

PACIFIC HUMAN RIGHTS LAW DIGEST

VOLUME 5



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of the Pacific
Community

PACIFIC HUMAN RIGHTS LAW DIGEST

Volume 5

Edited by:

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



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INTRODUCTION

This is the fifth volume of the *Pacific Human Rights Law Digest* (PHRLD) produced by the Pacific Regional Rights Resource Team (RRRT) of the Secretariat of the Pacific Community (SPC). 2015 marks the 10th anniversary of the launch of RRRT's first Pacific Human Rights Law Digest. This anniversary edition revisits all previous PHRLDs, containing two additional sections, with updates to cases and comprehensive indexing to assist greater accessibility to all editions.

Over the past 20 years RRRT has been working with, and has engaged in training of, members of parliament, non-governmental organisations, law students, lawyers, magistrates and judges in the Pacific 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 connected to the Internet, 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.paclii.org), and on other electronic sources outside of the Pacific region. (Readers who cannot access decisions that are reported in the PHRLD on the Internet can request them from RRRT.)

The PHRLD will also be a valuable resource for those outside of 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 just 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 has now been 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 to 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 Secretariat of the Pacific Community, an international organisation that provides technical assistance, policy advice, training and research services to 22 Pacific Island countries and territories.

RRRT has specific programmes in Fiji, Federated States of Micronesia (FSM), Kiribati, Nauru, Niue, Republic of 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, meso and macro levels.

RRRT's goal is to enhance development for all Pacific peoples through increasing the observance of all human rights (civil, political, economic, social and cultural) and good governance.¹ It seeks to achieve this goal, at the country level, by providing training, mentoring, linking and support to community organisations through its networks of country focal officers, community paralegals and civil society partners. At the regional level, it 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.

Volume 5 of the *Pacific Human Rights Law Digest* is supported by the Australian Government.

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 fifth volume of the *Pacific Human Rights Law Digest*. As with previous volumes, volume 5 publishes summaries of leading cases from the Pacific region and elsewhere that illustrate important developments in the judicial application of human rights standards.

This volume is divided into five 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 4 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 that 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 two themes: sexual and reproductive health and rights (SRHR) and asylum seekers. This part has been added at a time when issues regarding SRHR and asylum seekers are emerging in the Pacific region. It contains selected international cases that illustrate some of the issues that courts have had to determine in relation to SRHR, and regional cases in relation to asylum seekers. Although these areas are relatively novel in terms of regional jurisprudence, it can be expected that litigation on such issues will become more frequent and complex in coming years, both within and beyond the Pacific region.

Within the first three parts, 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. Not all cases referred to in the full text of the judgment are included in the summary; rather, only those cases that have a significant bearing on the human rights issue being discussed have been included.

Part IV is an updates section, providing updated information relevant to some of the Pacific cases mentioned in the previous four volumes.

Part V is a new keyword index section, incorporating all cases reviewed, and covers all five volumes of the digest. The keyword index section aims to assist users to locate relevant cases in the PHRLDs.

The PHRLD was modelled on the highly regarded Interights *Commonwealth Human Rights Law Digest*. Unfortunately Interights ceased its operations in 2014. RRRT acknowledges Interights as the primary inspiration for producing a publication specifically focusing on the Pacific region.

ACKNOWLEDGEMENTS

RRRT would like to thank Joni Madraiwiwi, Chief Justice of Nauru, and Chris Yuen, Senior RRRT Human Rights Mentor/Australian Volunteers International volunteer, for contributing their expertise and significant support to this publication.

In addition, we would like to thank all of the lawyers, judges and magistrates who made unpublished judgments available to us. We would also like to thank SPC staff members who assisted during the final stages of producing this volume of the PHRLD. Staff of RRRT contributed to compiling the cases that appear in this volume.

RRRT extends thanks to the Australian Government for its support, without which this publication would not have been possible.

EDITORIAL REVIEW

Overview

This is the fifth volume of the *Pacific Human Rights Law Digest* (PHRLD). In the decade since the first volume was published (2005), the profile of human rights has become more visible in courts throughout the region. Human rights are no longer a novelty, and although the discourse around rights continues to be regarded with some wariness by the established power structures (traditional, religious and governmental) the subject of human rights can no longer be disregarded. What has facilitated this process in particular is the advocacy and awareness around the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *Convention on the Rights of the Child* (CRC). It is no coincidence that a significant number of cases in this volume concern women and children.

It is encouraging that the cases are arising from a more diverse background, ranging from arrest and detention, children, cruel and degrading treatment, custom, democracy and the rule of law, discrimination, fair trial, family law, mandatory sentencing, movement, privacy, procedure, property, violence against women, and workers' rights. Human trafficking, which first appeared in volume 4 of the PHRLD, reappears in this volume, and slavery is addressed as an issue for the first time in the region (although some aspects of the case raise questions). Both topics reflect the less appealing aspects of globalisation and the phenomenon of cross-border criminal activities. The cases involving asylum seekers and refugees in the region are also due, in part, to these factors.

Notwithstanding those positive trends, the level of ratification of the nine main human rights conventions remains low compared with other regions in the world. All Pacific Island states have either signed or ratified the CRC or CEDAW (with the exception of Tonga), and seven states have signed or ratified the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*. Palau is the only state to have either signed or ratified all nine conventions. This deficit tends to affect the region adversely by not having the processes and mechanisms in place to facilitate the implementation of human rights, and thus, remains a work in progress.

In considering human rights conventions and international standards, the courts have moved beyond the question of whether or not a convention has been ratified. This was the editorial focus of the first volume of PHRLD, and some of the case law reported in the volumes after that. These volumes have been prepared, at the very least, to be used as a guide or clarification of a particular right being considered. The focus now is more on the nature of the right being considered and how it might be applied to local circumstances. The distinguished drafters of the Bangalore Principles, which were developed in 1988, would be gratified that the reliance on conventions for guidance, clarification and interpretation is now commonplace, not only in the Pacific but globally as well, as reflected in the cases from outside the region.

Some attention has been given to democracy and the rule of law because those principles remain fragile and subject to the interventions of governments and politicians. The tendency to be critical and dismissive is understandable, but there needs to be acknowledgment that creating a culture of rights and embedding those values in Pacific Island societies takes time and commitment. There is no deep-rooted tradition or culture in the Pacific about asserting rights through mass action and protest. In such an environment, the courts bear much of the responsibility for holding the other arms of the state to account. But as was noted in the editorial commentary in volume 4, this is an issue for the entire community to be concerned with and vigilant about.

The Pacific is part of the global community, and human rights are universal. In Part II of this volume of the PHRLD, cases are included that remind judicial officers, practitioners and paralegals that while the jurisdiction and context may differ, the concerns are the same and that parties are relying on either

bills of rights provisions in their constitutions, or on human rights conventions or both. Litigants go to court to seek redress for alleged breaches of their rights, usually by a state party.

Part III highlights cases dealing with sexual and reproductive health rights and refugee matters in order to take account of the recent focus on sexual and reproductive health rights and the establishment of refugee processing centres in the region (Nauru and Papua New Guinea). There is little debate and discussion in the Pacific over the latter issue, but it is a real and ongoing concern in Australia given that the centres are a direct result of the Australian government's immigration and border control policies. From a rights perspective, human rights practitioners and advocates in the region have an equal responsibility to ensure that the rights of asylum seekers and refugees are fully observed and respected.

PART I

This part of the PHRLD deals with cases from Pacific jurisdictions involving the application of human rights standards, whether on the basis of human rights convention, bills of rights provisions of constitutions and/or statutes. In some of the cases, the courts have relied on constitutional provisions and legislative enactments rather than on human rights conventions to uphold and enforce particular rights.

Arrest and detention

Two cases from Guam illustrate the process that courts apply in balancing the public interest against individual liberty. In *People of Guam v Calhoun*, the appellant successfully applied to have evidence of his intoxication suspended. The court held that the public interest was served by stopping him and testing his blood alcohol levels, and that this was an acceptable means to control drink driving; the absence of authorisation at the appropriate level to legitimise the actions of the officers at the checkpoint converted them into unfettered discretions that were illegal and unconstitutional.

In *People of Guam v Taman*, the court adopted a broad interpretation to a provision of the *Stop and Frisk Act*, which provides that in certain circumstances a suspect cannot be stopped nor can necessary enquiries be made as to whether to arrest that person beyond a limit of 15 minutes. It was held that there could be an implied waiver to that provision if it was established that consent was voluntary. The court reasoned that if the 15-minute limit were to be strictly applied, suspects could deliberately prolong the process to evade the law. The requirement to establish whether consent was voluntary is a safeguard that has to be satisfied before the time limit can be lifted.

Children

The CRC is the most widely ratified convention in the region because the proposition that children are vulnerable and require protection is self-evident. This understanding is also accompanied, paradoxically, by ambivalence in terms of cultural and religious reinforcement about 'children being seen and not heard'. Many parents and elders in the Pacific have real difficulty accepting that disciplining and positively reinforcing children does not have to include corporal punishment, as illustrated by one of the cases below.

Several cases deal with child offenders and the varying ways in which the courts have dealt with them. In the Fijian case of *State v KRAK*, the offender was 10 years 7 months old when he fatally shot a 6-year-old victim with a gun that was left unattended. He was convicted of manslaughter and his parents were required to enter into a bond of FJD 5,000 to assure his good behaviour until the age of 18. In the Vanuatu case of *Public Prosecutor v Tiobang*, a 13-year-old offender sexually assaulted a 5-year-old girl who regarded him as her father. He received a two-year suspended sentence, conditional on good behaviour. While there is some concern about leniency in the latter case, had both

jurisdictions adopted a higher age of criminal responsibility (between 14 and 16 as recommended by the CRC Committee), neither offender would have had to experience the criminal justice system. In both cases, no custodial sentence was imposed in recognition of the potential for rehabilitation of child offenders.

The approach taken where children are victims of non-sexual actions taken by adults is interesting.

In the Fijian case of *Dakai v The State*, the court reduced the 2-year sentence (with an 18-month non-parole period) of a parent who had whipped his 10-year-old son with an extension cord causing serious injuries. The substituted sentence was 12 months, with 9 months suspended for 3 years, which suggests some leniency. No reference was made to the CRC. In another Fijian case, *Chief Education Officer v Gibbon*, the appellant queried the reliance on the CRC. The respondent, an 11-year-old student, had been talking in class and the teacher had him parade in front of the other students before having his trousers and boxer shorts pulled down by another older student. The court at first instance cited the CRC as a guide in awarding damages against the state, which was endorsed on appeal.

In instances where children are victims of sexual offences by adults, the courts have been prepared to dispense with criteria that might have adverse consequences for child victims. In *People of Guam v Mendola*, an essential element of First Degree Criminal Sexual Conduct was a finding of sexual penetration. The court held that while there was no direct evidence from the victim about penetration, her specific age and language used at trial provided circumstantial evidence that, when viewed with the examining nurse's verbal evidence as a whole, supported a reasonable inference of penetration. In *Kumar v The State*, the appellant's attempt to argue that a child's uncorroborated evidence contrary to s. 9 of the *Juveniles Act*, denying him the right to a fair trial, was unsuccessful. The court held that the provision was unconstitutional and that the requirement for corroboration was based on incorrect stereotypes and myths.

Article 21 of the CRC concerning 'the best interests of the child' has received judicial attention across the Pacific. In the Tongan case of *Saavedra v Solicitor General*, the court held that the best interests of the child is not confined to material wellbeing and educational advantages. The assessment was made after examining all the circumstances, and on that basis that (a) the child was well-looked after by his mother, grandmother and extended family; (b) was receiving an education; and (c) the child had no wish to leave the only environment he knew. Compare this with the Nauruan case *In re Adoption of BR*, where it was held that s. 9(1) of the *Adoption of Children Act* was not in breach of art. 21 in providing that parents of a particular ethnicity could only adopt children of the same ethnicity. The act was silent on the issue. And if it was to be construed as contrary to the spirit of CRC, the act predated the CRC and parliament had chosen to retain it. Contrast this with another Fijian case, *Sing v Singh*, in which the court – while citing the CRC and the provisions of art. 21 – nevertheless made an adoption order contrary to the provisions of the *Adoption of Infants Act*. These cases emphasise the importance of carefully relating the applicable convention and law to the facts.

Cruel, inhuman or degrading treatment

The cases in this category are all from Papua New Guinea (PNG). It would, however, be unfair to conclude that PNG is less respectful of human rights than its Pacific neighbours. In the years after the December 2006 coup in Fiji, there were several well-publicised incidents of deaths of people in custody and beatings of prisoners that were neither investigated nor punished because of the climate of impunity that prevailed at the time. Acknowledgment needs to be made of the role the PNG courts have played in highlighting the issues that are systemic and deep-rooted in nature.

In *Kenziye v Independent State of Papua New Guinea*, damages were awarded under each head (property, robbery, assault, sexual assault and rape, perverse sexual assaults and false imprisonment) for actions committed by police officers against a community in 1991. General and exemplary

damages were ordered against the state for victims of perverse sexual assault, including forcing the victims at gunpoint to perform sexual acts and sodomy in public. A significant point to note is that although it had been over 20 years since the incidents had occurred, the proceedings were entertained under the relevant constitutional and legislative provisions. Police brutality is a common occurrence in PNG. The reasons are varied and complex, requiring reform and other complimentary measures at all levels of the system. PNG as a country is much larger than its Pacific neighbours and far more diverse. Those factors also need to be taken into account during any discussion about these issues.

In the case of *In re Jacob Okimbari*, the applicant was awarded reasonable and exemplary damages for the treatment he received after he was arrested after a bank robbery. Subsequently convicted, he was first assaulted then told to lie on the floor. He was then shot in both legs and taken to hospital when he lost consciousness. The police refused to allow him to be admitted, and he was made to sleep in the cell. He then was assaulted for another two days, and was beaten with a bat until he lost consciousness. He was again taken to hospital and then released without the doctor's approval and assaulted until he signed a confession. In *In re Namson Lamasing*, the plaintiff was awarded reasonable and exemplary damages for assault, denial of medical treatment, detained without charge and without being taken before a court for 10 days. He was detained for a further five months before being granted bail. The repeated use of violence in both cases suggests it is a routine occurrence.

The case of *Kauke v Commanding Officer Boen Correctional Institution* concerned the diet that was served to inmates. The plaintiff alleged that the correctional institution and the state had failed to provide food that was adequate for maintaining his health and wellbeing. The court held that he was entitled to be protected against inhumane treatment and treated with humanity and respect for the inherent dignity of the human person. The minimum legal requirements regarding food from the prescribed groups had to be observed. However, the breaches were not so severe as to suggest the plaintiff was being treated inhumanely. However, the standards set out in the legislation and the regulations had to be complied with and the correctional institution was to file a schedule setting out a timetable for compliance.

Custom

The case in this category is one concerning banishment from Samoa where the village *fonos* or councils have powers conferred by statute to make regulations that are akin to bylaws. In *Punitia v Tutuila*, the appellants appealed against damages awarded against them totalling WST 963,710, with several being ordered to pay an additional WST 18,585. On appeal, the amount was reduced to WST 813,710, which they were jointly and severally liable to pay, plus general and vindicatory damages of WST 50,000. The appellants had not only banished the respondents from the village but they had also damaged their property. The court held that the respondents' constitutional rights had been breached and that the *fono* was obliged by law to act according to law and observe the requirements of fairness. Applicants could claim damages under tort law or by way of constitutional remedy but adjustments had to be made to avoid double compensation. The punitive level of damages indicated strong court disapproval of such action by the *fono*.

Democracy and rule of law

The cases grouped under this subject relate to different aspects of those principles but are all related to whether or not constitutional provisions have been followed. The rule of law grounds democracy in legal structures, systems and rules that enable the popular will to be expressed and reflected in a manner that mitigates arbitrary or personal conduct. Democracy, in turn, infuses the rule of law with principles that allow it to be more responsive to the popular will. One cannot exist without the other for those reasons.

The cases from PNG demonstrate the vigilance of the courts in interpreting and applying the provisions of the PNG Constitution. *In re Constitutional Amendment Law 2008*, reference by the

Ombudsman Commission of PNG, attempts to limit the independence of the Ombudsman Commission by making it subject to another entity set up by parliament were declared unconstitutional. In *O'Neil v Klapat* the matter was dismissed for want of prosecution. The state had initially appealed a decision declaring the suspension of a senior public servant illegal because it failed to comply with constitutionally prescribed procedures. Its failure to take the matter further was a tacit admission of its initial mis-step. Finally, in *In re Powers, Functions and Responsibilities of the Commissioner of Police*, the court held that the commissioner of police had the authority to issue directions to the police concerning criminal investigations and police conduct. However, a warrant of arrest, issued by the district court, was equivalent to a court order and a duty was imposed onto whomever it was addressed.

Constitutional procedural requirements have been strictly applied in various jurisdictions. They underscore the point that they are intended for a purpose (i.e. to ensure that the standards prescribed are fulfilled so that obligations are discharged as intended). They also provide criteria for assessing whether an exercise of power or authority has been done legally. In the Tuvalu cases of *In the Matter of the Constitution* and *In the Matter of an Application for Interpretation of the Constitution between Hon Kamuta Latasi & Ors v Attorney General & Ors*, the court held that what was asserted to be the first sitting of parliament on 30 September 2011 after the elections on 16 September was not, in fact, the case because certain procedural and notice requirements had not been observed. Similarly, in the Vanuatu case of *Carcasses v Boedoro* it was held that the speaker rightly declined to convene an extraordinary meeting of parliament because some of the signatures to the petition were improperly obtained, thereby failing to meet the prescribed number necessary. In an appeal involving the same parties, the Court of Appeals affirmed the court's at first decision in which it determined that the offences for which the members of parliament had been suspended were criminal in nature if they were proven. It was a breach of the separation of powers and, therefore, unconstitutional. In the Nauru case of *Keke & Ors v Scotty*, the court came to a different conclusion and held that the power of parliament to suspend its members for misconduct was protected by parliamentary privilege, and declined to intervene.

On the other hand, a distinction is drawn between the exercise of legislative powers per se and the objective of that process. In *In re Right of Referendum of the People of Guam*, the legislature passed a law providing for a binding referendum to be put forth at the November 2014 general election on whether to allow an amendment to the Guam Code Annotated (GCA), legalising the medicinal use of cannabis. The Guam Electoral Commission refused to place the question on the ballot, arguing that it violated the Organic Law and the GCA in breaching the separation of powers doctrine. The court held that the authorising law was valid and was not an unconstitutional delegation of legislative power. The referendum was only a consultative mechanism by which the electorate could express a binding opinion on the legislature. In the Solomon Islands case of *Wale v Attorney General*, the applicants sought to argue that the requirement of registration of political parties under the *Political Parties Integrity Act* was contrary to their right of freedom of assembly and association. The court held that it was a permissible limitation because putting in place clear guidelines for the regulation of political parties could only improve certainty and stability in governance. In the Nauru case of *Abigail Limen v Chief Secretary*, the Public Service Appeal Board determined that the appellants' rights to freedom of expression, association and assembly were qualified by her status as a public servant.

In *Attorney General, Iro Republic of Kiribati v Baakoa*, the court dismissed an application by the appellant that a case for constitutional redress was *res judicata*. The respondent had been charged and convicted without any evidence being called, and on appeal was granted a retrial. The case was dismissed on a retrial because no evidence was called and she had sought constitutional redress. Subsequently, the respondent pursued similar pre-emptive action in another similar case, raising questions about the state's position as *parens patriae* (the public policy power of the state to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection).

Discrimination

While discrimination on particular grounds such as race, sex, religion, colour, sexual orientation and the like are prohibited, constitutions and statutes may sometimes allow it on other grounds such as nationality or place of origin. In the case of *Hanpa Industrial Development Corporation v Republic of Palau*, the plaintiff Korean company challenged the legality of a tender document that required the participating company to be Palauan or Taiwanese. The plaintiff argued that the condition violated the equal protection clause of the Palauan Constitution. The court held that the constitution expressly allowed discrimination in favour of Palauan citizens. In relation to the condition of the tender document, it was substantially related to a government interest that derived from the powers vested in the president and the legislature to conduct foreign affairs.

Fair trial

In the Fijian case of *Chandra v State*, the accused was charged with one count of an act contrary to the *Public Order Act*. The accused's mental state was an issue but a psychiatric report was inconclusive. The police prosecutor withdrew the complaint under s. 169 of the *Criminal Procedure Decree* and the magistrate discharged him and ordered that the accused seek treatment as an outpatient at St Giles. The accused appealed, seeking an acquittal on grounds of mental impairment under s.28 of the *Crimes Decree*. The court acquitted him under s. 169 of the *Criminal Procedure Decree* on the basis that no proper record had been entered and the inconclusive nature of the report.

Human trafficking

In *State v Laojindamane, Lum Bing, Zhang Yong and Jason Zhong*, three women from Thailand had been lured to Fiji with promises of work as masseurs. Once in Fiji, they were compelled to sell sexual favours. The first, second and third accused were sentenced to 10 years for 2 counts each of trafficking-related offences (the first two accused to serve a minimum term of 9 years and the third 7 years). The fourth accused was sentenced to 11 years 9 months for 2 counts of sexual servitude (to serve a minimum term of 10 years). The court determined the sentences on the basis of the roles played by each of the accused in the operation.

Mandatory sentencing

The argument has sometimes been put forth that mandatory sentencing contravenes the separation of powers doctrine. In the Solomon Islands case of *Bade v Regina*, the appellant sought to argue this point in the context of the mandatory life sentence for the offence of murder. The court dismissed the appeal and recognised that the setting of a sentence, whether as a minimum or maximum, was a policy issue determined by the exercise of judicial power. It further acknowledged that one of the reasons why it had been repeatedly invited to consider the issue was the lack of a regular parole regime.

Movement

Freedom of movement is a fundamental freedom and the courts have generally upheld its application subject to reasonable limitations in a democratic society. In the Marshall Islands case of *In re Petition for Citizenship by Tamuera*, the applicant had applied for citizenship on the basis of her Marshallese descent, and claimed that it was in the interests of justice that she be granted citizenship. The applicant had entered the country with her family to work. The court held that other than her criminal and security clearance, the interests of justice did not favour the grant of citizenship. She had entered the country to seek employment and there was no compelling basis, such as violence or persecution, to trigger the 'interests of justice' qualification. The applicant's freedom of movement was subject to the criteria prescribed for non-citizens who have no automatic right of entry. In the Solomon Islands case of *Hatilla v Attorney General*, the court expanded the applicant's right to freedom of movement to hold that it would be infringed if her husband, a non-citizen, was compelled to leave the country because it would mean that she would have to either leave as well, or remain and possibly end her

marriage. The court went further and issued an order for mandamus to the Director of Immigration to grant her non-citizen husband citizenship.

Privacy

The right to privacy is not absolute as demonstrated by the Chuuk case of *In re Suka*. The petitioner was convicted of assault with a dangerous weapon contrary to the Chuuk State Criminal Code and sentenced to three years of imprisonment. The petitioner subsequently sought to have his conviction expunged on the basis that he was sufficiently rehabilitated and that it was a hindrance to the petitioner's efforts to obtain employment and run for public office. It was held that the power to do so was a legislative prerogative and the court was not authorised to do so. The threshold for a violation of a basic legal right was not made because of the public interest in maintaining accurate criminal histories and the right to information about persons who had contravened the law.

Procedure

Procedure is important in determining the appropriate course of action to be pursued. An incorrect choice may sometimes doom an application. In the Fijian case of *Tamblyn v Director of Public Prosecutions*, the applicant was charged with drug-related offences. The matter was transferred from the Magistrate's Court to the High Court and under the Criminal Procedure Decree the prosecution had to file the information within 21 days of the order for transfer to be made. The prosecution failed to do so and sought additional time to file in the absence of the applicant. It did so again on the second occasion with the applicant present, and leave was granted by the court. The applicant then filed an originating summons, seeking constitutional redress, alleging a breach of his rights. The court held that it was an abuse of process when the proper course was to appeal against the extension of time, and dismissed the application.

The process by which an annex to a convention is incorporated in domestic law can be relatively straightforward. In *PBSEA Tow Ltd v Attorney General*, among the issues the court had to decide on was the status of the *Convention on the Safety of Life at Sea (SOLAS)*. It held that SOLAS was part of the domestic law of Samoa by virtue of the *Shipping Act 1998*, which stipulated it had 'the force of law'. As regards the lack of subsidiary legislation, the annex to SOLAS was applicable and contained chapters with relevant regulations.

Property

The right to property is a fundamental right but co-exists with the right of the state mandated by constitutional authority to acquire property for a public purpose. In *Koima and Jomar Trading Ltd v Independent State of Papua New Guinea*, the state wished to acquire the applicants' land for a road. The parties had separate valuations of the land made and there was a slight variation between these values. The applicants sought an injunction until the issue of compensation was determined. The court refused the application, holding that the state had the right to compulsorily acquire the land for the road, and that the proceedings to determine appropriate compensation could continue. It was important for the state to begin work on the road in the meantime.

In the Cook Islands case of *In the Matter of the Cook Islands National Superannuation Fund Act 2000 and the Cook Islands Constitution*, the legislation was challenged on the ground that it infringed the right of an individual not to be deprived of property and was not saved by the relevant provision. The court accepted that it had infringed an individual's right to own property but the act was saved by the proportionality test. It was sufficiently important to justify the limitation of the right. It was rationally connected to the objective as it was the mechanism by which the scheme was to be implemented, and it struck an appropriate balance between individual rights and the public interest because the benefits far outweighed the diminution of individual rights.

Slavery

The first case of slavery in the Pacific received much publicity and media attention. In the Fijian case of *State v Raikadroka*, there were two accused. One was convicted of two counts of slavery and domestic trafficking of children, and the other was convicted of various offences of domestic trafficking of children. The first accused received 16 years' imprisonment for the slavery offences, and 4 years' imprisonment for the trafficking of children, to be served concurrently, with parole available after 14 years. The second accused was sentenced to 12 years' imprisonment and was eligible for parole after 10 years. In *Queen v Tang HCA 39* (28 August 2008) (3 PHRLD 53), Gleeson CJ discussed the elements of slavery in terms of the rights of ownership exercised by the perpetrator over the victim. That was not apparent on the facts in this case, with the victims having a degree of freedom of movement. They were neither bound nor restrained. There was some reference to 'situational coercion' but that would still not appear to equate to the degree of control considered in *Tang's case* to amount to slavery.

Violence against women

The cases under this heading relate to sentencing in cases of rape, sexual violence and manslaughter. The courts play an important role in reflecting community outrage at one of the consequences of entrenched attitudes about women. The results are uneven although the supervisory role played by appellate courts is necessary in order to correct undue leniency or excessive sentencing by lower courts.

In the Samoan case of *Key v Police*, the court substituted a sentence of 11 years for the 14-year term for rape handed down by the court at first instance. It also proposed four bands of tariff for rape, with 8 to 10 years at the lowest end, and 19 years to life in the most serious cases. In the Kiribati case of *Republic v Arawaia*, the court upheld an appeal against sentence and substituted a five-year sentence for the two-year sentence awarded at first instance for two counts of defilement and two counts of indecent assault. Contrast this with the Solomon Islands case of *Regina v Bonuga*. The defendant was convicted of three counts of rape of his adopted daughter when she was 12, 13 and 15 years old. The court overturned a 3-year sentence for each count to be served concurrently and imposed a 10-year sentence for each of the offences to be served concurrently. In *R v Gua*, the same court handed down a seven-year sentence for rape in place of a four-year term imposed by a court at first instance. The accused and the victim were married although living apart at the time. In the Tongan case of *Latu v Rex*, the court upheld an appeal against a sentence for rape and reduced the 14-year sentence to 8 years, and left in place the 14 months for 2 counts of indecent assault to be served concurrently. However, in *Filimone Hefa v Rex*, the appellant's sentence was reduced from 13 years' imprisonment (with the last 3 suspended) to 6 years with the last 3 years suspended for 3 years. The fact that he had a small child who needed round-the-clock nursing appears to have been a factor in the decision. Apart from the Kiribati case, which appears more lenient than in other jurisdictions, the case just discussed appears to indicate a better appreciation of the trauma, violence and personal violation committed against a woman or child in such situations.

Two cases deal with sentencing of killings in domestic situations. In the Solomon Islands case of *Fo'oka v Regina*, the court varied the nine-year sentence for manslaughter to allow the last two years to be served extramurally under the supervision of a guardian. The appellant was 17 and a half when he fatally struck his wife in the head with an axe following a dispute. In the Tongan case of *Vao'omotou v Rex*, the appellant's initial 16-year manslaughter sentence was reduced to 10 years with the last 2 years suspended. The court had applied a starting point of 14 years and then took various mitigating factors into account. The appellant had pleaded guilty to manslaughter, having stabbed his estranged wife in her sleep 23 times. In both cases, the courts held that there were persuasive mitigating factors such as the age of the appellant in the Solomon Islands. The Tongan case is more problematical, given the degree of violence exercised by the appellant on the victim, which the court did not appear to emphasise.

Workers' rights

In the Fijian case of *Labour Officer v Lolohea*, the matter came before the High Court for sentencing. Under the *Employment Relations Promulgation Decree 2007*, the maximum fines for offences were far in excess of the jurisdiction of the Employment Relations Tribunal. The Employment Relations Tribunal could only impose fines of FJD 2,000 and a 12-month prison term. The offence of enlisting and recruiting for foreign employment without proper authorisation carried a maximum penalty of FJD 20,000 or 4-year prison term, while obstructing a labour officer in his/her duties carried a fine of FJD 10,000 or 12 months of imprisonment. The court held that fines for both offences would meet the ends of justice.

The Tongan case of *Ilagana v Westpac Bank of Tonga* concerned an attempt by a bank officer to enforce her rights at common law. The appellant was dismissed pursuant to the notice provisions of her contract. No reasons were given. The court held that while the dismissal was harsh and unfair it was lawful. It was open to her to argue that there was a breach of an implied term of mutual trust and confidence, but that was not raised.

PART II

This part deals with cases from outside the region that concern human rights issues of relevance and interest to the Pacific. These cases cover a broad spectrum but also reflect the fact that they are universal issues that may arise in our jurisdictions in the future.

Cruel, inhuman or degrading treatment

In *Vogel v Attorney General*, the appellant was sentenced to life imprisonment for murder in 1988. He was released on parole in 1998, and was recalled to prison for reoffending in 2000. The complaint filed concerned the recall period when he was sentenced to solitary confinement for 21 days for a drug-related offence while in prison. The maximum period for cell confinement under the *Penal Institutions Act* is 15 days. The complainant sought damages and a declaration under s. 9 and 23(5) of the *New Zealand Bill of Rights Act*. The court held that the sentence was in breach of s. 23(5) of the *New Zealand Bill of Rights Act* and s. 33 of the *Penal Institutions Act* but declined to award damages. The state had a positive duty under s. 23(5) in relation to persons deprived of liberty. It is similar to article 10 of the ICCPR, which requires detained persons to be treated with humanity and with respect for the inherent dignity of the human person.

Discrimination on the basis of gender

In the Malaysian case of *Noorfadilla Ahmad Saikin v Chayed Basirun & Ors*, the plaintiff sued the Ministry of Education for unlawful discrimination for withdrawing a placement she had been given on the grounds she was pregnant. The court upheld her claim as being gender discrimination contrary to article 8(2) of the *Malaysian Federal Constitution* as well as being in breach of the provisions of CEDAW.

Discrimination against people with disabilities

In the Australian case of *Haraksin v Murray Australia Ltd*, the appellant alleged discrimination by the respondent in providing services. The appellant was confined to a wheelchair and wished to book a Sydney to Canberra return trip on a wheelchair accessible coach. She eventually proceeded to court under the provisions of the *Australian Human Rights Act*, relying on the *Direct Discrimination Act 1992* and the Disability Standards. The court upheld her claim of discrimination for access to or use of premises (the coach) and discrimination in not providing services between Sydney and Canberra. It also upheld complaints over standards, and directed the respondent to provide services to the appellant for two years between Sydney and Canberra. The defence of 'unjustifiable hardship' was not substantiated on the facts.

Environmental defenders

While *In re GreenPeace* is not an environmental case on its facts, the issues it deals with are, nevertheless, pertinent because they concern the broad question of whether political activism is a proper role for environmental defenders and other members of civil society seeking to be registered under the *Charities Act 2005*. The court held that a ‘political purpose’ exclusion should no longer be applied in New Zealand in determining whether an objective was charitable. Political and charitable purposes are not mutually exclusive in all situations, and the underlying inquiry should focus on whether a purpose is for a public benefit that is recognised by law as charitable.

Freedom of expression

Media freedom arising out of the proportionality of the sanctions attaching to defamation laws was considered by the African Court of Human and People’s Rights in the Burkina Faso case of *In the Matter of Lore’ Isaa Konate v Burkina Faso*. It arose out of three articles by two authors that were published in two separate issues of *L’Ouragan* in 2012, alleging corruption in a high profile case. The prosecutor filed a complaint and contempt of court and criminal proceedings were issued against the authors and the paper. The appellant was sentenced to 12 months’ imprisonment and a fine equivalent to USD 3000. He was also ordered to pay damages to the prosecutor equivalent to USD 9,000 and court costs equivalent to USD 500. *L’Ouragan* was suspended for six months and the judgment was to be published in the daily newspapers as well as in *L’Ouragan* when it resumed publication at the cost of the appellant and the other author. The appellant appealed to the African Court of Human and People’s Rights, alleging breach of his rights under article 9 of the African Charter of Human and People’s Rights, article 19 of the ICCPR, and article 66(2)(c) of the Revised Treaty of the Economic Community of West African States.

The court unanimously held that the respondent state had violated the three conventions as follows: (a) the existence of penal sanctions for defamation in its laws, (b) in the conviction of the appellant and the imposition of a custodial sentence, (c) in the payment by the appellant of excessive damages, fines, interest and costs, and (d) in the six-month suspension of *L’Ouragan* for defamation. By a majority it further held that the respondent state did not violate those conventions by the existence of non-custodial sanctions in its laws. The court ordered the respondent state to amend its legislation on defamation to be consistent with the respective treaties within two years of the judgment.

Movement

The ‘best interests of the child’ lie at the heart of the CRC, and it is reasonable to assume that it would be an important consideration in any decision to deport a parent whose child was a citizen of the deporting state. This issue was considered in the New Zealand case of *Chief Executive Officer of Ministry of Business, Innovation and Employment v Liu*. The respondent was a Samoan national who was deported after the immigration officer concerned declined to cancel his deportation order. He argued that the officer had failed to consider article 9.1 of the CRC in relation to his New Zealand-born son. Before an officer can exercise an absolute discretion to deport, New Zealand’s international obligations must be taken into account on the basis of information provided. The respondent’s personal circumstances had been considered, including a personal protection order against him by his former wife and children, and a conviction and jail term for assault against his present wife, as well as the country’s international obligations although article 9.1 was not specifically mentioned. The court held that article 9.1 had no relevance in a deportation case, on the basis of Australian, Canadian and UK authorities. It only applies where a family order in a domestic setting is to be considered in protecting children. The provision requires states to ensure that a child is not to be separated from his or her parents against their will unless competent authorities, subject to judicial review, decide it is necessary and in the best interests of the child.

Religion

Religion remains an important part of life in Pacific Island societies but freedom to practice religion is not synonymous with the right to worship in one's mother tongue or ethnic language. In *Illafi v The Church of Jesus Christ of Latter Day Saints Australia*, the appellants challenged the Mormon Church's decision to prohibit services in the Samoan language in various parts of Queensland in 2007 and 2008. They alleged it was a breach of s. 9 of the *Racial Discrimination Act 1975*, which concerned 'a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'. The court dismissed the appeal and held that the right to worship publically as a group in the Samoan language was not protected under the act. Relying on precedents from the European Court of Human Rights, that in the event of disagreements, the individual right to freedom of religion is exercised through the freedom to leave. Individual church members who chose to enter a particular group gave up their individual freedoms and had a choice to leave.

Religious freedom also involves situations where parents make decisions on behalf of their children. In *Indira Gandhi A/p Mutho v Pengara Jaratan Agama Islam Perak & Ors*, the applicant mother of three children, aged 12, 11 and 11 months, challenged the right of her estranged husband to unilaterally convert their children to Islam. A complicating factor was a decision by an appellate court in respect of article 12 of the *Malaysian Federal Constitution* and the right to education. The reference to parent in the singular gave a parent a right to choose the religion of a child under the age of 18. Moreover, it was not inconsistent with article 8, relating to equality before the law. Notwithstanding precedent, the court held in favour of the applicant by finding that article 11, which upheld the right to religious freedom, included the teaching of one's faith to one's children. This was reinforced by article 5, concerning freedom of life and liberty, including the right to teach one's religious beliefs to one's children. The conversions were, therefore, unconstitutional. In considering the *Universal Declaration of Human Rights*, CEDAW and CRC, and Malaysia's international obligations, the ambiguity in article 12 should be resolved by adopting an interpretation consistent with those obligations.

Torture

Torture is one of the few violations in respect of which there are no exceptions or reservations. The prohibition against the use of torture is total and is regarded as part of customary international law. However, states continue to tacitly approve its use on the basis of national security and combating international terrorism. In the case of *El-Masri v The Former Yugoslav Republic of Macedonia*, the applicant alleged that while travelling in Macedonia he was arrested, questioned, ill-treated and held incommunicado before being handed over to United States Central Intelligence Agency agents at Skorpje Airport. He was flown to a secret detention facility in Afghanistan and ill-treated for over four months. The alleged ordeal occurred between 31 December 2003 and 29 May 2004. The European Court of Human Rights unanimously held that the respondent state had breached articles 3 (torture and ill-treatment), 5 (personal liberty and rights while detained), 8 (right to respect for private and family life) and 13 (right to effective remedy before a national authority) of the *European Convention on Human Rights* by acts done to the applicant while under their control and in handing him over to United States authorities. The court ordered non-pecuniary damages of EUR 60,000 (together with chargeable tax and interest) to be paid by the respondent state. The practice of 'extraordinary rendition', whereby some states 'remove' suspects to jurisdictions less vigilant or scrupulous about human rights violations, was discussed in the judgment.

Violence against women

The obligation of states in this regard is a positive rather than a benign one. It is, in part, a recognition and acknowledgment of how deeply entrenched and systemic the culture of violence is against women. In the case of *Eremia v Republic of Moldova*, the applicants' mother and two teenage daughters filed a complaint against the respondent state, alleging that it failed to protect them from incidents of violence by their husband and father between 2 July 2010 and 4 April 2011. The court

held that the respondent state had failed in its positive obligations under articles 3 and 14 of the *European Convention on Human Rights* in respect of the applicant mother. The respondent state had also failed to protect the applicant's children under article 8 of the convention, and ordered non-pecuniary damages of EUR 15,000 and costs.

PART III

Part III focuses on cases relating to sexual and reproductive health (SRPH) and refugee matters, which are emerging issues in the region. SRPH is significant in the Pacific because of the high proportion of young people in the youth cohort and the sexual choices they may have in environments that are neither supportive nor sympathetic. Refugee processing centres operate in Nauru and PNG, and the challenges accompanying them have become more apparent and remain real and ongoing human rights issues. While it is now a reality, their operation must comply with internationally accepted best practices in human rights standards while long-term solutions are found to resolve the plight of refugees – both in the region and elsewhere.

Sexual and reproductive health and rights

Abortion throughout the region is a criminal offence, and the strong Christian ethos and influence exerted by the churches suggests that the right of women to autonomy over their own bodies in such matters is not likely to happen soon. In the Samoan case of *Police v Apelu*, the defendant received a five and one-half year prison term after pleading guilty to procuring an abortion for a prison inmate. In 2004 she had been sentenced to two and one-half years for the same offence. The charges, which were not proceeded with at the time, were revisited in 2005 and a year was added to the defendant's sentence. It was also open to the court to refer to CEDAW for the purposes of sentencing.

Discrimination in child custody over relevance of a parent's sexuality

The prejudice and stereotyping of gay parenting is amply illustrated by the case of *Atala Riffo and Daughters v Chile*. The complainant filed a complaint with the Inter-American Commission of Human Rights, which referred the matter subsequently to the Inter-American Court of Human Rights (IACHR) regarding decisions made by the Chilean judiciary in her child custody case largely on the basis she was an unfit mother because of her sexual orientation. The IACHR held that the rights to sexual orientation were protected under the constitution, and that any restriction had to be legitimate, necessary and proportional. While the best interest of the child was a legitimate goal, the judgments in the Supreme Court and the provisional decisions of the Court of Appeal were based on inadmissible considerations to the complainant's detriment. There was a failure to demonstrate causality between the alleged harm to the children and the complainant's alleged behaviour. Their decisions were instead based on abstract, speculative and stereotyped conceptions of the alleged harm to the children. The complainant's rights under article 24 and 1 (1) of the *American Convention on Human Rights*. The decision also discriminated against the children, based on their mother's sexual orientation and contrary to articles 24, 19 and 1(1). The complainant's right to private and family life under articles 10, 11 and 17 was also violated. The state was ordered to publish the judgment, acknowledge responsibility, and pay pecuniary and non-pecuniary compensation to the complainant and her children. Chile was also requested to implement training and education for the judiciary and public officials to uphold protected rights.

HIV patients' right to informed consent over sterilisation procedures

In the Namibian case of *Republic of Namibia v LM, MI and NH*, the respondents were female HIV patients who were sterilised by way of a bilateral tubal ligation. The process was performed at the same time as their caesarean operation. The respondents had signed a general consent form prior to the sterilisation operation. They sued the state for wrongful sterilisation without consent and in violation of their constitutional rights. They also alleged discrimination on the basis of their HIV

status. The court held there was no informed consent because they were in varying degrees of labour. They therefore did not fully comprehend the consequences of providing consent for the sterilisation procedure. The fact that they made no appointment to confirm the sterilisation negated the consent. On the issue of discrimination, the court dismissed the claim and held that there was no evidence to suggest that the sterilisation was carried out because of their HIV status rather than as a general procedure.

Discrimination on the basis of pregnancy after maternity leave granted

In *Stanley v Service to Youth Council Incorporated*, the applicant was made redundant and retrenched after first being given maternity leave after disclosing her pregnancy to her employer. She instituted proceedings under the *Sex Discrimination Act* and the *Fair Work Act*, alleging sexual harassment, and that the employer's actions to make her position redundant and to retrench her, amounted to discrimination on the basis of her sex, pregnancy and/or family responsibilities. The court held that sexual harassment was not made out. To prove discrimination, the applicant had to demonstrate that the disadvantage she suffered in her employment would have been suffered by a hypothetical employee in her position, as a result of their being absent from work but not by virtue of the reason for the absence (in this case pregnancy). The court held that the applicant had suffered some disadvantage by her absence from work, but this was due to her being absent from work and not by virtue of her pregnancy specifically, and on that basis the court held that the applicant did not establish disadvantageous treatment. The applicant was awarded AUD 4,500 for the employer's failure to respond to her request for different work arrangements under the *Fair Work Act*.

Inadequacy of gender classification in relation to the male/female dichotomy

Our assumptions about what is normal are constantly being challenged in the discourse on human rights as individuals assert their right to be treated with respect and dignity for the human person. This applies to people who do not accept or feel that the traditional notions of male and female gender apply in their particular case. In *New South Wales Registrar of Births, Deaths and Marriages v Norrie*, the applicant wished to be registered as neither male nor female and the issue was whether the person could be classified as 'non-specific' under the relevant New South Wales legislation. The court held that it was open to the registrar to do so based on *bona fide* evidence although it was not open to actually set categories.

Refugees

These cases arise from the presence of refugees in Nauru and PNG, and reflect the challenges involved in hosting refugee processing centres and the additional international scrutiny to which the countries involved (and their neighbours) are subjected. In *Attorney General v Nauru*, the applicants applied for asylum at Christmas Island on 1 September 2013. On 24 September 2013 they were taken to Nauru by aircraft against their will. On arrival they were given entry permits called Australian Regional Processing Visas issued under the *Nauru Immigration Act 1999*. Under the *Immigration Regulations 2013*, an application for a regional processing visa could only be made by an officer of the Commonwealth of Australia. Such a visa was issued for the purpose of making a refugee status determination for the visa holder. A condition of the visa was that the visa holder must reside in specified premises (i.e. a regional processing centre). The applicants sought an order for their release from the regional processing centre on the basis of their unlawful detention. Dismissing the application, the court held that it was within the meaning of article 5(1)(h) of the constitution. However, the detention was authorised by the *Immigration Act 1999* and the *Immigration Regulations 2013*, and was, therefore, lawful under the said provision.

The establishment of refugee processing centres has engendered a defensive reaction to the increased international publicity that has resulted. As such, authorities have been reluctant to allow access to overseas media and refugee advocacy groups due to concerns that they would harm the country's image and standing. This perspective is reflected by the stance that the state adopted in the PNG case

of *Namah v Pato*. The PNG Opposition Leader, Belden Namah, challenged the constitutionality of arrangements between the governments of Australia and PNG over the purported transfer of asylum seekers in Australia to PNG for refugee status processing pursuant to s. 18(1) of the constitution. It was argued that the arrangement was unconstitutional as their personal liberty was protected by section 42(1) of the constitution. Under section 18(1), the court must declare whether an applicant has standing. The PNG government claimed that the applicant had no locus. The court held that he had standing and declared so to that effect. A citizen is presumed to have standing if he/she can show the court that they have a genuine interest in the constitutional issue raised.

In *State v Transferee*, section 57(1) of the PNG Constitution confers jurisdiction on the court either on its own initiative or upon application by any person with an interest in its protection or enforcement, or in the case of a person who, in the opinion of the court, is unable to fully and freely exercise their rights under this section, by a person acting on his behalf, whether or not by his authority. The court acted under this provision to initiate an inquiry into allegations of breaches of human rights of asylum seekers on Manus Island. The state sought leave to appeal and a stay of proceedings. The court granted leave to appeal, concluding that there was an arguable case for reasonable apprehension of bias and extended the stay pending appeal.

Joni Madraiwiwi, editor

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

ARREST AND DETENTION

Searches and seizures – random roadside sobriety checkpoint operation

- A random roadside sobriety checkpoint arranged under approved guidelines but not administered under the supervision of a sufficiently senior police officer failed the threshold tests which safeguard constitutional rights against unreasonable searches and seizures.

PEOPLE OF GUAM v CALHOUN

Supreme Court
Torres CJ,
Carbullido and Maraman AJJ

Guam
[2014] GUSC 26
24 Oct 2014

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

The Organic Act of Guam (The United States Constitution, Fourth Amendment *protects against unreasonable searches and seizures and is made applicable to Guam vide section 1421b(c) of the Organic Act of Guam.*)

Facts

The appellant (A) was driving his vehicle when he was stopped at a sobriety checkpoint conducted by the Guam Police Department (GPD). Officers noticed that A's breath smelled strongly of alcohol. When asked whether he had had anything to drink, A responded that he had had three beers. A failed the field sobriety tests administered by the officers, and a breath test subsequently showed that his blood alcohol concentration (BAC) was 0.194%. As a result, A was charged with operating a vehicle while intoxicated, as a misdemeanour, and operating a vehicle with a BAC of 0.08% or more, as a misdemeanour. A then moved to suppress the evidence of his intoxication, alleging that the checkpoint violated the Fourth Amendment of the *United States Constitution*. More specifically, A alleged that the police failed to *adhere to the requirements of GPD's Traffic Investigation Section (TIS) 91-45 sobriety checkpoint guidelines*. The court at first instance denied A's motion to suppress the evidence.

Issue(s)

1. Did the GPD checkpoint guidelines pass the constitutional threshold?
2. If so, did the GPD correctly implement the guidelines in setting up the relevant checkpoint which validated the evidence which was obtained from the checkpoint?

Decision

The court upheld the appeal. In setting out the standard of the review it noted that as the seizure was not conducted under a warrant, and that the People had the burden of proof at the suppression hearing. In its analysis the court adopted a three-pronged balancing test: (1) *the gravity of the public concerns served by the seizure*, (2) *the degree to which the seizure advances the public interest*, and (3) *the severity of the interference with individual liberty*. Under American case law, the Fourth Amendment requires that 'a search ordinarily must be based on individualized suspicion of wrongdoing.' '[A]

seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual...' Otherwise, 'the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.'

In relation to the first two limbs of the test, there were sufficient public interests that warranted a sobriety checkpoint be set up. A further list of considerations articulated in previous cases was adopted in examining whether the interference with individual liberty was kept to a minimum. Each consideration was discussed, and the court concluded that the written guidelines made provisions to safeguard the minimum levels of intrusiveness to an individual, and therefore the checkpoints were constitutionally permissible. However, regarding the implementation of the guidelines on this occasion, the court determined that the records failed to show that this particular operation was approved by a sufficiently high-ranking official. It therefore failed to comply with an important consideration designed to prevent the field officers' unfettered discretion in operating the checkpoint.

Comment

In reviewing the exercise of the police powers of arrest and detention, the courts must always balance the rights of the individual with the public interest. The intention of this balancing is to ascertain whether the purported limitation on liberty is permissible in a particular context. The courts tend to exercise some vigilance in consideration of policing powers because these powers relate to physical restrictions on personal liberty. In the instant case, while the random roadside sobriety checkpoint was consonant with the public interest to eradicate drunken driving to improve road safety, the absence of authorisation at an appropriate level of seniority invalidated this particular operation. The lack of the necessary check rendered the actions of the police officers at the checkpoint as an unfettered discretion, and tipped the balance negatively on the permissible degree of interference with individual liberty. The extent and scale of interference with individual liberty will depend on the particular circumstances of each case.

Searches and seizures – police powers to detain a suspect – statutory time limits

- Whether the statutory time limitation on detaining a suspect for preliminary investigation can be extended or waived by the suspect.
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PEOPLE OF GUAM v TAMAN

Supreme Court
Carbullido CJ,
Torres and Maraman AJJ

Guam
[2013] GUSC 22
8 November 2013

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

The United States Constitution, Fourth Amendment. Stop and Frisk Act, Guam

Facts

A police officer attended the scene of a traffic accident, where he stopped and questioned the defendant (D), at approximately 2:32 a.m. At 2:37 a.m. D admitted that he had consumed alcohol but could not remember how much. At 2:45 a.m., 13 minutes from the onset of the investigative detention, D was asked to participate in a standardised field sobriety test, which he failed. At approximately 3:00 a.m., 28 minutes from the onset of the investigative detention, D was placed under arrest and later charged with two counts of alcohol- and driving-related offences. Almost one year later D moved to suppress all evidence obtained from his investigative detention on the grounds that his detention lasted longer than the 15 minute limit prescribed by Guam's *Stop and Frisk Act*. The court at first instance issued a decision and order suppressing all evidence gathered from the onset of D's investigative detention at 2:32 a.m. until his arrest at 3:00 a.m. The People filed an appeal.

Issue(s)

1. Whether obtaining voluntary consent tolls or establishing probable cause obviates the 15 minute limit prescribed by law.
2. Whether suppression of all evidence gathered from an investigative detention that lasts longer than 15 minutes is the appropriate remedy for the breach of the 15 minute limit.

Decision

The Supreme Court (SC) upheld the People's appeal.

The SC set out the relevant provisions of the *Stop and Frisk Act*, which authorised police officers to detain and search a suspect under certain circumstances for the purpose of identifying the suspect and making necessary enquiries as to whether the suspect should be arrested. Relevantly, the statute provides that: *No person shall be detained under the provisions of § 30.10 longer than is reasonably necessary to effect the purposes of that section, and in no event longer than fifteen (15) minutes. Such detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.* The court at first instance rejected the People's argument that voluntary consent could 'stop the clock', based on the clear language of the statute. The SC held that the court at first instance had erred, and that a waiver (actual or implied) of a statutory right would suffice to stop the clock. Otherwise, absurdity would result, as the suspect could strategically prolong the investigative detention beyond 15 minutes to avoid an arrest. The case was remitted to the court at first instance to decide whether D's continued contact with the police was voluntary, because consent as a waiver could only be established if consent was voluntary.

Another element of the first issue concerned the argument advanced by the People that once ‘probable cause’ was established, the 15 minute rule no longer governed the detention and thus vitiated the time limit. The SC considered and contrasted the working definitions of ‘reasonable suspicion’ and ‘probable cause’ under case law, and ruled that: *as a matter of law, the development of probable cause obviates the fifteen-minute limit imposed by Guam's Stop and Frisk Act on investigative detentions that are supported by reasonable suspicion, because the appearance of probable cause transforms the nature of the detention and thereby removes the encounter from the strict parameters of the statute.* The SC further observed that: *[a] prolonged detention supported by probable cause might implicate a constitutional claim, but the language of the statute as written does not preclude the police from extending their investigation well beyond fifteen minutes.* The SC, however, declined to rule on whether sufficient evidence was adduced on the issue of ‘probable cause’, and remitted the matter for the trial court to decide.

Comment

This case suggests that there may be different tests applicable to rights claimed between those based on statute and those based on the constitution. It would seem that courts appear to be more willing to interpret statutes less stringently, to the benefit of law enforcement agencies. Here, a broad purposive approach was taken to interpretation because the statutory provision clearly prescribed a period of 15 minutes. An implied waiver of the period was read in if it could be established that consent was voluntary. Otherwise, a suspect could prolong the investigative detention beyond 15 minutes to avoid an arrest. That would result in an absurdity, wherein the purposes of the legislation would be defeated. In adopting this position, the court was seeking to devise a practical solution, whereby the police could proceed unimpeded by an investigative arrest if a citizen detained in those circumstances had voluntarily given consent to that detention. In doing so, the court disregarded the literal interpretation of the provision, in which detention under it should be ‘in no event longer than 15 (fifteen) minutes’.

CHILDREN

Children – adoption – best interest of a child – material and educational wellbeing only a factor – love and family support significant considerations

- Each child has his or her specific circumstances which warrant specific consideration, regardless of similar facts and their family ties and relationship.
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SAAVEDRA v SOLICITOR GENERAL

Court of Appeal
Salmon, Handley and Blanchard JJA

Tonga
[2013] TOCA 7
17 April 2013

Law(s) and/or international instrument(s) considered
Convention on the Rights of the Child (CRC), art. 21

Facts

The appellants (As) appealed against a decision of the Lord Chief Justice (LCJ) refusing their application for the adoption of a six-year-old Tongan boy while allowing the adoption of his one-year-old half-sister. Each of the applications for adoption had been supported by the Guardian ad litem, the Solicitor General. In refusing the adoption, the LCJ was not prepared to accept that the boy would be better looked after than he was by his mother's extended family. He had been brought up for the first five years of his life by his grandmother, was close to his mother and did not wish to go on a plane with the As. The As were non-Tongan and the boy would be in a different environment from that he had known all of his life. Although the As could provide a higher level of material and educational wellbeing, this was only one consideration in deciding where the best interests of a child lie. The proposed adoption was not in the best interests of the child.

Issue(s)

In considering the 'best interests of the child', would the boy be better off with all of the material comforts and educational opportunities that life in the United States of America could offer, compared to the life he had in Tonga, with a mother, grandmother and extended family who loved and nurtured him, and provided for his needs?

Decision

The Court of Appeal upheld the original decision. Article 21, clause b, of the CRC recognises that inter-country adoption may be an alternative if a child cannot be placed with an adoptive family or foster care or in any other suitable manner be cared for in the child's country of origin. Inter-country adoption was only a means of last resort, and in the present case the mother had subsequently withdrawn her consent to the adoption, and the child was being cared for by his mother and grandmother and was attending school. The child was happy with his situation and his needs were being met. The provisions of the CRC regarding adoption could no longer be met and, accordingly, the appeal was dismissed.

Comment

The best interests of the child are given a broad interpretation and not merely confined to the ability to provide for material wellbeing and educational advantage, in comparing one society with another. The entire context of a child's circumstances will be considered. In the present case, the child was six years old, and had known no other environment. He seemed happy and was not inclined to leave what he was familiar with and the family he had known and who knew and loved him, for something

different. Adoption is only considered when there are no appropriate local options for the child. In the case of the boy's one-year-old half-sister, given her young age she had not formed bonds or attachments as strongly as her brother had. Weighing these competing options is often difficult because a court is called upon to make assumptions about situations and circumstances it has no way of knowing at the time. It can only make an educated guess based on all the facts before it and what appears in a court's judgment to be the best interests of the child. Some may argue that the lifestyle and opportunities afforded by the As in this case more than offset the love and support he was receiving from his mother, grandmother and extended family. However, the LCJ, while acknowledging those advantages, recognised the intangible value the boy derived from being in the comfort and familiarity of home and family. Further, overseas adoption was only a means of last resort where local alternatives were clearly available, as was the case here.

Children in conflict with the law – the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth.

- **Generally, when a juvenile is the subject of sentencing, the sentencing court should be mindful that, while the juvenile bears the responsibility for their own actions or offences committed, they are in need of guidance, assistance and protection because of their state of dependency, vulnerability and immaturity.**
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STATE v K.R.A.K.

**High Court
Bandara J**

**Fiji
[2013] FJHC 339
17 July 2013**

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

International Covenant on Civil and Political Rights (ICCPR)
Convention on the Rights of the Child (CRC)
Crimes Decree 2009
Juveniles Act
Sentencing and Penalties Decree 2009

Facts

The juvenile offender (D), the deceased boy (V) and their uncle (R) had returned to a compound after shooting pigeons with the gun that was alleged to have killed V. Upon returning, the boys began playing with their cousin, Nabil (N). At some point D handled the gun that was lying on the back seat of his uncle’s vehicle. The gun discharged, causing injuries to N and V, who sustained 21 injuries and died from his wounds. At the time of the offence, D was 10 years and 7 months of age, and V was six years of age.

Issue(s)

What should be the appropriate sentence, considering the age of the offender? Did D have the requisite level of maturity to understand the consequences of his conduct? Or, mitigating culpability, was D simply motivated by negative influences which nurtured the offending environment, or impulsive as a result of his inchoate life experiences?

Decision

The court convicted D of the offence of manslaughter. D’s father was ordered to pay costs of \$2500 to the court. In addition, D’s parents were required to enter into a bond of \$5000 each to assure the good behaviour of the juvenile offender for the next seven years, until he ceased being a juvenile.

Comment

The conviction and sentence D as a juvenile is not consistent with the Minimum Age of Criminal Responsibility (MACR) recommended by the CRC Committee in its General Comments (2007). Fiji has a MACR of 10 years; had it adopted the recommendations of the Committee in setting a standard of between 14 and 16 years, D would not have been prosecuted under the criminal justice system. D was not given a custodial sentence in the light of his age, and by virtue of the court’s acceptance that he was not old enough to fully appreciate or understand the implications and consequences of his actions. The decision was also accompanied by an acknowledgment that D’s prospects for rehabilitation were very good, given his age. The decision to impose sanctions on D’s parents may raise some concern. The CRC Committee, in its report cited earlier, observed that it ‘regrets the trend

in some countries to introduce the punishment of parents for the offences committed by their children... criminalising parents of children in conflict with the law will not likely contribute to their becoming active parents for the social reintegration of their child'. However, the good behaviour bond was a guarantee on behalf of D, who was not legally responsible, and terminated when he became an adult.

Children – adoption

- **Domestic laws not necessarily inconsistent with the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination where they prescribe conditions based on ethnicity.**
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IN RE ADOPTION OF BR

Supreme Court
Eames CJ

Nauru
Civil Case No. 7 of 2013
9 September 2013

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

Convention on the Rights of the Child (CRC)
Convention on the Elimination of All Forms of Discrimination (CERD)
Constitution of Nauru (CN)
Adoption of Children Act 1965 (ACA)
The Universal Declaration of Human Rights (UDHR)

Facts

On 2 May 2013, the Family Court stated a case for the Supreme Court about an application for adoption of ‘B-R’ – whose parents were citizens of the People’s Republic of China – by a married Nauru couple. The case stated concerned section 9 of the ACA.

Section 9 provides:

9. Adoption by Nauruans etc.

- (1) Where the applicant is a Nauruan, an adoption order shall not be made unless the child in respect of whom the application is made is a Nauruan and the spouse of the applicant is a Nauruan.
- (2) Where the applicant is a married Nauruan, an adoption order shall not be made unless the child in respect of whom the application is made is a Nauruan and the spouse of the applicant is a Nauruan.
- (3) Where the applicant is not a Nauruan, an adoption order shall not be made unless the child in respect of whom the application is made is also not a Nauruan.
- (4) Where the applicant is a married person who is not a Nauruan, an adoption order shall not be made unless the child in respect of whom the application is made is not a Nauruan and the spouse of the applicant is also not a Nauruan.

Issue(s)

1. A determination of the legal position concerning s. 9 of the ACA.
2. Whether s. 9 is an impediment to adoption in the case before the Family Court.

Decision

The court held that s. 9 was valid and that it was an impediment to adoption in the case before the Family Court for the following reasons:

1. The provision was not ultra vires art. 3 of the CN, which did not adopt all of the rights and freedoms set out in the UDHR, but was only intended to be a summary of the general principles underlying the specific rights in articles 4 to 13 of the CN. There was no general right to adoption that could be enforced.
2. The only article in the CRC addressing the question of adoption is art. 21. Art. 21(1) requires states to ensure the best interests of the child are the paramount consideration. It does not address the desirability or otherwise of the state imposing a policy prohibiting adoptions by persons of a

different race or ethnicity to that of the child. Therefore, s. 9(1) is not inconsistent with either the letter or the spirit of the CRC. The CRC does not address the subject matter of s. 9(1). Even if it should be taken that the spirit of the CRC determined that adopting parents of a different ethnicity is irrelevant, a state might choose not to adopt that approach. The ACA predated both the CRC and CERD and the legislature had chosen to retain it.

3. The provision was not in contravention of the CERD because, while art. 1(1) defined racial discrimination as, inter alia, any distinctions, exclusions, restrictions or preferences based on race, colour, descent or national or ethnic origin, which has the effect of impairing the enjoyment or exercise of 'human rights and fundamental freedoms', the subject matter in s. 9 does not necessarily amount to racial discrimination. Nothing in the CERD asserts that a child enjoys a human right or fundamental freedom to be adopted irrespective of the race or ethnicity of the child and/or of the adopting parents.

Article 1(2) of the CERD provides that the CERD does not apply to distinctions, exclusions, restrictions or preferences drawn by a state between 'citizens' and 'non citizens'. Section 9 (1) is not concerned with those distinctions, but rather with other descriptors. While s. 9 may impose a race- or ethnic-based criterion for adoption, it does not necessarily amount to racial discrimination.

The Nauru legislators may have taken the view that the adopted child's best interests are best served by requiring the adopted parents to share the same race. Their intention is not the relevant matter, but the issue is whether the effect of s. 9 is to impose discrimination that is inconsistent with the CERD. Assuming that the restriction prima facie constitutes discrimination as identified by the CERD, it does not follow that s. 9 (1) is invalid. Conventions do not form part of domestic law unless incorporated into local law, and the CERD could not be applied to resolve an ambiguity because the terms of s. 9 were clear.

Comment

The Supreme Court chose not to follow *In re Lorna Gleeson [2006] NRSC 8* (15 December 2006), which concerned the validity of s. 9 (2), in which Millhouse CJ held that it was in breach of art. 3 of the CN and the provisions of the CRC, as being contrary to the best interests of the child. Section 9(2) contravened the right of the individual to his private and family life that was implied in art. 3, and it was contrary to the spirit of the CRC. However, art. 3 is a preambular provision and does not confer substantive rights.

The court cited the constitutional discussions which preceded the adoption of the CN in 1968. Moreover, a closer examination of the alleged offending provisions, s. 9(1)(a) of the ACA and art. 21(1) of the CRC, is useful because the latter is silent on whether the prohibition of adoptions by persons of a different ethnicity to that of the child is desirable. To assert that the prohibition is contrary to the spirit of the CRC is immaterial because the ACA predated the CRC and CERD, and Nauru had chosen to retain it. Therefore the provision prevailed as a legislative enactment against the provisions of a non-domesticated applicable human rights instrument. The application of human rights instruments and constitutional provisions sometimes calls for an appreciation of detail and nuance, as was undertaken by the court. It cannot be assumed that the spirit of the CRC or any other human rights instrument would necessarily lead to a particular outcome. The totality of the situation needs to be considered, including considering the provisions of the CRC, whether the international instruments have been domesticated, and the legislation being challenged.

Children – corporal punishment, degrading or inhuman treatment

- Claim that the Convention on the Rights of the Child cannot be used by the court because it had not been adopted by legislation.
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CHIEF EXECUTIVE OFFICER FOR EDUCATION v GIBBONS

Court of Appeal (CA)
Chandra, Basanayake and Mutunayagam JJA

Fiji
[2013] FJCA 195
3 October 2013

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

Convention on the Rights of the Child (CRC), arts 16, 28 and 37
Constitution of Fiji (CF), ss 25 and 37

Facts

At the relevant time the plaintiff (P) was a student in Class 5. On the day in question, the first defendant (D1) (a teacher at Vatuwaqa Primary School) was attending to the students, who were in P's class (Class 5) and another class, Form 1. The classes were combined on this occasion due to the absence of a teacher. D1 found P talking in class several times, despite having received several warnings not to do so. P was told by the teacher to go to the front of the class and to pull down his pants, which he did. P was wearing boxer pants and underwear underneath his outer pants. D1 then ordered a Form 1 student to pull down P's boxer pants, leaving him standing only in his shirt and underwear for about two to three minutes. P was then told by the teacher to pull up his boxer pants and shorts and to return to his seat.

P sought damages in a civil action based on battery, injury to feelings and breach of a child's constitutional rights. Damages were awarded to P. The education authorities appealed.

Issue(s)

1. Whether the *Convention on the Rights of the Child* is applicable in this case.
2. Whether expert evidence is necessary in assessing trauma.

Decision

There was insufficient evidence for the arguments that were posed and accordingly the appeal was dismissed.

The court at first instance upheld the claims of battery, injury to feelings and dignity, and awarded aggravated damages.

On appeal, it was held that the CRC was an appropriate tool to be used for guidance, which the lower court was entitled to do. The appeal based on want of procedural particularity in the claim of battery also failed in common law. The CA also rejected the third ground of appeal, and reasoned that matters of expert witness should go to the issue of quantum of damages awarded which was not being appealed.

Comment

In dismissing the appeal, the CA accepted that the CRC had not been enacted in domestic legislation. However, the court also made the point that the CRC had been cited in numerous cases for guidance, elucidation and clarification in relation to the rights of children. This is consistent with the application of human rights instruments as reflected in the Bangalore Principles, which were drafted by a colloquium of senior Commonwealth judges regarding the role of such instruments in domestic law.

The wide number of ratifications, accessions and signatories by states, as well as the continuing focus given to children's rights and advocacy on their behalf, has enhanced the CRC's status as a significant source of empowerment for children's rights. The CRC and other human rights instruments cannot be the basis of a cause of action *per se*; the action must always be grounded in the local context, both constitutional and statutory. The CRC is only directly applicable as law when it has been enacted in local legislation.

Children – sexual offence involved with a five-year-old victim and a 13-year-old perpetrator

- Issues about the juvenile justice system and the appropriateness of the sentence.
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PUBLIC PROSECUTOR v TIOBANG

Supreme Court
Saksak J

Vanuatu
[2013] VUSC 206
8 November 2013

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

Penal Code (cap. 135)

Facts

In this case, a five-year-old girl (V) was sexually assaulted by a 13-year-old boy (D) in a plantation in the Sesivi area, West Ambrym. D admitted the sexual assault. V regarded D as her 'daddy'.

Issue(s)

What is the appropriate sentence for a criminal offence in which both the victim and the perpetrator were minors?

Decision

The Supreme Court imposed a two year suspended sentence, conditional upon the good behaviour of D.

Comment

The strong rhetoric expressed by the court against the actions of the perpetrator and men who sexually assault women was not reflected in the decision. The serious sexual assault, abuse of trust and the young age of the victim were outweighed significantly by the unblemished record of the perpetrator as a first-time offender, the D's guilty plea at the first opportunity, the D's co-operation with the police and his willingness to perform traditional reconciliation. The age of the perpetrator and the prospects for rehabilitation, in addition to the mitigating factors, influenced the court. In that regard, the outcome accords with Rule 11.4 of the *Beijing Rules* 1985, which state that 'in order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for continuing programmes such as temporary supervision and guidance, restitution and compensation of victims'. The court did not see fit to order that D be subject to proper and appropriate adult supervision and guidance for a specified period, in view of the gravity of the offence in accordance with Arts 37 and 40 of the *Convention on the Rights of the Child*. It is also unfortunate that the name of the child perpetrator in this case was not suppressed, compromising his interests and privacy, contrary to Rules 8 and 21 of the *Beijing Rules*.

Children – victim of sexual offence – evidence

- Circumstantial evidence and lack of specificity may secure a conviction for the offence of sexual penetration where corroborated by the testimony of a medical expert.

PEOPLE OF GUAM v MENDIOLA

Supreme Court
Torres CJ, Carbullido and Maraman AJJ

Guam
[2014] GUSC 17
16 July 2014

Law(s) and/or international instrument(s) considered
Guam's Criminal Code (GCC)

Facts

The appellant (A) was the uncle of the victim who was a nine-year-old girl at the time of the offence. Five convictions were upheld at the conclusion of the third trial, including a conviction of first degree criminal sexual conduct, against which A appealed. The facts of the incident were not in dispute, but A argued that the conviction could not stand on the basis that *insufficient evidence was presented at trial to support a finding of sexual penetration – a necessary element of First Degree Criminal Sexual Conduct*.

Issue(s)

Whether any rational trier of fact could have found the essential elements of the crime proven beyond reasonable doubt.

Decision

The Supreme Court dismissed the appeal. Sexual penetration is defined in the GCC as: 'sexual intercourse, cunnilingus, fellatio, anal intercourse or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.' The court accepted that, while there was no direct evidence from the victim at trial regarding penetration, the victim's specific age and the expressions and descriptions used by the witnesses at trial provided circumstantial evidence which, viewed together with the examining nurse's admitted verbal evidence at trial, as a whole supported the reasonable inference that penetration occurred.

The court further observed that, *often child victims do not have an intricate knowledge of their genitalia to sufficiently describe a sexual encounter. Although specificity when testifying is always preferable, a general description of the events does not necessarily defeat any possibility that penetration occurred. ... just as [the victim's] lack of specificity does not absolve [the appellant] of guilt, it does not single-handedly affirm his conviction either. Thus, because [the victim] spoke generally while testifying, the testimony of [the examining nurse] becomes vital evidence.*

Comment

The court made allowances for the fact that the complainant was a nine-year-old child. It adopted some latitude in accepting that her evidence about her genitalia was general rather than specific. However, as an evidentiary safeguard, the court relied on the detailed testimony of the examining nurse to hold that a reasonable inference could be drawn that penetration had taken place. This should not be equated with the rule for corroboration, which applies generally in relation to the evidence of children, but rather as a positive measure to enhance the testimony of a child. In sexual cases involving minors, the inability of complainants, because of their age and inexperience, to provide the degree of specificity required to discharge the burden of proof may result in perpetrators escaping

conviction. Had the court not adopted the approach it did in this case, the perpetrator may have been acquitted.

Children – adoption order

- Whether the best interests of the child were taken into account in considering the relevant legislative provisions.

SING v SINGH

Magistrates Court
Neil Rupasinghe Esq., Resident Magistrate-
Nasinu

Fiji
[2014] FJMC 176
27 November 2014

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

Convention on the Rights of the Child (CRC)
International Covenant on Civil and Political Rights (ICCPR)
Constitution of Fiji (CF)
Adoption of Infants Act (AIA)

Facts

The applicant (A) was the maternal uncle of the child, who had just turned 17 years of age at the time of the application. A and his mother cared for the child when she was young, until A left Fiji for New Zealand in 2009. The child's biological mother, who had since married and had her own family to care for, consented to the adoption. The Social Welfare Office (SWO) was a party in the proceedings but did not object to the application, except for remarking about sections 6(1) and 6(4) of the AIA, which prohibit adoption: 1) of a female infant by a single male applicant, except in 'special circumstances which justify an exceptional measure making an adoption order;' and 2) by 'any applicant who is not resident in Fiji'.

Issue(s)

Whether the adoption order should be granted.

Decision

The court granted the adoption order and directed that the child was not to be taken out of Fiji unless accompanied by her grandmother.

Comment

The court appears to have acted contrary to the provisions of sections 6(1) and 6(4), in making an order for the adoption of a female child by a single male applicant who was not resident in Fiji. In respect of s. 6(1), the court did not provide any 'special circumstances which justify the making of an adoption order'. The court also departed from precedent in not following *Social Welfare Officer v Marshall [2008] FJHC 283; HBAH.2006 (7 March 2008) (2 PHRLD 8)*, in which an application for adoption was declined in view of the non-local resident status of the applicant. The purpose of a residency qualification is to safeguard against possible abuse of procedure and to allow the Department of Social Welfare to determine the bona fides and suitability of an applicant, as well as to enable a child to bond with an applicant. After citing the CF, CRC and ICCPR, the court observed: *The best interests' standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best. Even the most basic factors are left for the judge to figure out as an upper [sic] guardian of the children.* This statement is, with respect, unfortunate. The 'best interests of the child' are to be determined objectively on the set of facts and circumstances before a court at any given time. The court should then exercise its discretion in making a decision. To take a simple example, it could be argued that the 'best interests of the child' in the present case were prima facie not served by allowing the non-resident male applicant to adopt a female child contrary to the provisions of the AIA and to proper inter-country adoption procedures in accordance with international practices. The court's imposition of the condition that the child could

only leave the country if accompanied by her paternal grandmother suggests that the court was mindful of s. 6(1) of the AIA.

See also the Vanuatu case of *In Re Child M [2011] VUSC 16* (4 PHRLD 12) in relation to issues relevant to the interplay between the best interests of the child, non-resident applicants and inter-country adoption practices.

Children – victim of sexual offence – evidence – corroboration

- Whether the right to a fair trial requires corroboration of a child's evidence.

KUMAR v STATE

Court of Appeal
Calanchini P., Basnayake and Goundar JJA

Fiji
[2015] FJCA 32
4 March 2015

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

Constitution of Fiji (CF), s. 15
Juveniles Act (JA), s. 10

Facts

The appellant (A) was convicted of rape based on uncorroborated evidence provided by an eight-year-old victim child. A sought to rely on a statutory provision in relation to the need of corroboration before a child's evidence could be relied on for a conviction. A alleged that allowing the conviction under the circumstances violated his constitutional right to a fair trial guaranteed under s. 15(1) of the constitution. The court at first instance relied on a 2008 High Court (HC) decision, which held that statutory provisions requiring a child's evidence to be corroborated was unconstitutional.

Issue(s)

Whether s. 10 of the *Juveniles Act* is unconstitutional, and whether A's right to a fair trial was violated.

Decision

The court held that s. 10 of the *Juveniles Act* was unconstitutional and dismissed the appeal.

While not bound by the previous HC decision, the court endorsed the views expressed there, in particular that: s. 10 of the JA was based on myths and stereotypes about children that should have no place in a rational system of law; laws that prohibit the prosecution of crimes against the most vulnerable victims have no place in our criminal justice system and would be inconsistent with the *Convention of the Rights of a Child*; and the only obligation a court has in relation to a child witness is to tell the child the importance of telling the truth before receiving his or her evidence, and the evidence should be treated like any other evidence, without the need of corroboration. The court added that a law that restricted a child victim's right to testify would be inconsistent with the best interests of a child enshrined in the constitution.

In relation to A's claim of a right to a fair trial, the court considered that the issue involved multifaceted considerations, such as the rights of victims (in this case a child), the rights of the accused and the court's duty to ascertain the truth, and ruled that there was no infringement of A's constitutional rights.

Comment

The decision reflects the progressive stance that courts have taken in relation to stereotypes about the unreliability of children and women as witnesses. Fiji's 2013 constitution enshrines the best interests of a child as the primary consideration in every matter concerning the child. This mandatory consideration, in turn, necessitates measures to ensure that child witnesses in sexual abuse cases are appropriately dealt with, for example, with the use of screens or video links. Section 10 of the JA reflects the position at common law, underpinned by the myth that children were predisposed to lie or embellish the truth, and therefore required corroboration by an adult. Accordingly, there was no

infringement of the appellant's right to a fair trial. The focus given to children's rights by the CRC and the advocacy and awareness-raising that have accompanied its coming into force have had an impact on changing judicial attitudes in relation to children's evidence.

Children – corporal punishment by parent

- Significant reduction in sentence for parent convicted of intentional wounding of a child.
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DAKAI v STATE

High Court (appellate jurisdiction)
De Silva J

Fiji
[2015] FJHC 129
27 February 2015

Law(s) and/or international instrument(s) considered
Crimes Decree 2009

Facts

A father (D) whipped his 10-year-old son (V) with an extension cord, causing injuries, because V had lied to his parents about his whereabouts after school. There were lacerations on V's left lower back and legs, and his right buttock was infected and swollen. D was convicted of 'unlawful wounding' under s. 261 of the *Crimes Decree*, and sentenced to a two-year jail term, with an 18-month non-parole period. D appealed the sentence.

Issue(s)

Whether the magistrate erred in relying on an aggravating factor that was an element of the offence, and whether the sentence was otherwise harsh and excessive.

Decision

The High Court (HC) reduced the sentence of a two-year prison term with an 18 month non-parole period, to a 12-month term, with the remaining nine months still to be served suspended for three years.

Comment

This case is troubling because of the level of violence inflicted on the child and the corresponding inverse proportion in the leniency granted to A by the HC. The court held that the aggravating and mitigating factors cancelled each other, and accordingly substantially reduced the sentence. The appellant abused his position of trust and authority as a parent to inflict violence against his child. The best interests of the child factor, as a constitutional principle, arguably required at least further consideration of this issue, particularly in relation to proportionality regarding the child's misconduct and the punishment. Genuine remorse shown by the parent would be a relevant mitigating factor in determining whether it was beneficial for the child to be deprived of his father, had A received a longer custodial sentence.

CRUEL, INHUMAN OR DEGRADING TREATMENT

Ill-treatment – compensation

- Compensation and damages awarded for theft, assaults, rape, gross sexual acts of indecency and sodomy.

KENZIYE v INDEPENDENT STATE OF PNG

National Court of Justice
Poole J

Papua New Guinea
[2013] PGNC 185
15 November 2013

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

Constitution of Papua New Guinea (CPNG), ss 38–48
Wrongs (Miscellaneous Provisions) Act

Facts

On 20 May 2013 this matter came to light when the court was reviewing incomplete matters. On 18 October 1996 the plaintiffs (Ps) filed a claim against the state and a police officer seeking damages for loss of property and wrongs to their person and their constitutional rights. The defendants (Ds) did not respond, and a default judgment was entered on 6 December 1996, with damages to be assessed. Further court orders required that the assessment be determined by way of affidavits, but Ds again failed to respond. In May 2013 the court invited parties to file any further material, but again Ds did not respond. This action arose from an incident in 1991, when the police conducted raids and searches on Ps and their properties in a village. According to Ps, police personnel burnt down houses, stole money, raped a number of women, assaulted and wounded a number of people, falsely imprisoned a number of people, and by armed threat, forced a number of people to commit acts of gross sexual indecency and sodomy. The claims include property loss, assault, false imprisonment and breaches of constitutional rights and freedoms, damages for arson, robbery, rape and indecent assault.

Issue(s)

How each uncontested claim and damages should be assessed.

Decision

The court relied on the principles set out in an earlier Supreme Court decision in relation to assessment of damages when default judgment on liability was entered. Importantly, Ps still had to prove damages by credible evidence and to the satisfaction of the court on the balance of probabilities.

Accordingly, the court then ordered damages under each head (property, robbery, assault, sexual assault and rape, perverse sexual assaults and false imprisonment) of the claims by each individual through reviewing the affidavits filed.

General and exemplary damages were also ordered against the state for victims of perverse sexual assaults, which included forcing the victims at gun point to perform sexual acts and sodomy in public. The court was emphatic about the gross violation of the victims' constitutional rights, including freedom from inhuman treatment and rights to privacy and human dignity.

Comment

Police brutality in Papua New Guinea (PNG) appears to have been prevalent for a long time. In the last two years the court has considered a number of similar cases, including: *Application for*

Enforcement of Human Rights, in re Namson Lamaning [2013] PGNC 165; N5419 (15 November 2013); Application for Enforcement of Human Rights, in re Jacob Okimbari [2013] PGNC 166; N5420 (15 November 2013); In re Application for Enforcement of Human Rights, in re Batley Isaiah [2013] PGNC 167; N5421 (15 November 2013); In re Ruben Micah - application for enforcement of human rights, [2013] PGNC 210; N5427 (22 November 2013); Wati v Gavera [2013] PGNC 182; N5363 (3 October 2013); Kaima v Poga [2013] PGNC 181; N5362 (3 October 2013); Pain v State [2014] PGNC 70; N5604 (16 May 2014).

This case underscores the daily challenges which confront the rule of law in PNG as well as other Pacific jurisdictions. It is also salutary that PNG is significantly larger than its neighbours, in terms of its size, resources and population, and also has a diverse population. The extent and degree of lawlessness and abuse of power and authority reflected in this case is horrific, but it appears to be a snapshot of a country coming to terms with the challenges of development and the varying stages of that process in which its people find themselves, ranging from remote and highly traditional village structures to a modern, cosmopolitan society. Papua New Guinea continues to face serious problems in instilling professionalism and discipline in the police. The long delay in finalising the claims in this case was largely attributable to this issue, along with unresponsive government machinery in need of reform and restructuring. The police were uncooperative in locating the police officers responsible as well as in filing necessary court documents to facilitate an expeditious resolution of the claims. Some of the court's observations are apposite: *...it is disturbing to note that the State has filed no material whatsoever... instead being content to act as a passive pay master to distribute damages to be paid from badly needed public funds; it should take proper steps to protect these funds by identifying police against whom claims are made, actively defend claims where appropriate and seek appropriate indemnities and contributions from the police concerned when they are guilty and the facts justify this.*

Ill-treatment – police brutality of an accused in custody – compensation

- Damages awarded for infringement of rights comprising routine assaults at various stages of the arresting process.
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IN RE APPLICATION OF ENFORCEMENT OF HUMAN RIGHTS, IN RE JACOB OKIMBARI

**National Court of Justice
Cannings J**

**Papua New Guinea
[2013] PGNC 166
15 November 2013**

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

Constitution of Papua New Guinea

Facts

The plaintiff (P) was arrested and subsequently convicted for carrying out a bank robbery. When P was arrested he was assaulted and then told to lie on the floor. The Police then shot him in both legs. P lost consciousness and was then taken to hospital. An attending doctor wanted to X-ray and admit P, but the police refused, and returned P to a cell that night. The police then assaulted P for another two days when he did not provide answers to police interrogations that police considered satisfactory. P fell unconscious when the police beat him with a baseball bat. P was taken to the hospital, where he spent one night before being removed without approval from the doctors and was assaulted until he signed a confession. The beatings then stopped.

Issue(s)

Whether there was an infringement of the rights of the plaintiff.

Decision

There was an infringement of the rights of the plaintiff and he was awarded constitutional remedies of reasonable and exemplary damages.

Comment

The court, in coming to its decision, found that the plaintiff was denied full protection of the law, subjected to inhumane treatment, denied the right of detained persons to contact family members and a lawyer, and denied the right to be treated with humanity and respect. The facts indicate the wanton manner in which P was routinely assaulted at different stages of his arrest and denied access to appropriate medical attention. The repetition and pattern of the treatment suggest that this was normal conduct of police in respect of those arrested and charged with offences. While P was fortunate to be able to obtain redress for the treatment he was subjected to, it is sobering to consider that many accused are likely to suffer such injustices without reporting the incidents, which encourages perpetrators to continue such practices and contributes to an environment of impunity.

Ill-treatment – police brutality of accused in custody – compensation

- Damages awarded for infringement of rights constituting denial of due process.
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IN RE APPLICATION OF ENFORCEMENT OF HUMAN RIGHTS, IN RE NAMSON LAMANING

National Court of Justice
Cannings J

Papua New Guinea
[2013] PGNC 165
15 November 2013

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

Constitution of Papua New Guinea

Facts

The plaintiff (P) was arrested for committing armed robbery. On his arrest he was assaulted, denied medical treatment and denied access to a lawyer. P was detained without charge and without being taken before a court for 10 days. He was detained for a further five months before he was granted bail.

Issue(s)

Whether there was an infringement of the rights of the plaintiff.

Decision

The court held that the rights of the plaintiff were infringed and awarded him constitutional relief in the form of reasonable and exemplary damages. The court took judicial notice of the fact that P was convicted of armed robbery in the criminal trial related to the armed robbery. In the criminal trial the plaintiff presented the same evidence and, although there was no medical evidence to corroborate the alleged facts, the court determined that on the balance of probabilities P's evidence was sufficiently credible.

Comment

As with *Jacob Okimbari's case*, the denial of the plaintiff's rights in this case appeared to be part of systemic practice by the police. There appears to be a view among many police officers in Papua New Guinea that convicts or those alleged to have broken the law are not entitled to have their rights respected. This perspective can be curbed by penalising such conduct, while providing ongoing training, education, counselling and mentoring, and sufficiently changing attitudes to facilitate sustainable reform. However, this may be generational change because ingrained attitudes and prejudices, particularly in relation to cohorts held in low esteem by the community, are difficult to change.

Ill treatment – prisoners’ rations – rights to adequate food and diet

- The right to the full protection of the law and to respect for the inherent dignity of the human person obliged Correctional Services to ensure that inmates’ nutritional requirements were met, in compliance with the provisions of the Correctional Service Act and Regulations.
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KAUKE v COMMANDING OFFICER, BOEN CORRECTIONAL INSTITUTION

National Court of Justice
Cannings J

Papua New Guinea
[2014] PNGC 104
25 June 2014

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

Constitution of PNG, ss 37(1) and (17), 41(1), 57 and 225

Correctional Service Act 1995 (CSA), ss 123(1)

Correctional Service Regulations (CSR), ss 69 and 71

Facts

The plaintiff (P) was a prisoner at Beon Jail, who brought an application for enforcement of his human rights, alleging that the Commanding Officer and the state (Rs) failed to provide him with food adequate to maintain his health and wellbeing. P claimed that, as a prisoner, he had a right to be protected against inhuman treatment and to be treated with humanity and respect for the inherent dignity of the human person, and that the relevant laws gave effect to those rights by prescribing minimum nutritional requirements for food provided to prisoners, which the Rs failed to follow. Specifically, P alleged that he and other detainees were provided with the same type of food every day and were rarely provided with fruit, vegetables or dairy products, as required by law. The Rs denied the allegations and denied P’s human rights were breached.

Issue(s)

1. What are the human rights of detainees with respect to food and diet?
2. The appropriateness of the food provided to detainees at Beon Jail.
3. Has any breach of human rights been proven?
4. What declarations or orders should the court make?

Decision

The court recognised that a prisoner has fundamental human rights, which are conferred by the constitution and must be adhered to and respected by all authorities within the criminal justice system.

Accordingly, prisoners are not to be submitted to torture or to treatment or punishment that is cruel or otherwise inhuman (s. 36(1)), they are to be afforded the full protection of the law (s. 37(1)), they are to be treated with humanity and with respect for the inherent dignity of the human person (s. 37(17)) and they are to be protected against harsh or oppressive or otherwise proscribed acts (s. 41(1)).

Further, the allegations that the P (and other prisoners) were, with occasional exceptions, provided with the same meals each day, which consisted of food from groups A and B, with no or negligible quantities from groups C, D and E, was upheld. There were minimum legal requirements to be adhered to in the administration and treatment of prisoners. A prisoner must be provided with food that is adequate to maintain his or her health and wellbeing.

Further, it appears that the Commanding Officer did not prepare a schedule of monthly detainee meals, as required by the Regulation.

The claim that P and other prisoners were denied the full protection of the law, contrary to s. 37(1) of the constitution was also upheld. However, the court held that the breaches were not so severe, or committed in such bad faith, as to conclude that the applicant was being treated inhumanely, without humanity or respect for the inherent dignity of the human person, or harshly or oppressively.

The court ordered that, within 14 days, the Commanding Officer was to prepare and file, for approval by the court, a schedule of detainee meals for the month of August 2014, which must be compliant with the food and nutritional requirements of the Act and the Regulation, and to provide food to those prisoners affected, in accordance with the schedule.

Comment

The court acknowledged that prison inmates have rights that are protected by the constitution. These include the right not to be subjected to torture or to treatment that is cruel, inhuman or degrading (s. 36 (1), the right to full protection of the law (s. 37 (1)), the right to be treated with dignity and with respect for the inherent dignity of the human person (s. 37 (17)), and the right to be protected against harsh, oppressive and otherwise proscribed acts (s. 41 (1)). P was holding the Correctional Service accountable for the statutory nutritional obligations it had in respect of him. In holding that P was denied the full protection of the law, the court then adopted a pragmatic approach, stating the breaches were not so severe, or committed in such bad faith, as to hold that P was being treated inhumanely, or without respect for the inherent dignity of the human person, or harshly or oppressively. However, there were standards set out in the CSA and the CSR that had to be complied with, and the Correctional Service was required to file a schedule with the court that complied with those requirements. In the context of Papua New Guinea, where there is a perception that the police and the Correctional Service sometimes operate in an environment of impunity, it is encouraging that these proceedings were instituted and that the court held as it did.

CUSTOM

Banishment practice – conflict with the law

- Banishment is unconstitutional other than in a very limited range of situations.
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PUNITIA v TUTUILA

Court of Appeal
Fisher, Hammond and Blanchard JJA

Samoa
[2014] WSCA 1
31 January 2014

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

Constitution of Samoa, art. III
Village Fono Act
Land and Titles Act

Facts

Of 16 appellants in this appeal (As), the primary appellants referred to in the judgment were X and Y, who were leaders of the village of Tanugamanono. A decision of the Supreme Court ordered the As to pay damages for unlawfully banishing the respondent and her family (Rs) from the village and being party to subsequent damage to their property. All of the As were ordered to pay damages, totalling \$963,710. A number of specific As were also ordered to pay an additional \$18,585. The As appealed that decision.

Issue(s)

Whether the As are liable to pay damages, and the quantum of damages.

Decision

The appeal against liability was dismissed. The appeal against the quantum of damages was allowed on a limited basis, and the damages were slightly reduced. In lieu of the damages awarded in the Supreme Court, the As were jointly and severally liable to pay special damages of \$813,710, in addition to general and vindictory damages of \$50,000; a total of \$863,710, as well as costs of \$5,000.

The banishment ordered by the village leaders were, in the circumstances, unlawful, unconstitutional and invalid. Alternative arguments for validity of the banishment order, based on customary law, also failed. The court observed that banishment must be sanctioned by the Land and Titles Court (LTC), and must only be approved in limited situations. Consequently, damage caused by the act of banishment should be assessed either under a constitutional remedy (which is discretionary) or in tort law.

Comment

This is an interesting case, in which the traditional practice of banishment is in conflicts with human rights principles. Not only were the Rs' rights to freedom of movement significantly infringed by being banished from their village, but they were further victimised by the damage caused to their property by village leaders. This is a relatively recent example of intervention by the courts to protect the rights of those disadvantaged by the arbitrary acts of the *fono* (a traditional body with statutory and decision-making functions). The quantum of damages reflects both the gravity of the breach of human rights and the personal harm done to the Rs, as well as judicial disapproval of the practice. The *fono*, as a traditional entity with statutory functions and responsibilities, is obliged to act within the confines of the law. That law requires it to balance the *fa'a Samoa* with the application of human

rights and the principles of natural justice. The two are not mutually exclusive, because *fa'a Samoa* also incorporates notions of justice and fairness. The courts have not hesitated to intervene in instances of inconsistency between laws of national jurisdiction and *fa'a Samoa*.

In relation to whether damages should be considered under tort law or a constitutional remedy, the court preferred the former, however it observed:

However there is no absolute rule to that effect. In Simpson v Attorney-General [Baigent's case] [1994] 3 NZLR 667 (CA) at 678, for example, Cooke P said this:

As to the level of compensation, on which again there is much international case law, I think that it would be premature at this stage to say more than that, in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and [to] deter breaches are also proper consideration; but extravagant awards are to be avoided. If damages are awarded on causes of actions not based on the Bill of Rights, they must be allowed for in any award of compensation under the Bill of Rights so that there will be no double recovery. A legitimate alternative approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights and nominal or concurrent award on any other successful causes of action.

Cooke P could see no difficulty in an action in which damages for breach of constitutional rights co-existed with private law causes of action so long as there was no duplication of compensation for the same loss. Private law causes of action would not have been a satisfactory substitute in the present case. Undoubtedly there were trespasses to person and property.

Accordingly, applicants may either institute proceedings in tort or seek constitutional redress, in the alternative. In cases such as the present, the remedy under constitutional redress was more appropriate, given the official status of the *fono* and the extent to which it had abused its powers and trampled on the rights of the As. However, where damages are awarded under both constitutional redress and tort, the courts must take care not to allow double recovery or duplication of compensation.

DEMOCRACY AND RULE OF LAW

Rule of law – constitutional rights for not being prosecuted without cause – compensation

- Prosecution entered but DPP failed to provide any evidence on the date of the trial.
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ATTORNEY GENERAL, IRO REPUBLIC OF KIRIBATI v BAAKOA

Court of Appeal
Paterson, Blanchard and Handley JJA

Kiribati
[2013] KICA 6
23 August 2013

Law(s) and/or international instrument(s) considered
Constitution of Kiribati, art. 10

Facts

The respondent (R) was charged with and convicted of one count of carrying an offensive weapon in public and one count of assault causing actual bodily harm, in the Magistrates Court. R was sentenced on 28 April 2009 to three years and six months imprisonment, and served her sentence until 4 September 2009, when she was released on bail pending appeal.

On 24 September 2009 the appeal against conviction and sentence was quashed in the High Court, when the Chief Justice found that the *trial was fundamentally irregular*, as the police prosecutor opened the prosecution case but called no evidence, and that a retrial was inevitable. On 4 September 2010 R was acquitted at the retrial, when the prosecution again offered no evidence.

R then brought proceedings, in June 2011, for compensation against the Attorney General for contravention of R's rights under art. 10 of the constitution, which affords the right to a fair hearing before an independent and impartial court in criminal matters.

The appellant (A) in this case sought to strike out the civil action, arguing that the matter was *res judicata* (that the substantive matters before the court had already been subject to adjudication). The High Court had held that the High Court in criminal appeal and the Magistrates Court in retrial did not determine the issue of redress for breach of constitutional rights, and declined to strike out the application. A appealed to the Court of Appeal.

Issue(s)

Whether the civil action for compensation under art. 10 should or could have been adjudicated in the criminal proceedings, and therefore whether the civil action for compensation under art. 10 amounted to *res judicata* and abuse of process.

Decision

The Court of Appeal upheld the decision of the High Court and dismissed the appeal. The High Court and the Magistrates Court in the criminal matter did not have jurisdiction to entertain a matter of civil compensation or constitutional redress.

Comment

The prosecution appears to have tried to raise the issue of *res judicata* in circumstances where R, the original defendant, sought to bring a claim for compensation for breach of her right to a fair trial and due process. However, there was no basis for this argument, because the initial case against R was for offences for which she was initially convicted without evidence being called. The prosecution called

no evidence at the rehearing, and R was acquitted. Rather than investigating the reason why R was convicted without evidence, which was incumbent upon them to do so as officers of the court, the prosecution was more concerned with pre-empting R's claim for constitutional redress (occasioned by the gross miscarriage of justice she had suffered).

Rule of law – the role of the Ombudsman Commission

- Process of certification of legislation and proposed constitutional amendments to regulate the Ombudsman Commission considered.
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IN RE CONSTITUTIONAL (AMENDMENT) LAW 2008, REFERENCE BY THE OMBUDSMAN COMMISSION OF PNG

Supreme Court
Injia CJ, Salika DCJ, and Sakora, Kirriwom and
Gavara-Nanu JJ

Papua New Guinea
SC Reference No. 01 of 2010, [2013] PGSC 67
19 December 2013

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

Constitution of Papua New Guinea (CPNG)
Constitution (Amendment) Law 2008 (C(A)L)

Facts

The ombudsman initiated a Special Reference under s. 19 of the CPNG challenging the validity of proposed constitutional amendments concerning the powers and functions of the Ombudsman Commission (OC) pursuant to s. 27(3)(c), s. 27(5), s. 28(1), s. 28(5), s. 29 and s. 219 of the CPNG. These amendments were set out in the C(A)L 2008. At the time the reference was filed the C(A)L had been passed by parliament but not yet certified by the speaker. Before the court delivered its opinion on the reference the speaker certified the C(A)L.

Issue(s)

The Special Reference dealt with three categories of questions:

1. Questions relating to procedures employed in the passage of the C(A)L 2008.
2. Specific questions on the provisions of the C(A)L 2008.
3. Questions on the interpretation and application of the C(A)L 2008 in the event that the amendments are constitutional.

Decision

The Supreme Court held:

1. A law that has gone through the required number of readings but is awaiting certification by the speaker is a law or proposed law subject to the scrutiny of the court. Certification is only a formalisation of the law-making process. The C(A)L 2008 was passed by Parliament according to its internal procedures and was already law, except for certification, which formalised that process. It is Parliament's role as the supreme law-making body under s. 100 of the CPNG, in which the court could not intervene, as to do so would contravene the doctrine of separation of powers.
2. Question 8(a) and question 9(a) and (b) are answered in the affirmative, and therefore the provisions of the C(A)L 2008 referred to in the specific provisions of the C(A)L 2008 are unconstitutional and invalid as they are in conflict with ss 217(5), 55(1), and ss 37(11) and 37(12). Section 27(5) of the C(L)A 2008 is not valid law as it contravenes s. 217(5). Similarly, s. 219A, as amended, establishing a parliamentary committee to act as watchdog over the OC, is also invalid and of no effect as it takes away the independence of the OC guaranteed by the CPNG. Further, s. 28(9) of the CPNG, as amended, directly contravenes s. 55(1), which provides that citizens are equal in the eyes of the law, while the law separates members of parliament, who are not covered by the law and are treated differently from other citizens. Finally s. 29(3) of the CPNG, as amended, is ultra vires ss 37(10) and (12), in that it empowered the OC to exercise certain judicial

powers in determining the culpability of a person against whom a complaint is made in a particular way, but it is directing the OC contrary to ss 37 (11) and (12), and is of no force and effect.

Comment

The court did not hesitate to strike down the C(A)L 2008 as invalid and of no effect in seeking to limit the independence and autonomy of the OC. In doing so it was performing its role as the interpreter and guardian of the CPNG. Section 217(5) of the CPNG provides: ‘in the performance of its functions ... the Commission is not subject to directions or control of any person or authority.’ The C(A)L 2008, under the guise of greater accountability and transparency, sought to establish a parliamentary committee to oversee the functions of the OC and to remove from it the power to give directives, including implementation of the national government’s policies and directives, and implementation of annual budgetary allocations. The OC was deliberately established with sweeping powers and shielded from political control at independence, in order to reinforce its oversight role of potential government malfeasance. The status of the C(A)L 2008 was also clarified, in that at the time the proceedings were initiated the legislation was awaiting certification by the speaker, and therefore, having gone through the required number of readings, it was a law or proposed law subject to the scrutiny of the courts. The legislation had been passed by Parliament according to its internal procedures and was law. Certification was merely a formality.

Democracy – rule of law – suspension of a senior civil servant’s position – legality

- Non-compliance with mandatory constitutional procedural requirements for suspension of senior public servants.
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O’NEIL v KLAPAT

Supreme Court
Salika DCJ, Sawong and Logan JJ

Papua New Guinea
SCM No. 13 of 2014, [2014] PGSC 13
29 August 2014

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

Constitution of Papua New Guinea (CPNG)

Facts

On 11 January 2012 the respondent (K) was suspended from his position as head of the Department of Community Development by the governor general (GG) on the advice of the National Executive Council (NEC). K challenged the decision by way of judicial review in the National Court (NC). On 21 March 2014 the NC declared the suspension illegal and issued an order of *certiorari* quashing the decision. The appellant (A) filed an appeal on 27 March 2014, and thereafter did nothing further to advance its case.

Issue(s)

What is the appropriate course of action in the light of the appellant’s inaction in prosecuting the appeal?

Decision

The appeal was dismissed for want of prosecution. Since filing the appeal, the A had done nothing to advance it or to explain the inactivity, even after an application for dismissal was filed on 3 July 2014. In any case, the appeal only went to the asserted errors in the exercise of discretion by the NC to grant relief. The appellant conceded that there had been a serious departure from lawful public administration. K had not been suspended in accordance with the mandatory procedure laid down in s. 193(1D) of the CPNG and the *Public Service (Management) Act 1995*. The GG should not have been joined as a party as he acted on advice, and the proper party was the Attorney General, in accordance with s. 3 of *Claims By and Against the State 1996*.

Comment

The conduct of the state in not prosecuting its appeal with any vigour, while disappointing, is not surprising, given there were irregularities in the original administrative decision that it had sought to defend. The state had not challenged the merits of the decision in the NC, but had appealed on the basis that the NC had not exercised its discretion properly to grant an order of *certiorari*. The decision by the A to bypass the mandated procedures under s. 193(1D) of the CPNG and approach the GG and the NEC directly was clearly a departure from lawful public administration, as the NC recognised and the court affirmed. These procedures were put in place to minimise the likelihood of political interference in the appointment of public servants.

Democracy – rule of law – arrest warrant against the prime minister

- Status of a judicial warrant and the responsibility of the Commissioner of Police and the Papua New Guinea Police in respect of that warrant.

IN RE POWERS, FUNCTIONS, DUTIES AND RESPONSIBILITIES OF THE COMMISSIONER OF POLICE

Supreme Court of Justice
Cannings, Makail, Sawong, Poole and Kangwia JJ

Papua New Guinea
[2014] PGSC 19
2 October 2014

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

Constitution of Papua New Guinea (CPNG)
Arrest Act 1977 (AA)
District Courts Act 1963 (DCA)

Facts

This matter involved three constitutional references arising out of the granting by the District Court (DC) of a warrant of arrest for the Prime Minister (PM), Hon. Peter O'Neill. That event led to two National Court proceedings: OS (JR) No 485 of 2014, in which the Commissioner of Police (CP) and the PM sought leave to seek judicial review of the DC's decision to issue the warrant; and OS 484 of 2014, in which the member of the Papua New Guinea Police Force (PNGPF) who had applied for the arrest warrant wished to charge the CP with contempt of court for disobedience of the warrant. The third reference was an application by the attorney general pursuant to s. 19(1) of the CPNG for the exercise of the Supreme Court's (SC) original interpretive jurisdiction under s. 18(2).

Issue(s)

The references, as consolidated by the SC, comprised 16 questions of law for determination relating to the process of execution of a warrant issued by the District Court for the arrest of the prime minister.

Decision

The court held as follows:

1. The CP has authority to issue directions to other members of the PNGPF concerning criminal investigations and their conduct.
2. Granting a warrant of arrest by the DC under the AA is a decision of the national judicial system in terms of s. 156(6) the CPNG. It is equivalent to a court order, a duty to obey, and, accordingly, it is imposed on those to whom it is addressed, and there is no discretion otherwise.
3. In an appropriate case, a member of the PNGPF, including the CP, to whom the warrant is directed, may be guilty of contempt if they either do not execute the warrant in a timely manner, refuse to execute it or frustrate the attempts of others to do so.
4. Power to punish for contempt of the DC for offences other than those created by s. 227 of the DCA vests in the NC under ss 154(4) and (6), 166 and 172 of the CPNG. Any appropriate person, including the CP, may be prosecuted by the NC for contempt of the DC, constituted by disobedience of a warrant of arrest issued by the DC.

Comment

The case is an interesting demonstration of the checks and balances within the judicial system and the nature of the relationship of the judicial system with another branch of the state, in this case the executive, as represented not only by the CP but also by individuals within the PNGPF seeking to compel the CP to implement the arrest warrant in question. While the decision recognised that the DC did not have powers to punish for contempt, the court found that the matter could be prosecuted in the NC in appropriate circumstances, as a warrant issued by the DC was equivalent to a court order. Members of the PNGPF, including the CP, were liable for contempt if a warrant of the DC was not

executed in a timely manner, if they refused to execute it, or if they frustrated the attempts of others to do so.

Democracy – rule of law – power of legislature to trigger a referendum

- Use of a referendum as a consultative mechanism to seek approval for law reform is valid.
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IN RE RIGHT OF REFERENDUM OF THE PEOPLE OF GUAM

Supreme Court
Torres CJ,
Carbullido and Maraman AJJ

Guam
[2014] GUSC 24
10 October 2014

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

The Organic Act of Guam (Organic Act)
The Guam Code Annotated (GCA), Title 3, Chapter 16

Facts

In February 2014 the Guam legislature (legislature) passed a law (the authorising law), which provided for a binding referendum to be placed in the November general election in relation to whether Guam should adopt an amendment to the GCA, which would legalise the compassionate use of cannabis. The legislature sent a letter to the Guam Election Commission (GEC), directing it to this effect. In reply to the direction, the GEC refused to follow the direction, claiming that the law purporting to authorise the referendum was invalid as it violated both the Organic Act and the Guam law. The legislature instituted proceedings seeking a declaration that the authorising law was lawful and that the GEC did not have the authority to refuse the direction based on its view of the validity of the law.

Issue(s)

Whether the authorising law was valid and whether the GEC had the authority to refuse to act under the circumstances.

Decision

The court declared that the authorising law was valid as it did not violate the Organic Act or the GCA. However, it was not necessary to rule on whether the GEC had the authority to refuse the legislature's direction.

Comment

One of the GEC's arguments was that asking voters to decide whether a law should be enacted would violate the principle of separation of powers, as it would be a delegation of legislative authority to voters. The court rejected this argument, citing previous cases, in which the courts had recognised that legislatively referred referenda to amend state statutes did not impermissibly delegate legislative authority, and that a legislative referendum was not an unconstitutional delegation of legislative power. The referendum did not, of itself, delegate legislative authority to the electorate of Guam. It was, in essence, a consultative mechanism by which the electorate could express an opinion that was binding on the Guam legislature. If the proposition was affirmed, the legislature would then enact an amendment to reflect that outcome. The referendum was conducted during the November 2014 general election, and the compassionate cannabis use law was subsequently passed by the legislature.

Democracy – rule of law – whether restriction of candidacy in election allowable under the constitution

- **Whether the right to freedom of association and assembly is compromised by the Political Parties Integrity Act 2014.**
-

WALE v ATTORNEY-GENERAL

High Court
Palmer CJ

Solomon Islands
[2014] SBHC 148
14 November 2014

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

Constitution of Solomon Islands (CSI)
Political Parties Integrity Act 2014 (PPI Act)

Facts

Solomon Islands passed the PPI Act in 2014. The relevant sections of the PPI Act provide that only registered political parties are allowed to nominate and endorse candidates for elections, and candidates in an election can only associate with registered parties, or must run in an election as an independent candidate. The applicants (As) – a member of parliament and contending candidate in the upcoming election, and a political party (which had not been registered in accordance with the PPI Act) – sought declaratory orders that certain provisions of the PPI Act were contrary to the constitutional right to freedom of assembly and association.

Issue(s)

1. Whether the identified provisions of the PPI Act are inconsistent with the constitutional rights to freedom of assembly and association.
2. If so, whether the inconsistency is allowed under the limitations of the rights prescribed in the CSI, namely, whether the registration requirements for political parties under the PPI Act are in the interests of public order or safety and are justifiable in a democratic society.

Decision

The court dismissed the application, and held that: *[the] requirements of registration and limitations imposed do not alter or interfere with the voluntary nature of political parties as to their membership and activities and that the provisions of section 45 do come within the exceptions of public, [sic] interest, public order and public safety and that it has not been shown that they not [sic] reasonably justifiable in a democratic society.*

Comment

In coming to its decision, the court considered the objectives of the PPI Act and reviewed the relevant jurisprudence in other jurisdictions, including Papua New Guinea and Europe, in relation to the registration requirements of political parties. It recognised that putting in place clear guidelines for the administration, supervision and control of political parties could only improve political certainty, focus and stability in governance in Solomon Islands. The relevant provisions thus come under the allowed restrictions of the protected rights. The rights conferred in the CSI are not absolute, and that is recognised by the limitations contained in the CSI. The provisions being challenged regulated the manner in which political parties and candidates were to organise themselves in order to participate in elections, but the provisions nevertheless allowed them to participate once those conditions were met.

See also similar discussions in a PNG case, *Special Reference by Fly River Provincial Executive; Re Organic Law on Integrity of Political Parties and Candidates [2010] PGSC 3 (4 PHRLD 16)*.

Democracy – parliamentary sitting and purported acts of minister

- Elements necessary to determine what constitutes a first session of parliament.

IN THE MATTER OF THE CONSTITUTION AND IN THE MATTER OF AN APPLICATION FOR INTERPRETATION AND APPLICATION OF THE CONSTITUTION AND ORDERS, Civil Case No.1 of 2014 (High Court of Tuvalu, 2014)

High Court
Ward CJ

Tuvalu
Civil Case no 1 of 2014 (unreported)
17 July 2014

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

Constitution of Tuvalu (CT), ss 116 and 140
Standing Orders of Parliament

Facts

A general election was held on 16 September 2010. Fourteen members of parliament were elected. In accordance with the procedures under Schedule 2 of the *Constitution of Tuvalu*, an election to appoint the prime minister (PM) was held on 29 September. Maatia Toafa was elected PM. Later that day the governor general (GG) swore in the members of the new cabinet. On 30 September 2010, at 10:00 am, an election for speaker was held at the Vaiaku Lagoon Hotel conference room. At 2:00 pm that day, members of parliament met in the Vaiaku Falekaupule – the usual venue for parliament to sit. The members had been summoned to the meeting by the clerk to parliament in a letter written the previous day. The speaker duly took his place at the meeting. Opening prayers were conducted by a representative of the Congregational Christian Church of Tuvalu, *Te Ekalesia Kelisiano Tuvalu* (EKT), and the meeting was adjourned thereafter.

Issue(s)

Was the meeting held on 30 September 2010 the first session of parliament after the general election of 16 September 2010?

Decision

The court held the meeting did not constitute the first session of parliament, as no proclamation had been issued by the GG on the advice of the prime minister as to the date, time and place of the sitting of parliament, as required by section 116 of the CT. The clerk, while advising members in her letter dated 29 September 2010 that a proclamation had been issued by the GG, was unable to provide any evidence that this proclamation had been issued.

Comment

The applicants argued that the meeting of 30 September was the first session of parliament because the speaker had presided and prayers had been offered by a member of the EKT, as was the custom and procedure. The court disregarded those considerations in determining whether the preconditions for a first session had been fulfilled. The holding of a first session of parliament required that the GG, upon being advised by the PM of the date, time and venue of the first sitting, then issue a proclamation to that effect. That was not done. The fact that the clerk had advised members of parliament that a proclamation had been issued and that members attended a meeting at which prayers were offered and over which the speaker presided in accordance with established practice, made no difference. The provisions of s. 116 had not been fulfilled. The decision emphasises the importance of procedural requirements in the exercise of parliamentary and constitutional functions, which are formulated to protect both the institutions and the officers who perform duties relevant to their function.

Democracy – exercise of speaker’s powers

- Whether the decision to refuse to summon parliament to an extraordinary session was justified.
-

CARCASSES v BOEDORO

Court of Appeal
Vincent Lunabek CJ,
Bruce Robertson, Daniel Fatiaki, Oliver Saksak and
John Mansfield JJA

Vanuatu
Civil Case No. 1 of 2014 (unreported)
14 November 2014

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

Constitution of Vanuatu

Facts

A notice of request for the Speaker of Parliament of Vanuatu to hold an extraordinary meeting had 27 signatures. Three members of parliament (MPs) informed the speaker that they did not sign any request to convene parliament and that their signatures were used without their consent. Based on this, the speaker refused to summon parliament to an extraordinary meeting, declaring that the notice was not in order.

The court in first instance held that the speaker’s actions were justified. This decision was appealed.

Issue(s)

Whether the actions of the speaker of parliament to refuse to summon an extraordinary meeting is within his powers.

Decision

The Court of Appeal affirmed the decision at first instance and dismissed the appeal.

Comment

The court had made the same ruling in a previous case, *Vanuaroroa v Republic of Vanuatu [2013] VUCA 41* (22 November 2013), with similar facts. There was no suggestion that the ruling in *Vanuaroroa* was wrongly decided. Deciding whether or not to summon an extraordinary meeting of parliament is within the constitutional duty of the speaker and it is reasonable and justifiable that he considered complaints of MPs in such circumstances. The speaker’s discretion is exercised on the basis of the facts before him/her. Unless those impugning the speaker’s powers in this regard could prove that the facts were otherwise – that is, that there were the requisite numbers in support of an extraordinary session – the objection was an exercise in futility.

The court also condemned a so-called ‘loan agreement’, which purported to bind the parliamentarians to their loyalties and constrain their freedom to vote. The court reiterated its illegality and unenforceability, and cited the 1910 UK case of *Amalgamated Society of Railway Servants v Osborne [1910] AC 87*, in which Lord Shaw of Dunfermline said: *...in regard to the member of Parliament himself, he too is to be free, he is not to be the paid mandatory of any man, or organisation of men, nor is he entitled to bind himself to subordinate his opinions on public questions to others, for wages or at the peril of pecuniary loss, and any contract of this character would not be recognised by a Court of law, either for its enforcement or in respect of its breach.*

This situation is to be compared with provisions in several Pacific constitutions, for example, Papua New Guinea and Fiji, where ‘crossing the floor’ is prohibited and attracts the ultimate sanction of losing one’s parliamentary seat.

Soon after the Court of Appeal delivered this judgment in favour of the respondents, a motion was passed in the parliament suspending 16 opposition MPs based on allegations of misconduct, which if proven would amount to criminal offences. The suspended MPs successfully sought an interim injunction quashing the motion, pending a full hearing. The government appealed that decision, but the Court of Appeal affirmed it: *Boedoro v Carcasses* [2015] VUCA 2; CAC 01 of 2015 (8 May 2015). In essence, the Court of Appeal in *Boedoro v Carcasses* endorsed the view expressed by the lower court, in that: *...the pronouncement by the movers of the motion amounted to a conclusion of guilt pronounced on the petitioners without first being tried by a competent court of law. It is apparent that by doing so the executive arm of government under the guise of Parliament as the legislative arm of government were encroaching on the powers of the judiciary, the third arm of government. The notion of separation of powers is deeply embedded in our Constitution and must be respected and maintained at all times. This case should remind us that this notion is in danger of being eroded, thus undermining the democratic values and sovereignty that is enshrined first and foremost in Article 1 of our Constitution. See Carcasses v Boedoro [2014] VUSC 155; Constitutional Case 10 of 2014 (2 December 2014), par. 20.*

Democracy – rule of law – parliamentary privilege

- Whether there is jurisdiction to enquire into the processes of parliament to determine the constitutional validity of its actions in suspending members of parliament.
-

KEKE v SCOTTY

Supreme Court
Madraiwiwi CJ,
Hamilton-White and Khan JJ

Nauru
[2014] NRSC 7
11 December 2014

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

Constitution of Nauru (CN), arts 2(1) and (2), 14 and 36
Parliamentary Powers & Privileges Act 1976 (PPIA), ss 21 and 36
Standing Orders of Parliament, Rules 45–50

Facts

The plaintiffs (Ps) were members of the Nauru parliament. Three of these members of parliament (MPs) were suspended by resolution of parliament on 13 May 2014 for making damaging statements to the international media deemed damaging to Nauru, and their rights and privileges, including salaries and allowances, were withheld until they apologised to parliament. Two other MPs were suspended on 5 June 2014 for unbecoming conduct and language in parliamentary debate held on 20 January and 15 May 2014. The Ps instituted legal proceedings challenging the validity of their suspensions and the withdrawal of their privileges, including the right to sit and take part in parliamentary proceedings and to receive their salaries and allowances. The Ps alleged breach of their constitutional rights under arts 2(1) and (2), 14 and 36.

Issue(s)

Whether there is jurisdiction to examine the detail of parliament's decision-making process and to determine the constitutional validity of the plaintiffs' suspensions.

Decision

The court held that the actions of parliament were protected by parliamentary privilege as they related to a matter that was within parliament's own powers to regulate, that is, the conduct of its members, and the court accordingly would not proceed further.

Comment

Contrast this cautious approach taken in the Vanuatu case of *Carcasses & Ors v Boedoro & Anor*; *Constitutional Case No 10 of 2014* (5 PHRLD 38), and the Court of Appeal decision in *Boedoro v Carcasses [2015] VUCA 2*; *CAC 01 of 2015* (8 May 2015), in which the Vanuatu courts held that the actions of parliament, in seeking to suspend MPs based on allegations of misconduct that, if proven, amounted to criminal offences, were subject to adjudication by the courts. The cases are distinguishable on the basis that the Nauru parliament was exercising disciplinary powers over its members without trying to punish them for criminal wrongdoing. The tradition of parliament being master of its own house is a long and well-established one, although there are instances where the courts will not hesitate to intervene where there is a clear breach of the constitution. One slightly troubling aspect in the case was the enactment by parliament, while *Keke v Scotty* was being heard, of the *Parliamentary Salaries and Allowances Act (Amendment) Act (Act No 22 of 2014)*. This act conferred discretionary power in the parliament to withhold the salaries and privileges of members of parliament and appears to pre-empt the decision of the court.

Democracy – public servants must be apolitical, neutral and impartial

- A public servant's political right to openly oppose and to take part in demonstration against the incumbent government is curtailed for want of public confidence in the administration of the public service.

LIMEN v CHIEF SECRETARY

Public Service Appeals Board
Madraiwiwi CJ (Chair)
Ms I Garabwan and Ms C Garabwan (members)

Nauru
[2015] NRPSAB 1
23 January 2015

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

Constitution of Nauru (CN), arts 12 and 13
 Public Services Act 1998 (PSA), s. 58

Facts

The appellants (A) were public servants in the Department of Finance. During her maternity leave she used a government mobile phone to encourage public servants and others to join an anti-government demonstration, on the night before the demonstration, and she also participated in a public demonstration herself. As a result of these activities, she was subjected to disciplinary action under the PSA. A appealed to the Public Service Appeals Board (the Board), which upheld her appeal on a technicality, with a direction requiring the Chief Secretary (R) to rehear the matter according to the Board's findings. Consequently, R found that A's conduct breached the following sections of the PSA: *a) is guilty of disgraceful or improper conduct, either in his official capacity or otherwise; or (b) is negligent or careless in the discharge of his duties; or (c) acts in a disorderly manner or in a manner unbecoming an officer; or (d) acts in a manner that is prejudicial to the good order and discipline of the Public Service.* A was demoted and transferred to the Department of Health. A appealed against R's decision, based on her constitutional rights, namely freedom of expression and freedom of association, or alternatively, that the disciplinary action was too severe. The Board considered the matter *de novo*.

Issue(s)

1. Whether A's conduct was in breach of the relevant sections of the PSA in the context of the relevant constitutional provisions.
2. Whether the disciplinary action was too severe.

Decision

The Board dismissed the appeal and upheld R's decision.

In coming to its decision, the Board considered the restrictions of the relevant rights allowed under the CN. Freedom of expression and association are not absolute rights, but are subject to legislative provisions that are *reasonably required in the interests of defence, public safety, public order, public morality or public health.* The Board considered that A's conduct (openly participating in a demonstration against the government and encouraging others to do so) was a clear breach of the PSA, because it compromised the professionalism, neutrality and impartiality of the public service. Limitation of the rights applicable to public servants is necessary in order to maintain the public's confidence in the neutrality and impartiality of the public service. The Board expressed the view that *A was fortunate to have retained employment in the Public Service given the gravity of her conduct.*

Comment

This case demonstrates how the notions of public order and public morality may play out to curtail some basic rights in relation to public servants. It also shows how competing interests in a democracy

may be considered and adjudicated. Instrumental in the decision was the A's public advocacy of a position against the government and her improper use of government property. Even though these activities occurred in her own time, they violated the basic rule that a public servant was required to be seen by the public as apolitical in order to give the public confidence in the administration of the public service. The Board is set up under the CN to hear appeals against disciplinary action under the PSA.

See also the similar Australian case of *Banerji v Bowles* [2013] FCCA 1052 (9 August 2013).

See also media commentary of the Australian Human Rights Commissioner:

<http://www.theage.com.au/comment/free-speech-the-public-service-and-civilising-behaviour-20140408-zqs2t.html>

DISCRIMINATION

Discrimination on the basis of nationality or place of origin

- **Justification for discrimination on the basis of citizenship and important government interest.**

HANPA INDUSTRIAL DEVELOPMENT CORPORATION v REPUBLIC OF PALAU

Supreme Court (Appellate Div)
Salil, Materne and Pate AJJ

Palau
[2013] PWSC 37
29 November 2013

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

Republic of Palau Constitution (RPC)
Republic of Palau Procurement Act

Facts

The dispute arose out of a government tender for a road paving project, which was funded by the Taiwanese government. The tender document included a condition that was in accordance with the grant conditions, requiring the participating company to be a Palau- or Taiwan-owned entity. The appellant company (A) was a Korean company operating in Palau. Following its disqualification from the tender, A took action challenging the legality of the tender document which it argued violated the equal protection clause of the RPC. The court at first instance dismissed the application. A appealed.

Issue(s)

Whether the disparate treatment of tenderers required by the eligibility criteria is constitutionally valid. That is, whether the RPC allows the government to restrict bidding on the basis of the bidding company's nationality.

Decision

The Supreme Court affirmed the decision in the lower court and dismissed the appeal.

The relevant provisions in the RPC provide that: '[t]he government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation except for the preferential treatment of citizens[.]' From the outset, the appellate court dismissed Palau's argument that the appellant had failed to demonstrate its constitutionally protected right to bid on Taiwanese government grant-funded projects. The court then analysed the different considerations applicable to discrimination based on nationality (or 'place of origin'). In relation to discrimination in favour of Palauan companies, the court expressed the view that the RPC explicitly allows 'for the preferential treatment of [Palauan] citizens.' (See RPC, art. IV, § 5, cl. 1) Accordingly, although the eligibility criteria discriminate against the appellant in favour of Palauan nationals, the discrimination is sanctioned by the constitution.

In relation to preferential treatment in favour of Taiwanese nationals, the court opined that government actions of this kind are ordinarily subject to strict scrutiny, citing its earlier decision of *Carreon*: *But there are exceptions to that rule. In Carreon, [the court] concluded that intermediate scrutiny, rather than strict scrutiny, should apply to 'review of laws in the area of immigration and foreign affairs that distinguish among individuals based on citizenship.'* (At 75) Recognizing that the *Olbiil Era Kelulau* and the President must have the power to 'conduct foreign affairs as they see fit,' the court held that government action that implicates foreign affairs will survive an equal protection challenge if it is *substantially related to an important government interest*. The important government

interest here is the government's ability to negotiate with foreign nations for aid for the benefit of the Palauan people.

Comment

The equality provisions in the RPC (and other constitutions) need to be read carefully as they may provide exceptions in favour of citizens of that country. Context is always important, because it often shapes the way in which the subject is considered. Apart from preferential treatment to be accorded its citizens, an additional rationale for making exceptions made to the equality provisions may lie in the vulnerability that small Pacific Island countries like Palau perceive in the face of globalisation. In addition, there may be other grounds, such as immigration and foreign affairs, which provide the rationale for distinctions among individuals and corporate entities based on citizenship or country of origin. In the present case, the measure in favour of Taiwanese companies was justified on the basis of the government interest, as reflected in its ability to negotiate with foreign nations for the benefit of the Palauan people.

FAIR TRIAL

Fair trial – discharge or acquittal

- An inconclusive psychiatric report in relation to the accused and the withdrawal of the police charge resulted in an acquittal.

CHANDRA v STATE

High Court (Appellate Jurisdiction)
Madigan J

Fiji
[2014] FJHC 143
13 March 2014

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

Criminal Procedure Decree 2009 (CPD)
Crimes Decree 2009 (CD)

Facts

The accused (A) was charged with one count of an act contrary to a provision of the *Public Order Act*, alleging that he 'disturbed the public peace by inciting hatred of any class of person'. A number of mentions ensued, in which A's mental state was raised. A subsequent psychiatric report stated that: (i) 'the accused has the capacity to participate fully with court of law'; and (ii) 'I cannot report with certainty the state of his mind at the time of the alleged offence due to limitation.' The police prosecutor then decided to withdraw the complaint under s. 169 of the *Criminal Procedure Decree*. On the same day as this withdrawal, the magistrate proceeded to discharge A, and made an order that A seek treatment at St Giles hospital as an outpatient. A appealed, seeking an order of acquittal based on 'mental impairment' as provided in s. 28 of the *Crimes Decree*.

Issue(s)

Whether the magistrate erred in making the order she did and, if so, what order should have been made?

Decision

The High Court upheld the appeal and ruled that the magistrate failed to make a proper entry on the record, and ordered that A be acquitted.

Comment

Although A alleged that his rights under the *Universal Declaration of Human Rights* had been breached, in particular his right to a fair trial without particular delay, the court made no mention of human rights. The matter was dealt with on the basis of the inconclusive nature of the psychiatric report and the failure of the court at first instance to make a proper entry on the record. The oversight of the Magistrates Court in not making a proper entry on the record allowed the High Court to conclude that the magistrate had not properly exercised her unfettered discretion under s. 169 of the CPD, and it accordingly acquitted A under s. 28 of the CD. It appears that the High Court did not see the need to consider the constitutional arguments because the matter was more readily dealt with under the applicable legislation. The lower court's oversight provided the perfect opportunity for an acquittal, and the constitutional issue was not considered.

HUMAN TRAFFICKING

Human trafficking – sentencing

- Considerations in cross-border human trafficking sentencing matter.
-

STATE v LAOJINDAMANEE, LUM BING, ZHANG YONG & JASON ZHONG

High Court
Madigan J

Fiji
[2013] FJHC 20
25 January 2013

Law(s) and/or international instrument(s) considered
Crimes Decree 2009

Facts

Three women from Thailand were recruited and brought to Fiji to perform massages professionally. The first two accused men (A1 and A2) accompanied the three women to Fiji, where they were met by the third accused (A3), who facilitated their transport to Suva, where they finally met the fourth accused (A4), who was apparently in control of the operation. The women were not aware that they were expected to provide sexual services, rather than massages, during their stay in Fiji. They complained to A4, who told them that: *'unless they paid for their return tickets to Bangkok they had to "service" any customers brought to them'*. The women were later able to alert a young lawyer of their situation and the authorities were informed.

Issue(s)

What should be the appropriate sentence for trafficking, as there had only been one other case that had been decided previously?

Decision

A1: 10 years for two counts of trafficking-related offences (minimum term of 9 years).

A2: 10 years for two counts of trafficking related offences (minimum term of 9 years).

A3: 10 years for two counts of trafficking-related offences (minimum term of 7 years).

A4: 11 years and 9 months for two counts of sexual servitude-related offences (minimum term of 10 years).

Comment

The case dealt with trafficking as well as associated evils such as debt bondage, sexual servitude and domestic trafficking. Trafficking in persons is a relatively new offence in Fiji, and reflects the global nature of human trafficking to which the region is no longer immune. This global characteristic requires a multilateral response, as a result of which the international community has been increasing its efforts at coordination and cooperation. The women were lured to Fiji with false promises of professional massage work. The court, in determining appropriate sentences, considered the different roles the four accused had played in the women's ordeal. A1 and A2 had brought the women from Thailand and remained with them in Fiji as 'guardians'. A3 facilitated their transportation to Suva, provided accommodation and arranged sexual favours for his clients. A4 was convicted of sexual servitude for threatening and coercing the women for sexual favours. The court cited *R v Shaban Maka [2005] EWCA Crim 3365* (16 November 2005), which involved a 15-year-old girl who was trafficked from Lithuania to the United Kingdom and then six times within the UK, all by the same offender. The offender received a term of 18 years' imprisonment, including two 9-year sentences to be served consecutively. The facts and gravity were different from the present case, but the nature of the offences underscores their cross-border nature.

A1, A2, A3 and A4 have been given special leave to appeal: *Laojindamane v State* [2015] FJCA 41; AAU47.2013 (13 March 2015); *Bing v State* [2014] FJCA 218, AA.U50.2013 (12 December 2014); *Zhong v State* [2014] FJCA 108, AA.U44.2013 (15 July 2014).

MANDATORY SENTENCING

Mandatory sentence for murder – separation of powers – right to a fair hearing

- A law that imposed a mandatory sentence of life imprisonment on those found guilty of murder did not infringe the separation of powers doctrine or the right to a fair hearing.
-

BADE v REGINA

Court of Appeal
Goldsbrough P, Williams and Ward JJA

Solomon Islands
[2014] SBCA 1
9 May 2014

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

Solomon Islands Constitution (CSI), s. 10
Penal Code, s. 100

Facts

The appellant (A) was convicted of murder and was sentenced to life imprisonment by the High Court. Life sentence is mandatory for murder under the Penal Code. The court was invited to revisit *Manioru v R*, [2012] SBCA 1 (see 4 PHRLD 40), in which it held that the mandatory life sentence for murder did not breach the principle of separation of powers or a convicted person's right to a fair hearing.

Issue(s)

Whether mandatory life sentencing for murder provided by the Penal Code is inconsistent with the exercise of a court's discretionary power in sentencing and thus denied a person's right to a fair hearing.

Decision

Appeal dismissed.

The court affirmed *Manioru's case*, and cited with approval dicta from a Canadian case, *R v McDonnell* [1997] 1 S.C.R. 948 (24 April 1997): *(I)t is not for judges to create criminal offences, but rather for the legislature to enact such offences.*

And further: *The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of a view that condign punishment is called for to suppress that activity and to determine whether a level of punishment should be enacted as a ceiling or a floor.*

In laying down the norms of conduct which give effect to those assessments, the legislature may decide that an offence is so serious that consideration of the particular circumstances of the offence and the personal circumstances of the offender should not mitigate the minimum punishment thought to be appropriate to achieve the legislature's objectives, whatever they may be.

The court also made the observation that, [u]ndoubtedly, one of the reasons this court has been repeatedly asked to consider the constitutional validity of a mandatory life sentence is the fact that there is no regular parole regime in place in the Solomon Islands. Though there is legislative provision for a Parole Board, it has only been enlivened intermittently.

Comment

The argument that a mandatory sentence for those found guilty of murder is unlawful is based on the proposition that a mandatory sentence is contrary to the separation of powers doctrine. The contention is that a mandatory sentence removes judicial discretion. However, if the role of parliament is to enact legislation, then it is entitled to set mandatory sanctions for specific offences. The trigger for these repeated challenges, as noted by the court, is the absence of a regular parole regime, although a Prerogative of Mercy Commission is established under the CSI, with powers to review, inter alia, life sentences. The prospect of those serving life sentences for any offence without having any opportunity for review does raise human rights questions about potential endless incarceration.

On 9 July 2013 the Grand Chamber of the European Court of Human Rights (ECHR) handed down a decision² (16:1 majority), ruling that a mandatory life sentencing without the prospect of having the life sentence reviewed to consider the prisoner's eligibility for parole would be inconsistent with article 3 of the *European Convention on Human Rights*³. The ECHR came to this decision after an extensive review of individual European countries' legislation and case law, as well as international case law, conventions and instruments. Interestingly, article 3 of the *European Convention on Human Rights*, which provides that, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment', is substantively identical to the relevant section of the CSI (s. 7: 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment').

² *Case of Vinter and others v the United Kingdom (Applications nos 66069/09, 130/10 and 3896/10)*, see [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664#{"itemid":\["001-122664"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664#{)

³ While the ECHR did not go as far as prescribing the form (judicial or executive) of the review, nor the period after the imposition of the life sentence within which a review should take place, it opined that a period of no longer than 25 years from imposition, and further periodic reviews, had support from international law material.

MOVEMENT

Freedom of movement – citizenship by grant based on interest of justice

- A distant descendent of Marshall Islands failed the ‘interests of justice’ test in seeking citizenship.
-

IN RE PETITION FOR CITIZENSHIP BY TAMUERA

High Court
Ingram CJ

Republic of the Marshall Islands
[2013] MHHC 4
25 April 2013

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

Constitution of the Republic of Marshall Islands (CRMI), art. 11, s. 21(c)

Facts

The applicant (A) was a Kiribati national of Marshallese descent, who entered the Republic of the Marshall Islands (RMI) in April 2009, intending to apply for RMI citizenship and to reside there with her husband and two children. A was granted a one-year permit to stay and work for a specific venture. In July 2010 A applied for citizenship under the Marshallese descent provisions provided by article 21, s. 2(1)(c) of the CRMI.

Issue(s)

Whether the application should be granted in the interests of justice.

Decision

The High Court (HC) declined to grant citizenship to A.

The relevant constitutional provisions allow application by registration if an applicant can satisfy one of the three conditions, and that there are no adverse national interest concerns. The three alternative conditions are that the applicant: 1) holds Marshallese land rights; 2) has lived in RMI for three years and is a parent of a child who is an RMI national; or 3) is of Marshallese descent, and in the interests of justice the application should be granted.

The HC accepted A’s distant Marshallese descent. In dealing with the issue of ‘interests of justice’ the court considered the following issues:

- The applicant’s criminal and security records.
- The applicant’s education and work history.
- The applicant’s financial dependency or independency.
- The applicant’s ties with the RMI.
- Any exceptional circumstances, such as fleeing violence or asylum claims.

Other than the applicant’s criminal and security clearance, the other considerations did not appear to be in her favour. The court considered that A was an opportunistic job seeker. Accordingly, the interests of justice did not favour the granting of citizenship, nor would refusal result in injustice. However, the court observed that the applicant could seek RMI citizenship by naturalisation.

Comment

‘The interests of justice’ qualification requires some positive factor that would incline a court to grant the application. It is a phrase which allows wide latitude, while simultaneously imposing a requirement that restricts the court to considering the merits in terms of what is fair to both the

applicant and generally. In the present case, A had the requisite Marshallese descent but, apart from employment considerations, which were not relevant in determining this question, there were no compelling factors for the court to take into account. A was not fleeing violence or persecution. The status of her husband and two children were not relevant to the application. A had to demonstrate that it would be unjust to deny her application based on the features of her case. She was unable to demonstrate this, and accordingly she was unable to establish that it was in the interests of justice that she be granted citizenship. Unless the criteria for citizenship are clearly fulfilled, the courts will tend to take a cautious approach.

Freedom of movement – claim of a prospective violation of a constitutional right

- Refusal to grant residence permit to the claimant's husband is unlawful and not a reasonably justifiable limitation to human rights.
-

HATILIA v ATTORNEY GENERAL

High Court
Apaniai J

Solomon Islands
[2014] SBHC 125
13 October 2014

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

Solomon Islands Constitution (CSI), s. 14
Immigration Act

Facts

The applicant (A) claimed that the Director of Immigration's (the Director) refusal to grant her husband (R) a residency permit was a breach to her right to freedom of movement. A also sought a writ of *mandamus* to compel the Director to issue a residency visa for R. A asserted that R's departure from Solomon Islands would either force her to leave with him or to remain behind at the risk of ending her marriage, thereby adversely affecting her freedom of movement. R had first gone to Solomon Islands in 2007 to work as a cook. He subsequently fell out with his employer/sponsor, and his work permit was cancelled in 2010. There followed a series of exchanges between the parties before A filed this application.

Issue(s)

1. How broadly should the right to freedom of movement be interpreted?
2. Does the prerogative writ of *mandamus* lie to compel a public official to issue a residency visa to an alien subject?

Decision

The High Court held that section 14 of the CSI was to be given a broad and purposive interpretation, in accordance with well-established authorities including *Fisher's case [1979] UKPC 21* (14 May 1979). Therefore, the removal of R from Solomon Islands would affect A's full enjoyment of her right to freedom of movement under that provision, by causing her to make choices that would render that freedom less meaningful. The departure of R would compel A either to accompany him to save her marriage or to stay in the country and possibly end it. The Director's refusal was therefore unconstitutional, and a writ of *mandamus* would issue to compel the issue of a residency permit for R.

Comment

The decision may be considered at first glance as a victory for human rights. But it raises very serious concerns about the expansive interpretation given to freedom of movement and about interfering with a statutory discretion. A's substantive right to leave or stay in Solomon Islands was unaffected by what happened to R. The choice of whether to leave with R to preserve her marriage or remain in Solomon Islands (and perhaps end the marriage) was A's to make, and this decision was a step removed from her right to leave and enter Solomon Islands as she pleased. However, the court read into the right a requirement that her marriage to R – an alien with no rights of residency in Solomon Islands – and her decision about whether to accompany R or remain, were part of the exercise of A's right to freedom of movement. In doing so, the court was conflating the individual freedom of movement enjoyed by A with her marriage to R, which, as a consequence, gave R rights to which he was not otherwise entitled. The other troubling aspect is the ease with which the court issued the writ of *mandamus* to compel the Director to give R a residency permit. R, as an alien, had no independent

entitlement to the permit. It is a prerogative writ that issues to compel a public official to do his/her duty, however there was no obligation, in the circumstances, for the Director to grant A's husband a status to which he was not, in law, entitled.

PRIVACY

Criminal records – privacy as a constitutional right

- Whether an individual has the right to have records of his criminal conviction expunged as a basic right to privacy.

IN RE SUKA

Supreme Court
Noket CJ

Chuuk State, FSM
[2013] Chk. S. Ct. Tr 2013, CSSC 005-2013
12 February 2013

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

Chuuk State Criminal Code, State law Nos 6-66, 407

Facts

The petitioner (P) was charged with and convicted of assault with a dangerous weapon, in violation of the Criminal Code. In March 2009 P was sentenced to three years' imprisonment, subject to delineated conditions. In January 2013, after serving his sentence, P petitioned the court to have his criminal records expunged, submitting that he had been punished enough, and had sufficiently rehabilitated. P alleged that the criminal records served as a significant hindrance to his ability to secure employment and deprived him of his right to hold public office. P consequently argued that his basic rights and his right to privacy were violated.

Issue(s)

Whether there is judicial power to authorise the expunction of a criminal record where the legality of the underlying criminal conviction is not being challenged.

Decision

In the absence of explicit authorisation from the Chuuk legislature, the judiciary has no power to expunge a petitioner's criminal record. The court has generally regarded the expunction of criminal records a matter of legislative prerogative, and accordingly that this may only be granted or withdrawn by the legislature. The court also rejected the contention that it has inherent jurisdiction over this kind of petition. It accepted that a criminal record disadvantaged P by creating social stigma and exposing him to potential discrimination by prospective employers. However, it opined that without a statutory defect in the underlying criminal proceeding or illegality in the arrest and the ensuing proceedings, the mere impediment to P's ability to run for an office was insufficient to reach the threshold for a violation of a basic legal right. The petition was denied.

Comment

An individual's right to privacy in relation to a criminal conviction must be balanced with the public interest in maintaining accurate criminal histories and the public's right to information about a person who has contravened the law. It is particularly relevant in the case of persons with convictions for violent or sexual offences, but the broad principle cannot be confined to these cases, for reasons of fairness and broad public policy considerations. The right to privacy is not absolute. Criminal history is a relevant consideration in deciding whether a person is fit to hold public office or to be employed or serve as an office bearer in any organisation. In any case, whether or not such records should be expunged is not a matter for the courts but rather a policy matter for the executive and parliament to consider.

PROCEDURE

Procedure – prosecutor’s failure to file information within statutory time limit – allegation of infringement of constitutional right

- Court’s decision should be challenged by way of an appeal, and the institution of separate constitutional challenge is an abuse of process.

TAMBLYN v DIRECTOR OF PUBLIC PROSECUTION

High Court
Tuilevuk J

Fiji
[2014] FJHC 884
2 December 2014

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

Constitution of Fiji (CF), s. 26

Criminal Procedure Decree 2009 (CPD), ss 198 and 199

Facts

The applicant (A), an Australian national, was accused of drug related charges, and was refused bail. The matter was transferred from the Magistrates Court to the High Court. Under the relevant sections of the CPD, the prosecution must file the information in the High Court and serve A within 21 days of the order of the transfer, unless leave is granted by the High Court to extend the time for service. The prosecution failed to file the information within 21 days, and on the first court day, at which A was not represented, the prosecution successfully sought leave to extend the time to file. The prosecution again failed to file the information on the extended date, but again sought leave to further extend the time. The High Court considered both parties’ submissions on the issue and again granted leave. A’s counsel then filed an originating motion seeking constitutional redress, relying on s. 26 of the CF. The prosecution sought to strike out the motion.

Issue(s)

Whether the proceedings fell within one of the grounds for striking out, namely that: (i) it discloses no reasonable cause of action; (ii) the proceeding is scandalous, frivolous and vexatious; (iii) the proceeding may prejudice, embarrass or delay the fair trial of the proceeding; and (iv) it is an abuse of the court process.

Decision

The court ruled that the proceedings were an abuse of process as well as being scandalous, frivolous and vexatious, and dismissed the application.

Comment

The attempt by A to seek constitutional redress by way of originating motion to challenge the failure of the prosecution to file the information within 21 days of the transfer order to the High Court was ill-advised. There was no basis for the remedy, and it reflected adversely on A’s counsel. By filing this motion, rather than appealing the decision of the court at first instance, A jeopardised his own case. It was a clear abuse of process, whereas the basis for appealing the extension of time for transfer was clearly made out on the facts. The court tacitly acknowledged this point when it declined to consider whether the court at first instance had properly exercised its discretion, and proceeded to deal with the application for striking out. It observed that the former issue was for an appellate court to consider upon an appeal of the decision by A.

Procedure – subsidiary instrument of international treaty – domestic application

- Whether annexures to the treaty become domestic law in the same way as the main body of the treaty does.

PB SEA TOW LTD v ATTORNEY GENERAL

Court of Appeal
Fisher, Hammond and Blanchard JJA

Samoa
[2014] WSCA 6
28 April 2014

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

Convention on the Safety of Life at Sea (*SOLAS Convention*)
Shipping Act 1998

Facts

The dispute arose in relation to the ship *PB Matua* (the ship), which was built to provide transport between Samoa and Tokelau. The ship was built to comply with a number of international conventions with respect to load line, pollution prevention and the requirement of classification society. It was registered in Cook Islands, and the Cook Islands government issued the ship with a ‘Vessel Safety Certificate’ (the certificate) under the *Ship Registration Act 2007*. The certificate was valid until 31 May 2017.

An inspection was carried out at Apia, where the authority detained the ship from sailing from Apia except as a cargo vessel with no more than 12 passengers, as permitted under the *SOLAS Convention*, despite the fact that the ship had been built to a standard capable of carrying a maximum of 62 passengers (or a maximum of 15 when carrying dangerous cargo). The ship owner challenged the detention, seeking compensation under international law (the *SOLAS Convention*) for unlawful interference with the ship’s rights.

Issue(s)

Insofar as the *SOLAS Convention* gives rise to obligations between contracting states and does not form part of Samoa’s domestic law, unless it is incorporated into domestic law by statute, was the detention under the *SOLAS Convention* lawful when it sought to interfere with private individuals/entities in Samoa? Alternatively, has Samoan statute law incorporated the *SOLAS Convention* in relation to facts that are material to the present detention?

Decision

The court upheld the decision of the court at first instance that the *SOLAS Convention* was part of Samoa’s domestic law by virtue of the provisions of the *Shipping Act 1998*.

Comment

One aspect of the case that is relevant to an understanding of human rights treaties and the domestication of them is worth highlighting. The court endorsed a view expressed by the lower court (presided over by Sapolu CJ), which alluded to the long title and substantive sections of the *Shipping Act 1998*, including a section which stipulated that the *SOLAS Convention* and other relevant conventions, had the ‘force of law’. The *Shipping Act* was clearly intended to give effect to the *SOLAS Convention*. The court also took note of secondary material (*A New Zealand Guide to International Law and its Sources*, report 34, 1996 at 45), quoting the author that the phrase, ‘force of law’, when utilised, was taken as giving ‘direct effect’ to the text of a treaty. It was said to be a

standard legislative ‘signal’ and, consequently, the *SOLAS Convention* had been statutorily incorporated into Samoa’s domestic law.

The court rejected the argument that the *SOLAS Convention* was not readily operable in Samoa because of a lack of known regulations in domestic law. It took the view that not only was the scheme of SOLAS incorporated, but also its annex, including chapters that contained regulations, had been incorporated into the *Shipping Act 1998*.

The domestication of international conventions does not necessarily require elaborate enabling legislation, but such conventions may be incorporated through legislative reference, especially where detailed regulations in an international convention may supplement any lack in the substantive legislative provisions, that renders the specific domestic legislation complete.

PROPERTY

Compulsory acquisition of land by the state

- Whether compulsory acquisition of land under an act without agreement in relation to compensation is inconsistent with the constitutional right of freedom from deprivation of property which justifies an injunction restraining the state to build a road.

KOIMA & JOMAR TRADING LTD v THE INDEPENDENT STATE OF PNG

National Court of Justice
Makail J

Papua New Guinea
[2014] PGNC 48
14 April 2014

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

Constitution of Papua New Guinea (CPNG), ss 41, 53 and 58
Land Act 1996

Facts

The plaintiffs (Ps) were the registered proprietor of a piece of land and the associated business entity. The proprietor and his family had resided for some time on the subject land which the State of Papua New Guinea had sought to acquire under the *Land Act* for the construction of a road. The Ps and the state carried out their own valuations of the land. The private valuer engaged by the Ps valued the land at K6.4 million, while the state Valuer General's figure was K4.65 million. Consequently, the state's offer of compensation was not accepted by the Ps. Subsequent negotiations between the parties also failed, and the state proceeded to compulsorily acquire the land under the *Land Act*. The Ps invoked the court's inherent jurisdiction under the CPNG and obtained an *ex parte* interim injunction against the state and sought to restrain the state from evicting the Ps until the compensation issue was resolved. The Ps based their argument on the constitutional right to freedom from unjust deprivation of property. The state sought to set aside the interim injunction, while the Ps applied to have it perfected.

Issue(s)

1. Whether there is a serious issue to be tried.
2. Whether the balance of convenience favours the continuation of an injunction.
3. Whether damages would be an adequate remedy.

Decision

The court set aside the interim injunction. It held that this was neither a case of unlawful deprivation of property nor a case of the state and its officials being harsh and oppressive in dealing with the plaintiffs under s. 41 of the CPNG, requiring that the plaintiffs' interests in the land be protected by way of an injunction. The balance of convenience favoured setting aside the injunction to allow the state to commence work on the proposed road. The only unresolved issue was that of proper compensation, in respect of which the Ps may institute proceedings in the event of failing to reach agreement with the state.

Comment

In considering where the balance of convenience lay, the court sought to balance the competing interests between the Ps' personal and commercial interests in the subject land and the state's pressing need to construct a road for the public good. The court held that it was more important that the road could be built to ease traffic congestion, facilitate movement, and accommodate the city hosting the Pacific Games. There was no illegality or harsh conduct on the part of the state in its land acquisition

process under the *Land Act*. The Act provides that: '1) All land in the country other than customary land is the property of the State, subject to any estates, rights, titles or interests in force under any law. (2) All estate, right, title and interest other than customary rights in land at any time held by a person are held under the State.' Under the *Land Act* the state may acquire land by agreement or by compulsory acquisition and the procedure for compulsory acquisition prescribed by the Act. The rights of the Ps were limited to taking the matter to court for assessment of damages (compensation), and an injunction to restrain the state from commencing work on the road would not be necessary in any event. Also, s. 53 of the CPNG provides for compulsory acquisition of property under an Act of the Parliament, provided that the acquisition is for a public purpose or a reason justifiable in a democratic society, *and* that there is a necessity to do so, notwithstanding any resultant hardship to any person affected (see ss 53(1)(a) and (b)).

Constitutionality of the Superannuation Act

- Whether compulsory contribution to a superannuation fund is a deprivation of property.
-

IN THE MATTER OF COOK ISLANDS NATIONAL SUPERANNUATION FUND ACT 2000 AND THE COOK ISLANDS CONSTITUTION

Court of Appeal
Williams P, Barker and Paterson JJA

Cook Islands
[2014] CKCA 4/14
17 November 2014

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

The Cook Islands Constitution (CCI), arts 40(1), 64(1) (c) and (2)
Cook Island National Superannuation Fund Act 2000 (CINSFA)

Facts

The case arose from a criminal enforcement against individual employers (Rs) who failed to pay employer contributions under the CINSFA. The Rs argued in their defence that the compulsory superannuation fund established by the CINSFA was in violation of the CCI and was therefore invalid. The government sought a declaration from the High Court that the CINSFA was constitutional. On 31 January 2014 the High Court declared the Act invalid to the extent necessary by reason of being contrary to the provisions of article 64 (1)(c) of the CCI. The government appealed to the Court of Appeal.

Issue(s)

1. Does the CINSFA constitute a compulsory taking or acquisition of property contrary to article 40(1) of the CCI and, if so, does the requirement to provide compulsory contributions constitute a tax under Article 40 (2)(a), so as to immunise it against challenge under Article 40(1)?
2. Does the CINSFA infringe the right of the individual to 'security of the person' contrary to article 64 (1)(a) of the CINSFA and, if so, is the infringement saved by article 64(2)?
3. Does the CINSFA infringe the right of the individual not to be deprived of property contrary to article 64(1)(c) of the CINSFA and, if so, is the infringement saved by article 64(2)?

Decision

The appeal was upheld and the lower court's decision was overturned.

The High Court considered that article 40(1) of the CCI had no application in this case because the superannuation scheme into which compulsory contributions were required to be paid was not a taking possession of or an acquiring of property. Additionally, a compulsory payment to the fund was not a compulsory acquisition, as there was no corresponding recipient of a proprietary interest. Instead, the contributions under the scheme were pursuant to the CINSFA, which is an act of general application enacted for the public's benefit.

In relation to the argument based on the right of the individual to 'security of the person', the Court of Appeal held that article 64 (1)(a) of the CCI means physical security and does not encompass economic security.

In relation to the third issue, deprivation of property prohibited under article 64 (1)(c) of the CCI, the Court of Appeal held that the Act infringed this article, although the court was less emphatic than the lower court about the lack of government guarantee of the fund as a basis for its decision. However, on the basis of the proportionality test, the infringement of article 64 (1)(c) was saved by article 64(2).

Comment

The case turned on whether the CINSFA infringed the rights of the individual contrary to article 64 (1) (c) of the CCI. While the Court of Appeal held that the CINSFA infringed the rights of the individual not to be deprived of property, this infringement was saved by article 64 (2). Applying the three limbs of the proportionality test, it was held that the objective of CINSFA, to provide a retirement fund for Cook Islanders, was sufficiently important to justify the limitation of the fundamental right. Second, CINSFA was rationally connected to this objective, since it provided the mechanism by which this scheme could be implemented. Lastly, as to whether a fair balance was struck between the rights of the individual and the interests of the country, the significant benefits to the individual and the public far outweighed any diminution of individual rights. The three-limbed test applied by the Court of Appeal was a means of determining whether the legislation being challenged was constitutionally valid. Had it been held to have not met one of the criteria, the CINSFA would have been declared *ultra vires*.

SLAVERY

Slavery – first slavery decision in Fiji – trafficking – sexual servitude

- While not detracting from the crime of rape of a child, which is an abominable crime, trafficking a child for sexual services carries additional grave elements, in that it is not one single act of violence, but rather it is the making available of a child for numerous sexual acts in return for monetary gain.

STATE v RAIKADROKA

High Court
Madigan J

Fiji
[2014] FJHC 409
9 June 2014

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

Convention against Transnational Organised Crime and two of its three protocols: the protocol to prevent, suppress and punish trafficking in persons, especially women and children; and the protocol against the smuggling of migrants by Land, Sea and Air.

Convention to Suppress the Slave Trade and Slavery (1926)

Constitution of Fiji

Crimes Decree 2009

Facts

In June 2012 the first accused (A1) met three sisters (aged 18, 17 and 15 years) who were working as sex workers under the control of another person. A1 took them for dinner, followed by a drinking party in his room at the Elixir Motel. At the party they discussed the sex business, fees and the splitting of fees for commission, and A1 asked the women if they were prepared to work for him. The two younger women were kept at the Elixir Motel for two to three months, and during that time they provided sexual services for clients that were arranged by A1, who received commission from the fees that was paid to the women. Later, A1 asked for all their money to be paid to him, but in return A1 would pay for the women's accommodation, beatification, clothes and shoes. A1 moved the women to different locations when there were few clients, and arranged for the women to be taken to hotels and motels to provide sexual services. The second accused (A2) also arranged clients for the women, and took them by taxi to various locations where they provided sexual services. These arrangements continued until December 2012, when the youngest woman returned home and told her grandmother about her sex work, who reported this to the police.

Issue(s)

What should be the appropriate sentence, given this was the first case of slavery in Fiji?

Decision

A1: 16 years for two counts of slavery and 14 years for the counts of domestic trafficking of children, to be served concurrently. Eligible for parole after 14 years.

A2: 12 years for the various offences of domestic trafficking of children. Eligible for parole after 10 years.

Comment

This case attracted extensive publicity and media attention, as the first case of slavery in Fiji. A closer analysis of the facts and the nature of the relationship between A1 and his victims raises pertinent

questions, because there is little discussion in the decision about the core elements of slavery, and, in particular, about whether it was made out on the facts. A key issue is how A1 exercised powers over the victims that amounted to an exercise of rights of ownership, a necessary element of slavery. While A1 exercised a degree of coercion over the women, their movements were not restricted, and they were not confined or detained at any time. While they may not have been happy or satisfied with the arrangements at times, there appears to have been a degree of acquiescence, if not consent. The defence's robust arguments regarding the victims' freedom of choice were dismissed by the court, based on the psychological notion of 'situational coercion' founded, in this case, on the victims' broken family backgrounds. Whether 'situational coercion' falls within the elements of the offence of slavery is a matter of contention. In the Australian case, *Queen v Tang HCA 39* (28 August 2008) (3 PHRLD 53), Gleeson CJ engages in a detailed discussion of the elements of the offence of slavery. Those elements, as they relate to the rights of ownership that A1 would need to be found to be exercising, as an element of slavery, do not appear to be present in this case. The offence of slavery in the Crimes Decree 2009 is expressed in similar terms to the relevant provisions of the Australian Criminal Code.

Another aspect of this case is the court's reliance on the tariffs for rape offences as comparators for sentencing. Both slavery and rape humiliate, demean and degrade the victims of those crimes. They are comparable in that regard, and in the misery, trauma and suffering inflicted upon victims. However, it is problematic to equate the two offences because they involve substantially different elements and impacts.

See also:

State v Raikadroka [2014] FJHC 391; HAC80.2013 (2 June 2014) – ruling no case to answer.

State v Raikadroka [2014] FJHC 396; HAC80.2013 (4 June 2014) – summing up.

State v Raikadroka [2014] FJHC 402; HAC80.2013 (6 June 2014) – judgment.

VIOLENCE AGAINST WOMEN

Rape – inconsistent sentencing

- Rape bands established to ensure consistency in sentencing tariffs.
-

KEY v POLICE

Court of Appeal
Fisher, Hammond and Hansen JJA

Samoa
[2013] WSCA 3
28 June 2013

Law(s) and/or international instrument(s) considered
Prisons Parole Board Act 1977

Facts

The appellant (A) was convicted on one charge of rape, attempted rape and resisting and assaulting a constable. The trial court imposed a sentence of 14 years for the charge of rape, five years for the charge of attempted rape, and six months for the charges of resisting and assaulting a police officer. These latter sentences were to be served concurrently with the sentence for the rape charge. A appealed his convictions (on the sole ground of incompetence of counsel), and he appealed the sentence in relation to the charge of rape only.

Issue(s)

1. Whether the convictions should be revisited.
2. Whether a guideline sentencing decision for the offence of rape in Samoa should be made.

Decision

The appeal against the convictions was dismissed on the basis of A's lack of credibility.

Both parties agreed that guidelines for sentencing decisions in rape cases should be made and the court accepted that guidelines should be made. Consequently, the appeal against the sentence was allowed; the sentence of 14 years was quashed, and a sentence of 11 years was substituted. The court was satisfied that nine years was an appropriate starting point, and added two years for the aggravating features of the offence.

Comment

The significance of this case is that tariffs have been set down to ensure consistency in sentencing of rape cases. The court adopted the bands formulated in the New Zealand case of *R v AM [2010] NZCA 114* (13 March 2010), and proposed the following tariffs:

Band one: 8 to 10 years to apply where the perpetrator's actions are at the lower end of the scale and there are either no aggravating features or they are minimal.

Band two: 9 to 15 years where the degree of violence and premeditation by the perpetrator are moderate in nature.

Band three: 14 to 20 years where the aggravating features of the perpetrator's actions are of a relatively serious nature.

Band four: 19 years to life where the perpetrator's actions are similar in character to band three but there may also be multiple acts committed over a lengthy period of time; e.g. repeat family offending.

The significance of this and other like decisions is that it provides a standard for ensuring there is a measure of uniformity and consistency in the application of sentencing. Treating similar cases in a like or comparable manner is an important consideration in the administration of justice and reinforces confidence in the justice system.

Rape – sentencing – state appeal

- Adequacy of sentence where aggravating features are present for the offence of rape.
-

REPUBLIC v ARAWAIA

Court of Appeal
Paterson, Blanchard and Handley JJA

Kiribati
[2013] KICA 11
23 August 2013

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

Court of Appeal Amendment Act 2010
Penal Code

Facts

The respondent (R) was found guilty of two counts each of indecent assault and defilement of a girl under the age of 13, and was sentenced to a total of two years' imprisonment. The state (A) appealed the sentence on the grounds that it was manifestly inadequate. R was 47 years of age, and the Victim (V) was 12 at the time of the offences. R was the husband of V's grandmother. The relevant offences occurred over a three-day period, at various properties, but the last offence occurred after V told her grandmother, and R had apologised for the previous acts.

Issue(s)

Was the sentence manifestly inadequate and, if so, what should the appropriate sentence be?

Decision

Appeal allowed. The sentence was manifestly inadequate and the court substituted it with a total of five years' imprisonment, representing five years for two counts, and one year and six month for the other two counts, which were to be served concurrently.

Anything less than a five- year starting point would be manifestly inadequate, considering a previous decision of a similar nature. The court referred to the starting point applied in Australian and New Zealand courts, noting that, in cases involving multiple offences and counts, the totality principle should apply; that is, the sentencing should take into consideration not only the penalty for each offence separately, but also whether the total term was appropriate for the collective offending conduct. Consequently, a range of seven to eight years was justified. In relation to the aggravating and mitigating factors, little weight was placed on the apology as a mitigating factor, but the R's early guilty plea, and the fact of the state's appeal, should result in a five-year total term.

Comment

The inadequacy of the sentence imposed by the court at first instance underscores the important role that appellate courts play in the review process, and highlights the consequent need to ensure that both sentencing tariffs and what constitute mitigating and aggravating features of the offending are clearly articulated. This ensures both consistency in sentencing and uniformity in decision making. The inadequacy of the sentencing in this case also illustrates the different perspectives that courts sometimes have in respect of matters before them. While it is useful to have regard to other jurisdictions, such as Australia and New Zealand, as a guide in sentencing, the peculiarities of the local context and what will meet the ends of justice in that context are arguably primary considerations.

Rape – child victim of sexual violence – sentencing appeal by the Crown

- **Manifest inadequacy of sentence for the offence of rape.**

REGINA v BONUGA

Court of Appeal
Goldsbrough P, Williams and Hansen JJA

Solomon Islands
[2014] SBCA 22
17 October 2014

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

Penal Code, ss 142 and 143
R v Billam [1986] 1 WLR 349

Facts

The defendant (D) was convicted of three counts of rape of his adopted child, on three separate occasions, when she was 12, 13 and 15 years old. Two of the offences occurred in the family home. The sentencing judge ordered three jail terms, the longest of three years', which were to be served concurrently. The Crown appealed the sentences.

Issue(s)

1. Whether the correct principles relating to the starting point for sentencing in rape cases of this kind were applied.
2. Whether the sentences were manifestly inadequate.
3. Whether an error of law occurred in applying the sentences to be served concurrently.

Decision

The Court of Appeal (CA) upheld the appeal and ordered that the offender be jailed for 10 years for each count of the offence, to be served concurrently. The court relied on a 1984 English case, which had been adopted in previous cases, which held that the starting point in sentencing in relation to a rape offence, in circumstances in which the rape was committed by a person in a position of responsibility towards the victim, should be eight years' imprisonment. The court also dismissed the trial judge's consideration of the victim's delay in reporting the matter to the police as a mitigating factor, commenting that *it [was] a feature far too common in offending of this sort*. (At par. 23) While the victim had not produced evidence of psychological harm, judicial notice should be taken of the devastating effect on victims of sexual offences, especially young victims. Thus the court considered that the aggravating factors had the effect of adding four years to the sentence, implying a 12 year sentence for each count. The court accepted the offender's general good character as a mitigating factor, and the fact that it was the Crown's appeal, and accordingly deducted 2 years from the concurrent sentences. However, the case was not one of repetitious behaviour of the offender on the same victim, but rather three distinct and discrete episodes of rape. While it rejected this as a mitigating factor, the court considered that consecutive sentences were not appropriate, and applied the totality principle indicating concurrent sentences.

Comment

The discrepancy in the sentences between the CA and the court at first instance is pronounced, and the CA was rightly critical of the court at first instance. There was clear precedent to the effect that the sentencing starting point for cases of this type was eight years. While the purpose of an appellate court is to remedy anomalies, it is sobering to reflect on the degree of leniency shown to the respondent by the lower court. The court appears to have overlooked the abuse of trust and authority which the respondent committed in raping his adopted daughter on three separate occasions. This was heightened by making the sentences for the three separate offences concurrent rather than consecutive. While the judiciary is an independent third branch of the state, it is expected to reflect society's

disapproval and repugnance for more heinous offences such as rape, and particularly the rape of children, because of the fundamental abuse of power and trust it engenders.

Rape – sentence – appeal by the Crown

- Manifestly inadequate sentence and inconsistent application of sentencing tariffs.
-

R v GUA

Court of Appeal
Goldsbrough P, Ward and Mwanasalua JJA

Solomon Islands
[2013] SBCA 2
26 April 2013

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

Court of Appeal Act, s. 21(1)(B)

Facts

The appellant (A) was convicted of raping the victim (V), his estranged wife. V had left the marital relationship, and had begun a relationship with another man. A had persuaded V to get into his taxi on the pretext of seeing their children. A attempted to reconcile with V. She refused. A then drove V to an isolated area and raped her orally and vaginally. A was convicted in the High Court and was sentenced to four years' imprisonment. The Department of Public Prosecutions appealed on the ground that the sentence was manifestly inadequate.

Issue(s)

Whether a four-year sentence for the offence of rape, with aggravating features, is appropriate.

Decision

The Court of Appeal allowed the appeal and increased the sentence to seven years. It noted the inconsistencies in the judgment that was being appealed, where the lower court had found that the tariff should be seven years in cases involving aggravating features, rather than 5 years, but had found no aggravating features, and attributed some blame to V, and therefore imposed a four-year sentence. The Court of Appeal pointedly declined to attribute any fault to V, and emphasised the aggravating aspects of the rape: the initial trickery and the oral rape, in addition to the rape and premeditation. While affirming that five years, rather than seven years, should be the starting point for sentencing tariffs in circumstances that did not involve aggravating or mitigating features, the aggravating factors in this case necessitated the sentence be increased to seven years.

Comment

This was the first case in the Solomon Islands which recorded a conviction for rape within marriage. While V had another partner, the parties remained legally married. The court at first instance mentioned this aspect in its decision, and proceeded to suggest that V was in some way responsible, which was an inappropriate and injudicious implication by the court. It is this finding that appears to have influenced the court at first instance's sentencing considerations. While emphasising this aspect, the judge downplayed the aggravating features of A's conduct, and imposed a four-year sentence, notwithstanding that the judge agreed that a seven-year starting point was appropriate. The case reflects the importance of appellate courts ensuring that courts properly apply sentencing guidelines. The appellate court also needs to be alert to any conduct by judicial officers suggesting gender bias, as was implied in the decision of the lower court in this case.

Rape – sentencing tariff

- Manifestly excessive sentence for the offence of rape.
-

LATU v REX

Court of Appeal
Salmon, Blanchard and Ward JJA

Tonga
[2014] TOCA 9
9 April 2014

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

Sentencing in rape
Laws of Tonga, Ch. 18 – Criminal Offences, 1988 ed.

Facts

The appellant (A) appealed a sentence of 14 years for three counts of rape, and 14 months for two counts of indecency offences, to be served concurrently. A and the victim (V) were in a relationship. V wanted to end the relationship, whereupon A threatened her with a knife, and raped and indecently assaulted her. A detained V for 24 hours and raped her two more times. A consistently denied committing the offences. The maximum sentence for rape is 15 years under the *Laws of Tonga*.

Issue(s)

Was the sentence manifestly excessive and, if so, what is the appropriate tariff?

Decision

The Court of Appeal allowed the appeal, quashed the sentence for the three counts of rape and substituted eight years, applying the starting point for the tariff of five years. The court preserved the sentences for the two counts of indecent assault, and held that the sentences for both offences were to be served concurrently. The only mitigating factor was that A had no previous conviction, but this was outweighed by aggravating factors, such as the multiple rapes, the effective detaining of V, the use of the knife and the fact that A continued to maintain his innocence.

Comment

Sentencing is a balancing exercise, in which the court needs to consider various factors. It is also a subjective process. While recognising the aggravating factors, such as the multiple rapes, detention, threats with the aid of a knife, and A's assertions of innocence throughout the trial, to which may be added the indecent assault, the court substituted a sentence that was closer to the starting point, rather than the maximum, for the offence. It considered the initial sentence of 14 years to be manifestly excessive. There is latitude for arguing the combined effect of the aggravating factors called for a tariff closer to the maximum, in the light of the fact that V was raped three times and that the only mitigating factor was that A had no previous convictions. The Court of Appeal's decision reflects the reality that sentencing is not an exact science, and that assessments often need to be made on impressionistic grounds.

Sexual Offence – appeal

- Special circumstances for mitigating sentence for the offence of rape.
-

FILIMONE HEFA v REX

Court of Appeal
Salmon, Handley and Blanchard JJA

Tonga
[2013] TOCA 4
17 April 2013

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

Sentencing in rape

Facts

The appellants (A) were convicted of one count of rape and were sentenced to 13 years' imprisonment, the last three years of which would be suspended. A had threatened his 17-year-old sister-in-law (V) with a knife, and had raped her. A and his wife had a two-year-old son, who had a rare illness, which immobilised him, and he required full-time care and attention. A's wife was the primary carer for their son, with limited support from A's family. However, it was submitted that she could not care for their son on her own. On this basis, counsel for A submitted that a lower tariff of three to five years should be applied, rather than the starting point of five years.

Issue(s)

Whether the carer needs of A's son was a mitigating consideration, and the effect of the aggravating factors.

Decision

The Court of Appeal allowed the appeal, and substituted a sentence of six years, with the last three years being suspended to enable A's early release. The only mitigating feature was that A was a first offender. The tariff was set at the higher end in the light of the aggravating features of the rape. These were the use of a knife and the threat which accompanied it, the relationship of A to V and the impact of the offending in a cultural sense. However, the last three years of the sentence would be suspended for three years, taking into account the condition of A's son.

Comment

Some aspects of this case are disturbing. The distinction the court drew between the sentence and the suspension is illusory, because the consequence of the suspension was that A would serve only half of his sentence in custody. While the substantive sentence reflected the gravity of the offence, the impact of the sentence was significantly reduced by the period of suspension which effectively halved the sentence.

The Court of Appeal treated this as a special case, because of A's seriously ill and immobilised child. By doing so, the court gave more weight to the child's condition than the seriousness of the offence against V. The aggravating features cited by the court were effectively negated by the consideration the court gave to the care of A's child. The case illustrates the circumstances and the dilemmas often faced by the courts in trying to reconcile competing interests to meet the ends of justice. In this case, the court viewed the need to punish the offender as less important than the needs of parties who are unrelated to the offending, in order to meet the ends of justice. The court took into account A's wife's urgent need of the offender's physical and moral support to care for their child.

Domestic violence – 17-year-old perpetrator – sentencing

- Suspension of part of sentence for manslaughter because of additional factors not considered at trial.
-

FO'OKA v REGINA

Court of Appeal
Goldsbrough P, Williams and Ward JJA

Solomon Islands
[2014] SBCA 10
9 May 2014

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

Penal Code, ss 204 and 205
Juvenile Offenders Act, s. 16

Facts

The appellant (A) was aged 17-and-a-half years when he twice struck his wife of six months on the head with an axe, following what he considered to be offensive remarks made by her about his mother and niece. The blows cracked her skull fatally wounding her; she bled to death as a result of her wounds. A was convicted of manslaughter in the High Court, and was sentenced to nine years' imprisonment. A appealed his conviction and sentence.

Issue(s)

Is there any basis for any further leniency in sentencing, given that there appeared to be no realistic grounds to challenge the conviction?

Decision

The Court of Appeal dismissed A's appeal against his conviction, but varied the appeal against the sentence to allow the last two years of imprisonment to be served under the care of a suitable person. This option had not been considered at first instance, and the case was remitted to the High Court to ascertain the suitability and willingness of A's uncle to care for him, or alternatively to identify another person willing to so. Upon the court being satisfied of a nomination of a suitable carer, A would be released from custody and placed in that person's care for the last two years of his sentence.

Comment

The Court of Appeal varied the sentence because the issue of there being someone available to supervise A – thereby enabling an early release into the community – was not considered at first instance. Both courts gave significant weight to A being a juvenile: the High Court, in determining a nine-year custodial sentence for A's killing of his wife, in circumstances which the court found involved some provocation; and the Court of Appeal, in varying the sentence to allow the possibility of A serving only seven years in prison, with the balance to be served under supervision in the community. The weight which the courts gave to A's juvenile status reflects the concessions that courts are prepared to make in the case of juveniles, recognising that the opportunity for rehabilitation is a real consideration.

Domestic violence – killing of wife – sentencing

- Successful appeal by the accused resulted in a substantial reduction in jail term.
-

VAOMOTOU v REX

Court of Appeal
Salmon, Blanchard and Ward JJA

Tonga
[2014] TOCA 11
9 April 2014

Law(s) and/or international instrument(s) considered
Sentencing in provocation

Facts

A was sentenced to 16 years' imprisonment for manslaughter (the last two suspended) for killing his wife (V). A stabbed V 23 times as she lay sleeping. The couple had a stormy relationship, and the court at first instance had accepted A's submission of provocation in V's conduct in engaging in a relationship up with another man. A's plea of provocation as a defence to murder was successful, and A pleaded guilty to manslaughter. A appealed his sentence.

Issue(s)

Whether there are any mitigating circumstances to reinforce A's appeal.

Decision

The Court of Appeal allowed the appeal, recognising that it was manifestly excessive and reducing the sentence to 10 years, with the last two years suspended. The extreme violence (V was stabbed 23 times), and the absence of provocative behaviour at the time of the attack, indicated an appropriate starting point for sentencing of 14 years. A's early confession, his guilty plea, his expressed remorse, his disoriented state of mind, and being a first offender, were taken into account as mitigating factors. In circumstances in which A's prospects of rehabilitation were good, he was unlikely to reoffend, and he had two small children, it was appropriate to suspend the last two years of the sentence.

Comment

The case is interesting in that V's conduct in taking up with another man was considered to be provocative behaviour, which justified the initial charge of murder being substituted with manslaughter, to which A pleaded guilty. In characterising V's conduct in those terms, the court was making a value judgment that the wife was not entitled to choose to be involved in other relationships. The level of violence committed by A was extreme, and was committed against V while she lay sleeping, and it seems problematic to treat this behaviour with the degree of leniency the court appears to have adopted, notwithstanding the mitigating factors that were accepted.

WORKERS' RIGHTS

Workers' rights – government's intervention in prospective overseas employment

- **Violation of the Employment Relations Promulgation to protect the interests of prospective workers engaging in overseas employment is an offence punishable by a custodial sentence.**
-

LABOUR OFFICER v LOLOHEA

High Court
Wati J

Fiji
[2015] FJHC 5
7 January 2015

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

Employment Relations Promulgation 2007 (ERP), ss 4, 37(4), 37(5), 211(3), 246(1) and 246(1)(a). Sentencing and Penalties Decree 2009 (SPD), s. 4(2)

Facts

This was a sentencing matter for offences under the ERP. The accused was convicted by the Employment Relations Tribunal (ERT) for enlisting and recruiting people for foreign employment without proper government authorisation (maximum penalties were a \$20,000 fine or a four-year prison term), and for the wilful obstruction of the labour officer carrying out his lawful duties (\$10,000 fine or a 12-month prison term). The maximum penalties the ERT can impose under its limited jurisdiction are fines to a maximum of \$2000 or a 12-month prison term. The ERT referred the matter for sentencing to the High Court pursuant to the ERP.

Issue(s)

Whether a custodial sentencing was appropriate under the circumstances and, if not, what quantum of fines should be imposed?

Decision

The High Court considered that a fine for both offences would meet the ends of justice, and ordered a fine in the total of \$6000 to be paid within three months. In default of timely payment, the offender was to be imprisoned for a term of 12 months.

Comment

This case was the first ERP prosecution that was sent to the High Court for sentencing.

The ERP does not prescribe factors to be considered in sentencing, so the court sought to rely on the general guidelines set out in the 2009 Sentencing and Penalties Decree. The prosecution sought a custodial sentence but did not provide a reason for seeking this penalty. After outlining the preamble of the ERP, the court observed that the requirement for the permanent secretary's prior authorisation for any foreign employment contract had a sound purpose, to ensure that Fijian workers' basic human rights were monitored and protected. Acts contrary to the relevant provisions of the ERP would put the life, safety and security of workers at risk and therefore constituted serious offences. The court accepted the mitigating factors pleaded by the accused, and in the absence of any aggravating factors, held that the imposition of fines would meet the ends of justice.

In a Hong Kong case, *HKSAR v. LAW WAN TUNG* [2015] HKDC 210; DCCC 651/2014 (27 February 2015), the court concluded that because of the disparity of power between an employer and

an employee coming from another country, abuse and ill-treatment were not uncommon, and government intervention was warranted in order to protect its nationals. In that case, a 20-year-old woman domestic helper from Indonesia was ill-treated by her Hong Kong employer for a long period of time, resulting in her sustaining injuries.

Discrimination – employment contract and dismissal

- **Whether harsh and unfair dismissal under an employment contract is lawful in the absence of unfair dismissal legislation.**
-

ILAGANA v WESTPAC BANK OF TONGA

Court of Appeal
Salmon, Handley, Hansen and Tupou JJA

Tonga
[2014] TOCA 18
31 October 2014

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

Common law of employment

Facts

The appellants (A) appealed a decision dismissing her action for unfair dismissal. Under Clause 11(b) of A's contract of employment, her contract could be terminated by either party by payment to the employee, or forfeiture of, one month's salary. A commenced employment at the Westpac Bank of Tonga (R) on 22 May 1989. She was steadily promoted, and was appointed manager branch banking in 2006, and manager retail banking in 2012. On 18 October 2012 A was advised, by letter from the general manager (GM) of the bank, that her services were no longer required and that her employment was terminated. A queried the decision and sought to ascertain the reasons for her dismissal, and asserted her right to be given an opportunity to be heard.

Issue(s)

Tonga has no unfair dismissal legislation, and the matter had to be determined under the common law. However, A argued that the Bank of Tonga Act and the rules of the bank's retirement fund had modified A's contract of employment to enable her to claim damages for breach of contract.

Decision

The court dismissed the appeal and held that while the dismissal was harsh and unfair, it was lawful. A had not argued a breach of implied trust and confidence, which could be implied by common law in contracts of employment, or that there was an obligation on R as an employer to exercise its powers under clause 11(b) in good faith. Although under the Bank of Tonga Act, the government initially was a substantial shareholder, it never exercised control over the bank, and the bank conducted business for profit for the benefit of its shareholders. Even if an employer was a public body established by statute, its contractual powers of dismissal were not limited unless provided for by statute.

Comment

The common law has its limitations, and A's counsel's oversight in not arguing breach of an implied term of mutual trust and confidence resulted in the dismissal of her case. In other jurisdictions, unfair dismissal legislation has made the process of terminating contracts of employment a more transparent process, in providing that employees be given reasons for the dismissal as well as the opportunity to be heard. Some employers in jurisdictions with unfair dismissal legislation would argue that the pendulum has swung too far towards employees' rights, making it very difficult to dismiss employees. But in the present case, R took advantage of clause 11(b) of A's contract of employment to dismiss her unilaterally, without cause, and without affording her an opportunity to be heard. The court acknowledged that the dismissal was harsh and unfair, but it considered that it was bound by the common law principles relating to the law of employment.

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

CRUEL, INHUMAN OR DEGRADING TREATMENT

Inhuman treatment of prisoner – prolonged period of solitary confinement

- Prisoner sought compensation for inhuman treatment in prison, of being kept in solitary confinement for longer than the permissible period. It was accepted as fact that the prisoner had requested the solitary confinement in order to deal with his drug addiction habit.

VOGEL v ATTORNEY-GENERAL

Court of Appeal
France, Young and Cooper JJA

New Zealand
[2013] NZCA 545
7 November 2013

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

New Zealand Bill of Rights Act 1990 (NZBORA), ss 9 and 23(5)

Penal Institutions Act 1954 and Penal Institutions Regulations

Prisoners and Victims Claims Act 2005 (PVC Act), s. 13

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 16

International Covenant on Civil and Political Rights (ICCPR), articles 7 and 10

Facts

The applicant (A) was sentenced to life imprisonment in 1988 for murder, and was released on parole in 1998, but was convicted again after reoffending in 2000, and sent to prison again. The complaint related to A's second period in prison, during which A was sentenced by a Visiting Justice to solitary confinement for 21 days, for a drug-related offence while in prison. Under the *Penal Institutions Act* and its regulations, the maximum continuous period that a prisoner is permitted to be sentenced to a cell confinement is 15 days. The complainant sought damages and a declaration based on ss 9 and 23(5) of the NZBORA. The court at first instance held that the Visiting Justice had not breached ss 9 and 23(5) of the NZBORA, despite accepting that the sentence was unlawful. The court accepted that the longer sentence had been a response to A's plea to have additional time in solitary confinement to deal with his drug habit. A appealed the decision.

Issue(s)

Whether the 21-day cell confinement sentencing had breached the relevant sections of the NZBORA and, if so, what remedies would be appropriate under the circumstances?

Decision

The Court of Appeal allowed the appeal and held that the sentencing of 21 days' solitary confinement under the circumstances had breached s. 23(5) (but not s. 9) of the NZBORA, and that ordering damages to be paid to the appellant would have been appropriate, but the difficulties in assessing the damages, and the effect of s 13 of the PVC Act, had prevented the court from doing so. (The PVC Act restricts prisoners' monetary claims for compensation to be considered by a court if the applicant had not sought internal complaints mechanisms at an earlier stage.)

The court made a declaration that the sentence of 21 days' cell confinement was in breach of s 23(5) of the NZBORA and of s. 33 of the *Penal Institutions Act*.

Comment

The applicant sought leave to appeal to the Supreme Court, arguing that the Court of Appeal was wrong in not ordering damages to be paid to the appellant. The Supreme Court refused leave to appeal. (See *John Alfred Vogel v Attorney-General and others* [2014] NZSC 5 (19 February 2014)) The decision has provided significant principles in interpreting s. 23(5) of the NZBORA, which has a close affinity with article 10 of the ICCPR (to treat detained persons with humanity and with respect for the inherent dignity of the human person).

The Court of Appeal observed that the fact that the prisoner had requested a prolonged solitary confinement was not a relevant consideration in relation to the sentence or to the state's positive duty in respect of s. 23(5) of the NZBORA. The court contrasted s. 9 (torture and cruel treatment) with s23(5), and reiterated that the latter section had imposed a positive obligation on the state in relation to persons deprived of liberty, citing an earlier Supreme Court decision in support. The fact that the prisoner was vulnerable (known to be a drug addict and known to have suffered a mental health condition at the time of the imposition of the confinement sentence) should have attracted special care in considering the length of the solitary confinement sentence. (At 67-75)

The remedy in any human rights violation by the state... *should have the purpose of vindicating the right breached, deterring the relevant authorities from future rights breaches and denouncing the conduct so as to mark society's disapproval of the breach.* (At 77)

DISCRIMINATION

Discrimination – employment – pregnancy

- **Discrimination on the basis of pregnancy is gender discrimination and a violation of a woman's constitutional rights.**

NOORFADILLA AHMAD SAIKIN v CHAYED BASIRUN & ORS

High Court
Yusof J

Malaya, Malaysia
[2012] 1 CLI 769
12 July 2011

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

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)
Malaysian Federal Constitution, s. 8(1)

Facts

The Plaintiff (P) applied for a teaching job in response to a ministry circular for the employment of untrained temporary teachers. The circular was issued due to the shortage of school teachers. Following a successful interview, P was invited to attend an appointment, along with other successful candidates, at which she was given a placement memo requesting her to report for duty at a specific school immediately. The government agency then asked all of the women who attended the appointment whether any of them was pregnant. P and two other appointees responded affirmatively. The agency then withdrew the placement memo of P. P later sought an explanation from one of the defendants, the ministry (D). After several attempts, P received a reply from D, which sought to rely on the circular saying that a pregnant woman could not be employed because: 1) her recovery from delivery is too long; 2) her inability to attend the job due to various health reasons; 3) replacement for the pregnant woman requires further briefings; and 4) the post could not be filled with 'replacement' teacher. P instituted legal proceedings, seeking damages and a declaration of unlawful discrimination.

Issue(s)

1. Whether the action of D in refusing to allow pregnant women to be employed as a temporary teacher was gender discrimination in violation of article 8(2) of the *Malaysian Federal Constitution*.
2. Whether P lacked *locus standi* because there was no contract.

Decision

The High Court held that *locus standi*, based on contract, was irrelevant because the challenge was based on a breach of P's constitutional rights.

The court rejected D's submissions that were based on the argument that the action was a policy consideration which ought not to be reviewed or questioned. The court held that the sole ground of withdrawing the employment was based on P's pregnancy, which amounted to gender discrimination in violation of the constitution.

Comment

The High Court seized upon the insertion of 'gender' into the relevant section of the *Malaysian Federal Constitution* as one of the prohibited grounds for discrimination in employment, which was in response to the country's ratification of CEDAW. Following a detailed analysis of CEDAW articles and the relevant UN and regional instruments, as well as court decisions in various jurisdictions, the court expressed the view that it was entitled to rely on this international material to clarify the

meaning of equality and the scope of gender discrimination envisaged in the constitution. It reasoned that P's pregnancy was innately connected with her gender, and discrimination against pregnant women was a form of gender discrimination, which was prohibited.

Discrimination – disability – wheelchair access to public transport services

- **Anti-discrimination legislation compels service providers to accommodate access for service for wheelchair-bound individuals.**

HARAKSIN v MURRAY AUSTRALIA LIMITED

Federal Court
Nicholas J

Australia
[2013] FAC 217
14 March 2013

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

Disability Discrimination Act 1992 (Cth) (DD Act), ss 5, 6, 23 and 24
Disability Standards for Accessible Public Transport 2002 (Cth) (Standards)
Australian Human Rights Commission Act 1986 (Cth) (AHRC Act)

Facts

The applicant (A) was born with brittle bone disease, and had to rely on a wheelchair for mobility. The respondent (R) operated coach transport services (a national transport provider, 'Countrylink'), including services between Sydney and Canberra. In August 2009 A telephoned the coach company to book a return seat on a wheelchair-accessible coach, travelling between Sydney and Canberra, on two specific dates, in order to attend a conference. A had used this service previously, but on this occasion she was informed by the person who took her call that R did not have any wheelchair-accessible vehicles, and that her booking could not be taken. A made other travel arrangements to attend the conference. A's husband took leave from his work and drove her to Canberra. A made a complaint to the Australian Human Rights Commission alleging direct and indirect discrimination under the DD Act (i.e., direct and indirect discrimination against A on the ground of her disability in the areas of access to or use of premises and the provision of facilities and services). A also sought relief based on the substantive Standards that were prescribed by legislative instrument to formulate standards applicable to transportation services, amongst other standards to promote anti-discrimination against disability.

The complaint was terminated by the Commissioner under the AHRC Act due to the lack of reasonable prospect of the complaint being settled by reconciliation. Pursuant to the AHRC Act, A filed this proceeding in the Federal Court.

Issue(s)

1. Whether R discriminated against A on the ground of her disability, based on relevant provisions of the AHRC Act and the Standards.
2. If so, whether the discrimination was permitted under the exception of 'unjustifiable hardship', which would otherwise be suffered by R.
3. What should be the appropriate remedy?

Decision

The Federal Court upheld A's complaints of discrimination for access to or use of premises (the coach) and discrimination to provide services (transportation between Sydney and Canberra), but rejected the claim of discrimination by imposing a discriminatory term or condition for the provision of the service, because the service was never provided. The court also upheld complaints based on the Standards.

The court exercised its discretionary powers and ordered R to comply with the Standards, to be limited to its services operating between Sydney and Canberra, for a period of two years. The court declined to consider claims of indirect discrimination, because the direct discrimination in terms of the same conduct was upheld.

In relation to the defence based on ‘unjustifiable hardship’ under the relevant provisions of the AHRC Act, R failed to substantiate the defence. In relation to the argument of ‘unjustifiable hardship’ applicable to the implementation of the Standards, the court declined to rule, because the expert evidence provided by R was relevant only to the general application of compliance, but the relief ordered was confined to the services between Sydney and Canberra.

Comment

This decision is authority for the proposition that public transport services provided by a private organisation are governed by national Standards. In coming to its interpretation of ‘Public Transport Service’ under the Standards, the court adopted a liberal and purposive approach, and rejected R’s technical arguments purporting to take the applicability of the Standards out of its ‘charter service’. The court reasoned that, if the service was intended to be for use by the public, it was not relevant whether it was provided as a public service or under the auspice of a charter service. The realistic and pragmatic approach the court adopted in coming to its orders also diminishes arguments based on resource and utility.

The success of this application demonstrates that there is a need for standalone anti-discrimination legislation, and to formulate respective national standards under the AHRC Act, in order to implement and promote an inclusive disability policy. Unfortunately, the Pacific region is falling behind in this area of development and implementation.

ENVIRONMENTAL DEFENDERS

Greenpeace – registration as a charitable entity

- ‘Political purpose’ no longer provides a blanket exclusion from the ‘charitable purpose’ inquiry for registration.

IN RE GREENPEACE

Supreme Court
Elias CJ, McGrath, William Young, Glazebrook and
Arnold JJ

New Zealand
[2014] NZSC 105
6 August 2014

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

Charities Act 2005, s. 5

Facts

Greenpeace of New Zealand Inc. (the appellant, A) sought registration as a ‘charitable entity’ in order to qualify for the tax relief benefit. The Charities Commission (CC) declined A’s registration on the basis that two of its objects were not charitable. The objects found to be not charitable were the promotion of disarmament and peace and the promotion of ‘legislation, policies, rules, regulations and plans which further [Greenpeace’s other objects] and support their enforcement or implementation through political or judicial processes as necessary’. The CC sought to rely on the *Charities Act* and the established principle of ‘political purpose’ exclusion, in determining charitable purpose. A’s appeal in the High Court was unsuccessful. In the Court of Appeal the appellant proposed to amend the objects of promotion in relation to ‘disarmament’ to ‘nuclear disarmament and the elimination of all weapons of mass destruction’, and to add ‘where such promotion or support is ancillary to those objects’, after the reference to the promotion of law and policy change.

Issue(s)

Whether the ‘political purpose’ exclusion is the law of New Zealand in relation to determining charitable purpose, and whether illegal activity may disqualify an entity from registration.

Decision

The Court of Appeal upheld the notion of ‘political purpose exclusion, but was prepared to deal with the foreshadowed change of its object, and considered that the promotion of nuclear disarmament and elimination of weapons of mass destruction was uncontroversial and of public benefit envisaged under the general principle of charitable. It remitted the matter on that basis, requiring the Commission to reconsider the application by considering whether this ‘political’ limb of the objects was truly ancillary and not an ‘independent standalone object’. The appellant challenged this finding in the Supreme Court, which held that:

- *A ‘political purpose’ exclusion should no longer be applied in New Zealand: political and charitable purposes are not mutually exclusive in all cases; a blanket exclusion is unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit within the sense the law recognises as charitable.*
- *Section 5 of the Charities Act does not enact a political purpose exclusion with an exemption if political activities are no more than ‘ancillary’, but rather provides an exemption for non-charitable activities if ancillary.*

- *The Court of Appeal applied an incorrect approach to assessment of charitable purposes when it concluded that an object ‘to promote nuclear disarmament and the elimination of weapons of mass destruction’ was charitable.*
- *Illegal activity may disqualify an entity from registration when it indicates a purpose which is not charitable even though such activity would not justify removal from the register of charities under the statute. (At 3)*

Comment

The Supreme Court reasoned that the label ‘political’ had itself... *been used in a number of different senses (party political, controversial, law-changing, opinion-moulding, among others) and is apt to mislead.* (At 60) It also came to the view that charitable purpose and ‘political’ purpose are not mutually exclusive (at 59–71) and the exclusion of it is unnecessary. (At 72–76)

It is interesting to note that the court, by way of example, said that, ...*today advocacy for such ends as human rights or protection of the environment and promotion of amenities that make communities pleasant may have come to be regarded as charitable purposes in themselves, depending on the nature of the advocacy, even if not ancillary to more tangible charity....Protection of the environment may require broadbased [sic] support and effort, including through the participatory processes set up by legislation, to enable the public interest to be assessed. In the same way, the promotion of human rights (a purpose of the New Zealand Bill of Rights Act 1990), as its long title indicates) may depend on similar broad-based support so that advocacy, including through participation in political and legal processes, may well be charitable.* (At 71)

The court formulated a test for the determination of whether an entity is for a charitable purpose when advocacy, or promotion of a cause, or law reform is involved: *[it] depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute.* (At 76)

The decision is a reflection of the seismic shift in community attitudes and perception over what ‘charitable’ and ‘political’ purposes constitute in the decades since the war in Vietnam. While not identical or synonymous, the two fields have drawn closer and in some circumstances overlapped, as advocacy for some particular cause – for example the environment, the rights of women and children, people with disabilities and others – have become identified as having both some charitable and political aspects. This is partly attributable to the phenomenal growth of civil society and community groups over the same period, beyond government and the private sector, seeking to improve some part of society through engagement with governments and other entities.

FREEDOM OF EXPRESSION

Media freedom – law of defamation – proportionality

- Laws relating to custodial sentences and excessive fines, damages, interest and costs in respect of defamation violating article 9 of the African Charter of Human and Peoples' Rights.

IN THE MATTER OF LOHE' ISSA KONATE' v BURKINA FASO

African Court on Human and Peoples' Rights
Ramadhani P, Thompson VP, Akuffo, Ngoepe,
Niyungeko, Tambala, Ore, Guisse, Kioko and Aba JJ,
and Eno R

African Union
Application No. 004/2013
5 December 2014

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

African Charter on Human and Peoples' Rights (Charter), article 9
 International Covenant on Civil and Political Rights (ICCPR), article 19
 Treaty of the Economic Community of West African States (Revised ECOWAS Treaty), article 66(2)(c)
 Information Code of 30 December 1993, articles 109, 110 and 111
 Penal Code of 13 November 1996, article 178

Facts

The case arose out of three articles published in two separate issues of *the L'Ouragan* in 2012. Two of the articles were written by the applicant (A), entitled 'Counterfeiting and laundering of fake bank notes – the prosecutor of Faso, 3 Police Officers and a Bank Official – Masterminds of Banditry', and 'Miscarriage of Justice – the Prosecutor of Faso: a rogue officer'. The third article, written by another person, was entitled 'The Prosecutor of Faso – a saboteur of Justice'.

The relevant prosecutor (complainant, C) filed a complaint in court against the two authors for defamation, public insult and contempt of court, based on which A was subjected to criminal proceedings before the Ouagadougou High Court (HC), resulting in A being sentenced to a 12-month term of imprisonment and a fine of an equivalent of USD 3000. The HC also ordered A to pay the C damages of an equivalent of USD 9000 and court costs of an equivalent of USD 500. In addition, the HC ordered that publication of *the L'Ouragan* be suspended for 6 months, the judgment to be published in newspapers and *the L'Ouragan*, when it resumed publication, at the cost of A and the other author.

The HC decision was appealed by A, but the Ouagadougou Court of Appeal (CA) affirmed the HC's decision.

A instituted proceedings in the African Court on Human and Peoples' Rights (ACHPR), alleging that the jail term, fine and damages, as well as the court costs, violated his right to freedom of expression protected under article 9 of the *African Charter on Human and Peoples' Rights*, as well as article 19 of the ICCPR. A also alleged that his rights under the Revised ECOWAS Treaty were violated.

Issue(s)

1. Whether the conviction and punishment, including the fine, civil damages and court costs, were in violation of the right to freedom of expression.
2. Whether the Burkina Faso laws on defamation and insult and, in particular, the jail term for defamation, are repugnant to the right to freedom of expression.

Decision

The ACHPR unanimously held that:

- 1) the Respondent State violated article 9 of the Charter, article 19 of the ICCPR and article 66(2)(c) of the Revised ECOWAS Treaty due to the existence of the custodial sentences on defamation in its laws;
- 2) the Respondent State violated article 9 of the Charter, article 19 of the ICCPR and article 66(2)(c) of the Revised ECOWAS Treaty because of the conviction of A and sentence to a term of imprisonment;
- 3) the Respondent State violated article 9 of the Charter, article 19 of the ICCPR and article 66(2)(c) of the Revised ECOWAS Treaty because of the conviction of A to pay an excessive fine, damages, interests and costs; and
- 4) the Respondent State violated article 9 of the Charter, article 19 of the ICCPR and article 66(2)(c) of the Revised ECOWAS Treaty because of the conviction of A to the suspension of his publication for a period of 6 month for defamation; and

By a majority of 6 to 4, the ACHPR held that the Respondent State did not violate article 9 of the Charter, article 19 of the ICCPR and article 66(2)(c) of the *Revised ECOWAS Treaty* due to the existence of non-custodial sanctions on defamation in its laws.

Consequently, the ACHPR ordered the Respondent State to amend its legislation on defamation in order to make it compliant with the respective treaties within two years from the date of the judgment, and also allowed A to file a brief on reparation within 30 days.

Comment

Article 9 of the Charter provides that:

- 1) *Every individual shall have the right to receive information.*
- 2) *Every individual shall have the right to express and disseminate his opinions within the laws and regulations.*

The Burkina Faso national defamation law provides for custodial sentences of between 15 days and 3 months, as well as a range of monetary fines. In relation to contempt of legal officers, juries or assessors, the national law provides for a term of imprisonment from 6 months to one year, and a larger range of monetary fines.

The ACHPR carried out a detailed analysis of its previous decisions, as well as the international jurisprudence relevant to the restrictions imposed by national laws on freedom of expression. Essentially, the court had to consider whether the national laws allowing restrictions on the freedom of expression aimed to pursue a legitimate objective and whether they were a proportionate means to attain the objective sought. Only legitimate reasons to limit these rights and freedoms are permitted under article 27(2) of the Charter (i.e., rights shall be exercised in respect of the rights of others, collective security, morality and common interest). The legitimate purpose of a restriction is stated in article 19(3) of the ICCPR, which confines such a purpose to the rights and reputation of others or the protection of national security, public order, public health or public morality. To these ends, the limitation of rights allowed under the national law is consistent with international standards.

However, the crucial question is whether the restriction is necessary to achieve the objective. To answer that question, the issue of proportionality must be considered. The gist of the issue was whether the national law allowing a custodial sentence and heavy fines to protect 'public figures' was absolutely necessary and proportionate to achieving the objectives. Importantly, this question must be considered in the context of a democratic society. The ACHPR reasoned that the law to protect a 'public figure' from defamation should not provide more severe sanctions than those of an ordinary individual, because a higher degree of tolerance is expected of 'public figures'. Accordingly, the relevant national law is contrary to the requirements of article 9 of the Charter, article 19 of the ICCPR as well as article 66(2)(c) of the *Revised ECOWAS Treaty*.

The court also expressed the view that, apart from serious and very exceptional circumstances, such as incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people based on their race, colour, religion or nationality, violations of laws concerning freedom of speech should not be sanctioned by custodial sentences.

MOVEMENT

Deportation order – right of a child not to be separated from parent

- Article 9(1) of the UN Convention on the Rights of the Child clarified, and separation of a parent from their children considered to be in the best interests of the child.
-

CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT v LIU

Court of Appeal
Randerson, Harrison and Miller JJA

New Zealand
[2014] NZCA 37
26 February 2014

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

Immigration Act 2009, ss 11 and 177

United Nations Convention on the Rights of the Child (CRC), arts 3, 9 and 10

Facts

The respondent (R) was a national of Samoa, who was subjected to a deportation order. R was subsequently deported, as the officer declined to consider cancelling the deportation order. R sought review in the High Court, arguing that the officer failed to consider article 9.1 of the CRC in relation to his New Zealand citizen child. Both his then current wife and son were New Zealand citizens. Under the *Immigration Act*, an immigration officer has an absolute discretion to consider cancelling the deportation order. However, an officer must consider exercising his or her discretion to cancel the deportation order if information provided by the deportee is relevant to New Zealand's international obligations. The officer had considered R's personal circumstances, which included a protection order against him in favour of his former wife and children, his conviction and jail term for assaulting his then current wife, his relationship with his wife and son, and relevant New Zealand international obligations. However, the officer did not mention or consider article 9.1 of the CRC specifically. The High Court held that article 9.1 of the CRC was relevant, and set aside the officer's decision. The government appealed.

Issue(s)

Whether article 9.1 was a relevant consideration in a deportation case.

Decision

The Court of Appeal overturned the High Court's decision, and restored the officer's decision, based on its conclusion that article 9.1 had no relevance in a deportation case.

Comment

This decision clarifies the distinction between articles 9.1 and 9.4 of the CRC, and their applicability. The Court of Appeal relied on New Zealand and international jurisprudence, citing Australian, Canadian and UK case law, in holding that article 9.1 does not apply to deportation matters.

Article 9.1 of the CRC requires States Parties to ensure that *a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child*. This decision clarifies that Article 9.1 of the CRC only applies to situations where a family order in a domestic setting is to be considered in protecting children, and the present case is not one of those cases.

See also discussions in the similar cases of *Teoh* (1 PHRLD 88) and *Tavita* (1 PHRLD 90).

RELIGION

Religious freedom – freedom to choose languages at services

- Whether the right to freedom of religion and expression includes the right to worship in the Samoan language.
-

ILIAFI v THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AUSTRALIA

Full Court of the Federal Court
Kenny, Greenwood and Logan JJ

Australia
[2014] FCAFC 26
19 March 2014

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

International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
International Covenant on Civil and Political Rights (ICCPR)
United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
Vienna Convention on the Law of Treaties
Convention for the Protection of Human Rights and Fundamental Freedoms
Human Rights and Equal Opportunity Commission Act 1986 (Cth), s. 46PO
Racial Discrimination Act 1975 (Cth), s. 9

Facts

The defendant church (D) operated in various areas around Queensland. The church made two separate decisions (in August 2007 and April 2008) to discontinue its Samoan language services in various locations, and the consequence of those decisions was that only English was allowed to be used in public worship at the church in those locations. Consequently, Samoan language-speaking members of the church were unable to use the Samoan language publicly to pray, sing or testify in services of public worship conducted by the church. In 2009 two groups of relevant church members commenced proceedings in the Federal Magistrates Court (FMC) claiming that D had acted in a manner that was unlawful, pursuant to s. 9 of the *Racial Discrimination Act*.

The FMC characterised the issue as whether the relevant protected human right or fundamental freedom included the right to delivery of the church services to the As in the Samoan language. The applicant church members (As) contended that the issue should have been whether the relevant rights included the applicants' right to public worship as a group in their native (Samoan) language. The FMC dismissed both applications at the end of 2012. The As appealed to the Federal Court.

Issue(s)

Whether or not the appellant had in fact identified a right at issue, which was properly described as 'a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life', within the meaning of s. 9 of the Act. (At 46)

Decision

The Full Federal Court held that: [n]one of the rights to freedom of religion or freedom of expression or right to nationality, as articulated by the appellants, protected the appellants' ability to worship publicly as a group in the Samoan language in the respondent's services. The appeal was dismissed.

Comment

Justice Kenny provided a detailed analysis of the protected rights under article 5 of the CERD relevant to the appellants' claims, which in turn required the court to examine articles 18(1), 19 and 27 of the ICCPR, namely, freedom of religion, freedom of expression and protection of ethnic/religious/linguistic minority groups.

Concerning freedom of religion, the court sought to rely on the jurisprudence of the international community, particularly the European Commission and the European Court. The court reiterated that: *in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his [or her] freedom to leave the community.* (At 78) The court reasoned that: *the fact that the appellants disagreed with the decisions to discontinue the Samoan-speaking wards and to ban the use of the Samoan language in public worship did not mean that their right to freedom of religion was impaired. Rather, the appellants' right to freedom of religion was preserved by their ability to leave the Church.* (At 81) This 'exit strategy' analysis is supported and justified by the view that the autonomous existence of religious communities (i.e. the churches) is indispensable for pluralism in a democratic society, and is an issue at the very heart of the protection of freedom of religion. In legal parlance, the individual church members who chose to enter a particular church or religion might 'contract out' of their individual freedoms. The 'exit strategy' would appear to be a well-reasoned analysis, provided that the opportunity to leave a particular religious community is a meaningful one. (At 84)

The As conflated their right to freedom of religion and worship with their wish to worship in the Samoan language in a particular religious group. The latter is not an entitlement, but rather is a preference that the respondent had chosen to withdraw. The As had voluntarily chosen to join the respondent, as members, and were free to leave it if it failed to fulfil their expectations. They could not impose their expectations on the respondent, as the decision to cease services in the Samoan language was taken by those duly authorised within the respondent to do so.

Religious freedom – a parent’s ability to make decision for their children

- Conversion of children requires the consent of both parents, in accordance with article 11 of the Malaysian Federal Constitution, which upholds religious freedom, and article 5, concerning freedom of life and personal liberty.
-

INDIRA GANDHI A/P MUTHO v PENGARAH JABATAN AGAMA ISLAM PERAK & ORS

High Court
Ya Tuan Lee Swee Seng, Judicial Commissioner

Ipoh, Malaya, Malaysia
Judicial Review No.: 25-10-2009
25 July 2013

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

Malaysian Federal Constitution, art. 8(2), 11 and 12 (4)

Guardianship of Infants Act 1961, ss 5 and 11

Administration of the Religion of Islam (Perak) Enactment Act 2004 (the Perak Enactment), ss 99, 100, 101 and 106(b)

Facts

The applicant (A) was the mother of three children, who, at the material time, were aged, respectively, 12 years, 11 years, and 11 months. As a result of differences and arguments within the marriage, the husband left the home, taking the youngest child with him. The husband subsequently converted to Islam and also unilaterally decided to convert the three children to the Islamic faith, and obtained relevant official certificates for their conversion. A applied in the High Court (HC), seeking to have the decision of the children’s conversion quashed. In a separate concurrent proceeding, A sought and obtained custody of all three children.

Issue(s)

Whether the court has jurisdiction to adjudicate in this matter and whether the conversion of a child to Islam by a converted parent without the consent of the other non-converting parent has violated Malaysian law and international norms and conventions.

Decision

The court dealt with the issue of jurisdiction in detail, and ruled that it has jurisdiction to hear a constitutional challenge.

The court ruled that the conversion of the children to Islam by the father alone was unconstitutional and was in violation of Malaysian law and international norms.

The substantive part of the judgment dealt with a seemingly difficult issue in relation to the fact that a relevant section of the *Malaysian Federal Constitution* adopts the word ‘parent’ in its singular form. Article 12 of the constitution provides for the rights in respect of education and, relevantly, it provides that, ‘the religion of a person under the age of eighteen years shall be decided by his *parent* or guardian’ (emphasis added). In addition, it was argued on behalf of the husband that the word ‘parent’ in the relevant section meant a single parent as decided by the Court of Appeals (CA), which would bind the HC. In effect, the CA had ruled that consent by a single parent for a child’s religious conversion did not violate article 8 of the constitution, which sought to uphold equality before the law regardless of a person’s religion, race, descent, place of birth or gender. In discussing the relevant parts of articles 8 and 12, the HC judge felt compelled to follow the CA’s decision, due to the doctrine of *stare decisis*, but did so *on an abundance of caution* that the decision might not be the *ratio decidendi* but rather *obiter dicta*. The HC thus considered article 11 of the constitution, which sought to uphold religious freedom. The HC considered that: *the practice of one’s religion would include the teaching of the tenets of faith to one’s children*. In support of its reasoning, the HC cited article 5

(freedom of life and personal liberty) and considered that *life* include emotional, intellectual and spiritual life, which included the *right to... teach one's religious beliefs to one's children*. Further, it suggested that *personal liberty* also included *freedom to bring one's children to a place of worship or religious instruction*. (At p48) Based on this analysis, the HC ruled that the collective acts of the respondents in authorising, affirming and confirming the conversion of the minor children to Islam without the consent of their mother was unconstitutional, illegal, null and void and of no effect.

The HC also ruled that as the Perak Enactment provided for some technical requirements for a valid conversion, which the children did not or could not comply with, the conversion was therefore invalid. The HC declined to entertain the respondent's submissions that these technical requirements had never been strictly complied with by other minors as a matter of fact.

Similarly, the HC also declared the issuance of the conversion certificates invalid, based on the principles of natural justice, on the basis that the affected persons – i.e., the mother and children – had never been given an opportunity to be heard on matters that affected their interests.

Lastly, the HC considered international human rights instruments and conventions (UDHR, CEDAW, CRC), as well as judicial principles (Bangalore principles), and argued that, where there were two possible interpretations of the word 'parent' in article 12(4) of the constitution, the interpretation that best promoted Malaysia's commitment to international norms and human rights was to be preferred. (At p78) It seems unusual for the court to go through this analysis in the latter part of the judgment, given that it considered itself bound by the CA's decision on the earlier point.

Comment

The case is an interesting one in the context of Malaysia, a multicultural country in which Islam is the state religion and exerts a strong influence on daily life, which is balanced by a long history of moderation and degree of secularism in public affairs. The balance of the pendulum between the two strands has oscillated over time. This decision is remarkable in its invalidation of the attempt of one parent to convert his children to Islam without the consent of his wife. The Islam authorities in the State of Perak would have taken a dim view of this decision on two grounds: first, the decision circumvented the decision of the father, in a largely patriarchal context; and second, it invalidated the Islamic conversion of the children. The creative manner in which the court resolved the matter in favour of A, notwithstanding the binding precedent of a higher court, by relying on alternative provisions of the *Malaysian Federal Constitution* is also very encouraging.

Note: Despite the fact that the mother of the children obtained the custodial orders and won this decision, due to lack of action by the police and the complicated court system (Federal and Shariah law courts) in Malaysia, she was not able to be reunited with her youngest child until November 2014. (See http://news.yahoo.com/malaysias-sharia-law-costs-non-muslims-kids-061705866.html;_ylt=AwrSbmik7q5VBFkAYfIXNyoA;_ylu=X3oDMTByb2lvbXVubGNvbG8DZ3ExBHBvcwMxBHZ0aWQDBHNIYwNzcg-- and <http://www.malaysia-today.net/segregating-malaysia/>)

TORTURE

Torture – CIA rendition

- **Detention, interrogation, ill-treatment, torture and the transfer to US custody contravened articles 3, 5, 8 and 13 of the European Convention on Human Rights.**
-

CASE OF EL-MASRI v THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

European Court of Human Rights (Grand Chamber)
Bratza P, Tulkens, Casadevall, Spielmann,
Vajic, Lorenzen, Jungwiert, Lefevre, Hajiyev,
Guerra, Bianku, Karakas, Gaetano, Laffranque,
Scilianos, Mose and Keller JJ

European Union
39630/09
13 December 2012

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

Vienna Convention of Consular Relations 1963, article 36

International Covenant on Civil and Political Rights (ICCPR), articles 4, 7 and 9

International Convention for the Protection of All Persons from Enforced Disappearance, articles 1, 2, 3 and 4

United Nations Office of the High Commissioner for Human Rights, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – the Istanbul Protocol, 1999

International Law Commission, 2001 Articles on Responsibility of States for Internationally Wrongful Acts, articles 7, 14, 15 and 16

United Nations General Assembly, Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 2 July 2002, UN Doc. A/57/173

Parliamentary Assembly of the Council of Europe, Resolution 1433 (2005) on lawfulness of detentions by the United States in Guantánamo Bay, adopted on 26 April 2005

Parliamentary Assembly of the Council of Europe, Resolution 1463 (2005) on enforced disappearances, adopted on 3 October 2005

United Nations General Assembly Resolution 60/148 on torture and other cruel, inhuman or degrading treatment or punishment, adopted on 16 December 2005

European Commission for Democracy through Law (Venice Commission), Opinion on the international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners (no. 363/2005, 17 March 2006)

Report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 4 February 2009, UN Doc. A/HRC/10/3

United Nations Human Rights Council, Resolutions 9/11 and 12/12: Right to the Truth, adopted on 18 September 2008 and 1 October 2009, respectively

The European Convention on Human Rights, articles 3, 5, 8, 10 and 13

Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, 30 March 2011, The Constitution of 1991, The Criminal code, the Criminal Procedure Act of 1997, The Obligations Act of the Former Yugoslav Republic of Macedonia

Facts

This matter arose from the post 9/11 anti-terrorist operations mounted by the United States government. The applicant (A) was a German national who travelled by land to the Former Yugoslav Republic of Macedonia on 31 December 2003, where he was detained by the Macedonian authority.

A alleged, in particular, that he had been subjected to a secret rendition operation, namely that agents of the respondent State had arrested him, held him incommunicado, questioned and ill-treated him, and handed him over at Skopje Airport to agents of the US Central Intelligence Agency (CIA) who had transferred him, on a special CIA-operated flight, to a CIA-run secret detention facility in Afghanistan, where he had been ill-treated for over four months. The alleged ordeal lasted between 31 December 2003 and 29 May 2004, when A returned to Germany. (At 3)

The allegations were the subject of investigations by the Parliamentary Assembly of the Council of Europe (the Marty Inquiry) and the European Parliament (the Fava Inquiry). A sought redress, unsuccessfully, in the USA and Macedonian courts. He also sought redress in the German court, resulting in arrest warrants issued against 13 CIA agents. A instituted proceedings in the ECHR against his own country, the Former Yugoslavia Republic of Macedonia (R).

Issue(s)

Whether R breached articles 3 (torture and ill-treatment), 5 (personal liberty and rights while detained), 8 (right to respect for private and family life), 10 (freedom of expression and right to truth) and 13 (right to effective remedy before a national authority) of the *European Convention on Human Rights* (the Convention).

Decision

The court unanimously held that the respondent state had breached articles 3, 5, 8 and 13 of the Convention by acts done to the applicant while he was under their control, including transferring the applicant into the custody of the US authorities. The court ordered non-pecuniary damages of EUR 60,000 (plus any chargeable tax and interest) to be paid to the applicant by the respondent state within three months. The court otherwise dismissed the claim based on article 10.

Comment

In discussing the general principles applicable to the prohibition of torture and other ill-treatment the court confirmed that: *[u]nlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France [GC]*, no. 25803/94, § 95, *ECHR 1999-V*, and *Labita v. Italy [GC]*, no. 26772/95, § 119, *ECHR 2000-IV*). The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned...* (At 195)

The court also emphasised the special characteristic of torture, which differed from other ill-treatment, in its severity of treatment and a purposive element, as recognised in the *UN Convention Against Torture*, which defined torture in terms of the ‘intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating’. (At 197)

Taking the evidence as a whole, the court considered that the transfer of the applicant to the US authority (being characterised by the court as an ‘extraordinary rendition’) was done knowingly exposing him to a real risk of ill-treatment contrary to article 3 of the Convention. (At 215-222)

In assessing the evidence, the court adopted the standard of proof ‘beyond reasonable doubt’, but highlighted that its role was not to rule on criminal or civil liability, but on contracting states’ responsibility under the Convention. Its task thereby influences its approach to the issues of evidence and proof. There are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. *According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The*

Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights. (At 151)

More recent cases on the same subject matter (assisting CIA rendition) have applied these principles, e.g., *Case of Al Nashiri v Poland (Application no. 28761/11)* (24 July 2014).

The practice of extraordinary rendition is a modus operandi that has been developed by some states as a response to the threat posed to national and international security by terrorism, especially after 9/11. It involves the removal of suspects or wanted persons (for whatever reason, but usually on the grounds of a threat to national security) from the jurisdiction of a state to the jurisdiction of another state or territory, where they may be interrogated unimpeded, through the lack of adherence of some states to human rights standards prescribed by national law and/or international human rights instruments. This situation has seen states tacitly justifying the most heinous of acts in the interests of national security and the security and wellbeing of their citizens.

VIOLENCE AGAINST WOMEN

Domestic violence – state’s responsibility

- A state has a positive duty to prevent domestic violence and protect women and children, which includes an effective investigation mechanism.

CASE OF EREMIA v THE REPUBLIC OF MOLDOVA

European Court of Human Rights
Casadevall, President, Gyulumyan, Bîrsan, Šikuta,
Guerra, Tsotsoria and Gričco JJ

European Union
3564/11
28 May 2013

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

Moldova Criminal Code, article 59 (conditional release from criminal liability) and article 201 (family violence)

Moldova Domestic Violence (Combat and Protection) Act 2007, s. 15 (protective measures)

European Convention on Human Rights, article 3 (torture and ill-treatment), article 8 (respect for private life), article 14 (discrimination based on gender) and article 17 (destruction of recognised rights and freedom)

Facts

The applicants were two teenage daughters and their mother (first applicant). The first applicant (A1) complained that the Moldovan government failed in its positive duties of protection of her and her daughters from the ill-treatment perpetrated by her husband, who was a police officer. The incidents (during the period 2 July 2010 – when A1 petitioned for divorce – and 14 April 2011) included physical violence as well as threats and verbal abuse, mainly directed at the first applicant. The two teenage daughters had also been subjected to verbal abuse and had also been psychologically affected by witnessing various abuses committed by their father against the mother. The alleged abuses were reported to the police in the first instances, and investigation ensued, resulting in a protection order being issued and a monetary fine being issued against the husband. However, in the subsequent period, A1 continued to suffer abuse by the husband, who had breached the protection order, and the police had been informed. The police nevertheless suspended the criminal investigation, with a warning to the husband that the investigation would resume if further breaches occurred. In addition, the police pressured A1 to drop the criminal complaints. The government welfare agency also pressured A1 to reconcile with her husband. None of the facts were in dispute, save for one matter, concerning the allegation issue of the husband returning home and remaining for a couple of weeks, during which time abuses occurred. There was no dispute about his returning home or the abuses, but the police alleged that A1 had agreed to the husband’s return, which she denied. As the government did not provide any evidence of such consent, the court ruled on the basis that the husband’s return home was not agreed to by A1.

Issue(s)

Whether the Moldovan government has breached its obligations under articles 3, 8, 14 and 17 of the *European Convention on Human Rights*.

Decision

The European Court of Human Rights (ECHR) unanimously held that the Moldovan government failed in its positive obligation under articles 3 and 14, in respect of A1. The court also found that the state failed in its obligations under article 8, to protect A1’s children. The court ordered non-pecuniary damages of EUR 15,000, and legal costs.

Comment

Moldova is a European country, which has a high rate of gender-based violence. Forty-one per cent of women have encountered some form of violence within the family during their lifetime (according to a 2005 survey, quoted by a UN Special Rapporteur who visited Moldova in 2008), and 73.4 per cent of the perpetrators were the victims' husbands or former husbands. (At 37)

This case is significant in that, notwithstanding the existence of national legislation, the court will look at what the contracting state did to guarantee practical and effective rights (rather than those that are merely theoretical or illusory) in order for the state to discharge its Convention obligations. The court rejected the state's claim that authorities had taken all reasonable measures to protect the first applicant from the risk of violence and to prevent such violence from recurring. 'Effective investigation' is one of these measures, when ill-treatment has been alleged to have been inflicted on an individual, even if it was inflicted by private individuals. *For the investigation to be regarded as 'effective', it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and to the length of time taken for the initial investigation.* (At 51)

A similar approach was adopted by subsequent decisions: *Case of T.M. and C.M. v the Republic of Moldova* (Application no. 26608/11, 28 Jan 2014)

The principles of 'effective investigation' adopted by the ECHR in relation to ill-treatment complaints made by domestic violence victims provide a template for Pacific Island countries, in which family protection legislation has already been enacted. Family and domestic violence is more insidious than generalised violence because it is more frequent and is often sanctioned by cultural and religious practice. The ECHR was emphatic about the special vulnerability of victims of domestic violence, and the state's positive obligation to protect them from being ill-treated. The outcome of this case demonstrated that a regional mechanism, such as a Pacific Human Rights Commission or Tribunal, may strengthen the protection guaranteed under respective national legislation.

PART III: CASES DEALING WITH SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS (SRHR) AND REFUGEE MATTERS

SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

SRHR – abortion – sentencing

- Whether the Convention on the Rights of the Child and Convention on the Elimination of All Forms of Discrimination Against Women ought to be considered in sentencing.

POLICE v APELU

Supreme Court
Nelson J

Samoa
[2010] WSSC 178
20 December 2010

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

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
Convention on the Rights of the Child (CRC)
Crimes Ordinance 1961

Facts

The defendant (D) pleaded guilty to one count of procuring an abortion, and came before the court for sentencing. A women inmate at Tafaigata Prison (W) who was two-months pregnant asked D to abort the foetus. The procedure was carried out by D using a duck speculum and uterine sound instrument while W was on weekend parole. Soon after W returned to the prison she was rushed to hospital complaining of severe labour pains. At the hospital, W delivered a live, premature female infant weighing 760 grams. The baby died of respiratory failure as a result of extreme prematurity and neonatal sepsis. The medical report in the matter stated that the instruments used by D had infected W's uterus and had induced the labour. D was originally charged, among numerous counts, with manslaughter, but these charges were withdrawn on trial day when D pleaded guilty to one count of procuring an abortion.

Issue(s)

What should be the appropriate sentence?

Decision

D was sentenced to five-and-a-half years in prison for the offence of procuring an abortion. Earlier, in 2004, in relation to different conduct giving rise to the same offence of procuring an abortion, D had been sentenced to three-and-a-half years' imprisonment. The sentencing judge in the present case considered D's previous record of recent convictions as aggravating factors. While the maximum sentence for this offence is seven years, the court considered it warranted a starting point of six-and-a-half years. The only mitigating factor in D's favour was her guilty plea, which avoided the necessity of a full trial, for which 12 months was deducted from her sentence.

Comment

The decision made by the court reflects the conflict between culture and human rights, and how cultural and religious factors in the Pacific take precedence, despite treaty ratification of key human rights conventions. It would have been interesting to see the court balance affirmative obligations

under the CRC and CEDAW, and whether this would have had any effect on sentencing. Regardless, the fact that Samoa continues to criminalise abortion after ratifying those conventions evinces clear legislative intention that abortion be criminalised, in the absence of parliament domesticating CEDAW through specific legislation.

The judge was clear in the primacy of parliament's intention: *This country through its elected representatives namely Parliament has chosen to take a pro-life stand and have legislated against abortion except when it is necessary to preserve the life of the mother: see section 73 (3) of the Crimes Ordinance as recognised by this court in Police v Apelu [2004] WSSC 8. Parliament having enacted that law the courts [sic] duty is beyond question, it is required to enforce the laws of the land. The rightness, wrongness or morality of such a law is debated in the building next door, not in this one.*

Nonetheless, those considerations did not preclude the court from taking CEDAW into account for the purposes of sentencing. While parliament had enacted the law criminalising abortion and specifying sanctions, it reserved to the courts the latitude to impose lesser sentences than those prescribed. However, given the previous conviction of D, and the court's reference to Christian values and the sanctity of life, it appears that there was a clear determination on behalf of the court to impose a deterrent sentence. The tenor of the court's remarks would, most likely, resonate throughout the Pacific, because of the strength of traditional and religious values.

SRHR – discrimination – child custody – relevance of a parent’s sexuality

- Examination of judicial proceedings and whether the Chilean courts had breached the American Convention on Human Rights.

CASE OF ATALA RIFFO AND DAUGHTERS v CHILE

Inter-American Court of Human Rights
García Sayán P, Ventura Robles VP,
Franco, Macaulay, Abreu Blondet and Pérez Pérez JJ

Organisation of America States
Series C, No. 239
24 February 2012

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

American Convention on Human Rights (the Convention), articles 1, 8, 11, 17 and 25

Facts

The complainant, Ms Karen Atala Riffo (C), made a complaint to the Inter-American Commission on Human Rights (which subsequently referred the matter to the Inter-American Court of Human Rights [IACHR]), in relation to the decisions made by the Chilean judiciary in a child custody proceeding between herself and her husband and the manner in which C was dealt with by the Chilean judiciary.

C separated from her husband in March 2002 and, by agreement, it was arranged that their three children (girls, born in 1994, 98 and 99) would live with C. On 14 January 2003 the husband filed child custodial proceeding in the Juvenile Court (JC) after he became aware that C had a cohabiting same-sex partner living with their children. As C was a Chilean court judge, the litigation prompted media coverage and C’s same-sex relationship was reported. Consequently, the husband sought an interim order seeking to have the children live with him, pending the outcome of the substantive proceeding. The judiciary also carried out an investigation on C in relation to her reported sexual orientation and unrelated alleged professional misconduct. The interim order was granted and the children were removed from the mother, C, to live with their father. On 29 October 2003 the Juvenile Court ruled in favour of C, but the husband sought an appeal in the Court of Appeals (CA), along with an application for a temporary injunction preventing the return of the children to C. The temporary injunction was granted by the CA. C made a complaint to the Supreme Court (SC) against two judges of the CA who had heard the temporary injunction application. The SC dismissed the complaint. On 30 March 2004 the CA (in the absence of the two challenged judges) upheld the Juvenile Court’s decision in favour of C, but the husband immediately applied for a remedy of complaint (*recurso de queja*)⁴ in the SC and an interim injunction preventing the return of the children to C. On 7 April 2004 the CA granted the injunction to the husband. On 31 May 2004 the SC (by 3:2 majority) granted the remedy of complaint in favour of the husband, and awarded permanent custody to the husband.

In the Juvenile Court the husband alleged that C’s sexuality and cohabiting with a lesbian partner would disqualify her as a suitable mother to care for the children. In particular, he alleged that children living in that environment would be subjected to distorted view of a normal family and would expose themselves to physical harm (sexually transmitted illness – STI) and psychological harm (potentially experiencing social discrimination based on the mother’s sexuality and the family structure). (See par. 31) The JC rejected the husband’s argument and restored custody of the children to C.

The CA endorsed the JC’s view, which had held that: *the existing evidence had established that the respondent’s sexual orientation was not an impediment to carrying out responsible motherhood, that*

⁴ The sole purpose of the *recurso de queja* (remedy of complaint or complaint appeal) is to correct serious faults, or abuses committed in the issuance of a jurisdictional ruling. See par. 183.

there was no psychiatric pathology that would prevent her from exercising her 'role as a mother', and that there were no indications that would allow for the presumption of any grounds for incapacity on the part of the mother to take on the personal care of the minors. The JC also held that there was no evidence to show that the children would be at risk of contracting any STI or suffering other harm including potential discrimination due to the mother's sexuality and choice of lifestyle. (See paras 44–49 and 52)

The husband argued before the SC that: *the judges being challenged had committed a 'fault and serious and flagrant abuse' because; i) they [had] given preference to the rights of the mother over the rights of the daughters; ii) they [had] failed in their legal duty to protect the vulnerability of the girls; and iii) they [had] violated the principles governing the conscientious assessment of evidence in cases involving family matters. More specifically, [the husband] argued that the judges had ignored all the evidence in the case demonstrating that "open expression of lesbian behavior produced directly and immediately in M., V., and R. confusion regarding sexual roles that interfered with and [would] later interfere with the development of a clear and defined sexual identity. (See par. 53; footnotes omitted) The SC accepted the husband's complaint based on the principle of the best interests of the child, and pronounced that the lower courts failed to recognise the deteriorating environment of the children, since their mother had made her lifestyle choice and had failed to consider the potential social discrimination the children might face, and had failed to consider the perception of people close to the children, in relation to the mother's same-sex relationship. (See paras 55–57, 97 and 113)*

Issue(s)

Whether the way in which the Chilean judiciary handled the proceedings and the judicial investigation about C had violated the *American Convention on Human Rights*.

Decision

The IACHR considered that rights of sexual orientation were protected under the Convention and that any restriction on these rights had to be legitimate, necessary and proportional. While the protection of the best interests of a child is a legitimate goal, the judgments in the SC and in the provisional decision of the JC indicated that these courts based their decisions on inadmissible considerations to the detriment of C. The courts also failed to show causality between the alleged harm of the children and C's alleged behaviour. Rather, the courts justified their decisions on abstract, speculative and stereotyped conceptions of the alleged harm to the children. The courts therefore violated C's rights under article 24 of the Convention, in conjunction with article 1(1). (See paras 107–146) Consequently, the IACHR also found that the decisions discriminated against the children based on their mother's sexual orientation in violation of article 24 of the Convention, in conjunction with articles 19 and 1(1).

The IACHR also considered other aspects of violation, and upheld C's complaints in relation to the violation of her rights of private life and family life (under articles 11(1) and 17(1) of the Convention), but rejected her claims based on rights to judicial protection and guarantee (articles 8 and 25).

In relation to C's complaints based on the judiciary's investigation of C, the IACHR upheld C's claims of violation regarding her rights to equality, private life and judicial protection and guarantee.

The IACHR ordered the state to publish the judgment, to acknowledge responsibility and to publicly apologise to C, and to pay pecuniary and non-pecuniary compensations to C and her children. The IACHR also asked Chile to put in place training and education plans for the judiciary and public officials in order to uphold the protected rights.

Comment

The IACHR held that a parent's sexual orientation should not be admissible as a consideration in custodial proceedings in a discriminatory way to the detriment of the complainant. It also considered

the principle of best interests of a child in relation to the consideration of the restriction of a protected right on the child's parents. It held that *the argument that the child's best interest might be affected by the risk of rejection by society, the Court considers that potential social stigma due to the mother or father's sexual orientation cannot be considered as a valid 'harm' for the purposes of determining the child's best interest.* The IACHR went further, saying that: *If the judges who analyze such cases confirm the existence of social discrimination, it is completely inadmissible to legitimize that discrimination with the argument of protecting the child's best interest.* (At par. 121)

The IACHR appeared to have come to this view on good policy grounds. It was of the view that: *States cannot use this as justification to perpetuate discriminatory treatments. States are internationally compelled to adopt the measures necessary 'to make effective' the rights established in the Convention... and therefore must be inclined, precisely, to confront intolerant and discriminatory expressions in order to prevent exclusion or the denial of a specific status.* (At par. 119) The IACHR illustrated the point by noting that social, cultural and institutional changes are taking place in contemporary society, where interracial couples, single mothers or fathers and divorced couples are much better received by the public than they once were. States must help to promote social progress and refrain from the grave risk of legitimising and consolidating various forms of discrimination against human rights. (See par. 120)

The conduct of members of the Chilean judiciary, and their concerted attempts to impugn C's attempts to gain custody of her children because of her life style choices reflects the challenges faced in the continuing struggle to ensure all sections of society are able to exercise their human rights to the fullest extent possible. C's sexuality became the central issue, rather than her ability to be a responsible, loving parent to her children. The judges who ruled against C became mired in a plethora of dubious argumentation about her seeming unsuitability because she was in a same-sex relationship. The case also needs to be understood in the context of a 'machismo' culture prevalent in Latin America. C's decision to enter into a same-sex relationship would have affronted her husband far more than had she taken up with another man. The husband's determination to pursue the custody issue to Chile's highest appellate court, coupled with C's genuine sense of grievance at the way in which her colleagues had dealt with her, underscores the challenges faced in the continuing struggle to ensure all sections of society are able to exercise their human rights to the fullest extent possible, especially in a 'machismo' culture.

This decision appeared to have a significant impact in Chile, paving the way for law reform in recognising non-discriminatory treatment based on gender and sexual orientation. See <http://www.washingtonblade.com/2014/12/08/sex-marriage-bill-introduced-chile/> .

SRHR – health – sterilisation of pregnant HIV patients – consent

- Pregnant women under labour pain were not capable of providing the required informed consent before sterilisation procedures were carried out on them. No evidence was induced that was capable of showing that their HIV status was the reason for the sterilisation procedures.
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GOVERNMENT OF THE REPUBLIC OF NAMIBIA v LM, MI AND NH

Supreme Court
Shivute CJ, Maritz and Mainga JJ

Namibia
Case No. SA 49/2012
3 November 2014

Law(s) and/or international instrument(s) considered
Constitution of Namibia (NC)

Facts

The three respondents (Rs), all female Namibians, were each sterilised by way of a surgical procedure known as bilateral tubal ligation, at two state hospitals, on different occasions between 2005 and 2007. All of the Rs had positive HIV statuses. The sterilisation was performed at the same time as caesarean operations for each of the women. Evidence adduced disclosed that all Rs had signed a consent form prior to the sterilisation operation. The Rs instituted proceedings against the government seeking compensation based on wrongful sterilisation without consent and violation of their constitutional rights. The Rs also alleged discrimination on the basis of their HIV status. The court at first instance ruled for the Rs on the point of consent, and the state appealed.

Issue(s)

1. Whether the government medical practitioners, in performing this surgical sterilisation procedure on the three respondents, had done so without their informed consent.
2. Alternatively, whether the signed consent forms satisfied the requirement of informed consent for the sterilisation operations under the circumstances.
3. Whether the alleged wrongful act amounted to discrimination and violation of the Rs' constitutional rights.

Decision

The Supreme Court held that the Rs did not give informed consent, because they were each in varying stages of labour. Therefore they did not fully and rationally comprehend the consequences of providing consent for the sterilisation procedure. The fact that none of the Rs made any appointment or booking to confirm their intention to be sterilised before going into labour negates the fulfilment of informed consent.

The appeal in respect of each of the respondents was dismissed and the matter was referred to the High Court for determination of the quantum of damages payable by the appellant.

Comment

This case is important authority on the application of the right to health in the Namibian context, particularly in the area of sexual and reproductive health and rights.

The Bill of Rights in the *Constitution of Namibia* makes provision for the right to liberty to be protected, under art. 7, the right to a family, which is guaranteed under art. 14, and the right to human dignity, under art. 8.

The argument that a wrongful and unlawful practice of discrimination on the basis of the HIV positive status was committed by government medical practitioners against the Rs was rejected, as the High Court was unable to find any credible evidence to support the second limb of the Rs' claim. To succeed on this ground the Rs would have to prove that the government medical practitioners performed the sterilisation procedure because of their HIV positive status, and did not perform this procedure on women who did not have HIV positive status.

Informed consent involved knowledge, apprehension and consent. Under the circumstances, the respondents did not have the capacity to apprehend the consequence of the operation. A non-reversible operation of this kind placed the onus on the medical practitioners to ensure that the respondents had the capacity to apprehend the consequence, and when they were in labour, and severe pain, they were considered as not having that capacity. (See paras 96–108)

The Supreme Court also made observations about the modern human rights approach to patients' rights and self-determination with respect to medical paternalism, and was critical of the medical professionals in this case. However, the court commented from the outset that there was no evidence to entertain any claim of discrimination based on the respondents' HIV status.

SRHR – discrimination – employment – pregnancy – redundancy

- Employer made pregnant employee's position redundant after approving her maternity leave.
-

STANLEY v SERVICE TO YOUTH COUNCIL INCORPORATED

Federal Court
White J

Australia
[2014] FCA 643
20 June 2014

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

Sex Discrimination Act 1984 (SDA), ss 14 and 28B
Fair Work Act 2009 (FWA), s. 44

Facts

The applicant (A) commenced working at the Service To Youth Council Incorporated (SYC, a youth support non-governmental organisation) – the defendant (D) – in November 2009. In February 2011 A informed her immediate manager of her intention to take 12 months' maternity leave, commencing closer to the due date of birth. She commenced her leave in August 2011. In early 2012 A contacted her manager and proposed to return to work earlier than previously arranged, with different work arrangement proposals. Following a formal meeting between the parties, D informed A that A's position had been made redundant and her employment was terminated.

A complained that, since revealing her pregnancy, SYC's management had engaged in actions intended to lead to her removal from the organisation. A also alleged that the comment made by a senior manager that 'she should not make a "hasty" commitment to a return to work because she may decide later that she would like more time off, or not to return to work at all' was in violation of sexual harassment legislation (s. 28B of the SDA).

A also alleged that D's decision to make her position redundant was in violation of the provisions of the SDA (i.e., discrimination in employment on the grounds of a person's sex, pregnancy or family responsibilities) and the FWA (i.e., statutory duties to respond to the employee's request within a specified time limit and duties to consult).

Issue(s)

1. Did the senior manager's comment fall within the ambit of sexual harassment?
2. Did D's act to make A's position redundant and to retrench A, under the circumstances, amount to discrimination in employment based on A's sex, pregnancy or family responsibilities?
3. Did D breach the relevant provisions of the Fair Work Act?

Decision

The Federal Court considered the history of the alleged incidents, including evidentiary issues (see also *Stanley v Service to Youth Council Incorporated (No 2) [2014] FCA 644 (20 June 2014)*), and held that A failed to make out her case in relation to sexual harassment and sex discrimination. However, the court upheld a complaint in relation to D's failure to respond to A's request for different work arrangements, according to the legal requirement under the FWA, and ordered damages of A\$4,500 to be paid to A.

Comment

In relation to the sexual harassment allegation, the court was of the view that: [the] *statements to the applicant about her decisions in relation to a return to work cannot reasonably be characterised as 'conduct of a sexual nature' in relation to the applicant. Those comments did not involve or evidence*

sexual attraction, instinct, activity or relationships. Instead, they appear to be in the nature of a well-intentioned, if unsolicited, suggestion to the applicant concerning her own interests. Even if from the applicant's perspective the suggestion was gratuitous and unwanted, it was not conduct of a sexual nature. (At 88)

In relation to the allegation of discrimination in employment based on sex, pregnancy and family responsibilities, the applicant relied on circumstantial evidence of incidents that occurred during a period of 12 months from before the applicant's maternity leave until the termination of her employment. On the evidence presented, the defendant did not target the applicant. The way in which the defendant treated the applicant was not less favourable than how it would have treated an employee who was not pregnant or without family responsibilities but who had similar skills and experience, and who took 12 months' leave with the defendant's consent, and had an equivalent entitlement to return to work. The judge appeared to accept that the applicant had suffered some disadvantage due to her absence from work, but took the view that this disadvantage would have been suffered by the hypothetical employee, as a result of their absence from work but not by virtue of the reason for the absence (in this case pregnancy). For this reason, the applicant did not establish disadvantageous treatment for a proscribed reason. (At 133)

While the legal test for discrimination cases requires a comparison of treatment to a hypothetical person without the characteristics of the proscribed elements but under the similar situation, the fact that an employer appeared to have taken advantage (apparently on two separate occasions – see below) of the opportunity to restructure the organisation and to make employees' positions redundant during their approved absence would seem to have gone against the legislative intent in relation to protecting employees who are pregnant or have family responsibilities.

The judgment in a strikingly similar case was delivered by the same court on the same date, with the same defendant, involving another pregnant employee, who was made redundant in 2010 during her maternity leave. The application, based on discrimination, was similarly dismissed. See *Poppy v Service to Youth Council Incorporated [2014] FCA 656* (20 June 2014).

SRHR – specification of gender – male/female dichotomy

- Whether a person’s choice not to specify a male/female gender declaration in a registration certificate is permitted under the legislation.
-

NSW REGISTRAR OF BIRTHS, DEATHS AND MARRIAGES v NORRIE

High Court
French CJ, Hayne, Kiefel, Bell and Keane JJ

Australia
[2014] HCA 11
2 April 2014

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

Births, Deaths and Marriages Registration Act (NSW) 1995

Facts

The appellant (A) underwent a sex affirmation procedure in 1989, in Scotland, where she was born with a male reproductive organ. A later became an Australian resident. In November 2009 A applied for a registration of change of sex under the *NSW Births, Deaths and Marriages Registration Act*, seeking to have her sex registered as ‘non-specific’. In February 2010 the NSW Registrar of Births, Deaths and Marriages approved A’s application and provided her with the relevant certificates registering her sex as ‘not specified’. The Registrar later informed the appellant that the change of sex certificate was invalid. A sought review of the decision at the NSW Administrative Decisions Tribunal (ADT).

The ADT found that it was not open to the Registrar to register A’s sex as ‘non-specific’. The ADT proceeded on the basis that: *the Act is predicated on an assumption that all people can be classified into two distinct and plainly identifiable sexes, male and female ... [T]he Registrar does not have the power under section 32DC of the Act to register a change of sex by a person to 'Non specific'.* The appeal panel of the ADT dismissed an appeal.

The NSW Court of Appeal upheld the appellant’s appeal, holding that it was open to the Registrar to consider registering change of sex beyond the male or female categories, and ordered the ADT to reconsider the matter according to the submitted facts. The Registrar appealed the decision to the High Court.

Issue(s)

Whether it is open to the Registrar to register a person’s sex as ‘non-specific’ under the relevant NSW legislation.

Decision

The High Court held that it was open to the Registrar to register the category of sex as ‘non-specific’, based on bona fide evidence.

Comment

While the decision was largely about the interpretation of a specific statute, the High Court recognised that the sex of a person is not unequivocally male or female in every case. The indeterminate nature of a person’s sex in some cases has support, both under the relevant legislation and in case law (*AB v Western Australia [2011] HCA 42* (6 October 2011)). Based largely on this recognition of the potential for indeterminate sex, the court set out to interpret the relevant legislation, and pronounced that the law does allow the NSW Births, Deaths and Marriages Registrar to consider registering a person whose sex is non-specific.

However, the court rejected the NSW Court of Appeal's ruling that it was open to the Registrar to consider sex categories such as 'intersex' or 'transgender'. The High Court said that it was unnecessary for the court to consider that issue, and that consideration of these further categories of sex went too far.

The significance of this High Court decision appears to be that it reaffirms the court's previous view that a person's sex or gender does not necessarily fall within the male-female binary. It also further diminishes the traditional view (based on the English case of *Corbett v Corbett*, decided in the early 1970s), advanced by most religious groups, that a person's sex or gender is purely a matter of biology (the chromosomal, gonadal and genital tests). As legislation increasingly recognises gender reassigned persons, and case law follows suit in gradually recognising the fluidity of gender issues, these developments may pave the way in the not-too-distant future for greater equality for otherwise marginalised members of the community.

One argument advanced by the Registrar was that allowing a 'non-specific' sex registration would create unacceptable confusion. The High Court rejected this argument, because the argument was not supported by facts. The Registrar was not able to identify any particular statute which could not be construed to operate as intended in respect of a person whose sex was recorded in the register as 'non-specific'.

REFUGEES

Asylum seeker – liberty – unlawful detention

- Asylum seekers transferred from Australia to Nauru failed in their action against being detained.
-

AG v SECRETARY OF JUSTICE

Supreme Court
Von Doussa and Ward JJ

Nauru
[2013] NESC 10
18 June 2013

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

Constitution of Nauru (CN)
Immigration Act 1999
Immigration Regulations 2013
Refugee Convention Act of 2012
Asylum Seekers (Regional Processing Centre) Act 2012
Criminal Proceedings Act

Facts

The applicants (As) arrived at Christmas Island, Australia, as offshore entry persons on or about 1 September 2012, and on 24 September 2012 they were brought to Nauru on an aircraft against their will. On their arrival in Nauru, the As were granted entry permits, called Australian Regional Processing Visa (RPV), issued under the *Immigration Act* 1999. The application for the relevant visa was not made by the As because the *Immigration Regulations* 2013 provided that an application for the RPV may only be made by an officer of the Commonwealth of Australia.

The visa was issued for the purpose of making a refugee status determination for the visa holder. One of the visa conditions was that the holder must reside in specified premises, in this case, the Regional Processing Centre (RPC). The detainees were organised to take part in occasional excursions outside the detention centre, involving surveillance and control. The As' freedom to move around had been restricted, within the confines of the RPC, with constant monitoring by security personnel.

The As sought an order for their release from the RPC, alleging that they were unlawfully detained.

Issue(s)

Whether the As had been unlawfully detained.

Decision

The application was dismissed.

The Supreme Court held that the As were 'detained' within the meaning of art. 5(1)(h) of the CN. However, the detention was authorised by the *Immigration Act* 1999 and the *Immigration Regulations* 2013, such that the detention was lawful under art. 5(1) of the CN.

Comment

The Supreme Court rejected the respondent's (the Secretary of Justice of Nauru's) submissions that were based on the arguments that a restriction that compels where asylum seekers must reside, as one of the temporary visa conditions, was not detention prohibited under the CN. Instead the court accepted that it was detention regardless of the fact that the asylum seekers could choose to leave

Nauru at any time. The issue was whether the detention was lawful, as opposed to being arbitrary. After comparing the wordings of the relevant exceptions to the constitutional prohibitions between the CN and the *European Bill of Rights*, the court came to the view that the Nauruan subsidiary legislation authorising the detention was lawful and allowed by the CN. The court's decision was also influenced by the temporary nature of the asylum seekers' stay in Nauru, under the agreement between the Australian and Nauruan governments. Asylum seekers who were transferred to Nauru were never intended to be resettled in Nauru, even if they were accepted as being refugees. Apparently the Australian Human Rights Commission has a different view in relation to children asylum seekers kept in detention in Nauru. On November 2014 the Australian Human Rights Commission published the report 'The Forgotten Children', which assesses evidence of the impact of prolonged detention on children and sets out that the indefinite periods of detention with no pathway to protection or settlement of children, including 186 children in Nauru, constitutes deprivation of personal liberty.

The issue of asylum seekers is vexed, in which human rights and political realities collide.

The suggestion that protective custody may be warranted may create problems in the human rights context, because detention, as a condition of asylum seekers' interim placement, is premised on their uncertain status (not a refugee until assessed to be so), and is designed as a temporary measure. Once asylum seekers have been assessed as refugees they should be released into the community pending resettlement. Those who are assessed as not being refugees (whether stateless or not) will continue to be detained pending removal, which begs the question as to the character of their detention while they continue to be held in 'protective detention' without any realistic prospects for resettlement in third countries.

On a separate issue, segregation by means of detention raises serious concerns from a human rights perspective, because those detained have committed no crime and are entitled to the presumption of innocence. The fact that the Government of Nauru took a policy decision to accommodate the regional refugee processing centre also mitigates arguments (such as security and health) justifying mandatory detention.

Asylum seeker – liberty – *locus standi* (standing) to institute proceedings

- Whether a politician has sufficient public interest to institute a court action in relation to detained asylum seekers.
-

NAMAH v PATO

Supreme Court of Justice
Salika DCJ, Sakora, Kandakasi, Cannings and
Poole JJ

Papua New Guinea
[2014] PGSC 1
29 January 2014

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

Constitution of PNG (CPNG), ss 18(1) and 42(1)
PNG Supreme Court Rules 2012

Facts

The PNG opposition leader, Belden Norman Namah (MP) (the applicant, A) sought to challenge the constitutionality of the arrangements between the governments of Australia and Papua New Guinea (PNG) in relation to the agreement and purported transfer of asylum seekers (transferees) in Australia to PNG for refugee status processing pursuant to s. 18(1) of the CPNG. A argued that the arrangement was unconstitutional, as the transferees' personal liberty, protected under s. 42(1) of the CPNG, would be breached. Under the *Supreme Court Rules 2012*, a challenge instituted under s. 18(1), relating to the Supreme Court's exclusive original jurisdiction in interpreting the constitution, requires the court to declare that A has standing before the substantive matter can be heard. The PNG government argued that MP did not have any personal interest in the matter and therefore did not have standing. It alleged the challenge was for an ulterior political motive to embarrass the incumbent government.

Issue(s)

Whether A has standing in the substantive application.

Decision

The court unanimously held that A had standing to make the application, and granted the declaration.

Comment

The court relied on the principles of standing formulated in its earlier decision in *Re Petition of MT Somare [1981] PNGLR 265 (Somare)*, which laid down the following criteria: a) the applicant has a sufficient personal interest in the matter or has a genuine concern as a citizen or as the holder of a public office; b) the application raised significant (not trivial, vexatious, hypothetical or irrelevant) constitutional issues; c) the applicant is not a mere busybody, and the application is not for some improper motive; and d) the fact that other ways exist in determining the constitutional issue by the court does not deny standing.

The court rejected the PNG government's attempt to limit the ambit of this earlier decision in the government's submission that *Somare* only applied in situations where the challenge was to the exercise of legislative power by parliament. The applicable principles made no distinction as to whether the challenge was to legislative, executive or judicial powers. The court further elaborated that the contested nature of the factual issue had little bearing on the question of standing. Importantly, the court confirmed that what lay at the heart of *Somare* was *that a citizen will be presumed to have standing, provided he or she can demonstrate a genuine concern for the constitutional issues raised.*

In relation to the allegation of improper motive on the part of the applicant to run this case for political reasons (to show that the government was incompetent), the court observed that: *Politics is an integral part of parliamentary democracy, which is the system of Government that the People of Papua New Guinea have entrenched in their Constitution.* (At 53) Therefore, A was not a busybody and was not acting for any improper motive. The essence of the decision is that a liberal interpretation will be adopted in relation to applicants seeking to challenge the exercise of legislative, executive or judicial powers, as long as the applicant can establish a proper motive and either a sufficient personal or public interest in the matter.

Asylum seeker – inquiries initiated by the court under the constitution in relation to human rights issues – allegation of bias

- Whether the process adopted under the relevant provision of the Constitution of Papua New Guinea was tainted by bias and was a breach of the rules of natural justice.
-

STATE v TRANSFEREE

Supreme Court of Justice
Makail J

Papua New Guinea
[2014] PGSC 23
2 June 2014

Law(s) and/or international instrument(s) considered
Constitution of Papua New Guinea (CPNG), s. 57(1)

Facts

Judge Cannings of the National Court initiated an inquiry under section 57(1) of the CPNG, which provides for the court to act on its own initiative for the protection and enforceability of the rights and freedoms in the constitution. The inquiry was in relation to allegations of breaches of human rights of asylum seekers detained on Manus Island. Section 57(1) of the CPNG provides:

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 other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on 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 fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.

The judge personally conducted proceedings, including summoning persons to appear before the court, and made various directions and orders. Ad hoc directions were given in relation to the conduct of the inquiry, as there was no prescribed procedure for the inquiry. The state sought leave to appeal a decision of the National Court in relation to Judge Cannings' refusal to disqualify himself from hearing the inquiry. The State also asked for the extension of the stay of proceedings pending appeal.

Issue(s)

Whether this is an arguable case of apprehended bias against the presiding judge in an inquiry which justifies the granting of leave to appeal and the granting of a stay order of the proceeding.

Decision

The court granted an extension of the stay order and granted leave for appeal.

Comment

The court, in coming to its decision, found that there was an arguable case for the allegations of bias and breach of the rules of natural justice in the inquiry proceedings. The applicant relied on the presiding judge's alleged oversight in not appointing counsel assisting, and on the judge's decisions to choose witnesses at his own discretion and to ask asylum seekers what remedies they wanted, as contributing factors to conclude that this was an arguable case of apprehended bias.

Under PNG's legal structure, inherited from the United Kingdom, the adversarial system requires the court to remain at arm's length from the litigants, with opposing counsel having carriage of cases. However, while this appeal named the 'the transferees' and 'Amnesty International' as respondents,

the inquiry itself was not a typically litigious or adversarial environment, involving opposing parties. Given the powers prescribed in the CPNG for the National Court and the Supreme Court to initiate proceedings together, with an absence of regulations or procedures to be followed, it would appear the National Court was adopting a practical, common sense approach to these issues. The nature of the jurisdiction conferred by the CPNG suggested this outcome, although it also provided the basis for the state's challenge to the court's actions. This was an intermediate stage of the process, with the substantive issue – the powers of the National Court under s. 57 (1) – to be determined.

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Attorney General v Maumasi (Samoa, 1999)

This case was applied in the Samoan Court of Appeal in *Police v Kum* [2000] WSCA 1; 11 1999 (18 August 2000), and continues to be cited by various courts, most recently in *Police v Vailopa* [2009] WSSC 69 (2 July 2009). The *Crimes Ordinance* 1961 was repealed by the *Crimes Act* 2013.

Balelala v State (Fiji, 2004)

See s. 129 of the *Criminal Procedure Decree* 2009, which removed the need for corroboration in sexual offence cases. See also *Kumar v State* [2015] FJCA 32; AAU0049.2012 (4 March 2015) (5 PHRLD 36) in relation to corroboration involving child witnesses.

Jeremiah v Nauru Local Government Council (Nauru, 1971)

The Nauru Local Government Council has been abolished by virtue of the *Nauru Local Government Council Dissolution Act* 1992 and the president or the cabinet took over its functions by virtue of the *Nauru Local Government Council Dissolution Consequential Amendments Act* 1997. See also *In re Lorna Gleeson* [2006] NRSC 8; *Miscellaneous Cause No 4 of 2006* (15 December 2006) (2 PHRLD 4) and also *In re Adoption of BR* [2013] NRSC 11 (9 September 2013) (5 PHRLD 27); in each of these cases, *Jeremiah* was cited.

Joli v Joli (Vanuatu, 2003)

This case continues to be cited by various courts, most recently in *Bradford v Bradford* [2014] VUSC 135; *Matrimonial Case 06 of 2010* (19 September 2014). The two main issues in this case were discussed by Sue Farran in *The Joli way to resolving legal problems: a new Vanuatu approach*, (2003) *Journal of South Pacific Law* (7) 2: <http://www.pacii.org/journals/fJSPL/vol07no2/1.shtml>. See also Professor Don Paterson in *Mariango v Nalau* [2007] VUCA 15: *Compensation for contributions to property by de facto partners* (2008) *Journal of South Pacific Law* (12) 1: <http://www.pacii.org/journals/fJSPL/vol12no1/pdf/paterson3.pdf>

Lafaialii & Ors v Attorney General (Samoa, 2003)

Applied in *Asiata v Asiata* [2007] WSSC 4 (2 February 2007), and cited in the 2010 inquiry into religious freedom in Samoa: *Commission of Inquiry Freedom of Religion* [2010] WSOM 1 (15 May 2010). The Samoan government has ongoing inquiries into the dynamics of religious freedom protected under the constitution and through custom. See also a report in May 2014: <http://www.samoobserver.ws/other/community/10130-freedom-stays-committee-says>.

Leituala & Ors v Mauga & Ors (Samoa, 2004)

See also *Punitia v Tutuila [2014] WSCA 1* (31 January 2014) (5 PHRLD 45) regarding banishment practices in Samoa and tort and constitutional remedies.

Lyndon v Legal Aid Commission & Anor (Fiji, 2003)

The *Constitution of Fiji* 1997 has been replaced by the *Constitution of Fiji* 2013. See ss 6(5) and 14(2)(d) of the 2013 constitution in relation to limitations on protected rights and rights to legal representation and to the legal aid service.

Molu v Molu (Vanuatu, 1998)

See also *Tally v Tally [2012] VUSC 122; Civil Case 41 of 2011 (24 May 2012)*, in which *Molu* was cited.

Naba & Ors v State (Fiji, 2001)

See ss 11, 13 and 14 of the *Constitution of Fiji* 2013.

Nadan & McKoskar v State (Fiji, 2005)

The *Crimes Decree* 2009 repealed the *Penal Code* and removed the relevant discriminatory offences. See also ss 24 and 26(3)(a) of the *Constitution of Fiji* 2013, which are worded differently than ss 37 and 38 of the *Constitution of Fiji* 1997.

Noel v Toto (Vanuatu, 1995)

A subsequent dispute arose; see: *Noel v Champagne Beach Working Committee [2006] VUCA 18; CAC 24-06* (6 October 2006).

Police v Afa Lee Kum (Samoa, 2000)

See also *Police v Vailopa [2009] WSSC 69* (2 July 2009) (3 PHRLD 16) and *Police v Faiga [2008] WSSC 96* (19 November 2008).

Qiladrau v State (Fiji, 2000)

See ss 207-224 of the *Crimes Decree* 2009, which repealed the *Penal Code*.

Public Prosecutor v Kota & Ors (Vanuatu, 1993)

A short judgment striking out an action in *Family Kalontano v Duruaki Council of Chiefs [2002] VUSC 32; Constitutional Case 040 of 2002* (24 May 2002), which was said to disapprove a horizontal application of the constitutional rights, and attracted a commentator's criticism. See M. Forsyth, *Is there horizontal or vertical enforcement of constitutional rights in Vanuatu? Family kalontano v*

duruaki council of chiefs (2005) *Journal of South Pacific Law* (9) 2:
<http://www.paclii.org/journals/fJSPL/vol09no2/10.shtml>

R v Rose (Solomon Islands, 1987)

See also *Regina v Ludawane [2010] SBHC 128; HCSI-CRC 233 of 2008* (5 October 2010), in which the so-called common right of parental disciplinary corporal punishment of children was discussed. See also the Fijian case of *Dakai v State - Judgment [2015] FJHC 129; HAA04.2015* (27 February 2015) (5 PHRLD 38).

Rarasea v State (Fiji, 2000)

The relevant *Prisons Act* was repealed by the *Prisons and Corrections Act* 2006. See ss 28 and 29, in relation to remission of sentences of prisoners and provision of food in prisons. See also s. 11(1) of the *Constitution of Fiji* 2013.

Republic of Fiji & Attorney General of Fiji v Prasad (Fiji, 2001)

See also *Qarase v Bainimarama [2009] FJCA 9; ABU0077.2008S* (9 April 2009) (3 PHRLD 37).

Republic of Kiribati v Iokiri (Kiribati, 2004)

See also a Fijian case, *Kumar v State [2015] FJCA 32; AAU0049.2012* (4 March 2015) (5 PHRLD 36).

Seniloli & Attorney General of Fiji v Voliti (Fiji, 2000)

See also *Devi v Nandan [2013] FJCA 104; ABU0031.2011* (3 October 2013), in which the Court of Appeal cited *Seniloli*.

Simona v R (Tuvalu, 2002)

See also a Samoan case, *Police v Vailopa [2009] WSSC 69* (2 July 2009) (3 PHRLD 16), in which the Samoan Supreme Court cited this case along with others involving the operation of the CRC.

State v Bechu (Fiji, 1999)

See the *Crimes Decree* 2009 in relation to rape provisions.

State v Fong & Ors (Fiji, 2005)

See s. 11(1) of the *Constitution of Fiji* 2013. Note also that in March 2015 the Fijian Parliament decided to ratify the UNCAT.

State v Kata (Fiji, 2000)

See s. 14(2)(g) of the *Constitution of Fiji* 2013.

State v Pickering (Fiji, 2001)

See also a Solomon Islands case, *Manioru v R*, and an Indian case, *State of Punjab v Singh* (4 PHRLD 71), and a Solomon Islands case, *Bade v Regina [2014] SBCA 13; SICOA-CRAC 31 of 2013 (9 May 2014)* (5 PHRLD 67), in relation to mandatory sentencing.

State v Tamanivalu (Fiji, 2003)

See also *State v K.R.A.K - Sentence [2013] FJHC 339; HAC73.2013 (17 July 2013)* (5 PHRLD 25), in relation to juvenile offenders.

State v Tanaburenisau & Ors (Fiji, 2005)

See *Lyndon v Legal Aid Commission & Anor (Fiji, 2003)* (1 PHRLD 17) and updates on that case.

Wagner v Radke (Samoa, 1997)

See *Police v Vailopa [2009] WSSC 69 (2 July 2009)* (3 PHRLD 16), in which this case was cited and applied.

‘Uhila v Kingdom of Tonga (Tonga, 1992)

Tonga ratified the CRC in 1995, as discussed in *Tone v Police [2004] TOSC 36; AM 022-025 2004 (28 June 2004)*.

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Ali v The State (Fiji, 2005)

See similar discussion on constitutional redress in the case of *Tamblyn v Director of Public Prosecution [2014] FJHC 884; HBM11.2014* (2 December 2014) (5 PHRLD 74).

Attorney General v Mbwe (Kiribati, 2006)

See a similar case, *Attorney General v Teraoi [2013] KICA 4; Civil Appeal 04.2013* (23 August 2013), in which *Mbwe* was cited. See also *Attorney General, iro Republic of Kiribati v Baakoa [2013] KICA 6; Civil Appeal 07.2013* (23 August 2013).

Australasian Conference Association Ltd v Sela & Ors (Fiji, 2007)

This case has been cited in various decisions, most recently in *Native Land Trust Board v Veisamasama [2011] FJHC 632; HBC34.2011* (6 October 2011), in relation to the application of the equitable doctrine of estoppel in an interest in land rights. Note that the *Constitution of Fiji 1997* has been repealed and substituted by the *Constitution of Fiji 2013*. The relevant sections are ss 27, 28 and 29.

Ayamiseba v Attorney General (Immigration) (Vanuatu, 2006)

A further civil claim arose from this case, but it was struck out by the court. See *Ayamiseba v Republic of Vanuatu [2008] VUSC 15; Civil Case 196 of 2006* (2 May 2008) and *Ayamiseba v Government [2008] VUSC 45; Civil Case 196 of 2006* (11 June 2008). However, in relation to the principle of the government's vicarious liability in tort, the case of *Solong v Republic of Vanuatu [2014] VUSC 1; Civil Case No. 27 of 2012* (5 February 2014), was cited *Ayamiseba* to hold that the government was vicariously liable in a tort action.

Devi v The State (Fiji, 2003)

This case has been cited in a Magistrates Court case, *State v Hill [2013] FJMC 211; Traffic Case 8905.2013* (27 May 2013), in which bail was granted.

Efi v Attorney General (Samoa, 2000)

See *Samoa Party v Attorney General [2009] WSSC 23* (20 March 2009), in which this case was cited in relation to the discussion of the doctrine of separation of powers. See also *Samoa Democratic United Party (SDUP) v Leiataua [2009] WSSC 49* (6 May 2009), in which this case was quoted in its discussion of the implication of the notion of an opposition party under the constitution. In a 2010 freedom of religion inquiry, reported by the Samoan Ombudsman, this case was quoted by way of

mention when it discussed fundamental rights and the rationale of upholding them: *Commission of Inquiry Freedom of Religion* [2010] WSOM 1 (15 May 2010), at par. 11.7.

Fa'aoso v Paongo & Ors (Tonga, 2006)

See the decision of *Police v Vailopa* [2009] WSSC 69 (2 July 2009) (3 PHRLD 16), of the Samoa Supreme Court, in which this case was cited with approval.

Fiji Human Rights Commission v Fiji Law Society (Fiji, 2007)

Note that the *Legal Practitioners Act* 1997 has since been repealed by the *Legal Practitioners Decree* 2009.

Fiji Human Rights Commission v Police & Attorney General (Fiji, 2005)

This case was not reported in PACLII. The Court of Appeal case referred to in the *Editors' Note* was *Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police* [2006] FJCA 75; ABU0003U.2006S (24 November 2006) (3 PHRLD 1).

Fiji Human Rights Commission v Suva City Council (Fiji, 2006)

The relevant constitutional right of freedom from discrimination is now enshrined in s. 26(3)(a) of the *Constitution of Fiji* 2013. However, s. 26(8) provides a number of exceptions, and s. 26(8)(b) allows the imposition of a retirement age in law.

Fijian Teachers' Association & Fiji Public Service Association v Public Service Commission & Interim Attorney General (Fiji, 2007)

See remarks made in *FHRV v Suva City Council*, above, regarding retirement age.

In re Eroni Delai (Fiji, 2000)

The *Criminal Procedure Code* has been repealed and substituted by the *Criminal Procedure Decree* 2009. Part XIII of the 2009 *Decree* now deals with proceedings before the Magistrates Court. Note also that the similar constitutional rights to personal liberty, and exceptions to this right, are provided for by s. 9 of the *Constitution of Fiji* 2013.

In re Lorna Gleeson (Nauru, 2006)

See *In re Adoption of BR* [2013] NRSC 11 (9 September 2013) (5 PHRLD 27), in which the critical comments made by the PHRLD here were mentioned with approval (at par. 54), and *In re Lorna Gleeson* was not followed by the Nauruan Supreme Court.

In re Nikhil Naidu (Fiji, 1987)

See also *Baleinamau v Commander of Fiji Military Forces* [2001] FJHC 331; [2001] 2 FLR 100 (8 May 2001), in which this case was discussed and followed in relation to the police powers under the *Public Emergency Regulations*. The existing version is the 2009 *Regulations* made under the *Public Safety Act*.

In re Thesai Maip (PNG, 1991)

De facto relationships are now recognised in law in PNG.

Interim Attorney General v Draunidalo (Fiji, 2007)

The indemnity cost order in this case was reduced on appeal: *Attorney General v Draunidalo* [2009] FJCA 54; ABU0006.2008 (16 March 2009). The Court of Appeal's dictum in relation to indemnity cost has been cited in a number of cases, including the case of *Fiji Oral Health Workers Association v Fiji Dental Association* [2014] FJHC 447; HBC216.2011 (20 June 2014).

Kelly v R (Solomon Islands, 2006)

See *Regina v Tiko* [2010] SBCA 7; CA-CRAC 8 of 2009 (26 March 2010) and *R v Fo'oka* [2014] SBHC 5; HCSI-CRC 250 of 2012 (3 February 2014). See also discussion regarding 'duress' by Miranda Forsyth, *Duress as a criminal defence in Solomon Islands*, (2007) *Journal of South Pacific Law* 11(2), in which *Kelly* was discussed.

Khera v Fiji Islands Revenue and Customs Authority (Fiji, 2006)

Freedom of movement and restriction of this right are provided for by s. 21 of the *Constitution of Fiji* 2013, which is similar to s. 34 of the *Constitution of Fiji* 1997.

Khera & Ors v Fiji Independent Commission Against Corruption (Fiji, 2007)

In relation to the issue of whether FICAC's power to prosecute is inconsistent with the constitution, a judge in two subsequent High Court decisions declined to follow *Khera*: see *FICAC v Kumar* [2009] FJHC 76; HAC001.2009 (20 March 2009) and *Fiji Independent Commission Against Corruption v Devo* [2008] FJHC 132; HAC177D2007S (27 June 2008) (3 PHRLD 34).

Kirisome & Ors v Attorney General & Commissioner of Police (Samoa, 2002)

This case was cited in subsequent cases, including in *Digicel (Samoa) Ltd v Attorney General* [2008] WSSC 15 (30 March 2008) in relation to procedural fairness rules.

Mariango v Nalau (Vanuatu, 2007)

This case was applied in *Grillo v Schwartze [2010] VUSC 190; Civil Case 125 of 2009* (17 December 2010). See also discussion by Don Paterson in *Mariango v Nalau [2007] VUCA 15: Compensation for contributions to property by de facto partners* (2008) *Journal of South Pacific Law* 12(1)

Nai & Ors v Cava (Fiji, 2008)

See remarks made in updates below in the cases of *Social Welfare Officer v Marshall* and *RHEA v Caine*.

Office of The Public Solicitor v Kalsakau (Vanuatu, 2005)

See *Leo v Public Prosecutor [2008] VUCA 19; Criminal Appeal Case 7 of 2008* (25 July 2008), in which a constitutional right to be informed of a right to legal representation before a police interview was contested and *Kalsakau* was mentioned.

Public Prosecutor v Emelee & Ors (Vanuatu, 2005)

This case was subsequently applied in *Public Prosecutor v Withford [2006] VUCA 14; Criminal Appeal Case 07 of 2006* (2 October 2006).

Qicatabua v Republic of Fiji Military Forces & Ors (Fiji, 2006)

This case has been overturned by the Court of Appeal in *Republic of Fiji Military Forces v Qicatabua [2008] FJCA 119; [2009] 3 LRC 357* (12 September 2008).

R v K (Solomon Islands, 2006)

According to the citation this case was about the defence of compulsion, which was rejected by the Chief Justice, and conviction was entered with a life sentence imposed. There might have been an editorial oversight, as there was no discussion in this case of human rights issues. The facts, issues and commentary in print (2 PHRLD 18) appeared to refer to the Court of Appeal case of *Kelly*. The Court of Appeal remitted this case back to the High Court for sentencing, but the subsequent sentencing judgment was not reported in PACLII. In any event, refer to the remarks made under *Kelly*, above.

R v Su'u & Ors (Solomon Islands, 2007)

A subsequent case also discussed the interpretation of the relevant provisions of the *Amnesty Act*, and this case was cited in *Regina v Aili [2008] SBHC 104; HCSI-CRC 74 of 2004* (4 December 2008).

R v Vola (Tonga, 2005)

A subsequent case, *Rex v Ake [2006] TOSC 3; CR 140.2005* (3 February 2006), cited *Vola*.

Railumu & Ors v RFMF & Attorney General (Fiji, 2002)

The *Constitution of Fiji* 2013 has provided for similar rights to access to courts or tribunals under s. 15.

Rhea v Caine (Fiji, 2006)

A subsequent High Court decision, *Social Welfare Officer v Marshall* [2008] FJHC 283; *HBA11.2006* (7 March 2008) (2 PHRLD 8), had a similar discussion of the same issue, which arose from s. 6(4) of the *Adoption of Infants Act*, and should have had the effect of overturning the reasoning of this Magistrates Court's decision. However, the High Court decision has been cited in a Magistrates Court decision, *Sing v Singh* [2014] FJMC 176; *Adoption Case 10.2013* (27 November 2014), but the magistrate did not follow it. Note also that the Supreme Court of Nauru quoted the critical comments on *Rhea* made by the PHRLD with approval: *In re Adoption of BR* [2013] NRSC 11 (9 September 2013).

Sipo v Meli (PNG, 1980)

The adultery law has since been reformed in PNG. See http://www.paclii.org/pg/legis/consol_act/aaea1988233. See also the decision of *Re Wagi Non* [1991] PGNC 36; [1991] PNGLR 84; N959 (27 February 1991), in relation to adultery involving the National Court and the PNG village courts. 'Wagi Non' and the law in PNG were examined by Jean G. Zorn, in *Women, Custom, and State Law in Papua New Guinea* (1995) TWLS, 13: <http://scholar.valpo.edu/twls/vol13/iss1/> and by *Jessep, Owen, in Developments in the Underlying Law of Papua New Guinea*, 25 [2012] PGULJ 4.

Social Welfare v Marshall & Ors (Fiji, 2008)

See remarks made under *RHEA v Caine* above. See also discussion in 2 PHRLD (pp. 10–11) regarding the case of *Nai & ORS v CAVA*, in relation to the *Hague Convention* and other international human rights treaties in considering cross-border children's matters.

State v Sorpapelu (Fiji, 2006)

PACLII does not have cases reported for March and April of 2006 under the Fiji High Court portal, but see a related report of this matter in *State v Sorpapelu* [2005] FJHC 454; *HAM0068D2005S* (27 October 2005). The *Penal Code* has been repealed by the *Crimes Decree* 2009, and the relevant sections now are ss 212 and 213. See also the *Sentencing and Penalties Decree* 2009, in which the matters a sentencing court must consider are provided for by s. 4 of the decree, which include the age of and impact on the victim.

Taione v Kingdom of Tonga (Tonga, 2004)

See a discussion by John Maloney and Jason Reed Struble, in *A new day in Tonga: the judiciary, the reformers and the future*, (2007) *Journal of South Pacific Law* (11) 2, in which the authors engaged in a comprehensive discussion of this case in relation to media freedom and the constitution.

Takiveikata v The State (Fiji, 2007)

The decision in this case was unsuccessfully appealed in the Supreme Court: *Gates v Takiveikata; State v Takiveikata [2008] FJSC 16; CAV0015.2007S & CAV0016.2007S* (24 July 2008).

Teonea v Pule O Kaupule & Nanumaga Falekaupule (Tuvalu, 2005)

See *Teonea v Pule o Kaupule of Nanumaga [2009] TVCA 2; Court of Appeal Civil Appeal No. 1 of 2005* (4 November 2009) (3 PHRLD 33).

The State v Aigal & Kauna (PNG, 1990)

The *Sorcery Act* 1971 has been repealed by *The Sorcery (Repeal) Act* 2013 (No. 7 of 2013).

The State v Silatolu (Fiji, 2002)

See *Ledua v State [2008] FJSC 31; CAV0004.2007* (17 October 2008), in which the Court of Appeal commended the observations made in *Silatolu* in relation to factors to be considered by a trial judge. See also ss 6(5) and 14(2)(d) of the *Constitution of Fiji* 2013, in relation to limitations on protected rights and rights to legal representation and to the legal aid service.

Toakarawa v The Republic (Kiribati, 2006)

See also *Republic v Teriao [2013] KICA 12; Criminal Appeal 02.2013* (23 August 2013), in which *Toakarawa* was cited to uphold an appeal to increase the sentence.

Ulufa'alu v Attorney General & Malaita Eagle Force & Ors (Solomon Islands, 2001)

This case was cited in *Bartlett v Government of Australia [2012] SBHC 78; HCSI-CC 414 of 2011* (1 August 2012).

Yuen v The State (Fiji, 2004)

This case cited *Devi v The State* (2 PHRLD 11). See relevant remarks made in *Devi v The State*, above.

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Ali v Hakim (Fiji Islands, 2008)

The common law prerogative of *parens patriae* was discussed in the case of *Singh v Reddy [2014] FJHC 724; HBC123.2011* (6 October 2014), which was unrelated to the interpretation of the *Adoption of Infants Act*.

Arp v Arp (Samoa, 2008)

A subsequent case cited and adopted the approach of this case: *Hadley v Hadley [2010] WSSC 61* (19 March 2010).

Attorney General v Vaai (Samoa, 2009)

This case was cited in a subsequent case, *Police v Viali [2009] WSSC 75* (15 July 2009), in relation to the Court's power to discharge without conviction and order payment.

Attorney General v Yaya (Fiji Islands, 2009)

The current version of the right to privacy under the *Constitution of Fiji 2013* is provided by s. 24.

Commissioner of Police v A Mother (Fiji Islands, 2008)

This case was cited and applied in subsequent cases, including *Takiveikata v State [2008] FJHC 315; HAM039.2008* (12 November 2008) (included in this volume of the PHRLD) and *Tawake v Barton Ltd [2010] FJHC 14; HBC231.2008* (28 January 2010), in the context of police powers to arrest and detain a person under the law.

FICAC v Devo (Fiji Islands, 2008)

In relation to whether the office of the director of public prosecutions was the only competent body under the constitution to prosecute, this decision contradicted that decided in *Khera & Ors v Fiji Independent Commission Against Corruption* (Fiji, 2007) (2 PHRLD 88).

Groupe Nairobi (Vanuatu) Ltd v Government of the Republic of Vanuatu (Vanuatu, 2009)

The principles adopted in this case in relation to unjust deprivation of property have been further applied in various cases, including another Court of Appeal case: *Terra Holdings Ltd v Sope [2012] VUCA 16; Civil Appeal Case 04 of 2012* (19 July 2012) (4 PHRLD 45).

Jackson v Attorney General (Samoa, 2009)

This case was cited in a subsequent case, *Police v Malota [2013] WSSC 145* (15 November 2013), in the context of expert witnesses.

Maharaj v Raju (Fiji Islands, 2008)

See the Magistrates Court decision of *SSP v AAD [2013] FJMC 232; Family Court Case 74NAS2012 (6 June 2013)*, in relation to paternity determination and DNA testing.

Navualaba v Commander of Fiji Military Forces (Fiji Islands, 2008)

A subsequent High Court case, *Naqa v Commander, Republic of Fiji Military Forces [2009] FJHC 68; HBC377.2005 (11 March 2009)*, discussed and applied this case in relation to damages.

Naylor v Foundas (Vanuatu, 2004)

In a later case, *Benard v Republic of Vanuatu [2012] VUSC 32; Civil Case 38-07 (5 April 2012)*, the Supreme Court upheld the right of a judgment creditor to recover interest as a statutory right, citing *Naylor*.

Police v Faiga (Samoa, 2008)

A number of Supreme Court decisions in relation to sexual offences followed this case. The *Crimes Act 2013* has reformed the Samoan criminal law, including sexual offences. Sexual conduct with a child under the age of 12 now attracts heavier penalties, ranging from 14 years to life imprisonment. (See s. 58)

Police v Palemene (Samoa, 2007)

It was reported that following this decision, the ‘punishment cell’ was closed permanently: <http://www.radionz.co.nz/international/pacific-news/171908/samoa's-prison-punishment-cell-closed-after-supreme-court-ruling>

President of the Republic of Vanuatu v Speaker of Parliament (Vanuatu, 2008)

The *Family Protection Act 2008* subsequently came into force, in March 2009.

Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police (Fiji Islands, 2006)

A subsequent High Court case, *Rokotuiviwa v Seveci [2008] FJHC 221; HBC374.2007 (12 September 2008)*, noted this Court of Appeal case in considering the quantum of damages in similar claims.

Public Prosecutor v Nawia (Vanuatu, 2010)

A subsequent case, *Public Prosecutor v David [2012] VUSC 166; Criminal Case 30 of 2012 (22 August 2012)*, referred to this case in sentencing.

R v Setaga (Tuvalu, 2008)

A similar case was decided by the same justice (Ward CJ): *R v Penivao [2012] TVHC 5; Criminal Case 02 of 2011* (23 January 2012), in which this case was cited. A Samoan Supreme Court decision also cited and applied this case: *Police v Vailopa [2009] WSSC 69* (2 July 2009).

Samoa Party v Attorney General (Samoa, 2010)

A number of subsequent decisions cited this case, including *Rimoni v President of the Land and Titles Court [2011] WSSC 88* (8 August 2011), on the issue of paramount status of the constitution, and the case of *Law Society v Auimatagi Ponifasio [2013] WSCA 6* (15 November 2013), in relation to orders of costs against parties that represent the public interests.

Singh v State (Fiji Islands, 2008)

The current articulation of the right to privacy is provided in s. 24 of the *Constitution of Fiji 2013*.

State v AV (Fiji Islands, 2009)

The Court of Appeal considered the constitutionality of s. 10(1) of the *Juvenile Act* in the case of *Kumar v State [2015] FJCA 32; AAU0049.2012* (4 March 2015) (5 PHRLD 36), and endorsed the views expressed in this case in relation to corroboration of a child's evidence before a conviction can be entered.

State v Krishna (Fiji Islands, 2007)

There was an error in the year of the case in the citation in print. The year reference is 2007, not 2001: *State v Krishna [2007] FJHC 26; HAA040.2007* (10 September 2007). In this case the judge (Winter J) opined that: *The belief that adults have unlimited rights in the upbringing of a child compromises any approach to stop and prevent violence committed within the home or school or state institution. For lasting change, attitudes that condone or normalize violence against children need to be challenged.* Compare this opinion with a Fijian High Court case, *Dakai v State – Judgment [2015] FJHC 129; HAA04.2015* (27 February 2015) (5 PHRLD 38), in which the judge (De Silva J) cited a 2010 High Court decision, which included the following statement: *However despite the abuse and the severity of it, regard must be had firstly to the evident frustration of the father wanting to raise his daughter to be responsible and truthful and the [sic] secondly to the rights of the accused as a parent to punish.*

Takiveikata v State (Fiji Islands, 2008)

This case was cited in a number of subsequent cases, both in the High Court and the Magistrates Court, in relation to the issues of fair trial and permanent stay of a criminal case: *Baba v State [2011] FJHC 53; HAM238.2010* (17 February 2011).

Teonea v Pule oKaupule of Nanumaga (Tuvalu, 2009)

See the decision in the lower court, discussed in 2 PHRLD 83.

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Hamel-Landry v Law Council (Vanuatu, 2012)

The relevant regulation 2(b) included in print was erroneous. Please refer to the judgment or to the regulation for the correct version: *Legal Practitioners (Qualifications) Regulations*.

In re Child M (Vanuatu, 2011)

Compare this case with the Fijian Magistrates Court's decision of *Sing v Singh [2014] FJMC 176; Adoption Case 10.2013* (27 November 2014) (5 PHRLD 34).

In re Constitution Section 19(1) – Special Reference by Allan Marat (Papua New Guinea, 2012)

Two subsequent cases cited and applied this case: *Marat v Hanjung Power Ltd [2014] PGSC 33; SC1357* (4 July 2014) and *Koim v O'Neil [2014] PGNC 147; N5694* (28 July 2014). See also an article written by Logan, Justice John – *A year in the life of an Australian member of the PNG judiciary* (FCA) [2013] FedJSchol 9, in which the arrest of and charges against some of PNG's leading judges following this decision was discussed.

In re Reference to Constitution Section 19(1) by East Sepik Provincial Executive (Papua New Guinea, 2011)

This case was cited in *Keke v Scotty (2) [2013] NRSC 3* (15 March 2013), and in *In re Constitutional (Amendment) Law 2008, Reference by the Ombudsman Commission of Papua New Guinea [2013] PGSC 67; SC1302* (19 December 2013).

Kilman v Speaker of Parliament of the Republic of Vanuatu (Vanuatu, 2011)

The case of *Natapei v Korman [2011] VUSC 72; Constitutional Case 5 of 2011* (16 June 2011), mentioned in the comments section of *Kilman* in PHRLD Vol 4, was overturned by the Court of Appeal in *Kilman v Natapei [2011] VUCA 24; Civil Appeal 16 of 2011* (22 July 2011). See also *Vanuaroroa v Natapei [2011] VUSC 92; Constitutional Case 06 of 2011* (22 June 2011).

Lamon v Bumai (Papua New Guinea, 2010)

Despite this decision, the violent practice, in violation of human rights, within the PNG police force that this case was concerned with, did not stop. The judiciary carried out an inquiry in 2013 under s. 57 of the constitution. A report, in the form of a judgment, was produced in early 2014: *Enforcement of Basic Rights, In re Section 57 Constitution of the Independent State of Papua New Guinea [2014] PGNC 36; N5512* (26 February 2014), in which this case at trial was cited.

Liu v R (Tonga, 2011)

See another human trafficking case, decided in Fiji: *State v Laojindamane* – *Sentence [2013] FJHC 20; HAC323.2012* (25 January 2013) (5 PHRLD 65).

Manioru v R (Solomon Islands, 2012)

A further attempt to argue that mandatory life imprisonment is unconstitutional was again rejected by the Court of Appeal, in *Bade v Regina [2014] SBCA 13; SICOA-CRAC 31 of 2013* (9 May 2014), which is included in 5 PHRLD. See also *Regina v Nguyen Van Thang [2013] SBHC 26; HCSI-CRC 150 of 2011* (27 March 2013), in which the court reflected on the lack of practice direction following the decision of *Manioru*, in relation to non-parole period.

Namba v Naru (Papua New Guinea, 2011)

Refer to remarks made in *Lamon v Bumai*, above.

Natapei v Korman (Vanuatu, 2011)

This case was overturned by the Court of Appeal in *Kilman v Natapei [2011] VUCA 24; Civil Appeal 16 of 2011* (22 July 2011).

Ponifasio v Samoa Law Society (Samoa, 2012)

This case was cited and applied in a subsequent case, *Woodroffe v Samoa Law Society [2012] WSCA 15* (23 November 2012). However, the Court of Appeal in the latter case commented that: [w]e acknowledge that had we been approaching the matter afresh the question might well have been open to debate. However this Court will not depart from a principle established in an earlier decision unless it is clearly shown that there was an unequivocal error in the earlier decision, demonstrable change in circumstances since the decision was given or other special reason for the departure. No special reason of that kind could be suggested in the present case. ... *Ponifasio* clearly applies.

Public Prosecutor v Malikum (Vanuatu, 2010)

Subsequent decisions alluded to this case in relation to sentencing: *Public Prosecutor v Ray [2014] VUSC 100; Criminal Case 109 of 2014* (22 August 2014); *Public Prosecutor v Daniel [2014] VUSC 108; Criminal Case 65 of 2014* (28 August 2014).

Quarter v R (Cook Islands, 2011)

This case was further discussed in *Mokoha v Cook Islands Police [2013] CKHC 25; JP Appeal 05.2013* (19 July 2013).

R v Belo (Solomon Islands, 2012)

The presiding judge in this case, who has since left the bench, has continued to be critical of the way in which women and sexual offence victims have been treated in Solomon Islands: <http://www.abc.net.au/radionational/programs/lawreport/solomon-islands-hc-judge-speaks-out-v2/5912956>

R v Gua (Solomon Islands, 2012)

The accused was eventually convicted and sentenced to four years' imprisonment, but the Crown appealed the sentence, and the appeal was upheld by the Court of Appeal: *Regina v Gua [2013] SBCA 2; Criminal Appeal Case 37 of 2012 (26 April 2013)* (5 PHRLD 88).

Special Reference by Fly River Provincial Executive Council; Re Organic Law on Integrity of Political Parties and Candidates (Papua New Guinea, 2010)

Two subsequent cases, included in this volume, cited this case: *In re Constitution Section 19(1) – Special Reference by Allan Marat*, and *In re Reference to Constitution Section 19(1) by East Sepik Provincial Executive* (4 PHRLD 22 and 24). See updates to the respective cases, above.

State v Murti (Fiji Islands, 2010)

Leave to appeal against conviction and sentence has been granted by the Court of Appeal: *Murti v State [2013] FJCA 85; AAU3.2011* (8 May 2013). See also another human trafficking case, *State v Laojindamanee - Sentence [2013] FJHC 20; HAC323.2012* (25 January 2013), which is included in 5 PHRLD, and is also pending on appeal.

Terra Holdings Ltd v Sope (Vanuatu, 2012)

A later case of *Kwila Ltd v Joseph [2013] VUSC 36; Civil Case 105 of 2010* (14 March 2013) applied this case in relation to the boundary of customary land.

Ulugia v Police (Samoa, 2010)

This case was discussed in various subsequent decisions, including *Iosua v Attorney General [2014] WSCA 5* (2 May 2014), in relation to matters of sentencing.

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The *Pacific Human Rights Law Digest (Volume 5)* 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.

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