

**LT COL FILIPO TARAKINIKINI v COMMANDER, REPUBLIC OF FIJI  
MILITARY FORCES and 2 ORS**

HIGH COURT — CIVIL JURISDICTION

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BYRNE J

15 May, 24, 25 July, 15 August, 17 September 2002

10 [2002] FJHC 7

**Practice and procedure — applications — ex parte application for leave for judicial review — notice of resignation by a military member — Republic of Fiji Military Forces Act (Cap 81) reg 21.**

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The Commander Republic of Fiji Military Forces (1st Respondent) did not approve the Applicant's notice of resignation from the Republic of Fiji Military Forces. The Applicant filed an ex parte application for leave to apply for judicial review of the decision on the ground that the 1st Respondent did not transmit the Applicant's letter of resignation from the army to the President of the Republic of the Fiji Islands (2nd Respondent) but instead

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made the decision himself.  
**Held** — (1) Regulation 21 is clear. Any officer wishing to resign his commission must forward his application to his commanding officer who must then forward it to the Commander for transmission to the President. This was not done.

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(2) There is no evidence before the court of the terms of the letter which the Acting Commander wrote to the 2nd Respondent. The mere desire of the military to investigate the Applicants' alleged conduct further is not a valid reason for refusing to accept his resignation.

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(3) The Applicant has a right to claim damages from the 1st Respondent for the tort of misfeasance in a public office but further submissions should be heard before giving any decision as to the amount to be awarded. The reason is because of the refusal of the 1st Respondent to allow the Applicant for further employment which cannot be justified by the law.

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Application allowed.  
No cases referred to.

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*S. Matawalu* for the Applicant

*A. Mohammed* for the 1st Respondent

*W. Calanchini* for the 2nd and 3rd Respondents

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**Judgment**

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**Byrne J.** On the 8<sup>th</sup> of May 2002 the Applicant lodged an ex parte application for leave to apply for judicial review of the decision of the 1st Respondent dated 12th March 2002, that the Applicant's notice of resignation dated 27th February 2002 from the Republic of Fiji Military Forces be not approved.

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The Applicant seeks:

(I) A declaration that the decision of the 1st Respondent of the 12th of March 2002 is null and void;

(II) An order that certiorari do issue quashing the said decision;

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(III) A declaration that the Applicant has properly been cleared of all allegations made against him linking or implicating him with the coup of May the 19th 2000;

(IV) An order that mandamus do issue requiring the 1st Respondent to transmit the Applicant's resignation to the President for his decision, and;

(V) Costs.

5 On the 10th of May 2002 I directed that the application be heard inter-partes and on the 15th of May when the parties appeared before me, gave orders for the filing of affidavits and written submissions. It was agreed by the parties that the hearing of the application for leave be treated as the hearing of a substantive motion for judicial review. A total of 12 affidavits have been filed by the parties,  
10 the only one to which objection has been taken by the Respondents being a supplementary affidavit by the Applicant sworn on the 29th of June 2002 in support of his claim for damages from the Respondents. Although I did not grant leave for the filing of this affidavit I consider it would be unfair to the Applicant to refuse leave which I now grant.

15 The grounds on which the Applicant seeks relief are:

(a) that the 1st Respondent did not transmit the Applicant's letter of resignation from the Army to the 2nd Respondent under reg 21 of the Republic of Fiji Military Forces Act Cap 81 for his decision, purporting instead to make the decision himself;

20 (b) contrary to ss 21(b) and 23(e) of the Constitution the 1st Respondent has determined to deprive the Applicant of his personal liberty by deciding that the Applicant be brought back to Fiji from New York against his will:

25 (i) to be investigated further for his alleged role in the events of May 2000 after having been cleared by both the Fiji Police and the Fiji Military Forces in respect of the same allegations;

(ii) on unreasonable allegations that he is a deserter in the absence of any lawful instruction for his return;

30 (c) contrary to ss 21(b) and 25(1) of the Constitution, the 1st Respondent has persistently embarked on a course of conduct since May 2000 calculated to inflict mental or emotional stress on the Applicant and his family;

35 (d) the Applicant has been defamed and much maligned by continuous and biased media reports by the Fiji Military Forces and Ministry of Home Affairs, calculated to identify the Applicant as devious treacherous and cowardly in seeking to remain in the employ of the United Nations to frustrate efforts to conclude investigations into his involvement in the events of May 2000 and beyond;

(e) the Applicant has not been accorded procedural fairness, and;

40 (f) the 1st Respondent has been guilty of bias against the Applicant.

I take the following facts from the various affidavits to be not in dispute:

The Applicant is at present an officer in the Republic of Fiji Military Forces with the rank of Lieutenant-Colonel, having been commissioned in 1981 as a 2nd Lieutenant.

45 In December 2000, the United Nations selected him for secondment to the Military Adviser's office at its Headquarters in New York for a term of 12 months.

By letter dated 8th December 2000 the Permanent Secretary for Home Affairs and Immigration sought his release from the Headquarters Republic of Fiji Military Forces to assume his appointment:

50 On 11th December 2000 the 1st Respondent replied approving his secondment.

On that same date the Applicant was released by the Fiji Military Forces for service with the United Nations and he and his family were issued with diplomatic visas for their move to New York.

5 On the 22nd of December 2000 the Applicant was notified that the final clearance for his departure would only be given pending the outcome of a further interview to be carried out with him by a Lieutenant-Colonel Jimi Koroi.

10 Earlier on the 21st of November 2000 Lieutenant-Colonel Koroi, Private Marshall Headquarters, Land Forces Command of the Fiji Military Forces was appointed investigating officer to investigate allegations against the Applicant and several other senior military officers for their involvement and support of the coup plotters prior to and during the May 2000 upheaval.

15 Lieutenant-Colonel Koroi commenced his investigations in January 2001, a few weeks before the proposed departure of the Applicant to take up his appointment with the United Nations.

The interview took place on the 4th of January 2001 at the end of which Lieutenant-Colonel Koroi telephoned the 1st Respondent in the hearing of the Applicant and told him that he had completed the initial interrogation based on the evidence available so far. He advised the 1st Respondent to release the  
20 Applicant to go to New York which he did not but not until the 19th March 2001.

On the 19th of January 2001 the Prime Minister wrote to the Secretary-General of the United Nations in New York informing him that although the army and police had conducted thorough investigations into allegations that the Applicant had been involved in the coup none of the allegations had been proved and the  
25 Applicant had “been cleared of all these malicious allegations”.

According to Koroi the Applicant fully realised from his conversation with the Commander that further investigations would normally reveal further evidence that would ultimately require the Applicant to be recalled to Fiji for further interrogation. I interpolate here that why this was expected has never been stated.

30 Lieutenant-Colonel Koroi regarded the Applicant’s attempts to stay in New York as a means of evading further interrogation “about his role in the events of May 2000”.

The Applicant deposes that 5 months after his arrival in New York the United Nations requested an extension of his secondment for a further term of  
35 12 months, but this was refused by the Republic of Fiji Military Forces. A request for reconsideration was also refused.

The Applicant states that in a number of telephone calls with the 1st Respondent, the 1st Respondent rejected the Applicant’s calls for a full public inquiry into the May 2000 coup and after due consideration of his position both  
40 professionally and on a personal level, he decided to resign his commission under the provisions of the Fiji Military Forces Act. He wrote a 3-page letter of resignation to the 1st Respondent on the 27th of February 2002. This letter is headed “Resignation from the RFMF”. It is unnecessary to quote all of it but I quote the 1st, 2nd, 3rd, 4th, 8th, 9th and 14th paragraphs of it as being pertinent  
45 to this action:

*After careful considerations of my future within RFMF and that of my family it is with a sense of melancholy that I tender my resignation from the Fiji Military Forces to you as the incumbent Commander of the Republic of Fiji Military Forces with effect from the 21<sup>st</sup> of March 2002. I will now embark to seek my destination elsewhere. It is said that it takes more courage to leave an organisation that you love, then it did to join in the first place. This is true!*

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5 However I leave RFMF disappointed that I could not have helped to leave it a better organisation than when I joined. This is the noble obligation of each generation to the next. However sadly for RFMF professional ethics and moral values have in a short space of time become hardly recognisable. We have clearly lost the high moral ground. There is no way that the nation can go forward towards national reconciliation and the enduring peace and security that all citizens aspire to, until the RFMF regains that high moral ground.

10 After our telephone conversation a few weeks ago you categorically stated that a full public commission of inquiry into the RFMF and its failures prior to and during the May 2000 coup is irrelevant. It appears to me therefore that your therefore that your agenda against me is a personal one and that the investigation presently conducted in RFMF by you is a discriminatory selective means to frame and purge those professional officers, including myself, who question your command ethics. The Regimental fund that you are refusing to allow the Auditor General to look into is only an example.

15 When you slammed the phone on me in the middle of our conversation I felt that even simple discourtesies have helped erode some of the affections I had for that august office which all members of RFMF looked up to. It confirmed once again the message that you have been implying since taking office that there is no place for me in the RFMF as long as you are in command.

20 God only knows the efforts of some senior officers and I too regain the confidence of the nation in RFMF and to press on for the safe release of the hostages during the darkest hours of the crisis. Even when you agreed to a power-sharing deal with George Speight and his group, another senior officer and myself during the officers meeting the next morning refused to surrender the nation and told you to call off your agreement. Having faced much more difficult operational situations overseas we were confident we would find a way out, and we did at Muanikau. Our sole purpose was to free the national leaders who were held hostage so that they could once again fulfil their role to the people. Once released it was up them as the peoples elected representatives to explore the way forward for the nation. Our job as their servants is to be accountable to them, as our political masters and the law. That is what democracy is all about.

25 Unfortunately during the crisis and even now there exists in RFMF a dearth of strategic understanding and lack of moral Courage to accept the reality of what happened and draw the right lessons for the future. Instead some continue to exploit the public feeling of insecurity brought on by the May 2000 crisis and its aftermath to justify immature vanities and cover up abuse and excesses to the continuing detriment of the Force and the country's recovery progress.

30 I tender to your Sir my resignation effective from 21<sup>st</sup> March 2002 and I wish you, for the sake of Fiji, every success and all the very best in the remainder of your tenure in office.

The 1st Respondent replied to this letter on the 12th of March 2002 in a letter to the Applicant which, omitting formal parts, reads thus:

40 Dear Tara,

RESIGNATION FROM THE FORCES

I have received your letter of resignation dated 27<sup>th</sup> February 2002. I have carefully considered your request and have decided that first you must return home as scheduled.

45 You will appreciate that my desire to have you returned is based precisely on the outcome of the formal Board of Inquiry conducted by Lt-Col J Evans on the alleged participation by some members of the RFMF during the events of may 2000. It is for this reason alone that your presence is imminent to provide answers to these allegations.

You must understand that the interest of the Nation and in particular the RFMF is foremost and it is my intention to have the investigation completed as soon as possible. In view of the above reasons, your request for release is not approved.

50 JV BAINIMARAMA

Commodore

Commander  
REPUBLIC OF FIJI MILITARY FORCES  
12 March 2002

5 On the 21st of March 2002 the Applicant replied to the 1st Respondent's letter of the 12th of March. This is headed "*RESIGNATION FROM THE RFMF*" and the first paragraph reads as follows:

10 *I sent my resignation letter to you on 27<sup>th</sup> February 2002 and I received your response on 18<sup>th</sup> March 2002. After receiving your response I feel the need to highlight some issues in order to put matters that prompted my resignation in proper perspective. I list here the five issues that relate to my case and the resignation itself. The issues are:*

- a. *The investigation into the May 2000 coup;*
- b. *The extension of my contract with UNDPKO;*
- c. *My resignation;*
- d. *The allegations against me;*
- e. *Command*

15 The 14th paragraph reads:

*My resignation*

20 *14. With all due respects, your response to my resignation aims to cast doubt on me and is evasive and manipulative in avoiding issues. It says nothing of substance and is silent on issues I raised as some of the reasons prompting my resignation. Sec 194(2)b of the constitution provides me the absolute right to resign from the Force. I exercised this right in my letter of resignation dated 27<sup>th</sup> February. My resignation was formally accepted once received by you. Therefore it is effective no later than 18<sup>th</sup> March 2002 as that is the date of your reply.*

25 The Applicant later realised after consulting his solicitor that s 194(2) did not apply to him as he was not the holder of a public office. This was corrected in a letter dated 22nd of April 2002 by the Applicant's solicitor to the 1st Respondent which I quote in full:

*RE: LTCOL FILIPO TARAKINIKINI*

30 *We act for the above-named.*

*Your reply of 12<sup>th</sup> March to our client's letter of resignation dated 27<sup>th</sup> February is conclusive evidence of your not following the requirements of Regulation 21 of the Royal Fiji Military Forces Regulations (Cap 81).*

35 *Under these regulations, you are required, as our client's Commanding Officer, to convey his letter of resignation to the President (as Commander-In-Chief) with your comments on the matters set out under Regulation 21(1)(a) to (d). It is the President and not the Commander who grants or withholds an officer's resignation.*

*This letter is therefore to require you to transmit to His Excellency the President, our client's letter of resignation with immediate effect for his considerations.*

40 *To this extent you should also note that should there be any "objections" to his resignation, such objections exclude those of a personal nature but include those which are relevant to the peace and good order of the Military. Your reference to further allegations in your letter of 12<sup>th</sup> March is not acceptable and cannot be an "objection" within the meaning of the above regulations in view of the contents of a letter of even reference dated 19<sup>th</sup> January, 2001 by the Prime Minister to His Excellency, the Secretary General to the United Nations. Both as a matter of fact and law the Military is bound by the undertaking given in that letter.*

45 *We are aware of no provision of Military law which would allow you to act inconsistently with the requirements of the regulations referred to above.*

50 *In the circumstances therefore, we hereby advise that if within 2 days of this date of your receipt of this letter, you do not comply with the requirements of Regulation 21 as set out above, we shall have no alternative but to sue you not only as Commander but also in your personal capacity without further notice.*

*Yours faithfully*  
*Sam Matawalu & Associates*

Regulation 21 of the Fiji Military Forces Regulations made under the Fiji Military Forces Act is in the following terms:

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*Regulation 21*

*(1) An application from an officer to resign his Commission shall be forwarded by the Commanding Officer to the Commander for transmission to the President. When forwarding the application, the Commanding Officer shall state if:*

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- (a) all regimental claims have been paid;*
- (b) he is aware of any outstanding public claim against the officer;*
- (c) there is any objection to resignation being sanctioned;*
- (d) there is any special reason why such officer should not serve in the Reserve of Officers.*

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*(2) Where an officer is permitted to resign, the resignation shall not take effect, unless otherwise ordered by the President, until the acceptance is notified in the Gazette.*

In view of the correspondence between the Applicant, his solicitor and the 1st Respondent mentioned above I therefore found it very strange to receive some nine pages of submissions from the 1st Respondent and three from the other Respondents claiming that none of the Respondents, but particularly the first Respondent understood that the Applicant meant to resign his commission because he did not use these words in his letter of 22nd of February. I do not accept these submissions because the 1st Respondent knew at all times that the Applicant was a commissioned officer in the Republic of Fiji Military Forces. There is no suggestion that the Applicant held any other office than that Lieutenant-Colonel. To put the matter beyond doubt, on the 28th of April 2002 the Applicant wrote to Col I Naivalarua, Acting Commander of the Republic of Fiji Military Forces, stating that he wished to make it clear, if there had been any doubts before, that his letter of the 27th of February obviously meant he intended to resign from the Military Forces.

The Acting Commander replied to the Applicant on the 2nd of May acknowledging “your letter of resignation of commission dated 28<sup>th</sup> of April 2002” and advising that the Applicant’s application would be processed in accordance with the existing Republic of Fiji Military Forces Law and Regulations. In these circumstances I am satisfied that the 1st Respondent knowingly failed to forward to the 2nd Respondent, the Applicant’s resignation.

Regulation 21 is clear. Any officer wishing to resign his commission must forward his application to his commanding officer who must then forward it to the Commander for transmission to the President. This was not done and so I grant the 1st declaration the Applicant seeks and quash the decision of the 1st Respondent dated 12th March 2002 refusing to approve the Applicant’s notice of resignation. Certiorari is to issue for this purpose.

There is no evidence before the court of the terms of the letter which the Acting Commander wrote to the 2nd Respondent but if the 1st Respondent gives as his reason that the 2nd Respondent should not sanction or accept the Applicant’s resignation the ground that the Applicant’s conduct is still being investigated (and no other has been suggested) then I would hold that does not constitute a valid reason for refusing to accept the resignation. The mere desire of the military to investigate the Applicant’s alleged conduct further is not a valid reason for refusing to accept his resignation. If the Applicant had been charged with complicity in some form in the events leading to the events of 19th May 2000 then the position would be different. In my judgment it would be wrong to allow

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the 1st Respondent to require the Applicant to return to Fiji for further investigation in the possible hope that some evidence might be found to implicate him. The Prime Minister's letter to the Secretary-General of the United Nations on 19th of January 2001 in my view is sufficient reason for the Applicant not to return to Fiji.

The United Kingdom Army Act of 1955 is incorporated into the Laws of Fiji by s 23 of the Republic of Fiji Military Forces Act (Cap 81). Section 74 of the Army Act provides that person subject to Military law found committing an offence against the Act or alleged to have committed or reasonably suspected of committing such offence may be arrested. Under s 75 the allegation against the person shall be investigated without unnecessary delay. It must be quite clear that when the 1st Respondent released the Applicant to go to the United Nations he had no evidence on which to charge him under the law of the country, yet he has continued to press for a further investigation of the Applicant without charging him. This is unfair, unreasonable in the *Wednesbury* sense and arbitrary. I find it incredible that nearly two and a half years after May 2000 the Army should still be fishing for evidence which I have little doubt it would like to find against the Applicant who, in his letter of resignation, was most critical of the 1st Respondent and disillusioned with the state of the Republic of Fiji Military Forces to which he had given efficient and loyal service for some 20 years.

In these circumstances I consider that the Applicant has a right to claim damages from the Respondents, but particularly the 1st Respondent, for the tort of misfeasance in a public office but I desire to hear further submissions on this before giving any decision as to the amount to be awarded to the Applicant. I am of this opinion because of the evidence that the Applicant has been wrongfully denied the opportunity of further service with the United Nations Organisation because of the refusal of the 1st Respondent to allow him to accept further employment with that body for reasons which I consider cannot be justified in law. I therefore make a Declaration and Order in favour of the Applicant in terms of paras (i) and (ii) of the relief sought in the application and grant him judicial review of the decision of 12th March 2002. The Respondents must pay the Applicant his costs, the amount of which I shall fix after making an award of damages to the Applicant in due course.

I accordingly make these interim orders.

*Application allowed.*