IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 65 of 1985

Between:

KUINI T. NAQASIMA — Appellant

- and -

1. PUBLIC SERVICE APPEALS BOARD
2. MONICA L. SCHNEIDER — Respondents

A. Qetaki for the Appellant
Dr A. Singh and J. Madraiwiwi Amicus Curiae

Date of Hearing: 13th November, 1985

Date of Delivery: 14th November, 1985

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal from the decision of Kermode J, on a case stated by the Public Service Appeals Board pursuant to S.13(10) of the Public Service Act (Cap 74). That subsection provides that the Board may state a case for the opinion of the Supreme Court on any question as to the jurisdiction of the Board or on any question of law arising in proceedings before it.

These are the facts as set forth in the case:-

" 1. BY notice in Public Service Circular No. 13/84 dated 15 August 1984 the Public Service Commission advertised, inter alia, the post of Director of Nursing Services US04 Salary $21,450 - $23,100 in the Ministry of Health and Social Welfare.

2. AFTER having considered the applications of KUINI T. NAQASIMA and MONICA L.SCHNEIDER the Public Service Commission provisionally appointed MONICA L. SCHNEIDER to the post of Director of Nursing Services.

3. THE provisional appointment was published in Public Service Circular dated 15 November 1984 and it was advised that appeals against the said appointment would close on 6 December 1984 in accordance with subsections (1) and (3) of Section 14 of the Public Service Act.

4. THE unsuccessful candidate for the said position, KUINI T. NAQASIMA lodged a notice of appeal pursuant to subsection (3) of section 14 of the Public Service Act within the statutory time limit prescribed by that subsection.

5. THE date of hearing of the said appeal was set down 12 April 1985 and all parties concerned were notified accordingly.

6. ON the 12th day of April 1985 the following Legal Notice was published in the Fiji Royal Gazette Supplement:

'[LEGAL NOTICE NO. 28]

PUBLIC SERVICE ACT
(CAP.74)

ORDER UNDER SECTION 14

IN exercise of the powers conferred upon me by subsection (2) of Section 14 of the Public Service Act, I have ordered that no appeal by any officer shall lie against the promotion of any officer, or the appointment of any person to the offices which fall within the following salary ranges:-

Upper Salary Range 1
Upper Salary Range 2
Upper Salary Range 3
Upper Salary Range 4

Dated this 10th day of April 1985

D. TOGANIVALU
Acting Prime Minister"

7. THAT the hearing of the Public Service Appeal Board on 12 April 1985 was adjourned in order that the legal effect of Legal Notice No. 28 of 1985 in respect of the said appeal should be determined."

And this was the question posed in the case for the opinion of the Court:-

> "Does the coming into force of Legal Notice No. 28 of 1985 terminate the right of appeal of a public officer who has given Notice of Appeal under subsection (3) of Section 14 of the Public Service Act prior to 12th April 1985 a gainst a promotion or appointment to an office which falls within a salary range specified in the said Notice?"

It appears that the only submissions made before Kermode J came from Mr Matabalavu, on behalf of Mrs.Naqasima, and Ratu Finau Mara as amicus curiae. Both Counsel presented carefully prepared written submissions supporting the contention that the Board's jurisdiction to hear Mrs Naqasima's appeal had not been ousted by the Ministerial order. Kermode J was therefore deprived of the benefit of contrary argument but in the result held that the Board had no jurisdiction to entertain the appeal.

Again before us there was no contrary argument, Mr Qetaki and Mr Madraiwiwi being in agreement that the Board's jurisdiction had not been ousted.

In the lower Court and before us Counsel relied substantially on the leading case of Colonial Sugar Refining Co. Ltd. v. Irving [1905] A.C. 369 which concerned an application to the Judicial Committee to dismiss an appeal from the Supreme Court of Queensland on the ground that the power of the Court below to give leave to appeal to the Judicial Committee had been abrogated by S39 of the Australian Commonwealth Judiciary Act 1903. The action in which the appeal was brought was commenced on 25th October 1902, and S39 came into force on the 25th August 1903.

The Judicial Committee dismissed the application and Lord NacNaghten who delivered the judgment said at P.372:-

> "The case was fully argued before this Board. On behalf of the appellants it was contended that the provisions of the Judiciary Act, 1903, on which the respondent relies, assuming them to be within the powers of the Commonwealth Legislature, are not retrospective so as to defeat a right in existence at the time when the Act received the Royal Assent.
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> As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure ? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to the superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

After considering Irving's case Kermode J said "At first glance that case would appear to be on all fours with the instant case." (We would go further and say that if anything Mrs Naqasima is on even stronger ground in that her appeal had been launched and was on the eve of hearing when the order was made.) Kermode J then said:-

> "There are, however, important differences. In Irving's case the question of jurisdiction did not arise. The Privy Council's jurisdiction to hear the appeal was not affected by the later Australian Act which had no retrospective effect."

We cannot follow the learned Judge's reasoning. The whole point of Irving's case was whether the Judicial Committee had jurisdiction and whether the Judiciary Act had ousted it. It cannot be distinguished and is conclusive, of the issue, before us. Counsel referred to a number of other cases but it is unnecessary to go beyond it.

Kermode J appeared to decide the case on the basis that the relevant sections of the Public Service Act made the Ministerial Order retrospective either "by express enactment or necessary intendment" to use Lord MacNaghten's words.

S14(1) and (2) of the Public Service Act, so far as relevant provide:-

> "14. - (1) Subject to the provisions of sub-section (2), every officer, other than an officer on probation, appointed by the Commission shall have a right of appeal to the Appeal Board in accordance with this section against -
>
> (a) the promotion of any officer, or the appointment of any person who is not an officer, to any position in the Public Service for which the appellant had applied, if (in either case) the appointment of the appellant to that position would have involved his own promotion.
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> (2) Notwithstanding anything in subsection (1) no appeal by any officer shall lie against the promotion of any officer or the appointment of any person to any office or position specified in orders made by the Minister, howsoever that office or position is for the time being designated. For the purposes of this subsection, a certificate by a Commissioner as to any change in the designation of any office or position specified in any order shall be conclusive evidence of the facts stated in the certificate regarding that change."

These are Kermode J's comments concerning those statutory provisions:-

> "Subsection (1) is expressly stated to be subject to the provisions of subsection (2). Subsection (2) has the effect of limiting the right to appeal. To emphasize the overriding effect of subsection (2) which is not qualified or limited in any way, the subsection commences with the words "Notwithstanding anything in subsection 1 no appeal shall lie..." On production of the certificate referred to in subsection (2) the Board must accept it as conclusive evidence.
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> The order has the effect of limiting the powers of the Board. The Board, once the order is brought to its notice, has no power or jurisdiction to entertain an appeal in respect of promotion or appointment of any officer in the salary ranges mentioned in the order."
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> "It is apparent to me that the legislature expressly made the right to appeal subject to any order that the Minister might lawfully make acting under subsection (2).
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> The legislature has not limited the Minister's discretion in any way as it could have done. The order in my view, had retrospective effect so far as any pending appeal was concerned. The "necessary intendment", to use the phrase used by Lord MacNaughten, of the legislature is in my view to remove a right to appeal whether existing or not at the time the order was made in respect of the class of officers mentioned in the order."

We cannot accept the learned Judge's reasoning. Clear language is necessary to make a retrospective effect applicable to proceedings already commenced, the more so in this case because of the following provisions of the Acts Interpretation Act (Cap 7):-

> "22. All subsidiary legislation shall be published in the Gazette, shall be judicially noticed and shall come into operation on the day of such publication, or, if it is enacted either in the subsidiary legislation or in some other written law that such subsidiary legislation shall come into operation on some other day then, it shall come into operation accordingly.
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> 22. Any subsidiary legislation may be made to operate retrospectively to any date, not being

> a date earlier than the commencement of the written law under which such subsidiary legislation is made, but so, however, that no person shall be made or become liable to any penalty whatsoever in respect of any act committed or of the failure to do anything before the day on which such subsidiary legislation is published in the Gazette. "

In the instant case something more than the equivocal phrase "no appeal by any officer shall lie," which hints more at the future than the past, was necessary to rebut the presumption that existing rights were unaffected.

In Irving's case S.39 provided that decisions of the Court from which, at the establishment of the Commonwealth, an appeal lay to the Queen in Council "Shall be final and conclusive except so far as an appeal may be brought to the High Court." They are stronger words than we are considering but no retrospective effect was given them.

We therefore answer the question posed in the case in the negative and allow the appeal with costs to Mrs Naqasima in this Court and the Court below as fixed by the Registrar if the parties cannot agree.

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VICE-PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL