitations or qualifications as were therein specified. These directions were published in the Fiji Royal Gazette on 6th Feb[illegible]

1981, although there was no constitutional or statutory requirement that that they should be so published.

The direction to the Attorney-General and its schedule were laid out in the same form as the directions and schedules addressed to other Ministers, and it included the following provisions:—

"SCHEDULE

Column 1 (Business of the Government)	Column 2 (Ministry and Departments of the Government)
(*a*) Courts (legislation governing); Criminal law and procedure; Evidence;	Ministry of the Attorney-General together with—Office of the Director of Public Prosecutions (subject to section 85 of the Constitution);
(*b*) All written law associated with or arising from the subject-matter specified in paragraph (*a*).	The Judicial Department (subject to Chapter VII of the Constitution)."

It appears that no formal assignment of responsibilities to the various Ministers had ever been made until that time, and that the directions given on 28th January 1981 were intended to define more accurately and clearly the various areas of Government business within the responsibility of each Minister. The respondent does not allege that the direction to the Attorney-General was made with any improper motive. It formed part of the general definition of departmental responsibilities. Among the other departments, responsibility for the administration of which was assigned to the Attorney-General at that time, in addition to the office of D.P.P., were the offices of the Registrar-General, of the Registrar of Titles, and of the Commissioner of Stamp Duties as well as the Judicial Department. In so far as the office of D.P.P. and the Judicial Department were concerned the assignments were subject to reservations as already mentioned. The respondent had not been consulted about the direction to the Attorney-General, so far as it affected his department, before it was published, and he immediately complained to the Prime Minister's office that the direction was unconstitutional. Eventually he initiated the proceedings which have led to this appeal.

On the first issue, the majority of the Supreme Court held that the direction was unconstitutional. One of the reasons for their decision was that they held the office of D.P.P. was not a department of the Government within the meaning of section 76(1) of the Constitution. On appeal, the Court of Appeal held, and the respondent now accepts, that the office of D.P.P. was a "business of the Government" within the meaning of section 76(1), and counsel for the D.P.P. conceded before the Board, rightly in their Lordships' view, that it was also a "department of the Government". It follows therefore that assignment of responsibility in respect of that office is permissible in principle, provided that the assignment does not offend against subsection (7) of section 85 by encroaching upon the powers conferred on the D.P.P. by sub-sections (4) and (5) of section 85. The issue is therefore narrowed to the question of whether the direction distinguished with sufficient clarity the areas in which the D.P.P. was not subjected to ministerial control from those in which the administration of his department was, and could properly be, subjected to such control. The distinction was evidently intended to be made by the words "subject to section 85 of the Constitution" in the direction.

Part of the argument for the D.P.P. was to the effect that those words did not make the distinction clearly enough. A further part was that,

if full effect is given to the provisions of section 85(7), there is no substance in the direction, because the D.P.P. had no powers that would not be within the protection of the subsection. With regard to the latter point, it is to be observed that the responsibility which may be assigned under section 76(1) is " subject to the provisions of this Constitution *and any other law* " (emphasis added). A responsibility vested in the D.P.P. under a law other than the Constitution (for example the Criminal Procedure Code section 128) would not be incapable of being assigned under section 76(1), unless the particular law so provided, or the responsibility was incidental to his principal functions under section 85 of the Constitution.

But his functions under the Constitution and his non-assignable responsibilities under other laws are not exhaustive of all his responsibilities. There are other areas of his responsibility which might fall under the " general direction and control " of the Attorney-General by virtue of the assignment and of section 82, without contravening section 85(7). For example his department will require supply from public funds, and communications with the Cabinet and Parliament to explain and justify estimates for the office, as well as a responsibility for provision of appropriate accommodation and facilities, might be proper matters to be under the general direction and control of the Attorney-General without eroding the independence of the D.P.P. Responsibility for approving and reviewing the establishment of the department is vested in the Public Service Commission—Public Service Act, section 5(1)(*d*)—but matters concerning the economical and efficient deployment of staff might fall under the general direction and control of the Attorney-General. Their Lordships say " might " because they wish to avoid any appearance of drawing up a list of matters for which responsibility has been assigned, and also to allow for the possibility that circumstances might arise in which a government behaved so unreasonably, for example by exercising such excessive financial pressure on the D.P.P.'s department, that the inference would be that they were really seeking to interfere with his independence. There is, of course, no suggestion that such a possibility has been realised.

The Court of Appeal considered whether these financial and administrative matters were what was contemplated as the area in which the Attorney-General was to exercise general direction and control. They expressed the view, in the opinion of the Court delivered by Chilwell J.A., as follows: —

> " Applying ordinary principles of construction we would answer that question in the affirmative because so long as the assignment, by its wording, does cover something material other than the exclusive and protected powers there is room for it to take effect and we would have said that it is not for the Court to determine the relevance of that material as a matter of degree."

Their Lordships are in entire agreement with the Court of Appeal so far. But with the greatest respect their Lordships are unable to agree with the immediately following passage in the opinion, in which the learned judges conclude that the assignment is invalid because it is one which,

> " to persons untrained in constitutional law and the interpretation of constitutions has every appearance of giving the Attorney-General ascendancy over the D.P.P. in the exercise of the latter's exclusive and protected powers."

The Court of Appeal sought to support that view by referring to the judgment of the Board delivered by Lord Diplock in *Ong Ah Chuan*

v. Public Prosecutor [1981] A.C. 648, 669, which repeats the well-known passage in the *Minister of Home Affairs v. Fisher* [1980] A.C. 319, to the effect that

> " the way to interpret a Constitution on the Westminster model is to treat it not as if it were an Act of Parliament but ' as *sui generis* calling for principles of interpretation of its own, suitable to its character . . . . without necessary acceptance of all the presumptions that are relevant to legislation of private law '."

Their Lordships fully accept that a constitution should be dealt with in that way and should receive a generous interpretation. But that does not require the courts, when construing a constitution, to reject the plain ordinary meaning of words. Proper construction of a constitution, or of any other document, would be impossible if the court could not assume that the reader was reasonably intelligent and that he would read with reasonable care. Their Lordships are, with respect, quite unable to accept the view that a person of reasonable intelligence, reading the Governor-General's direction to the Attorney-General dated 28th January 1981 with reasonable care, even if he was untrained in constitutional law, would understand that the direction gave to the Attorney-General ascendancy over the D.P.P. The words "subject to section 85 of the Constitution " would immediately put such a reader on his enquiry, and reference to section 85 would explain the independence reserved to the D.P.P. and excluded from the assignment. The method adopted in this direction of making a comprehensive assignment, subject to section 85, appears to their Lordships to be a perfectly proper method of exercising the Governor-General's power under section 76(1). The alternative would have been to set out a list of administrative matters in the D.P.P.'s department for which the Attorney-General was to become responsible. That would have involved going into considerable detail and might well have led to uncertainty and inconvenience. In any event whether the method adopted was the only one, or the best one, is not in question. The only question is whether it was validly within the Constitution and their Lordships have no doubt that it was.

Having regard to their Lordships' view on the first issue the second issue does not, strictly speaking, arise. But counsel on both sides represented that the second issue was of general importance, affecting the holders of other public offices which were protected by constitutional guarantees of independence. On behalf of their respective clients, both counsel asked for guidance on the question whether the D.P.P. was entitled to sue by the name of his office. In response to that request their Lordships will briefly indicate their view.

The proceedings which have led to this appeal were instituted by the respondent under section 97(1) of the Constitution, which provides as follows: —

> " 97.—(1) Subject to the provisions of . . . . this Constitution, if any person alleges that any provision of this Constitution (other than Chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for a declaration and for relief under this section."

The draftsman of that subsection appears to have had in mind primarily the case of a private individual who claims that his interests are being affected by contravention of the Constitution. That view is confirmed by the fact that the section does not apply to contraventions of Chapter II of the Constitution, which is the chapter dealing with protection of fundamental rights and freedoms of the individual. In the present case the respondent is not alleging that his personal interests are

being, or are likely to be, affected. His allegations relate to the independence of his office of D.P.P., but counsel for the appellant accepted that they were about the respondent's " interests " within the meaning of the section. That being the nature of his complaint, it would seem appropriate that he should be entitled to bring the proceedings in the name of his office, unless there is clear reason to the contrary.

There is no difficulty in construing the word " person " in section 97(1) as including the holder of an office. Compare section 136 which provides that

> " No provision of this Constitution that any *person* or authority shall not be subject to the direction and control of any other *person* or authority . . . ." (Emphasis added).

The word " person " in section 136 must include the holder of an office since there are no provisions in the Constitution prohibiting direction and control of any named individual by any other named individual, but there are several provisions prohibiting control of the holder of one office by the holder of another office. In the opinion of their Lordships the word " person " should be construed in the same way in section 97(1).

The only reason that was suggested why the D.P.P. should not be entitled to apply under section 97(1) using the name of his office was that he might thereby cause the costs of his application to fall on public funds instead of falling on himself personally and possibly that he might use public facilities improperly or extravagantly. Their Lordships are not impressed by this argument. In the present case the first issue raised by the respondent was a serious one, particularly in light of the history in Fiji, and there was good reason in the public interest for submitting it for decision by the Court. In the unlikely event of some office holder in future applying for a declaration under section 97(1) unreasonably, or conducting the proceedings extravagantly, any expense which he might thereby improperly incur could be recovered from him personally by ordinary methods of departmental financial control and, in their Lordships' view, such control would not be affected by considerations of whether the office holder concerned had applied in his personal name or in the name of his office.

While their Lordships are accordingly of opinion that it was permissible for the respondent in the present case to make the application in the name of his office, they do not consider that it would necessarily be incompetent for a person in the position of the respondent to apply either in his personal name, or in some such style as " A.B. being the D.P.P.". If he were to apply in either of these ways, there might be some inconvenience if he died, or demitted office, while the proceedings were in progress, because proceedings under section 97(1) have to be founded on the allegation that " *his* interests *are being* or are likely to be affected ". Where the allegation relates to the interests of an office, it could hardly be maintained after the applicant had ceased to hold the office. In such cases, it will therefore probably be more convenient, as a general rule, to apply in the name of the office than in the personal name of the office holder.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the Declarations made by the Supreme Court of Fiji on 10th April 1981 and by the Court of Appeal of Fiji on 5th August 1981 should be set aside.

The Order of the Court of Appeal on the latter date that costs in the Court of Appeal should be awarded to the respondent will be set aside and there will be no order as to costs either in the Court of Appeal or before this Board.

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In the Privy Council

THE ATTORNEY-GENERAL

v.

DIRECTOR OF PUBLIC PROSECUTIONS

DELIVERED BY
LORD FRASER OF TULLYBELTON

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