PREM SINGH v KRISHNA PRASAD and 2 Ors

SUPREME COURT — APPELLATE JURISDICTION

ELIAS J

29 August 2002

[2002] FJSC 2

Practice and procedure — appeal — application for special leave — prompt determination of electoral challenges — right of appeal from final judgments — interpretation of s 73(7) — parliamentary elections — election petition — whether Court of Appeal had jurisdiction to hear an appeal — Constitution ss 6, 27(1)(a), 36, 41, 54, 56, 71(5), 73, 73(1), 73(7), 82, 120(1), 120(2), 121(1), 121(2), 121(3), 122(1), 122(2), 122(3) — Electoral Act 1998 ss 57(1), 57(5), 75(2), 116(1), 116(1)(d), 116(2), 116(2)(d), 116(3)(a), 116(3)(b), 116(3)(d), 153(2) — Court of Appeal Act 1978 s 12(2)(c) — Supreme Court Act 1998 s 7(3) — Court of Appeal Amendment Act 1998 s 3(3) — Criminal Procedure Code.

Prem Singh was elected representative of the Nadi Open Constituency Seat in the general election. Krishna Prasad applied to the High Court as Court of Disputed Returns claiming he should have been declared to be the elected representative. The court declared that Prem Singh was not the elected member for the seat and that Krishna Prasad was the duly elected member. An appeal was brought by Prem Singh in the Court of Appeal. The Court of Appeal dismissed the appeal for want of jurisdiction. It held that the appeal was precluded from the judgment of the Court of Disputed Returns. Prem Singh petitioned the Supreme Court for special leave to appeal.

Held — (1) Section 73(7) does not free the Court of Disputed Returns from the obligation to comply with the law. Its interpretation of the provisions of the Electoral Act is subject to reconsideration by the Courts of general jurisdiction, both at first instance and on appeal. A construction of s 73(7) to permit the appeal in the present case is not necessary to correct perpetuation of the error for the future. The opinion as to the correct interpretation of the Electoral Act expressed by all members of the Court is likely to achieve that correction for the future. The question is rather whether s 73(7) permits correction of the erroneous result in the case of the 2001 election for the Nadi Open Constituency.

Wybrow Chief Electoral Officer [1980] 1 NZLR 147, cited.

(2) Any construction of s 73(7) which empowers the High Court as Court of Disputed Returns to determine conclusively the scope of the system of voting provided by the Electoral Act 1998 would be unjust. Such conclusion is not in the context of the Constitutional right to elections which are fair and conducted in accordance with the law enacted by parliament and the obligations imposed by the Constitution upon the courts of general jurisdiction at all levels. The question of law in interpretation of the system of voting provided by the Electoral Act was not one which the judge was empowered to determine conclusively.

(3) The court cannot evade consideration of the proper balance required by the Constitution in the present case. It requires consideration of the balance between finality and legality in the circumstances of electoral rights. It is necessary to consider the character of the errors of law in the decision of the Court of Disputed Returns. The exercise was not undertaken by the Court of Appeal because of its erroneous view in the interpretation of the Constitution which requires consideration of the balance between finality and legality in the circumstances of electoral rights.

Special leave to appeal allowed.

Appeal dismissed.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; *ANZ Banking Group v Merchant Rank of Fiji* CBV0001/1995; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129; *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31; *Kennedy v Purcell* (1888) 59 LJ 279; *Kydd v Watch Committee of City of Liverpool* [1908] AC 327; *O'Reilly v Mackman* [1983] 2 AC 237; *Piper v St Marylebone Licensing Justices* [1928] 2 KB 221; *Re A Company* [1980] Ch 138; *Theberge v Laudry* (1876) 2 App Cas 102; *Venkatamma v Ferrier-Watson* Supreme Court Civil Appeal No CBV0002/92, cited.

Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd [1960] HCA 68(1960) 104 CLR 437; 107 ALR 1; *Re Racal Communications Ltd* [1981] AC 374; *Re Wellington Central Election Petition* [1973] 2 NZLR 470, considered.

R v Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australasia Limited [1947] HCA 32(1947) 75 CLR 361, distinguished.

D. S. Naidu, *R. Singh* and *S. Krishna* for the Petitioner

Messrs V.M. Mishra and *R. Prakash* for the 1st Respondent

S. Banuve for the 2nd and 3rd Respondents

Judgment

Elias J. The principal issue for determination on this application for special leave to appeal is whether the Court of Appeal was right to hold that it had no jurisdiction to hear an appeal from the decision of the High Court sitting as the Court of Disputed Returns. It requires evaluation of the balance struck by the Constitution between two important interests: the prompt determination of electoral challenges; and the conduct of elections according to law. It turns on the interaction of s 73(7) of the Constitution, providing for finality of the determination of the High Court upon an election petition and s 121(2), which confers a right of appeal from final judgments of that court in any matter arising under the Constitution.

Background

Prem Singh was declared by the returning officer to be the elected representative of the Nadi Open Constituency Seat in the General Election held from 25 August to 1 September 2001. By petition of 17 September 2001, Krishna Prasad applied to the High Court as Court of Disputed Returns claiming that he and not Prem Singh, should have been declared to be the elected representative.

The jurisdiction of the High Court in such matters is provided by s 73 of the Constitution:

> (1) *The High Court is the Court of Disputed Returns and has original jurisdiction to hear and determine:*
>
> *(a) a question whether a person has been validly elected as a member of the House of Representatives; and*
>
> *(b) an application for a declaration that the place of a member of the House of Representatives or the Senate has become vacant.*
>
> *(2) The validity of an election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise.*
>
> *...*
>
> *(7) A determination by the high Court in proceedings under para (1)(a) is final.*

In a judgment delivered on 8 February 2002 Gates J held that the returning officer for the electorate had wrongly disallowed as invalid 1697 votes. When re-counted, in accordance with the determination of validity made by the Court of Disputed Returns, Krishna Prasad received the majority of the votes cast. The court made consequential declarations that Prem Singh was not the elected member for the seat and, instead, that Krishna Prasad was the duly elected member.

An appeal was brought by Prem Singh in the Court of Appeal on 19 February 2002. His notice of appeal claimed that the judge had erred in law in reaching his decision in two respects. He was said:

- *to have interpreted s 116(3)(d) of the Electoral Act 1998 (which provides for invalidity of ballot papers) in a manner inconsistent with "the preferential system of voting as mandated by s 54(1) of the 1997 Constitution Amendment Act".*
- *to have acted "ultra vires" by misconstruction of s 116 of the Electoral Act 1998.*

The notice sought that the orders granted by the High Court be set aside.

An application for stay was heard in the Court of Appeal by Barker and Davies JJA. The court considered that it was first necessary to determine whether there was any right of appeal. Without such right, there could be no stay.

The appellant contended that he could appeal as of right under s 121(2) of the Constitution which provides:

> *(2) Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any matter arising under this Constitution or involving its interpretation.*

The appeal was said to arise out of the Constitution and to involve its interpretation because:

- the High Court was exercising original jurisdiction conferred by s 73(1) of the Constitution; and
- the judge had acted outside the provisions of the Electoral Act in allowing votes to be counted which the Act says are invalid and "thereby" "acted as a legislator" and contravened s 54 of the Constitution, which mandates the "alternative vote" preferential system of voting in accordance with legislation enacted by parliament.

The respondent argued that appeals from the original jurisdiction conferred upon the High Court by s 73(1) of the Constitution are prohibited by s 73(7). He submitted that "final judgment", from which an appeal lies under s 121(2), does not include a determination by the High Court in proceedings under s 27(1)(a) which by s 73(7) is expressed to be "final".

By its judgment of 1 March 2002, the Court of Appeal declined the application for stay and dismissed the appeal for want of jurisdiction. It held that s 73(7) of the Constitution precluded the appeal from the judgment of the Court of Disputed Returns.

The reasons of the Court of Appeal for dismissing the appeal are summarised in the joint judgment of Eichelbaum and Beaumont JJ. In brief, the Court of Appeal held that s 73(7) of the Constitution prevailed over the general right of appeal under s 121(2). Such result, the Court of Appeal considered, was consistent with the special nature of the jurisdiction and the need for the composition of parliament to be speedily identified. The Court of Appeal also expressed the view that s 121(2) did not apply because the challenge was to

the interpretation of the Electoral Act 1998 adopted by Gates J and therefore did not "arise" under the Constitution or involve its interpretation.

Because of the view it took as to its jurisdiction, the Court of Appeal did not enter on to the question whether the interpretation adopted by Gates J was correct. Any error in interpretation could not be reviewed on appeal because the decision of the Court of Disputed Returns was "final". Accordingly, the Court of Appeal held that no right of appeal arose either under s 121(2) of the Constitution or under any provision of the Court of Appeal Act 1978:

> *s 73(7) of the Constitution means what it says. In accordance with the position in many other countries, there is no right of appeal from the final decision of the Court of Disputed Returns (at 9).*

Prem Singh now, petitions this court for special leave to appeal. In his petition he asks the court to set aside the orders made in the Court of Appeal and the Court of Disputed Returns and to stay all further proceedings until the hearing and determination of his appeal.

In the meantime, by orders made in the Court of Appeal and Supreme Court, execution of the orders made in the Court of Disputed Returns has been stayed pending the determinations first of the Court of Appeal and now of this court. The effect has been that the present petitioner, Prem Singh, continues to act as the elected representative of the Nadi Open Constituency Seat and has been appointed as Leader of the Opposition by the President under s 82 of the Constitution. If the judgment of the Court of Disputed Returns is not disturbed in this court and the interim stay is discharged, the effect will be that Krishna Prasad will be the elected representative. On that basis Prem Singh would not be an elected; representative and would lose his eligibility to be the leader of the opposition.

We have heard full argument on the appeal. The parties were in agreement that, should we grant leave, we should deal with the substantive appeal.

Special leave to appeal

The Supreme Court has exclusive jurisdiction under s 122(1) of the Constitution, "subject to such requirements as the Parliament prescribes", to hear and determine appeals from all final judgments of the Court of Appeal: s 122(1). It has power "to review, vary, set aside or affirm decisions or orders of the Court of Appeal" and to make such orders "as are necessary for the administration of justice" (s 122(3)). Section 122(2) provides:

> *(2) An appeal may not be brought from a final judgment of the Court of Appeal unless:*
>
> *(a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or*
>
> *(b) the Supreme Court gives special leave to appeal.*

By s 7(3) of the Supreme Court Act 1998, parliament has prescribed the conditions upon which leave to appeal may be brought in civil matters "including a matter involving a constitutional question". The Supreme Court "must not grant special leave to appeal unless the case raises":

> (a) a far-reaching question of law;
>
> (b) a matter of great general or public importance;
>
> (c) a matter that is otherwise of substantial general interest to the administration of civil justice.

In the present case, each of the ingredients (a), (b), and (c) is clearly satisfied. Whether there is a right of appeal from the Court of Disputed Returns is a "far-reaching question of law" of substantial interest to the administration of civil justice. The subject of the case, the validity of an electoral return, is of the highest public importance and touches fundamental rights.

On an application for special leave where the conditions of s 7(3) of the Supreme Court Act are fulfilled, leave will usually be granted unless the decision of the Court of Appeal is clearly correct and the points raised by the substantive appeal are not arguable (see *ANZ Banking Group v Merchant Rank of Fiji* CBV0001 of 1995, 21 November 1995 (unreported)).

Whether the Court of Appeal had jurisdiction to consider the appeal turns on a matter of interpretation of the Constitution: whether s 73(7) prevented an appeal under the general right of appeal in constitutional matters provided by s 121(2). In particular, the appeal raises the question whether s 73(7) excludes appellate review and correction of demonstrated error of law by the Court of Disputed Returns in the interpretation of the legislation which it is required by the Constitution to apply and which gives effect to the constitutional right to vote in free and fair elections.

As appears from, the discussion below and in the judgment of Eichelbaum and Beaumont JJ, the points were not suitable for peremptory determination. The parties were in a position to argue the merits of the appeal and we have proceeded on that basis. If that course had not been available, it would have been necessary to grant leave so that the full argument could be properly considered.

Was there a general right of appeal to the Court of Appeal under s 121(2) of the Constitution?

Section 121(1) gives the Court of Appeal general jurisdiction to hear appeals from judgments of the High Court, subject to the Constitution and to statutory prescription. Parliament is empowered by s 121(3) to make provision for appeals (whether by right or by leave) from judgments other than final judgments of the High Court arising under the Constitution or involving its interpretation. In the case of appeals from final judgments of the High Court which arise under the Constitution or involve its interpretation, appeal is available as of right under s 121(2) of the Constitution.

The effect of s 121 is that rights of appeal are conferred by the Constitution only in respect of constitutional cases. The right to bring appeals from other judgments of the High Court is left by the Constitution to parliament to establish. Outside the right provided by the Constitution for constitutional cases, a right to appeal is the creature of statute.

Neither the Constitution nor the Electoral Act 1998 provides distinctly for appeal from decision of the Court of Disputed Returns. Indications that the general provisions for appeal from the High Court are applied are to be found however in both the Constitution and the Electoral Act. Section 73(1) of the Constitution establishes that the Court of Disputed Returns has "original" jurisdiction to hear both questions as to the validity of election to the House of Representatives and applications for declaration of vacancy in the House of Representatives and the Senate. Such jurisdiction is not described as exclusive of appeal, although "finality" is provided for in respect of questions as to the validity of elections. In relation to proceedings to determine whether there is a vacancy following expulsion from a party, s 71(5) of the Constitution assumes appeals. It provides:

(5) Despite subsection (4), if a member of the House of Representatives who is expelled from his or her political party brings proceedings in the courts challenging the validity of the expulsion, his or her place in the House of Representatives does not become vacant unless and until those proceedings, **including any appeal**, *are determined adversely to him or her and, pending their determination, the member is taken to be suspended from the service of the House.*

Consistently, s 153(2) of the Electoral Act, under the heading "Disposal of petition", assumes a right of appeal from determinations of the Court of Disputed Returns, subject to s 73(7):

(2) The right of appeal against any decision of the Court is governed by section 73(7) of the Constitution.

Subject to the application of s 73(7), therefore, the schemes of the Constitution and the Electoral Act do not exclude the general supervision of the High Court as the Court of Disputed Returns by the appellate courts.

Statutory general rights of appeal are provided by the Court of Appeal Act. By s 3 of the Act, as amended by the Court of Appeal Amendment Act 1998:

(2) The court shall have

(a) power and jurisdiction to hear and determine all appeals which lie to the Court by virtue of the Constitution, this Act or of any other law for the time being in force;

(b) all such powers and jurisdiction as are or may from time to time be vested in the Court under or by virtue of the Constitution, this Act or any other law for the time being in force.

(3) Appeals lie to the Court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court.

By s 12(2)(c) of the Act,

(2) No appeal shall lie

…

(c) *from the decision of the High Court or of any judge thereof where it is provided by any enactment that such decision is to be final.*

An enactment that a judgment is "final" may preclude appeal. Whether s 73(7) does so is considered below. But such effect is made explicit for appeals brought under the Court of Appeal Act by s 12(2)(c). It is no doubt for that reason that the appellant does not rely on the statutory general right of appeal conferred by s 3(3) of the Court of Appeal Act. He relies instead on the right of appeal provided by the Constitution in s121(2). No provision equivalent to s 12(2)(c) of the Court of Appeal Act 1978 is contained in the Constitution.

The Court of Appeal rejected the application of s 121(2) in this case on the basis that the appeal arises out of or involves the interpretation not of the Constitution but, rather, the Electoral Act 1998. It relied upon the decision of the Court of Appeal in *Kulavere v State* (13 August 1999, Tikaram P, Eichelbaum and Handley JJA) which held that the Constitution was not "involved or engaged" in controversy about interpretation of the Criminal Procedure Code. That approach in my view was too austere.

Under s 120(1) of the Constitution, the High Court has both the general unlimited original jurisdiction "under any law", "and such other original jurisdiction as is conferred on it under this Constitution". In addition, under s 120(2) it has "original jurisdiction in any matter arising under this Constitution

or involving its interpretation". The High Court has original jurisdiction under the Constitution:

- to hear applications for redress for contravention of the Bill of Rights provisions contained in Ch 4 of the Constitution (s 41).
- to hear and determine as Court of Disputed Returns petitions challenging an electoral result or declaring a vacancy in the House of Representatives or the Senate (s 73).

The special jurisdiction to determine "whether a person has been validly elected as a member of the House of Representatives" is original jurisdiction conferred upon the High Court directly by the Constitution. The final judgment of the High Court in the exercise of that jurisdiction is "in" a "matter arising under this Constitution", whether or not the judgment entails a point of interpretation of the Constitution. The jurisdiction arises in both circumstances: in a matter arising under the Constitution "or" involving its interpretation.

I am of the view that the Court of Appeal's reliance upon *Kulavere* was misplaced. Neither that case, nor the Australian cases cited in it, are in point on the question whether the exercise of an original jurisdiction conferred by the Constitution upon the High Court is a matter "arising under this Constitution". In *Kulavere* the costs jurisdiction exercised by the High Court was one conferred by the Criminal Procedure Code, not by the Constitution. There was no right of appeal provided by statute and the Court of Appeal declined to accept that such a right of appeal could be derived from s 121(2). That decision was clearly right. But it has no application here. I consider that s 121(2) gives a right of appeal from an exercise of an original jurisdiction directly conferred upon the High Court under the Constitution.

How are ss 121(2) and 73(7) to be reconciled?

The jurisdiction of the Court of Appeal under s 12l is "subject to this Constitution" (s 121(1)). The Constitution itself provides in s 73(7) that the decision of the Court of Disputed Returns on an electoral petition is "final". A specific provision may over-ride general appeal rights *Kydd v Liverpool Watch Committee* [1908] AC 327; Wade and Forsyth, *Administrative Law* 8th ed, p 701. Whether s 73(7) does so, to oust the general appellate jurisdiction of the Court of Appeal, is a matter of construction. The approach suggested by the maxim *generalia specialibus non derogant* reflects "simple common sense and ordinary usage" rather than a rigid legal rule: *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605 at 627 per Lord Cooke. Its application depends on context.

The meaning of words will differ according to context. The expression "final judgment" is commonly used to denote a decision that immediately determines the status of the parties (see *Standard Discount Co v La Grange* (1877) 3 CPD 71), and indeed is often used to define judgments from which a right of appeal lies (see for example r 2 of the New Zealand Privy Council Rules 1910). That is its use in s 121(2) of the Constitution which provides appeals, as of right, from "final" judgments of the High Court. Yet it is also not uncommon for the statutory formula "a determination is final" to signify that it is not open to review or appeal (see *R v Napton Overseers* (1856) 25 LJKB 296; sub nom *R v Hunt* 6 EL & BL 409). The striking contrast between such common usages of the same word "final", which respectively point towards and away from a right of appeal, points to the need when construing the Constitution to, look beyond purely verbal considerations to its essential policies.

The context here is competition between two important policies, both recognised by the Constitution: the desirability of speedy determination of electoral challenges which lies behind the requirement of finality; and the essentiality of the rule of law of which s 121(2) and the right of access to the superior courts is an expression. The Preamble to the Constitution asserts that adherence to the rule of law safeguards the human rights and fundamental freedoms of all. Section 3(a) of the Constitution requires interpretation of its provisions in a manner which promotes the objects of each and the spirit of the Constitution as a whole. In construing the provisions of the Constitution regard must be had to developments in the understanding and promotion of human rights (s 3(b)).

Such obligation to keep the law under review where it affects human rights makes it necessary to be cautious in application of authority lacking any constitutional or human rights context. Reassessment of even apparently settled law may be required (as in *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439). While some assistance by analogy from non-constitutional domestic law may be useful, it is important to keep in mind the very different approach required in respect of constitutions. They must be interpreted generously, in a manner befitting their unique importance in the legal order (*Minister of Home Affairs v Fisher* [1980] AC 319 at 329; *Attorney-General of (Fiji) v Director of Public Prosecutions (Fiji)* [1983] 2 AC 672 at 682).

Where human rights are affected, the courts exercising jurisdiction under the Fiji Constitution "must promote the values that underlie a democratic society based on freedom and equality", by reference to public international law if relevant (s 43(2)). In such circumstances, a mechanistic textual trumping of one provision by another is not appropriate. A more demanding attempt at reconciliation is required (in the manner suggested by Sedley LJ in *Douglas v Hello! Ltd* [2000] EWCA Civ 353; [2001] 2 WLR 992 (CA).

The court cannot evade consideration of the proper balance required by the Constitution in the particular case. That requires consideration of the balance between finality and legality in the circumstances of electoral rights. It is necessary first to consider the character of the errors of law claimed to arise in the decision of the Court of Disputed Returns. The exercise was not undertaken by the Court of Appeal, perhaps because of its erroneous view that s 121(2) of the Constitution was not engaged and its failure to appreciate that a further constitutional issue to be balanced with s 73(7) arose.

The system of voting provided for in Fiji

The "compact" recited in s 6 of the Constitution identifies a number of principles recognised by the people of Fiji as being those upon which the conduct of government is based. They include "the rights of a citizen … to vote and to be a candidate in free and fair elections of members of the House of Representatives held by secret ballot and ultimately on the basis of equal suffrage" (s 6(f)). Although not themselves justiciable, the principles identified in s 6 must, when relevant, be considered "in the interpretation of this Constitution or a law made under this Constitution"(s 7(2)).

Section 36 of the Constitution, contained in the Bill of Rights chapter, provides that "every person who has a right to vote in an election of a member of the House of Representatives has the right to do so in secret". Every person registered as a voter is required to vote (s 56).

Voting is dealt with in s 54 of the Constitution:

> *(1) The election of a member for each constituency is conducted under the preferential system of voting known as the alternative vote.*
>
> *(2) The Parliament may make laws relating to elections for the House of Representatives.*

The Constitution therefore prescribes the alternative vote preferential system of voting, in accordance with the laws it authorizes the Parliament to make. Those laws are contained in the Electoral Act. The Act provides the manner in which valid votes can be cast.

I am in agreement with the reasons expressed in the judgment of Eichelbaum and Beaumont JJ for their conclusion that Gates J misconstrued the provisions of s 116(3)(d) of the Electoral Act. I can therefore be brief in indicating why I too have reached the same conclusion.

The legislation permits preferential voting either by the voter listing the order in which he votes for individual candidates (by placing descending numbers in the boxes beside their names), or by the voter electing to adopt the list preferences registered by a party or independent candidate (by ticking the box beside the name of the registered party or independent candidate). He cannot do both. The option of voting for the preferences registered by a party or independent candidate is available only by a Pt II ballot paper. On it, the names of the parties and independent candidates who have registered lists of preferences appears at the top of the ballot paper, "above the line". The names of the individual candidates, against which the voter can identify his own preference by number, appear at the bottom of the ballot paper, "below the line". These options are provided by s 75(2) of the Electoral Act.

> (2) If a ballot paper handed to a voter is a Pt II ballot paper, the voter may mark his or her vote on the ballot paper:
>
> *(a) either in the manner described in subsection (1); or*
>
> *(b) by placing a tick in one of the boxes which appear at the top of the ballot paper opposite the name of a registered political party or independent candidate,*
>
> *but, subject to section 116(3), may not do both.*

Section 57(1) of the Act provides that "the votes in a poll must be taken by ballot and the ballot of each voter must consist of a paper prepared in accordance with this Act". Section 57(5) provides:

> *(5) Where one or more registered political parties or independent candidates has lodged a list of preferences in respect of a constituency, the ballot papers for that constituency must, so far as practicable, be in the form set out in Part II of the Schedule and will be known as "Part II Ballot Papers".*

The form of the Pt II ballot paper is set out in the schedule to the Act. It provides, above the line, the names of the parties or independent candidates who have lodged lists with associated boxes. Below the dividing line is the list of individual candidates. The paper instructs the voter above the line "EITHER" to place a tick in "*one* of these boxes to indicate which party's or candidate's preference you wish to adopt as your vote". Below the line the instruction is "OR number the boxes from 1 — in your order of preference. In this case number every box to make your vote count". Below, is the instruction "Do *not* do both".

The preference is critical to the operation of the election. If no clear preference for one candidate is obtained on first count, the lowest polling candidates are progressively removed and the preferences reallocated according to the order

indicated on the ballot paper until there is a majority for one candidate. In the present case, six counts were necessary before Prem Singh was declared to be elected.

Under s 116, ballot papers are invalid in a number of circumstances. They include a ballot paper that "does not indicate the voter's first preference for one candidate and the order of his or her preference for all the other candidates" in accordance with s 75 (s 116(1)(d)). Where a ballot paper is invalid "any votes marked on it must not be counted" (s 116(1)).

Section 116(2) saves Pt I ballot papers strictly incomplete (where the voter fails to assign a number to the last preference, but it is apparent from the ordering of all other candidates). The vote is also saved under s 116(2)(d) if there are four or more candidates and the voter has provided a sequence of preferences in not less than 75% of the boxes opposite the names of the candidates.

The same savings provisions apply to Pt II ballot papers where the voter has elected to vote by indication of preference for the candidates by numbering beside their names "below the line" (s 116(3)(a)). Section 116(3) goes on to provide a careful scheme for all other ways in which a vote can be cast using a Pt II ballot paper:

> *(3) In the case of a Part II ballot paper*
>
> *(a) if the voter has placed numbers opposite the names of individual candidates, the rules set out in subsection (2) apply for ascertaining whether the ballot paper is valid in respect of individual candidates;*
>
> *(b) if the voter has placed numbers as aforesaid; and*
>
> *(i) by applying the rules set out in subsection (2) the ballot paper would be invalid in respect of individual candidates; but*
>
> *(ii) there is a tick opposite the name of one, and only one, registered political party or independent candidate which or who has lodged a list of candidates under section 61,the order of preference shown on that list in respect of individual candidates is to be treated as the voter's order of preference in respect of those candidates;*
>
> *if the voter has placed numbers as aforesaid and by applying the rules set out in sub-section (2) the ballot paper would be valid in respect of individual candidates, its validity will not be affected by the placing of a tick opposite the name of one or more registered political parties or independent candidates which or who have lodged a list of candidates under section 61;*
>
> *(d) if the voter has not place numbers opposite the names of individual candidates, but has placed a tick as described in paragraph (b)(ii), the provisions of that paragraph apply;*
>
> *(e) if the voter has not placed numbers as aforesaid and has placed a tick opposite the name of more than one registered political party or independent candidate, the ballot paper is invalid and any votes marked on it must not be counted.*

I do not find the sense of s 116(3) elusive. Where the voter has cast a vote for individual candidates which is not valid in accordance with s 116(2), but has also ticked one registered party of one independent candidate who has lodged a list, then the list vote will be valid (s 116(3)(b)). If the voter has properly indicated a preference for individual candidates (applying s 116(2)) but has also ticked one or more registered parties or independent candidates who have lodged a list, then the individual candidate preferences are valid and prevail (s 116(3)(c)). If the voter has not placed numbers opposite the names of individual candidates, but

has placed a tick "opposite the name of one, and only one, registered political party or independent candidate which or who has lodged a list of candidates under section 61".

The order of preference shown on that list in respect of individual candidates is to be treated as the voter's order of preference in respect of those candidates.

The last provision for validity is the clear meaning of s 116(3)(d) when the text of s 116(3)(b)(ii), providing for the manner of the tick, is read into s 116(3)(d) (as required by the reference back) and the text of the consequence provided by s 116(3)(b) is also adopted (as similarly required by the reference back). The consequences of a tick for the registered party or independent candidate which has lodged a list is necessary to complete the statement of the circumstances in which a Ballot II paper will be valid. Finally, s 116(3)(e) makes it clear that if the order of preference for the individual candidates is invalid and the voter has ticked more than one registered party or independent candidate, the ballot paper is invalid and any votes marked on it must not be counted.

The language used in s 116 is consistent throughout. Voters either show a preference for "individual candidates" by recording numbers opposite their names or tick to obtain the list lodged by parties or "independent candidates" opposite the names of the political party or "independent candidate". The names of the registered political parties or independent candidates who have lodged lists appear "at the top of the ballot paper" (s 75(2)(b)). The prescribed forms for Pt II ballot papers are clearly divided between the options of voting for the party or independent candidate's lodged list of preferences, and voting for the voter's scheme of preferences. A tick below the line for one candidate is invalid and contrary to the careful scheme of the legislation. It is also wholly ambiguous as to intent: although the judge appears to have treated such votes as indicating an intention to adopt the list of the party of the candidate ticked, it is equally open to the inference that the voter intended to vote for one candidate only rather than for his preferences in order. Such failure to indicate preferences in order is an invalid vote under s 116(1)(d) unless there is one tick only "opposite the name of one, and only one, registered political party or independent candidate which or who has lodged a list of candidates under section 61" (s 116(3)(d)). The only place where that tick can be placed unambiguously and lawfully to indicate the party list is opposite the name of the party or independent candidate where it appears at the top of the ballot paper, above the line, in accordance with s 57(5) and the Schedule to the Act.

Strict observance of the scheme of validity for ballot papers provided by s 116 is underscored by s 150. It provides that an election "must not be declared invalid" because of irregularity in filling in a form prescribed by the Act "other than a ballot paper".

As a result of the error in interpretation, the Court of Disputed Returns treated single ticks opposite the name of one candidate below the line as valid votes for the list of the party of that candidate. Such votes were invalid in application of the scheme provided by s 116. The error was material. The declaration the court made as to the result of the election was based upon it. The error was also substantive. It was not a consequential or collateral question of law. It was integral to the function exercised by the Court of Disputed Returns. The error of law meant that the judge asked himself the wrong question in carrying out his responsibilities, with disenfranchising effect for those whose valid votes counted equally with invalid votes.

Is such error able to be corrected by appeal?

Section 73(7) does not free the Court of Disputed Returns from the obligation to comply with the law. Its interpretation of the provisions of the Electoral Act is subject to reconsideration by the courts of general jurisdiction, both at first instance and on appeal, as the decision in the New Zealand case of *Wybrow Chief Electoral Officer* [1980] 1 NZLR 147 illustrates. A construction of s 73(7) to permit the appeal in the present case is not therefore necessary to correct perpetuation of the error for the future. Indeed, the opinion as to the correct interpretation of the Electoral Act expressed by all members of this court is likely to achieve that correction for the future. The question is rather whether s 73(7) permits correction of the erroneous result in the case of the 2001 election for the Nadi Open Constituency.

The requirement for early finality in election cases is common in many sovereign states governed by the rule of law. There is no necessary inconsistency. The promotion of early certainty about the composition of Parliament furthers the proper object of ensuring that the government of the nation is not dangerously disrupted. Resolving disputed returns was formerly considered to be part of the privileges of Parliament, later conferred by it as special jurisdiction upon the courts (see *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31 at 38, describing the history of the jurisdiction. In *Devan Nair*, the Privy Council referred to the line of decisions starting with *Theberge v Laudry* (1876) 2 App Cas 102 declining any right of appeal from tribunals established to determine disputed electoral returns. It identified the reason for this approach as having been "put very neatly" by Lord Hobhouse in *Kennedy v Purcell* (1888) 59 LJ 279 at 280.

The decision of the Judicial Committee was, not that the prerogative of the Crown was taken away by the general prohibition of appeal, but that the whole scheme of handing over to courts of law disputes which the Legislative Assembly had previously decided for itself showed no intention of creating tribunals with the ordinary incident of an appeal to the Crown.

Rights of appeal in that special jurisdiction had therefore to be conferred specifically. In general, legislation based on the British model provided that the decisions of courts or tribunals of disputed return were "final". Such provisions have been held, as a matter of construction, to preclude appeal or judicial review. The underlying reason why that interpretation prevailed in the cases beginning with *Theberge v Laudry* was the perceived desirability of speedy determination of elections (*Devan Nair* at 40).

Though prompting care, I do not consider that the reasoning in these authorities is determinative. They pre-date the perspective of human rights and the context provided by the Fiji Constitution. They also predate the modern insistence that courts of general jurisdiction supervise legality even where more explicit ousters than a "finality" clause operate. That is the context in which the meaning of s 73(7) and its impact upon rights of appeal specifically conferred by the Constitution must be considered.

If the determination of electoral petitions had been entrusted to an administrative tribunal or court of limited jurisdiction a presumption would operate against an interpretation of s 75(7) which made its decisions on questions of law conclusive (*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *O'Reilly v Mackman* [1983] 2 AC 237; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129). I do not accept that such presumption would be rebutted by the constitutional and statutory policy of electoral certainty. In application of the approach adopted by the House of Lords

in *Re Racal Communications Ltd.* [1981] AC 374, the matter remains one of interpretation. The scope of s 73(7) turns on its construction in context.

The test proposed by Lord Diplock in *Racal* at 380 was whether the consequences of denying all appeals (where the statute provided that a decision "shall not be subject to appeal") led to results "so manifestly absurd or unjust as to drive one to the conclusion that Parliament must have intended that, despite the unqualified language used, the judge's decision should be unappealable on some grounds only but appealable to the Court of Appeal on others". It is clear that he grounded his decision that Parliament did not intend the "unappealability to be subject to implied exceptions" not only on the "plain" words of the ouster provision (more explicit than the finality clause here) but also, importantly, on the contextual "cogent reasons for denying any right of appeal". The context was a preliminary investigation, a "relatively minor inconvenience" which "decides no issue", and in which the provision of an appeal, alerting the company being investigated, would have defeated the object of the power (at 380).

Most importantly, the context here is a Constitution. It is a context far removed from the preliminary investigation with which the House of Lords was concerned in *Racal*. Unlike the order in issue; in *Racal*, which "decides no issue", the determination of the Court of Disputed Returns is a final one, affecting the rights of candidates and electors recognised by the Constitution. It affects the government of Fiji.

The application of s 73(7) turns on the construction of the Constitution as a whole. That is made explicit by s 3 of the Constitution, which provides that in the interpretation of any of its provisions:

> *(a) a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object; and*
>
> *(b) regard must be had to the context in which this Constitution was drafted and to the intention that constitutional interpretation take into account social and cultural developments, especially:*
>
> *(i) developments in the understanding of the content of particular human rights; and*
>
> *(ii) developments in the promotion of particular human rights.*

The right to vote and be a candidate in "free and fair elections" is fundamental to the Compact recorded in s 6 of the Constitution as to the conduct of Government in Fiji. The right to participate in a secret ballot for the election of members of the House of Representatives is affirmed in Ch 4 of the Constitution, where the Bill of Rights is located. That chapter binds the judicial branches of government "at all levels" (s 21(1)). And "In considering the application of this Chapter to particular legislation",

> a court must interpret this Chapter contextually, having regard to the content and consequences of the legislation, including its impact upon individuals, groups or communities (s 21(4)).

The Constitution therefore makes it clear that, in conformity with modern international jurisprudence, electoral rights are fundamental human rights. Some caution is necessary in considering cases from a time when the human rights dimension of electoral rights was not fully appreciated.

I am not persuaded that an appeal on law to correct such error would necessarily endanger the purpose of ensuring speedy determination of electoral challenges. Speed is self-evidently desirable in electoral matters and is indicated by s 153(1) of the Electoral Act (which requires the Court of Disputed Returns to give its decision on a petition "as soon as practicable"). But an appeal on a question of law as to the interpretation of the Electoral Act and the content of the Constitutional right to vote need occasion little delay. Speed in electoral matters may be a very good thing but not if it comes at the expense of fundamental rights. The context in this case does not provide the "cogent reasons for denying any right of appeal" which were persuasive in *Racal*.

The rights to representation according to law and to participate in free and fair elections to secure such representation are human rights. As such, they are a particular responsibility of the courts of general jurisdiction "at all levels", as s 21(1) of the Constitution affirms. The right recognised by s 6 to "vote and to be a candidate in free and fair elections of members of the House of Representatives held by secret ballot and ultimately on the basis of equal suffrage" is essential to the legitimacy of government under the Constitution. McLachlin J described the same right in the context of the Canadian Charter of Rights and Freedoms in *Dixon v British Columbia (Attorney-General)* (1989) 59 DLR (4th) 247 as:

> one of the most fundamental of the Charter rights. For without the right to vote in free and fair elections all other rights would be in jeopardy.

In *Dixon* the court identified a number of core values which form part of the guarantee of the right to vote in free and fair elections. They included "the right to have one's vote count for the same as other valid votes cast in a district". The principle underpins the fairness of any electoral system. The result of the decision of the Court of Disputed Returns is that, because of error of law in the construction of the Electoral Act, invalid votes have been counted equally with valid votes. The result is contrary to the right to participate in fair elections. The error was a material one in the application of a statute providing for fundamental rights recognised by the Constitution. It was not an error in an incidental question of law considered by the court in reaching its decision. It was an error that caused the judge with responsibility for determining the petition to ask himself the wrong question. By the error the scheme of ballot validity provided by parliament to achieve the right promised by the Constitution was effectively subverted. The consequences to the rule of law of permitting such result to stand without prospect of correction are a powerful consideration in the interpretation of s 73(7).

Eichelbaum and Beaumont JJ are of the view that, because the jurisdiction to challenge the election has been vested in the High Court, rather than in an inferior court or tribunal, Parliament has chosen to commit conclusively the task of interpreting the legislation to it. Unless the judge had acted arbitrarily and not judicially at all, the privative clause prevents appeal. They regard the decision of the House of Lords in *Re Racal Communications Ltd* as indistinguishable. Reluctantly, I am unable to support that position. It seems to me to be too black and white. It pays insufficient attention to the principle of legality, the most important attribute of the rule of law, and the context of human rights.

I accept that some deference to the Court of Disputed Returns is required by the terms of s 73(7). It is not to be deprived of any effect. It is not any error of law which would enable it to be brushed aside. While any error of law may be

regrettable, those which are not to be characterised as entailing truly radical error must be accepted as the price of early resolution of electoral disputes.

But nor is s 73(7) a trump, ousting supervision altogether. The supervising court (whether appellate or at first instance) must, in interpreting the scope of s 73(7), balance the constitutional policies in finality and legality in the context of the actual decision and its impact on human rights. Lord Scarman in *Racal* suggested that intervention where a judge acts arbitrarily would not be ousted by a finality clause. Similarly, it is unthinkable that the courts of general and appellate jurisdiction would be powerless to intervene if bias or breach of natural justice in the proceeding of the Court of Disputed Returns were established. Deference in respect of all other error, even if radical, is insufficient to discharge the constitutional obligations of the courts in protection of human rights. The framers of the Constitution cannot have intended s 73(7) to achieve a result which would destroy fundamental rights they had expressly created. The discussion in *Racal* was in the very different context of a preliminary investigation which decided no rights and no issue. I do not consider it authoritative in the present circumstances.

On any measure the error here was of the highest significance and in radical breach of the statute. As a result of the error, the judge went fundamentally astray in the exercise of his functions. The rule of law requires correction of the error. I am of the view that s 73(7), properly construed, does not put the result beyond appellate correction. In this different context the tests suggested by Lord Diplock and Lord Salmon in *Racal* apply by analogy with greater force. Any construction of s 73(7) which empowers the High Court as Court of Disputed Returns to determine conclusively the scope of the system of voting provided by the Electoral Act 1998 would yield a result that is "manifestly absurd or unjust". Such conclusion makes no "sense" in the context of the Constitutional right to elections which are fair and conducted in accordance with the law enacted by parliament and the obligations imposed by the Constitution upon the courts of general jurisdiction, at all levels. The question of law in interpretation of the system of voting provided by the Electoral Act was not one which the judge was empowered to determine conclusively.

The Court of Appeal was in my respectful opinion in error in considering that it had no jurisdiction to hear the appeal. I would grant special leave to appeal. Because of my conclusion (in agreement with the judgment of Eichelbaum and Beaumont JJ) that, if the Court of Disputed Returns had asked itself the right question, it can only have concluded that Prem Singh had been validly elected, I would exercise the powers conferred by s 122 to set aside the orders made in the Court of Disputed Returns. Since this is a case where the outcome depends only on the point of interpretation here decided, I would make an order directing the Court of Disputed Returns to declare that Prem Singh is the duly elected member for the Nadi Open seat.

Judgment of Eichelbaum and Beaumont JJ

Introduction

Prem Singh (the Applicant) and Krishna Prasad (the 1st Respondent) were candidates for the seat of Nadi Open in the General Election hold in August/September 2001. After the election, the Returning Officer declared the Applicant the elected member. However, upon an electoral petition by the 1st

Respondent, the Court of Disputed Returns (Gates J) declared that the Applicant was not the elected member; and that the 1st Respondent was the duly elected member.

The Applicant filed a notice of appeal to the Court to Appeal. That court (Barker and Davies JJA) dismissed the appeal for want of jurisdiction. The Applicant now seeks special leave to appeal from this judgment. We have heard full argument on the petition for special leave, upon the agreed footing that if we decided to grant leave, we would be in a position then to deal also with the appeal itself.

In order to understand the reasons of the Court of Appeal for dismissing the appeal for want of jurisdiction, reference should be made to the relevant provisions of the Constitution as follows:

The jurisdiction of the Court of Disputed Returns conferred by the Constitution

This jurisdiction of the Court of Disputed Returns is provided by s 73 of the Constitution:

7.3 (1) The High Court is the Court of Disputed Returns and has original jurisdiction to hear and determine:

(a) a question whether a person has been validly elected as a member of the House of Representatives; and

(b) an application for a declaration that the place of a member of the House of Representatives or the Senate has become vacant.

(2) The validity of an election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise.

(3) The petition:

(a) may only be brought by:

(i) a person who had a right to vote in the election concerned;

(ii) a person who was a candidate in that election; or

(iii) the Attorney-General; and

(a) *except if corrupt practice is alleged, must be brought within 6 weeks of the declaration of the poll.*

(4) If the petitioner is not the Attorney-General, the Attorney-General may intervene in the proceedings.

(5) Proceedings pursuant to paragraph (1)(b) may only be brought by:

(a) a member of the Parliament;

(b) a voter registered on any electoral roll; or

(c) the Attorney-General.

(6) If the proceedings are not brought by the Attorney-General, the Attorney-General may intervene in them.

(7) A determination by the High Court in proceedings under paragraph (1)(a) is final.

The jurisdiction of the Court of Appeal conferred by the Constitution

This jurisdiction is provided by s 121 as follows:

121 (1) The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by law.

(2) Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any matter arising under this Constitution or involving its interpretation.

(3) The Parliament may provide that appeals lie to the Court of Appeal, as of right or with leave, from other judgments of the High Court in accordance with such requirements as the Parliament prescribes."

The jurisdiction of the Supreme Court conferred by the Constitution

This jurisdiction is relevantly provided by s 122 as follows:

122 (1) The Supreme Court has exclusive jurisdiction, subject to such requirements as the Parliament prescribes, to hear and determine appeals from all final judgments of the Court of Appeal.

(2) An appeal may not be brought from a final Judgment of the Court of Appeal unless:

(a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or

(b) the Supreme Court gives special leave to appeal.

(3) In the exercise of its appellate jurisdiction, the Supreme Court has power to review, vary, set aside or affirm decisions or orders of the Court of Appeal and may make such orders including an order for a new trial and an order for award of costs) as are necessary for the administration of justice.

(4) …

(5) …

The provisions of the Electoral Act with respect to the Court of Disputed Returns

The relevant provisions of Pt 7 of the Electoral Act 1998 (the Electoral Act) with respect to the Court of Disputed Returns should also be noticed at this point, as follows:

- The requisites of an Electoral petition are specified. It must, amongst other things, set out the facts relied on to invalidate the election or return, with sufficient particularity to identify the specific matters relied on (s 144(a), (b)).
- The Attorney-General or the Supervisor may intervene (s 146(4)).
- The court's powers include powers to declare that any person who was returned as elected was not duly elected; and to declare any candidate duly elected who was not returned as elected (s 148(l)(f)).
- The court must give its decision and make an order on a petition as soon as practicable (s 153(1)).
- The right of appeal against any decision of the court is governed by s 73(7) of the Constitution (s 153(2)).

The appeal to the Court of Appeal

On 19 February 2002, the applicant filed a notice of appeal to the Court of Appeal from the decision of Gates J, in essence upon the following grounds:

- First, that s 116 of the Electoral Act (which provides that certain ballot papers are invalid) was interpreted wrongly, and contrary to s 54 of the Constitution (which provides that the election of a member for each constituency is conducted under the preferential system of known as the "alternative" vote (s 54(1)); and provides that the Parliament may make laws relating to elections for the House of Representatives (s 54(2))).
- Second, that the Court of Disputed Returns acted beyond its powers in its construction of s 116 of the Electoral Act and s 54 of the Constitution in allowing the validation of "below the line" ticks on Pt II ballot papers opposite the names of the individual.

In argument before the Court of Appeal, it was submitted for the applicant that his appeal was not precluded by the provisions of s 73(7) of the Constitution, (by which, as previously noticed, it is provided that the Court of Disputed Returns determination "is final") for these reasons:

- A right of appeal was available here by virtue of the provisions of s 121 of the Constitution (which provides for a right of appeal to the Court of Appeal from a judgment of the High Court in any matter arising under the Constitution or involving its interpretation).
- The functions exercised by the High Court sitting as a Court of Disputed Returns is an original jurisdiction of the High Court conferred on it by the Constitution, being functions which are consistent with its jurisdiction in dealing with other civil cases.
- In his interpretation of s 116, the Judge "acted as a legislator" by allowing votes to be counted which the Electoral Act did not permit.
- The Judge thereby contravened s 54 of the Constitution, which provision mandated the preferential system of voting known as the "alternative" vote.

The Court of Appeal's reasons for dismissal of the appeal for want of jurisdiction

The reasons of the Court of Appeal for dismissing the appeal were, in essence, as follows:

- Section 121(2) of the Constitution cannot give a right of appeal from the Court of Disputed Returns to the Court of Appeal. The Court's jurisdiction under s 121(1) of the Constitution is expressed to be "subject to" the Constitution, and to such requirements as the Parliament prescribes. Where the Constitution has specifically stated, in s 73(7), that there is to be no right of appeal from the Court of Disputed Returns, that provision overrides a general provision such as s 121(2). In other words, s 121(l) governs the interpretation of s 121(2). Therefore, s 121(2) cannot give a right of appeal from the High Court sitting as the Court of Disputed Returns.
- This interpretation accords with experience in many Commonwealth jurisdictions. Provisions denying appeals from electoral courts are "fairly universal", for the reason (citing the Privy Council in *Theberge v Laudry* (1876) 2 App Cas 102 at 106) that the jurisdiction is "extremely special" and one of its incidents or consequences must be that, by whomsoever it is to be exercised, it "should be exercised in a way that should as soon as possible become conclusive" and enable the Constitution of the Parliament "to be distinctly and speedily known". A similar perspective was taken by the Privy Council in *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31 at 39–40, a Malaysian appeal, where similar decisions on appeal from Sri Lanka and Belize were noted. Similarly, in *Re Wellington Central Election Petition* [1973] 2 NZLR 470, the New Zealand Electoral (Full) Court (Wild CJ, Roper and Cooke JJ) (citing *Nair* above, at 38) said: "The assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment". Because of the finality of the decision of the Election Court, the New Zealand legislation mandates a court of three judges.

- In any event, s 121(2) of the Constitution does not have unlimited application. It applies only when the judgment appealed from involves a matter arising under the Constitution, or its interpretation. Citing the Court of Appeal in *Kulavere v State* (13 August 1999, Tikaram P, Eichelbaum and Handley JJA) at 3–4 (itself citing High Court of Australia authorities) the question is whether in the judgment below, the interpretation of the provisions of the Constitution is "essential or relevant" to the questions of statutory interpretation arising. Here, Gates J was required to interpret the provisions of the Electoral Act, which he did without interpreting any part of the Constitution. The fact that the subject-matter of the case, namely an election, is a topic discussed at length in the Constitution is irrelevant. In *Kulavere* where the subject of the argument (the right to a fair trial) also featured in the Constitution, as in this case, the Constitution was not "involved or entangled" in the controversy. Nor was any provision of the Constitution "essential or relevant" to the question of statutory interpretation arising.
- Further, no right of appeal can be "manufactured" by claiming that the Judge was acting as a "legislator", when he was merely the interpreter of the work of the legislature. The Judge held that even where a voter had failed to observe the statutory voting instructions, the vote would still be counted, if the voter's intentions were clear from the ballot paper. (We interpolate, that is not how we construe the Judge's reasoning.) The Court of Appeal was not in a position to rule whether the judge's interpretation was right or wrong. Even if he did make an error of law, he did so whilst exercising his undoubted jurisdiction as the Court of Disputed Returns. As already held, no right of appeal or review is possible because of s 73(7) of the Constitution, supported by s 153(2) of the Electoral Act.

Should special leave to appeal be granted?

Section 7(3) of the Supreme Court Act 1998 provides that in relation to a civil matter (including one involving a constitutional question); this court must not grant special leave unless the case raises:

(a) A far-reaching question of law.
(b) A matter of great general or public importance.
(c) A matter that is otherwise of substantial general interest to the administration of justice.

The present case, in our view, plainly satisfies each of ingredients (a)-(c) above. On the other hand, if the Court of Appeal was in our opinion, not merely correct in its judgment, but clearly correct, we would not have granted special leave. (See *ANZ Banking Group v Merchant Bank of Fiji* CBV0001 of 1995 judgment, 21 November 1995). But, having had the benefit of full argument as on an appeal, we have concluded that the judge's interpretation of s 116 was wrong and that it is arguable, for the reasons we give below, that the Court of Appeal was not correct in dismissing the appeal for want of jurisdiction, for the reasons it gave. We therefore grant special leave to appeal and proceed now to the appeal itself.

The grounds of the appeal to this court

In essence, the appellant relies upon the following as the grounds for his appeal:

(1) The High Court fundamentally misapprehended the issue before it, and misconstrued the statutory provisions it was bound to apply, viz s 54 of the Constitution and s 116(3)(d) of the Electoral Act. The High Court's

errors of law went to its jurisdiction, such that s 73(7) could not operate so as to preclude the appellant's appeal to the Court of Appeal.

(2) The High Court's determination was made in relation to a matter arising under the Constitution, or involving its interpretation, thus giving rise to a right of appeal to the Court of Appeal by virtue of s 121(2) of the Constitution.

Consideration of the appeal

It will be convenient to turn first to analyse the character of the errors of law which, the appellant contends, were involved in the determination of the Court of Disputed Returns.

Did the Court of Disputed Returns make an error of law which went to its jurisdiction?

The question before the Court of Disputed Returns related to voters' completion of the form of ballot paper described in the Electoral Act as a Pt II ballot paper. We need to refer to the relevant provisions of the Electoral Act.

Section 59 provides that if a candidate is endorsed by a registered political party, the registered symbol of that party must be printed next to the name of the candidate on the ballot paper. If the candidate is not endorsed by a party, the section makes provision for the allocation of a symbol to the candidate. Again, the symbol must be printed adjacent to the candidate's name.

Section 57(5) provides that where one or more registered political parties or independent candidates lodged a list of preferences in respect of a constituency (which, we interpolate, was the position in the case of the Nadi constituency) the ballot paper must be a Pt II paper, in the form set out in a schedule to the Electoral Act. The scheduled form shows that the party names are to be in the top half of the form, ie "above the line". This popular expression arises from the presence of a line between the top and lower parts of the form.

One of the consequences of the provisions of ss 57 and 59 and the prescribed form of ballot paper, is that the symbols relating to parties or independent candidates appear twice, once in the top half (in association with the party name or the name of an independent candidate) and once in the lower half (in association with the candidate's name).

Section 58 deals with the determination of the order in which candidates' names appear on the ballot paper. Section 58(6) provides that in the case of a Pt II paper, the names of registered political parties, or independent candidates, which or who have lodged a list of preferences, must appear in the same order as the symbols for each party or independent candidate pursuant to s 59(2)(c).

Section 75 of the Electoral Act provides:

> *75 (1) If a ballot paper handed to a voter is a **Part I** ballot paper, the voter must mark his or her vote on the ballot paper by:*
>
> *(a) writing the number 1 in the square opposite the name of the candidate for whom the voter votes as his or her first preference; and*
>
> *(b) writing the numbers 2,3,4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the voter's preference for them.*
>
> *(2) If a ballot paper handed to a voter is a **Part II** ballot paper, the voter may mark his or her vote on the ballot paper:*
>
> *(a) either in the manner described in subsection (1); or*

*(b) by placing a tick in one of the boxes which appear **at the top of the ballot paper** opposite the name of a registered political party or independent candidate,*

but, subject to section 116(3), may not do both.

(We have underlined part of s 2(b).)

Section 116 provides:

116 (1) A ballot paper —

(a) that does not have on its back the initials of the presiding officer or clerk or the official mark referred to [sic] section 73(1)(c);

(b) on which anything is written or marked by which, in the opinion of the returning officer, the voter can be identified;

(c) that has no vote indicated on it; or

(d) that does not indicate the votes [sic] first preference for one candidate and the order of his or her preference for all the other candidates in accordance with section 75,

is, subject to this section, invalid and any votes marked on it must not be counted.

*(2) In the case of a **Part I** ballot paper —*

(a) if a voter has indicated a first preference .for one candidate and an order of preference .for all the remaining candidates except one and the square opposite the name of that candidate has been left blank, the voter's preference for that candidate must he taken to be the voter's last and, accordingly, the voter is to be taken as having indicated an order of preference for all the candidates;

(b) if there are 2 candidates only and the voter has indicated a first preference for one candidate and has left the other square blank or has placed a number other than 2 in it, the voter is to be taken as having indicated an order of preference for all the candidates;

(c) if there are 3 candidates the provisions of (l)(d) and (2)(a) apply.

(d) if there are 4 or more candidates and —

(i) the voter has placed the number I in the square opposite the name of one candidate;

(ii) the voter has not placed the number I in the square opposite the name of another candidate; and

(iii) in not less than 75% of the squares opposite the names of candidates the voter has placed numbers in a sequence of consecutive numbers starting with the number 1,

then —

(iv) the ballot paper is not invalid;

(v) the number 1 is to be taken as indicating the voter's first preference; and

(vi) the voter to [sic] to be taken to have indicated an order of preference by the other numbers in that sequence.

*(3) In the case of a **Part II** ballot paper —*

(a) if the voter has placed numbers opposite the names of individual candidates, the rules set out in subsection (2) apply for ascertaining whether the ballot paper is valid in respect of individual candidates;

(b) if the voter has placed numbers as aforesaid and —

(i) by applying the rules set out in subsection (2) the ballot paper would be invalid in respect of individual candidates; but

*(ii) there is a tick opposite the name of one, and only one, **registered political party or independent candidate which or who has lodged a list of candidates under section 61**,*

the order of preference shown on that list in respect of individual candidates is to be treated as the voter's order of preference in respect of those candidates;

(c) if the voter has placed numbers as aforesaid and by applying the rules set out in sub-section (2) the ballot paper would be valid in respect of individual candidates, its validity will not be affected by the placing of a tick opposite the name of one or more registered political parties or independent candidates which or who have lodged a list of candidates under section 61;

(d) if the voter has not placed numbers opposite the names of individual candidates, but has placed a tick as described in paragraph (b)(ii), the provisions of that paragraph apply;

(e) if the voter has not placed numbers as aforesaid and has placed a tick opposite the name of more than one registered political party or independent candidate, the ballot paper is invalid and any votes marked on it must not be counted.

(4) In considering, for the purpose of this section, whether numbers are in a sequence of consecutive numbers, any number that is repeated must be disregarded and any preference after the repeated number is invalid.

Again, we have added underlining.

Section 61 provides:

61 (1) A registered political party may, in respect of any constituency in which it has endorsed a candidate under section 60, lodge with the Supervisor a list of the candidates showing the order of preference in which the registered party would like to see the candidates placed by voters in that constituency.

(2) An order of preference in respect of a constituency must be lodged with the Supervisor not more than 7 days after the close of nominations in that constituency.

(3) An order of preference must be in writing and signed by

(a) a registered officer of the registered political party concerned; and

(b) the Chairman or some other member of the executive body of the party.

(4) An order of preference must include a certificate that the order was agreed in accordance with the rules of procedure of the party.

(5) Where a list of candidates has been lodged in respect of a constituency in accordance with this section, the Supervisor must

(a) cause notice of the list to be published in a newspaper and broadcast over a radio station accessible in the constituency; and

(b) cause the list to be affixed to the outside of every polling station in the constituency at least one hour before the poll opens at that polling station.

(6) If an order of preference in respect of a constituency has been lodged in accordance with this section, the ballot papers for that constituency must, so far as practicable, be in the form set out in ***Part II*** *of the schedule.*

(7) If no order of preference has been lodged in respect of the constituency, the ballot papers for that constituency must, so far as practicable, be in the form set out in ***Part I*** *of the schedule.*

(8) For purposes of this section, a candidate who has not been endorsed under s 60 (in this Act referred to as an "Independent Candidate") and who wishes to lodge an order of preference may do so as if he or she were a registered political party and this section, other than subsections (3) and (4), will apply to such a candidate."

We agree with the Court of Disputed Returns that the provisions of the Electorate Act regarding the manner in which ballot papers are to be completed are a code. This conclusion, gleaned from the detailed provisions referred to above, is strengthened by two further considerations. First, s 150 (2), provides that an election must not be declared invalid because of any omission or irregularity in filling up a prescribed form, specifically except ballot papers from this dispensation. Second, whereas earlier legislation (s 55(2) of the Electorate Act 1971, Cap 4) was to the effect that, notwithstanding directions as to the method of recording a vote, if a returning officer was satisfied that the intention

of the voter was clear beyond all reasonable doubt, he may at his discretion accept the ballot paper as a valid vote, the current Electoral Act does not contain any equivalent.

In this constituency, there were seven individual candidates, all of whom either had lodged lists, or whose parties had done so. The Pt II ballot paper showed, in the top half (or "above the line") the names of 17 parties or independent candidates, and their symbols, while "below the line" there were the names of the seven individual candidates and their symbols. The aspect of the judgment of the Court of Disputed Returns with which the petitioner has taken issue involves, primarily, the interpretation of s 116(3)(d). A significant number of voters who did not place numbers opposite the names of individual candidates, placed a tick in one of the seven boxes in the lower half of the Pt II ballot paper. These voters did not place any tick in the top half of the paper. The court held that the placing of the tick satisfied the requirement of the provisions of subs(3)(b)(ii). Thus in the opinion of the court these votes should be counted as indicating the order of preference shown on the list of candidates lodged by the ticked party or independent candidate. The returning officer had treated these votes as invalid. The decision of the Court of Disputed Returns resulted in the total count of votes being in favour of the first respondent.

Paragraph (b) of subs (3) applies primarily to the situation where the voter has indicated his or her preference by placing numbers. Under para (d), para (b)(ii) is also made applicable, by way of cross reference, to the situation where the voters have *not* placed numbers. That concept has not caused us as much difficulty as appears to have been the case with the Court of Disputed Returns and counsel for the applicant. As the court correctly perceived, the opening words of para (b) — "if the voter has placed numbers as aforesaid" — must necessarily be ignored when applying part of para (b) to the situation postulated in para (d), namely where the voter has *not* placed any numbers. Otherwise, as the judge observed, (d) does not make sense. So where the voter has not placed any numbers, *but* has placed a tick as described in (b)(ii), the last mentioned provision applies. That is, the order of preference in the particular list (the list indicated by the placement of the tick) is treated as the voter's order of preference. Although the drafting of para (d) could have been more elegant, its meaning is clear. The result may be more obvious if we rewrite (d) with the inclusion of the cross referenced words:

> *(d) If the voter has not placed numbers opposite the names of individual candidates, but has placed a tick opposite the name of one, and only one, registered political party or independent candidate which or who has lodged a list of candidates under section 61, the order of preference shown on that list in respect of individual candidates is to be treated as the voter's order of preference in respect of those candidates.*

So far so good. However, s 116(3)(b)(ii) does not validate *all* ticks wherever placed. It relates *only* to ticks "opposite the name of one … registered political party or independent candidate" (being a party or candidate who or which has lodged a list of preferences). Unfortunately, the Court of Disputed Returns did not examine the full meaning of the expression just quoted. In construing these words it is necessary to pay regard to s 75(2) which sets out the alternatives open to a voter issued with a Pt II ballot paper. The voter may either write in numbers, or alternatively place a tick "in one of the boxes *which appear at the top of the ballot paper* opposite the name of a registered political party or independent candidate". (Emphasis added.)

Section 75(2)(b) is subject to s 116(3), but only in a limited way. In general, to cast a valid vote a voter must not state *both* a numerical order of preference *and* place a tick opposite the name of a registered political party or independent candidate; but s 116(3) provides a limited dispensation. Nothing in s 75 however enables s 116(3) to authorise a departure from the requirement that a tick, to be valid, must be placed in one of the boxes *which appear at the top of the ballot paper*. The names of registered political parties appear only in the top half of the ballot paper. Even without recourse to s 75(2)(b), there would be a strong argument that s 116(3)(b)(ii) applied only to the top half of the ballot paper. But when s 75(2)(b) is taken into account, the argument becomes conclusive. No other interpretation is possible.

To meet this reasoning Mr Mishra argued that parties and independent candidates were identified by symbols and that these in effect were equivalent to party names. Thus he submitted that the reference in s 116(3)(b)(ii) to placing a tick opposite the name of a party or independent candidate was satisfied by the placing of a tick next to a symbol, whether appearing above or below the line. We are unable to accept that contention. The legislation uses the terms registered party, candidate, independent candidate and symbol distinctly and with precision. A requirement for placing a tick opposite the name of a registered party, or the name of an independent candidate, cannot be regarded as satisfied by the placing of the tick next to a symbol.

Mr Mishra also tried to make some point of the fact that the voting papers did not actually contain the party names in full, only initials or abbreviations. No explanation was offered how this came about but our own research brought us to the Electoral (Registration of Political Parties) Regulations 1991, made under the Electoral Decree of that year. Regulation 5(2)(b) provides that an application for the registration of an eligible political party shall set out an abbreviation of the party name, if the party wishes to be able to use such an abbreviation for purposes of the Decree. By virtue of s 163(2) of the Electoral Act, the 1991 Regulations remain in force, and references in the Regulations to the Electoral Decree are to be read as references to the Electoral Act. We have not found any specific reference in the Electoral Act that takes the issue of use of abbreviations further, but we do not see how pursuit of this line can assist the first respondent. However one regards the abbreviations, there was nothing in the lower half of the ballot paper that could be regarded as the name of a registered political party. Given the number of parties to be accommodated on the paper it may be that the use of abbreviations in the top half was in reliance on s 61(6) of the Electoral Act, providing that the ballot paper must "so far as practicable" be in the prescribed form.

The final point we wish to make under this heading is that, whether applied to the case where the voter has placed numbers, or the opposite situation, the meaning of subs (3)(b)(ii) is the same. In other words para (d) of subs (3) does not enlarge para (b)(ii). We cannot see any reason why the validation rule set out in para (b)(ii) should be interpreted differently according to whether, on the one hand, the voter has placed no numbers at all, or on the other has placed numbers incorrectly. If anything the latter case shows more strongly that the voter understood the system required the voter to indicate preferences. Thus it could be argued that in the case where the voter *has* placed numbers (incorrectly) he or she should be allowed more latitude if there is a tick as well. As we have stated however the effect of subs (3)(b)(ii) when read with s 75 is otherwise. That makes it even less likely that latitude should be allowed in the case where *no* numbers

have been placed. But in any event the short answer to any contention that the two situations should have different outcomes is that the wording of para (d) allows of only one interpretation.

For these reasons, we consider that in the respect under discussion, the Court of Disputed Returns was in error, and that s 116(3)(d) only validates votes where the tick referred to in para (d) has been placed opposite the name of one (and only one) registered political party, or independent candidate, which or who has lodged a s 61 list, *and the tick is in the top half of the paper* (ie "above the line").

In relation to the ballot papers in issue, since no other part of s 116 sufficed to validate them, the general provisions contained in subs (1) governed the situation. Since in terms of subs (1)(d) the ballot paper did not indicate the "votes" (sic) first preference for one candidate and the order of preference for all the other candidates, the papers were invalid.

To complete our analysis of the judgment we need to add the following. The Court of Disputed Returns stated it had reached its conclusion on the basis of the Electoral Act being a code, and that s 116 was mandatory rather than directory. The judgment continued:

> *However, one should not assume that the right to have a vote counted when the clear intention call be seen, is something that even Parliament can take away.*

The court then gave a number of citations emphasising the importance, in a free country, of the right to vote freely in properly conducted parliamentary elections.

As already noted, at an earlier time the Electoral Act contained a provision (s 55(2)) empowering a returning officer to give effect to the intention of the voter, if it was clear beyond doubt. The court concluded this section of its judgment by saying:

> *Although it is not in issue in this case, I doubt whether the omission of the words of section 55(2) from the 1998 Electoral Act will abolish the need always to be most cautious before disenfranchising the citizen.*

As the opening words of this paragraph make clear, this concluding section of the judgment was obiter. It may however contain a hint that in the court's view, the placing of a tick next to a party symbol below the line was an indication "beyond all reasonable doubt" of the voter's intention to record a vote activating the preference list of that candidate or the candidates' party. If so we must disagree. Indeed it is one of the weaknesses of the Court of Disputed Returns' view of s 116(3)(d) that the tick below the line cannot safely be taken as indicating any such intention. Equally, the voter may simply have been indicating a wish to cast a vote for that particular candidate, a form of "first past the post" voting not permissible under the Electoral Act. Or the voter may have intended, deliberately, to cast an invalid vote. It is impossible to be certain of the voter's intention.

Was any error by the Court of Disputed Returns beyond its jurisdiction?

In the far-reaching criticisms made of the judgment of the Court of Disputed Returns by the applicant, supported by the 2nd and 3rd Respondents, we heard that the court had changed the voting system, made it impossible to administer the system, deprived voters of their vote, deprived them of the alternatives that should have been available and deprived them of the right to cast an invalid vote. These criticisms were greatly exaggerated. Indeed if the points just set out were intended to be taken literally we do not agree with any

of them. Put simply the court misinterpreted the legislation with the result that it validated votes which the returning officer had rightly rejected as invalid.

On behalf of the appellant, much reliance was placed upon the decision of the English Court of Appeal in *Re A Company* [1980] Ch 138. There a judge of the High Court (Vinelott J) dismissed an application by the Director of Public Prosecutions for an order under the Companies Act 1948 (UK), authorising inspection of a company's books and papers. Notwithstanding a statutory provision that a decision under s 441 "shall not be appealable", together with a provision in the Supreme Court of Judicature (Consolidation) Act 1925 (UK) to that effect in the case of the Court of Appeal, an appeal was brought to the Court of Appeal, which reversed the judge's decision and made an order authorising inspection.

However, the Court of Appeal's decision was itself reversed in *Re Racal Communications Ltd* [1981] AC 374.

Lord Diplock said (at 380):

> *…I can see no ground for saying that the consequences of denying all appeals from the decision of a High Court Judge granting or refusing an order for production and inspection of a company's documents under s 441 are so absurd or unjust that Parliament cannot have meant what it so plainly said but must have intended the unappealability to be subject to implied exceptions. On the contrary, there seem to me to be cogent reasons for denying any right of appeal. So on the sole and simple ground that the statute says the judge's decision shall not be appealable I would hold the Court of Appeal had no jurisdiction to entertain an appeal from Vinelott J's decision to refuse the order applied .for by the Director of Public Prosecutions and that the order that they purported to make ordering production and inspection of Racal's papers is a nullity and must be set aside.*
>
> *It follows that your Lordships, in your turn, have no jurisdiction to enter upon a consideration of whether or not the judge's decision was right or wrong. Nevertheless to understand the reasoning by which the Court of Appeal reached the conclusion that it was entitled to exercise appellate jurisdiction in the instant case it is necessary to refer briefly to the judge's reasons for refusing to make the order that was applied for. He gave to the 'expression an offence in connection with the management of the company's affairs' in s 441(1) a construction which the Court of Appeal regarded as too narrow. In the context of the 1948 Act he regarded it as confined to offences committed the course of the internal management of the company and held that the particular offences of which an employee of Racal was suspected did not fall within the section. He also doubted whether the employee fell within the class of 'officer of a company' within the meaning of the Companies Act 1948. The ground on which he dismissed the application was therefore one of law.*

Lord Diplock went on to say (at 389):

> *There is … an obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction to decide a defined question finally and conclusively or unappealably, and a similar jurisdiction conferred on the High Court or a judge of the High Court acting in his judicial capacity. The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required to construe the words of the statute by which the question submitted to his decision was defined. There is simply no room for error going to his jurisdiction, nor, as is conceded by counsel for the respondent, is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their judicial capacity as such can be corrected only by means of appeal to an appellate court; and*

if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all.

My Lords, to describe Vinelott J's decision to dismiss the Director of Public Prosecution's application under s 441(1) as a refusal or renunciation of .jurisdiction seems to me to involve a misuse of the word "jurisdiction". His jurisdiction was to decide whether on the material placed before him the application should be granted or refused. In deciding that it should be refused, he was exercising his jurisdiction just as much as if he had decided that it should be granted.

Lords Salmon, Edmund-Davies, Keith and Scarman were of essentially the same opinion, although Lord Scarman added (at 393–394) the proviso that it is possible to interpret provisions ousting an appeal as limited to cases in which the judge "had exercised discretion judicially". That is to say, an appellate court might interfere "if the judge had acted arbitrarily, and not judicially, or had exercised [a] discretion … on grounds wholly unconnected with the case, or without any materials at all".

An example of a case where a privative clause was held not to apply because a Tribunal acted in excess of its authority is *R v Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australasia Ltd* [1947] HCA 32(1947) 75 CLR 361; [1947] ALR 453. The regulations in suit allowed the controller to determine a rent upon application by a lessor or lessee or of his own motion. However, the court held, the controller could vary a determined rent only upon application by the relevant lessor or lessee. An application for variation of a determined rent was made by the tenant of one portion of a city building. There was no application in respect of any of the other 38 tenancies in the building. Notwithstanding that fact, the controller varied all the rents. The High Court unanimously held he had erred and granted prohibition in respect of the 38 tenancies.

Regulation 38 of the Regulations said:

Every determination of a Fair Rents Board or of the Controller shall, except as provided in this Part, be final and without appeal, and, no writ of prohibition or certiorari shall lie in respect thereof.

In a joint judgment, Latham CJ and Dixon J said (at 369):

When Commonwealth legislation confers powers upon an officer a provision such as reg 38 cannot be construed as intended to provide that his powers are absolutely unlimited. Such a construction would raise questions of the validity of the legislation. Such a provision cannot help to give effect to any legislation which it is beyond the power of the Commonwealth Parliament to enact. Further, even where no question of validity arises, the effect of such a provision in a particular case depends upon the construction of the relevant statute taken as a whole. If a legislature gives certain powers and certain powers only to an authority which it creates, a provision taking away prohibition cannot reasonably be construed to mean that the authority is intended to have unlimited powers in respect of all person, and in respect of all subject matters, and without observance of any condition which the legislature has attached to the exercise of the powers. Such a provision will operate to prevent prohibition in cases of procedural deficiencies where the authority whose powers are in question is in substance dealing with the matter in respect of which power is conferred upon it. But if, upon the construction of the legislation as a whole, it appears that the powers conferred upon the authority are exercisable in certain cases, and definitely that they are not exercisable in other cases, and that any attempt to exercise them was intended to be ineffective, then a provision taking away prohibition will not exclude the jurisdiction of this Court under s 75(v) of the Constitution in a case of the latter description: see Hickman*. It is therefore necessary to inquire whether the regulations*

now under consideration impose any condition which must be satisfied when it is sought to exercise the power to vary a determination of rent. [Emphasis added.]

Their Honours went on to construe the Regulations in suit. They concluded (at 370) that "as a variation can be made only upon an application to the Controller, and as a decision of the Controller to act of his own motion cannot be regarded as an application to the Controller, the Controller has no power to vary a determination of his own motion".

Rent Controller may be contrasted with *Coal Miners' Industrial Union of Workers of WA v Amalgamated Collieries of WA Ltd* [1960] HCA 68(1960) 104 CLR 437 where, because of a provision that there be no appeal against a decision of an Industrial Court an application for prohibition and certiorari was refused in the absence of a finding that the Industrial Court had exceeded its jurisdiction, notwithstanding that it had erred in law in its decision. As Menzies J said (at 452) "to show that the Court here made a mistake of law is not itself sufficient to show that the order which followed that error was made without jurisdiction".

In our view, there was power and jurisdiction in the Court of Disputed Returns to decide, on the true construction of s 116, whether a tick below the line did, or did not, invalidate the ballot paper. In other words, the Court of Disputed Returns had the authority to decide that question either way, it did not lose that jurisdiction merely because it formed the view it did. In our opinion, the present case is, in principle, indistinguishable from *Racal*. The relevant jurisdiction has been vested in the High Court, to be exercised by the Judges of that superior court. This is not a case of any inferior court or tribunal. That being so, the reasoning of Lord Diplock is squarely in point.

As our analysis of the process of reasoning of Gates J has explained, what was involved here was no more than an error of law in the mistaken interpretation of s 116. But parliament, following other precedent, has chosen to commit conclusively the task of interpreting the relevant legislation to the High Court in the exercise of this special jurisdiction. There was here no conduct of the kind that would fall within Lord Scarman's proviso, nor, accepting the explicit constitutional and statutory limits on the court's jurisdiction and powers, did Gates J in his interpretation of s 116 exceed his powers with the consequence that the privative clause could not apply (see eg, *Venkatamma v Ferrier-Watson*, Supreme Court Civil Appeal No CBV0002/92, 24 November 1995, at 11).

Did s 121(2) of the Constitution confer appellate jurisdiction in any event?

We agree with the Court of Appeal that this ground of appeal must fail.

In the first place, it has been held that a specific provision preventing an appeal (such as s 73(7)) will prevail over a general appellate provision (such as s 121(2)). See *Kydd v Watch Committee of City of Liverpool* [1908] AC 327; *Piper v Marylebone Licensing Justices* [1928] 2 KB 221; Wade and Forsyth, *Administrative Law*, 8th ed, at 701.

In any event, so far as concerns s 121(2) itself, we agree with the Court of Appeal that the present case arises under, and involves the interpretation of, the Electoral Act, rather than the Constitution.

Disposition of the appeal

The result is that while we are satisfied that in respect of the ticks "below the line", the judgment of the Court of Disputed Returns was wrong, we do not have jurisdiction to correct it. That will seem an unfortunate outcome, but for good reason (based on long standing precedent in many parts of the world) parliament

has decreed there is to be no appeal from that court. Technically our conclusion that the judgment was incorrect must be regarded as obiter, not part of our formal decision.

Having had the opportunity of reading the separate judgment of Elias J we wish to add this. Of course we share her view of the significance, in terms of human rights, of the right to vote. However, in enacting the 1997 Constitution, the legislature both recognised those rights, and at the same time provided that the determination of the Court of Disputed Returns, when dealing with a question whether a person had been validly elected, was "final". That was a well-established expression meaning, as Parliament would have known, there was no right of appeal. Courts are obliged to give effect to the plain meaning of statutes and with respect we cannot see that parliament's language left room for implying that in some cases, nevertheless an appeal would lie. Nor can we agree that in adopting a precedent established by Parliaments all round the world, the legislature produced a result that was "manifestly absurd" or "made no sense".

It follows in our view, albeit for somewhat different reasons in some respects, that the Court of Appeal was correct in dismissing the appeal to it, for want of jurisdiction.

Law reform

Before we leave the appeal, we would, as mentioned by the Court of Appeal, draw to the attention of those concerned, the policy adopted in New Zealand of providing that a Full Court of three judges must exercise the jurisdiction of the Court of Disputed Returns. While, as we have said, the determination of the Court of Disputed Returns is not unexaminable, there are, as we have held, severe limits imposed by s 73(7) of the Constitution upon the scope of that examination. In those special circumstances, and given the need to expedite matters, it may be thought that a Full Court is an appropriate bench to constitute the Court of Disputed Returns in all cases.

Orders

In accordance with the decision of the majority the court makes these orders:

(1) Special leave to appeal granted.
(2) Appeal dismissed.
(3) Costs reserved. Direct that any written submissions on costs be filed and served within 28 days.

Special leave to appeal allowed.

Appeal dismissed.