IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL PETITION NO: CBV0008 OF 2021
Court of Appeal No. ABU 109 of 2019

BETWEEN	:	**VATUVONU SEVENTH DAY ADVENTIST COLLEGE, LUKE NARABE, AISAKE KABUKEINADAVE, VICTOR BONETTI, RAM CHANDAR, JOSATEKI TALEMAITOGA**
		Petitioners
AND	:	**ATTORNEY GENERAL *on behalf of* MINISTRY OF EDUCATION, HERITAGE & ARTS**
		Respondents
Coram	:	**The Honourable Acting Chief Justice Salesi Temo** **Acting President of the Supreme Court**
	:	**The Honourable Justice Terence Arnold** **Judge of the Supreme Court**
	:	**The Honourable Justice William Young** **Judge of the Supreme Court**
Counsel	:	**Mr. W.W. Clarke & Mr. K. Chang for the Petitioners**
	:	**Mr. R. Green, Ms. O. Solimailagi & Ms. M. Faktaufon for the Respondents**
Date of Hearing	:	**9 October 2023**
Date of Judgment	:	**27 October 2023**

JUDGMENT

Temo, AP

[1] I had read the draft judgment of His Lordship Mr. Justice Terence Arnold. I entirely agree with his reasons, conclusions and proposed orders.

Arnold, J

Introduction

[2] Historically, schooling in Fiji has been provided mainly by religious, cultural, and local organisations rather than only by government-operated schools. Among them are organisations associated with Christian denominations (Anglican, Methodist, Roman Catholic, Seventh Day Adventist and others) and Hindu and Islamic entities. Rather than providing a comprehensive system of Government schools, successive governments in Fiji have chosen to provide education to Fijian children principally through the schools run by these various organisations. Given this case concerns religious organisations, I will refer to the schools they run as denominational schools.

[3] The first Petitioner, the Vatuvonu Seventh Day Adventist College (the College), is one such denominational school. It was established and registered under the Education Act 1966 as a high school by the Seventh Day Adventist Church in Fiji (the Church) in 2012. (The remaining Petitioners are registered trustees of the Church.) Like many other denominational schools, the College receives extensive government aid, including the Free Education Grant.

[4] A dispute has arisen between the Church and the Ministry of Education, Heritage and Arts. The Ministry is headed by the Permanent Secretary for Education, who has a variety of functions, powers and responsibilities under the Education Act. There are two elements to the dispute.

[5] The first concerns the appointment of the Head of School/Principal and teaching staff to the College.

- Government policy is that any school receiving State aid such as a Free Education Grant must have a civil servant as Head of School. The Church challenges this, contending that under the Constitution of the Republic of Fiji 2013 (the Constitution), it has the right, whether or not it receives government financial aid, to require the appointment of adherents of the Seventh Day Adventist faith the College as Head of School and as teachers. All other religious communities or denominations that provide schools have the same right.

- For its part, the Ministry accepts that where a denominational school does not receive State aid, and so is a private school, it is entitled to appoint its Head of School and teaching staff itself. But where such a school does receive government funding (including through the provision of Government teachers), the Permanent Secretary must select Heads of School and teachers in a way that does not discriminate on the basis of religious belief, that being one of the prohibited grounds of discrimination. Accordingly, the Permanent Secretary must select those who are best qualified for appointment, irrespective of their religious beliefs.

[6] The second matter in dispute concerns the ability of a religious community or denomination to close an aided school or to convert it into a private school.

- The Church argues that, given its constitutional rights, it does not require the approval of the Permanent Secretary to close or convert the College. Rather, it is entitled to do so whenever it wishes.

- The Permanent Secretary accepts that an organisation running a denominational school is entitled to close or convert the school, but says this must be done in a way that allows for a proper transition, given the interests of pupils and teachers.

Origin of dispute

[7] When the Principal of the College left in late 2018/early 2019, the Permanent Secretary called for applications for the position. In March 2019, having applied the government's Open Merit Based Recruitment and Selection Guideline (the OMRS Guideline), the Permanent Secretary appointed Mr Raikivi as Head of School/Acting Principal. However, the Church opposed Mr Raikivi's appointment because he was not of the Seventh Day Adventist faith and identified a retired the Seventh Day Adventist teacher as being suitable for appointment.

[8] The Permanent Secretary did not accept that the Church's nominee was appropriate for the role, nor did she accept the Church's position that they had a right to refuse to accept Mr Rakivi's appointment. There were then various discussions and communications between the Permanent Secretary and representatives of the Church, but they produced no result.

[9] On 2 April 2019, the Permanent Secretary received a letter from the Church advising that it intended to close the College on 18 April 2019. The Church later advised that it intended to re-open the College soon after as a private school. According to an affidavit by the Permanent Secretary in the present proceedings, the College at that time had a student enrollment of 178 and a teaching staff of 21. 54 of the students were Seventh Day Adventists; none of the teaching staff were. In addition, the College had a chaplain who provided a daily religious programme.

[10] The Permanent Secretary asked the Church to delay closure of the College to enable satisfactory arrangements to be made for those pupils who would not be continuing at the College if it became private, for financial or other reasons. She also suggested that the College could be leased to the Government for the interim period. No solution emerged, however, and on 15 April 2019, the Attorney-General (on behalf of the Ministry) filed the present proceedings seeking various declarations and orders. Interim relief was also sought to preserve the existing position (including in relation to Mr Raikivi's appointment and the closure of the school).

High Court

[11] On 15 April 2019, the High Court granted the interim relief sought. The substantive matter was argued on 24 June and the High Court delivered its judgment on 22 November 2019.[1] The High Court discharged the interim relief, made several declarations and declined to make others. Relevantly:

- In relation to the issue of school closure, the High Court declared that the Church had no right to close the College without the Permanent Secretary's consent and that only the Permanent Secretary had the lawful authority to order closure of the College.

- In relation to staff appointments, the High Court declared that the Permanent Secretary had the lawful right to appoint a suitable principal and any acting staff *"in terms of the OMRS process and in a manner consistent with the constitutional right in section 22(4)"*. The High Court Judge declined to make a declaration that the Permanent Secretary was entitled to make such an appointment without any interference from the Church, or to order the Church not to interfere.

The Ministry then filed an appeal, and the Petitioners a cross-appeal.

Court of Appeal

[12] The Court of Appeal allowed the Ministry's appeal and dismissed the Petitioners' cross-appeal.[2] The Court set aside the declarations and orders made by the High Court and made its own declarations and orders. Given their importance, I set them out below.

[13] In relation to the issue of appointment, the Court of Appeal declared:

[1] *Attorney-General v Vatuvono SDA College* [2019] FJHC 1163.
[2] *Attorney-General v Vatuvono Seventh Day Adventist College* [2021] FJCA 115.

"a) Every religious community or denomination, and every cultural or social community, which has established a place of education under section 22(4) of the Constitution, has the right to appoint, at their expense and without any expense to the State, their own employees as teachers to teach at the place of education established by them, including the appointment of religious instructors/teachers.

b) Under section 4(3) of the Constitution of the Republic of Fiji, the Permanent Secretary for Education, or any teacher appointed by the Permanent Secretary, must not, as a public officer, prefer or advance any religion or religious belief by any means whatsoever, including the appointment of public servants as teachers, or the grant of public funds (including any education grant), to any educational institution. Consequently, any public officer sent to teach in schools cannot be required to promote or advance any religion or religious belief at any such school.

c) If, in the exercise of her discretion, the Permanent Secretary decides to assist any school through the provision of teachers, then the State, through the Permanent Secretary, must select and appoint such teachers only on merit without regard to or preference for any religion or religious belief(s).

d) Any religious community or denomination or any cultural or social community which receives assistance from the State in the form of teachers cannot interfere with the appointment of such teachers by the Permanent Secretary, nor, can they refuse to accept the appointment of any teacher, on the grounds of religion or religious belief or on any other prohibited ground of discrimination".

[14] In addition, the Court declared that the Permanent Secretary had the lawful right to appoint any teacher or principal to any acting position in any of the Church's aided schools without interference from the College or Church and ordered them not to interfere.

[15] In relation to the issue of closure, the Court of Appeal declared:

"e) Any religious community or denomination, or any cultural or social community, which has established an educational institution, and which institution is duly registered or recognised under the Education Act 1966, has the right to close that educational institution. However, such a right is subject to the regulatory sanction of the Permanent Secretary as required under s 19(2) of the Education Act, in order to allow the Permanent Secretary to ensure that the right to education of the students is not undermined or affected, or to ensure that the disruption to

education is minimized, provided that such sanction must not be unreasonably withheld or delayed."

[16] The College and Church then filed the present petition for leave to appeal to this Court against these declarations and orders. They seek the following substantive declarations:

> *"a) Pursuant to s 22(4) of the Constitution, any religious community or denomination can require that the appointment of any teacher be of the same religious denomination as the school it has established or maintains or manages, and can refuse the appointment of a teacher, whether or not it receives financial assistance from the state.*
>
> *b) Pursuant to s 22(4) of the Constitution, any religious community or denomination, which has established an educational institution registered or recognised under the Education Act 1966, has the right to close that educational institution, whether or not it receives financial assistance from the state.*
>
> *c) Pursuant to s 22(4) of the Constitution, any religious community or denomination, which has established an educational institution registered or recognised under the Education Act 1966, has the right to convert it to a private educational institution, whether or not it receives financial assistance from the state."*

The current position

[17] Before I go further, I should say something about the present position. In her affidavit evidence, the Permanent Secretary drew attention to an agreement reached following discussions between the Government and faith-based organisations that have schools. It had been agreed that when the next round of Head of School appointments took place, the Ministry would consult with the faith-based organisations *"to select the most suitable candidate in terms of the OMRS process and also keeping in mind the [faith-based organisations] mission"*. The Permanent Secretary also said that the Ministry was working on developing an appropriate policy for this. This agreement was publicly announced at the time.

[18] Mr Clarke, who presented the argument for the Petitioners, advised that the Church is pleased with the more open and collaborative relationship that has been developed with

the Permanent Secretary. He explained that the Church was not pursuing its petition because it was concerned about the current position, which is operating well, but because there was a risk that things might change in the future – for the future, he said, the Court of Appeal decision was an undesirable precedent.

[19] It is commendable that, despite the litigation, the parties have been able to agree a way of working that is satisfactory to all sides. It is to be hoped that it continues.

The petition for leave

[20] Section 7(3) of the Supreme Court Act 1998 requires the Supreme Court to grant leave to appeal only where a case raises a far-reaching question of law, a matter of great general or public importance or a matter that is otherwise of substantial general interest to the administration of civil justice. I accept that this case raises a matter of great general or public importance given the predominance of denominational schools in the Fijian educational system. I accept Mr Clarke's submission that this is a matter that the Court should consider even though the current arrangements in relation to appointments are working satisfactorily.

The Constitutional and statutory framework

[21] As Mr Clarke pointed out in his opening submission, this case involves the correct interpretation of ss 22 and 127 of the Constitution and the interaction of those provisions with s 19 of the Education Act, s 21 of the Civil Service Act 1999 and s 20 of the Human Rights and Anti-Discrimination Commission Act 2009 (the HRAD Act).

[22] Mr Clarke submitted that the starting point for the analysis was the Constitution. While I accept that the provisions of the Constitution are critical to the analysis, I do not agree that they should be the starting point. In my view, there is a relevant statutory context that, in the area of education at least, must be understood before the interpretation of the Constitution is undertaken. Accordingly, before discussing the relevant provisions of the

Constitution, I will briefly summarise relevant aspects of the Education Act 1966. Before I do so, however, I will provide some brief basic data about education in Fiji.

Some basic data

[23] The Minister for Education recently provided some basic data about the education system in Fiji that are relevant to the issues in this case.[3] Currently in Fiji there are 736 primary schools, which require 6415 teachers, and 176 secondary schools, which require 6620 teachers. In addition, there are 863 Early Childhood Education (ECE) schools, with a complement of 1405 teachers, and 20 special and inclusive schools with a complement of 184 teachers. There appear to be around 15,000 registered teachers in Fiji, most of whom (something over 13,000) are employed by the Ministry.

[24] In a September 2020 answer to a Parliamentary question about the ownership of primary and secondary schools in Fiji,[4] the then Minister said that of the country's 736 primary schools, 166 were managed by faith-based organisations, 568 were managed by committees[5] and 2 were Government schools. For secondary schools, the figures were 74 by faith-based organisations, 87 by committees and 11 were Government schools (giving a total of 172 secondary schools). Accordingly, at that time faith-based organisations managed 22.5% of primary schools in Fiji and 43% of secondary schools.

[25] Those brief data provide some background for the discussion which follows.

The Education Act 1966

[26] I highlight three features of the Education Act. First, "school" is defined to include schools such as the College, but there is an exclusion for institutions where the Permanent Secretary considers that the education is "wholly or mainly of a religious character" or

[3] Anish Chand "Beyond the Scope: The Education Challenge" *The Fiji Times* 16 September 2023.
[4] Question 126/2020, 2 September 2020.
[5] As I understand it, committee schools are mostly local schools operating within villages and similar small communities, which are managed by committees of local people.

which are owned and maintained by a religious society for the purpose of training people for the ordained ministry or for admission to a religious order. So, what might be described as core religious institutions do not fall within the Act at all.

[27] Second, the Permanent Secretary has extensive powers under the Act in relation to "schools". In particular:

- Anyone wishing to establish a school must apply to do so to the Permanent Secretary, who may refuse the application or impose conditions on it.[6] Once approved, the applicant must apply to register the school or obtain a certificate of recognition.[7] It is not clear from the Act what the difference between the two categories is, although the Education (Establishment and Registration of Schools) Regulations 1966 suggest that a school may receive a certification of recognition even though it does not meet the requirements for registration.[8]

- The Permanent Secretary has a wide power provide financial aid to schools for a variety of purposes.[9] Most schools in Fiji receive such aid. The Education (Grants and Assistance to Non-Government Schools) Regulations 1966 deal with eligibility for grants and contemplate the secondment of Government teachers to schools and the provision of financial assistance towards the salaries of certified teachers employed by a school's controlling authority.[10] They also allow the Permanent Secretary to impose terms or conditions when granting assistance.[11]

- The Permanent Secretary must establish or approve the basic curricula in all registered or recognised schools and may institute examinations.[12]

[6] Section 16(1) and (3).
[7] Section 16(1)(b)
[8] See Reg 6(2).
[9] Section 5.
[10] Regulation 3(b) and (c).
[11] Regulation 5.
[12] Section 10.

- Schools must have a controlling authority, which must appoint a manager of the school, who must be approved by the Permanent Secretary.[13]

- The Permanent Secretary has wide powers to make regulations, with the approval of the Minister.[14]

[28] Third, the Act provides that religious instruction may be provided in any school, although teachers may not be compelled to provide such instruction and pupils may not be compelled to receive it.[15] It is implicit, therefore, that denominational schools have the right to provide religious instruction to those pupils who wish to receive it. This also suggests that a school could not refuse to enrol a particular child because he or she is not of the same religious faith as the school. I note that reg 9 of the Education (Establishment and Registration of Schools) Regulations 1966 permits schools to give preference to children of a particular race or creed when selecting pupils for admission, but prohibits them from denying a child admission solely on the basis of race or religion.

[29] Finally, I mention teacher registration. Previously, this was dealt with in the Education Act but is now addressed in the Fiji Teachers Registration Act 2008. Section 4 of that Act establishes a Fiji Teachers' Registration Board, which administers the teacher registration system. To teach at a school in Fiji a person must hold a certificate of registration.[16]

[30] As will be apparent from this quick overview, the State exercises extensive powers over schools.

Constitution of the Republic of Fiji 2013

[31] The Preamble to the Constitution states, among other things, that the people of Fiji recognise the Constitution as "the supreme law of our country that provides the framework for the conduct of Government and all Fijians". Section 1 provides that Fiji is a sovereign

[13] Section 12.
[14] Section 29.
[15] Section 11.
[16] Section 10.

democratic State founded on certain specified values, including "respect for human rights, freedom and the rule of law". One of the rights recognised in the Bill of Rights (Chapter 2 of the Constitution) is the right to "freedom of religion, conscience and belief".[17]

(i) Section 4 of the Constitution

[32] In his submissions, Mr Clarke placed particular emphasis on s 4 of the Constitution, which is headed "Secular State". He drew attention to s 4(1), which states "Religious liberty, as recognised in the Bill of Rights, is ***a founding principle of the State***" (emphasis added). The emphasised words, he submitted, showed that freedom of religion is a fundamental or bedrock tenet of the State. As such, "it should not be undermined or watered down except by clearly and expressly stated exceptions within the Constitution itself".

[33] Section 4(3) goes on to identify what the secular State entails. It provides:

> *3. Religion and the State are separate, which means-*
>
> *(a) the State and all persons holding public office must treat all religions equally;*
>
> *(b) the State and all persons holding public office must not dictate any religious belief;*
>
> *(c) the State and all persons holding public office must not prefer or advance, by any means, any particular religion, religious denomination, religious belief, or religious practice over another, or over any non-religious belief; and*
>
> *(d) no person shall assert any religious belief as a legal reason to disregard this Constitution or any other law.*

[34] Section 4(3)(c) obviously applies to the Permanent Secretary. It has echoes in the HRAD Act. Section 19 of that Act provides that it is unfair discrimination in the context of (among other things) employment "directly or indirectly to differentiate adversely against … any

[17] Section 22(1).

other person by reason of a prohibited ground of discrimination". The definition of "prohibited ground of discrimination" in s 2 of the HRAD Act includes "beliefs", which would include religious beliefs.

[35] However, under s 20(1) of the HRAD Act, it is not unfair discrimination in relation to employment if the prohibited ground is a "genuine occupational qualification". Section 20(2) provides that there is a genuine occupational qualification "where a position is for the purposes of an organized religion and the differentiation complies with the doctrines, rules or established customs of the religion". In terms of the HRAD Act, then, a religious group could refuse to employ a person of a different faith, at least in some circumstances. Mr Clarke argued that there was scope within that framework to allow denominational schools to require teaching staff to be of the same faith as the school, that is, the concept of "suitability" for appointment could take account of religious belief. I will return to this point later in the judgment.

(ii) Interpreting and applying the Bill of Rights

[36] Before I come to s 22 of the Bill of Rights, which was at the heart of the argument, I should note two further matters, first, the Constitution's description of the interaction between the Bill of Rights and other laws and second, the obligations which the Bill of Rights imposes on the courts when interpreting it.

[37] Beginning with the interaction between the Bill of Rights and other laws:

- First, the Bill of Rights makes it clear that the rights it confers are not unlimited or absolute. Rather, they may be limited by reference to express statutory limitations, limitations contained in the Constitution or by limitations that can be inferred as being necessary in terms of the law or actions carried out under the law.[18]

[18] Section 6(5).

- Second, subject to the Constitution's provisions, the Bill of Rights applies to all laws in force at the time of adoption of the Constitution[19] and to laws made and administrative and judicial actions taken after its adoption.[20]

[38] In terms of the interpretation of the Bill of Rights, there are two relevant points:

- First, when interpreting and applying the Bill of Rights, a court "must promote the values that underlie a democratic society based on human dignity, equality and freedom".[21] It is important to note that this is an *affirmative* obligation − "must promote".

- Second, when considering the application of the Bill of Rights to any particular law, a court must interpret it "contextually, having regard to the content and consequences of the law, including its impact upon individuals and groups of individuals".[22] This reinforces a point that many judges have made over the years, namely that "in law, context is everything".

[39] I bear these points in mind in the discussion which follows.

(iii) Section 22 of the Bill of Rights

[40] Turning to s 22 of the Bill of Rights, I have already mentioned the right to freedom of religion enshrined in s 22(1). Section 22(2) provides that people have the right "to manifest and practise their religion or belief in worship, observance, practice or teaching", either individually or with others and either publicly or privately. Mr Clarke emphasised the reference in s 22(2) to "teaching", but I do not see that as assisting with the particular issues before the Court.

[19] Section 6(6).
[20] Section 6(7).
[21] Section 7(1)(a).
[22] Section 7(5).

[41] Section 22(4) and (5) provide:

> *4. Every religious community or denomination, and every cultural or social community, has the right to establish, maintain and manage places of education whether or not it receives financial assistance from the State, provided that the educational institution maintains any standard prescribed by law.*
>
> *5. In exercising its rights under subsection (4), a religious community or denomination has the right to provide religious instruction as part of any education that it provides, whether or not it receives financial assistance from the State for the provision of that education.*

[42] Mr Clarke submitted that the right in s 22(4) to "establish, maintain and manage" a school included the right to appoint the school's Head of School and teaching staff. The words "whether or not it receives financial assistance" meant that the fact that the religious community receives government financial aid for the school does not affect this right.[23] He submitted that this was highlighted by s 22(5), which confers a right to provide religious instruction, again whether or not the religious community receives Government financial aid.

[43] However, I consider that the right of a school to provide religious instruction as part of the education it provides must be interpreted in light of other provisions in the Constitution. In particular, s 22(6) provides:

> *6. Except with his or her consent or, in the case of a child, the consent of a parent or lawful guardian, a person attending a place of education is not required to receive religious instruction or to take part in or attend a religious ceremony or observance if the instruction, ceremony or observance relates to a religion that is not his or her own or if he or she does not hold any religious belief.*

[44] This is similar to s 11 of the Education Act and affirms the right of school children not to receive religious education. This indicates that the exercise of the right to religious liberty in an educational context must recognise the rights of others. This principle is expressed more generally in s 22(7)(a)(i), which provides:

[23] For completeness, I note that Mr Clarke did not argue that a denominational school had a *right* to government aid.

> *7. To the extent that it is necessary, the rights and freedoms set out in this section may be made subject to such limitations prescribed by law—*
>
> *(a) to protect—*
>
> *(i) the rights and freedoms of other persons;*
>
> *... .*

As I noted in paragraph [37] above, s 6(5) of the Bill of Rights states that the rights and freedoms it provides may legitimately be limited. Section 22(7) confirms that this is the position in relation to the right to freedom of religion.

[45] The fact that pupils have a right under the Constitution not to receive religious education suggests that a government-aided school must teach the courses it offers in a way that clearly demarks religious instruction from general educational instruction. This is necessary to enable pupils (either personally or through their parents) to determine whether they want to exercise their right not to participate in religious instruction. In his affidavit evidence, Dr Nemani Tausere, the Director of Education of the Seventh-day Adventist Church in Suva, said that Seventh-day Adventist schools:

> *"must be imbued with the values, belief in worship, observance and practice of the Seventh-Day Adventist faith. That requires more than simply providing religious instruction to students because it is about ensuring the culture of the school is about the Seventh-day Adventist faith".*

He went on to say that he could not emphasise enough "how much weight we place on the integration of faith and learning". This suggests that non-Seventh-day Adventist pupils will receive a certain amount of religious instruction and must abide by certain religious practices (for example, no work or social activities on Saturday (the Sabbath) before 6 pm)[24] whether they want to or not. There is a question as to whether this is consistent with the constitutional and legislative framework.

[24] Dr Tausere confirmed that this is the case in his affidavit.

[46] Finally, it must be noted that the right in s 22(4) is subject to a proviso – "*provided that the educational institution maintains any standard prescribed by law"*. Mr Clarke submitted that this referred simply to educational standards, whereas the Solicitor-General argued that it had a broader meaning.

[47] While it is true that "standard" in an educational context commonly means academic standards, the phrase "standard prescribed by law" is, in my view, broader in meaning and would, for example, include matters such as health and safety standards, teaching standards and some human rights standards (eg, no physical punishment). Ultimately, however, given the breadth of s 22(7) I am not persuaded that much turns on the precise meaning of "standard".

(iv) Other provisions of the Bill of Rights

[48] There are two additional provisions in the Bill of Rights that I should mention. The first is section 26. Section 26(1) provides that "everyone is equal before the law and has the right to equal protection, treatment and benefit of the law"; s 26(3) provides that people may not be directly or indirectly "unfairly discriminated against" by reason of (among other things) religion. Relevantly, s 26(5) provides that everyone has the right of admission, without discrimination on a prohibited ground, to educational institutions. However, s 26(7) goes on to state that treating some people differently from others on any of the prescribed grounds is discrimination *"unless it can be established that the difference in treatment is not unfair in the circumstances"*.

[49] The Solicitor-General argued that that the effect of these various provisions was that the Church (or any other religious organisation) could not exercise its rights under s 22(4) in a way that discriminated against a person because of their religious affiliation or non-affiliation unless it could show that the difference in treatment was not unfair in the circumstances.

[50] As I indicated earlier when referring to ss 19 and 20 of the HRAD Act, Mr Clarke argued that when the concept of "unfair discrimination" is considered in light of the religious

liberty protected by 4(1) and ss 22(4) and (5), it becomes clear that discrimination is not "unfair" where it is exercised to accommodate religious liberty. Rather, discrimination is necessary to ensure that the most suitable person is appointed to a denominational school.

[51] I will return to this point later in the judgment. For the moment, I simply note that Mr Clarke was critical of the Court of Appeal for approaching the case as one involving a conflict of rights and for invoking the concept of "proportionality". However, where one person is treated differently from another simply on the basis of their religious belief by a religious organisation claiming to exercise its rights under s 22(4), it is, in my view, appropriate to talk of a conflict of rights. The mediating principle in that context is "fairness", ie, can the religious organisation establish that the discrimination on religious grounds is "not unfair in the circumstances". It is not self-evident that a religious organisation can always establish this simply by asserting that it was exercising its rights under s 22(4). Such an approach would be over-broad and could be destructive of the rights of others. For example, if a particular religious denomination did not accept gay or lesbian people into its flock, would that entitle it to refuse to enrol gay or lesbian students at its government-supported high school, given that "sexual orientation" is a prohibited ground of discrimination?[25] As I see it, the true position is that the assessment of fairness is not made by the religious organisation based on its appreciation of its rights as a religious community but by the court, having regard to all the rights, values and interests involved.

[52] The second important section is section 31. Section 31(1) provides, in effect, that everyone has a right to education. Section 31(2) requires the State to take reasonable measures within its available resources to achieve progressive realisation of the right to free education. Section 31(3) directs that *iTaukei* and Fiji Hindi languages be taught in primary schools and s 31(4) empowers the State to direct educational institutions to teach certain subjects. The point of mentioning this section is that both the State's obligations and its powers in relation to schooling are an important element of the constitutional structure. If the State is constitutionally obliged to take reasonable measures within its available

[25] "Sexual orientation" is a prohibited ground of discrimination under s 26(3)(a) of the Bill of Rights.

resources to achieve the right to free education, it must have significant control over how that is done.

(v) Section 127 in Chapter 6 of the Constitution – Public Service

[53] Finally I come to s 127 of the Constitution, which deals with Permanent Secretaries. It is one of a group of sections governing the Public Service (Part A of Chapter 6). This part of the Constitution begins with s 123, which sets out the values and principles of State service. These include:

> *"(i) recruitment and promotion based on—*
>
> *(i) objectivity, impartiality and fair competition; and*
> *(ii) ability, education, experience and other characteristics of merit.*

The OMRS Guideline was introduced by the Public Service Commission in 2017 to implement these requirements and ensure consistency across the public service.

[54] In relation to s 127, much of the argument centred around sub-s (8). But in my view sub-(7) is also relevant, so I will set out it out as well:

> *"(7) The permanent secretary of each ministry shall have the authority to appoint, remove and institute disciplinary action against all staff of the ministry, with the agreement of the Minister responsible for the ministry*.
>
> *(8) The permanent secretary of each ministry, with the agreement of the Minister responsible for the ministry, has the authority to determine all matters pertaining to the employment of all staff in the ministry, including—*
>
> *(a) the terms and conditions of employment;*
> *(b) the qualification requirements for appointment, and the process to be followed for appointment, which must be an open, transparent and competitive selection process based on merit;*
>
> *…".*

[55] The Attorney-General argued that s 127(8)(b) required the Permanent Secretary to follow the appointment process that the Government required, which she did by applying the OMRS Guideline. Mr Raikivi emerged from that process as the most qualified candidate. For his part, Mr Clarke argued that the Permanent Secretary was not obliged to apply OMRS Guideline as her obligations under s 127(8)(b) applied only to staff *in* the Ministry, rather than to civil servants appointed by the Permanent Secretary (ie, teachers).

[56] This is an unattractive argument. Whether teachers are *in* the Ministry (as per s 127(8)(b)), *of* the Ministry (as per s 127(7)) or are simply civil servants appointed by the Permanent Secretary does not seem to me to be significant. It cannot be right that the Permanent Secretary is entitled to ignore the OMRS Guideline when appointing a government employee, whether that employee is in, of or without the Ministry. I note that s 21 of the Civil Service Act 1999 provides:

> *"In accordance with section 127(7) and (8) of the Constitution, a permanent secretary must exercise all his or her powers in relation to the employment, recruitment, discipline and removal of any staff in accordance with guidelines, directions, policies and other rules and regulations issued by the [Public Service Commission]."*

[57] Moreover, the OMRS Guideline refers specifically to the position of teachers. In the section on recruitment, cl 3.4 of the Guideline provides for a "pooling" approach where there are multiple positions with the same job description and vacancies that occur more than once a year. In such circumstances, selection can be carried out on the basis of an order of merit established for the "pool". One of the examples given is high volume positions such as teachers (cl 3.4.1). Obviously, the expectation of the framers of the OMRS Guideline was that it would apply to the placement of Government teachers.

Drawing the threads together

[58] The preceding overview of the constitutional and statutory environment has illustrated that the relationship between the Constitution and the relevant statutory provisions is indeed complicated. But one thing is clear – the framers considered that the right to freedom of

religion is not absolute and may properly be subject to limitations. This is a critical point. In my view, some of the arguments advanced on behalf of the Church treated the right conferred by s 22(4) as if it were absolute. While it is undoubtedly an important right, the s 22(4) right is subject to limitations. As I see it, then, what is at issue, broadly speaking, is the extent of those limitations in circumstances where the constitutional rights of others are or may be engaged.

[59] In the course of the overview above, I have identified and commented on many of the major points raised by the parties. Now, I will deal more directly with the two matters in dispute, namely, appointments and school closure.

Issue 1 – Appointments

[60] As previously noted, the Solicitor-General accepted that a religious organisation operating a private school (ie, one that does not receive State aid) is free to make its own appointments of Head of School and of teachers. He argued that the position is different when the denominational school receives State funding. Accordingly, I consider first, the significance of a school receiving government aid and then consider whether there is scope under the current constitutional and legislative framework for an approach such as that discussed in *Reddy.*

(i) Receipt of government aid

[61] I begin by going back to s 4 of the Constitution. Section 4 of the Constitution is about the secular State, that is, a State which is neutral on the matter of religion, accepting that religious belief or non-belief is a personal matter for individuals, and not a matter for it. Two obvious consequences flow from that, both clearly expressed in s 4:

- First, everyone has religious freedom, and is free to determine what, if any, religious beliefs they will follow.

- Second, the State, in all its manifestations, must be treat its people equally, whatever their particular religious beliefs, and must not differentiate between them simply on the basis of religious affiliation or seek to privilege or disadvantage one religious affiliation over another. In meeting this obligation, the State acts in a protective way, in the sense that it enables people to exercise their right of freedom of religion as they wish.

This is the setting for the discussion which follows.

[62] Mr Clarke submitted that, in allowing the Ministry's appeal and rejecting the Petitioners' cross-appeal, the Court of Appeal wrongly relied on the reasoning of the Privy Council in *Bishop of Roman Catholic Diocese of Port Louis v Tengur*.[26] In that case, the father of a Hindu child challenged the constitutionality of a system agreed with the Government under which half the places in Catholic run secondary schools were allocated to Catholic children, and half were allocated to others solely on the basis of merit. The Privy Council held that the system was unfairly discriminatory.

[63] Section 3(b) of the Mauritius Constitution provided certain human rights and fundamental freedoms, including "freedom to establish schools". Section 14(1) provided that "No religious denomination and no religious, social, ethnic or cultural association or group shall be prevented from establishing and maintaining schools ***at its own expense***" (emphasis added). Finally, s 16(2) provided that no one should be treated "in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority".

[64] The Privy Council held that because the Catholic schools received the bulk of their funding from the Government, they were not exercising the right protected by the Constitution, which was to operate schools at their own expense. The Privy Council went on to say that if the Catholic schools had been self-financing, their admission policy would not have fallen foul of s 16(2) because they would not be "acting in the performance of any public

[26] *Bishop of Roman Catholic Diocese of Port Louis v Tengur* [2004] UKPC 9.

function conferred by law" or "otherwise in the performance of the functions of any public office or public authority".

[65] Mr Clarke argued that the critical difference in the present case was that s 22(4) and (5) used the words "whether or not [the school] receives financial assistance from the State", meaning that the Church's constitutional rights did not depend on its meeting the College's costs itself.

[66] I make two comments. First, the fact that s 22(4) of the Constitution provides that religious organisations have the right "to establish, maintain and manage places of education" whether or not they receive State financial aid differentiates the constitutional position at issue in the present case from that addressed in *Tengur*. For this reason, I regard as valid reg 9 of the Education (Establishment and Registration of Schools) Regulations, which provides that schools may give preference to children of a particular race or creed in their admission policies, but may not deny admission solely on the basis of race or religion. Second, the Constitution does not confer on the Church and other religious bodies running schools a *right* to State funding, and Mr Clarke did not argue that it did. Rather, the State is entitled to set the basis which it will make funds available to denominational schools.

[67] To explain, the Permanent Secretary has a discretion under the Education Act to provide financial aid to schools. Like all statutory discretions, that discretion must be exercised for the purposes of the empowering legislation. A Permanent Secretary could not, for example, require that schools receiving government aid provide no religious instruction at all because that would be contrary to the empowering Act, specifically s 11. But providing she acts within the principles that apply to the exercise of statutory discretions, the Permanent Secretary has considerable flexibility. However, where the provision of financial aid takes the form of the secondment or provision of Government teachers to a school, as envisaged by reg 3 of the Education (Grants and Assistance to Non-Government Schools) Regulations, the Permanent Secretary is obliged to comply with the obligations placed upon her by the Constitution and by the Civil Service Act, which bring the OMRS Guideline into play.

[68] A religious organisation is, of course, free to refuse State aid for a school. Even where it accepts such aid, the organisation retains the right to provide religious instruction to those pupils at the school who want it, provided it employs religious instructors at its own expense. It cannot, however, require pupils to undergo religious instruction, nor can it require Government teachers to provide religious instruction; it cannot refuse to enrol a child based on religious grounds; and it must, in my view, accept Government teachers selected by the Permanent Secretary in accordance with procedures which she is obliged to apply.[27]

[69] One way of testing the interpretation of the Constitution that Mr Clarke advanced is to consider what its consequences would be. Mr Clarke argued that *all* religious organisations operating government-aided schools have a constitutional right to require the appointment of principals and teachers of their own faith. If this were accepted, the Permanent Secretary would likely have to operate multiple pools of potential appointees based on their religious affiliations. That may well be unworkable given the number and range of denominational schools in Fiji; but even if such a system could be devised, it does not sit happily with the concept of the secular State. This is because it would require the State to collect and retain information about Government teachers' religious beliefs and utilise that information for appointment purposes.

[70] However, this does not mean that the Permanent Secretary must always treat the religious affiliation of potential appointees as irrelevant. In some contexts, such as the appointment of a Head of School, I think it is legitimate for the Permanent Secretary to consult with the relevant religious organisation about potential appointees, as I now explain.

(ii) Scope for a Reddy approach?

[71] In *Reddy v Permanent Secretary for Education*,[28] the Court of Appeal addressed a dispute that had arisen between the controlling authority of a government-aided Hindu school and

[27] There is, of course, nothing to stop a teacher of a particular faith from applying for a position at a denominational school of the same faith and obtaining a position on merit.
[28] *Reddy v Permanent Secretary for Education* [2007] FJCA 25.

the Permanent Secretary concerning the appointment of a new Principal for the school. The school strongly supported the appointment of Mr Nand, its then Vice Principal and acting Principal, to the position. He had been teaching at the school for over 20 years was academically qualified, well-experienced and had demonstrated good leadership. The Ministry proposed to appoint Mr Takirua, who was more senior in terms of grade and had more years of experience but was not a Hindu. Ultimately, the Ministry advised Mr Nand that he was to be transferred away from the school. At that point, the school issued legal proceedings against the Ministry.

[72] The matter was ultimately resolved because Mr Takirua died during the proceedings and Mr Nand was appointed. But in its judgment, the Court made the following observation:[29]

> *"We think the fact that the school is a Hindu school, that the Principal's duties have always involved the organisation of Hindu ceremonies and that the school committee very much want the Principal to be a Hindu are important considerations to be borne in mind when assessing the suitability of candidates for the position. With respect, we do not agree with the Judge that that the school has "no role or function" in the making of the appointment. The overall aim of the assessment is to find the candidate most suited to the particular position and most likely to make a success of it. This may not necessarily be the candidate whose gradings are the highest or whose years of experience are the longest. It may well be that a candidate who does not score so highly in those areas may demonstrate that, for cultural or religious reasons, he or she is more likely to attract the support of the school, the parents, and the pupils. We are unable to accept Mr Lewaravu's suggestion that there is anything unfair, discriminatory or unconstitutional in approaching [the] assessment in this way".*

[73] The Court of Appeal in the present case distinguished *Reddy* on the basis that the 1997 Constitution which was at issue in that case did not have an equivalent of s 4(3) of the 2013 Constitution.[30] The Court said that s 4(3) prevented the Permanent Secretary from taking matters such as the religious character of a school or the religious desires of the controlling authority into account so as to prefer an applicant of a particular religious belief over another.

[29] At para [30].
[30] Quoted at para [33] above.

[74] Mr Clarke challenged the Court's analysis, arguing that what was in issue in this context was a person's suitability for appointment. He argued that in assessing suitability, the Permanent Secretary could have regard to religious affiliation and in doing so, would not be favouring one religion over another or discriminating against an unsuccessful candidate because of their religious belief.

[75] It will be recalled that s 22(4) confers a right to operate schools on cultural or social communities as well as on religious communities or denominations. There is nothing in s 4(3) to prevent the Permanent Secretary from having regard to an applicant's cultural background when considering whether they should be appointed to a Head of School position at an aided school run by a cultural organisation.

[76] Doing so would arguably be inconsistent with the "Public Service" part of the Constitution[31] and the OMRS Guideline, however. The OMRS process is described as "the system of appointing employees based on their ability to do the job, assessed against objective selection criteria which do not discriminate against or give preference to any group or individual."[32] This suggests that cultural factors should not be taken into account. On the other hand, a key element of the system is that "decision-making should be based only on the requirements of the position". Arguably, in some circumstances at least, one requirement for a Head of School position in an aided school operated by a cultural organisation would be a good understanding of, and affinity with, the particular culture. As the Court in *Reddy* noted, attracting the support of parents and students is an important requirement for a Head of School and cultural affinity is likely to help with that.

[77] Where denominational schools are involved, the position is more complicated because of State secularity as reflected in s 4(3). However, in my view, there is scope within the framework applying to appointments for the Permanent Secretary to engage with religious communities or denominations about critical appointments such as Heads of School at

[31] See para [53] and following above.
[32] Clause 2.3 of the OMRS Guideline.

aided denominational schools. That does not mean that the relevant religious community must approve an appointee or holds a power of veto. It does recognise, however, that the religious community has a legitimate interest in the qualities that the Head of School brings to the position, and some affinity with the religious identity of the school may legitimately be part of that.

[78] Accordingly, where several candidates are qualified for a Head of School role, albeit with different combinations of qualifications, experience, personal qualities and characteristics, the fact that one is of the same faith as the school may, I think, legitimately be taken into account by the Permanent Secretary. On the other hand, if there is a candidate who stands out clearly from the other candidates, that approach may not be possible.

[79] It is worth remembering in this context that although a document such as the OMRS Guideline performs an important function within the public sector in seeking to reinforce good hiring practices and eliminate bad ones, and selection processes typically involve aptitude and other forms of employment testing, the selection process does not have the precision of a scientific formula. There will often be some flexibility in the way it operates.

Issue 2 – Closing an aided school

[80] Section 19(2) of the Education Act provides:

> *"The controlling authority of any school may, at any time, request the Permanent Secretary to close such school and, in such event, the Permanent Secretary may order the manager of such school to close the school".*

[81] As I mentioned earlier, when it became clear that the Permanent Secretary and the Church could not agree on the issue of the appointment of Head of School, the Church said that it intended to close the school within a few days. Shortly after, the Church advised the Permanent Secretary that it intended to re-open the school as a private school. The Permanent Secretary did not dispute that the Church could close the College but asked that

they defer doing so to allow for the orderly transfer of staff and students. Surprisingly in my view, the Church was unwilling to agree to that.

[82] The declaration made by the Court of Appeal on this topic is set out in paragraph [15] above. The Court accepted that the Church was free to close the College. This was part of the right protected by s 22(4). However, the Court held that the Church's freedom to close the College was subject to the Permanent Secretary's regulatory control under s 19(2) of the Education Act.

[83] Mr Clarke challenged the Court of Appeal's view, arguing that under s 22(4), the Church had the right to close the school at any time, whether the Permanent Secretary agreed or not.

[84] I do not accept that the Church was free to close the College, or to change it to a private school, whenever it wished, as Mr Clarke argued. I agree with the Court of Appeal that the Permanent Secretary has a regulatory role to perform in relation to school closures. She cannot exercise her discretion under s 19(2) in a way that is unreasonable, but she is entitled to take account of the interests of students and teachers at the school. In the present case, almost two-thirds of the students were not Seventh-day Adventists and none of the teachers were. The Permanent Secretary was entitled to require the College to remain open for a longer period than the Church wished so as to give students and teachers the time to make alternative arrangements. The Record indicates that for some of the students in particular, alternative arrangements involved significant travel. In my view, the Permanent Secretary would have failed in her duty if she had not taken such matters into account.

Conclusion

[85] I have set out at paragraphs [13] and [15] above the declarations made by the Court of Appeal and at paragraph [16] above the substantive declarations sought by the Petitioners. It will be clear from what I have said that I do not agree with the declarations proposed by the Petitioners and that I agree with some, but not all, of the declarations made by the Court of Appeal.

[86] Because I think it better to summarise my conclusions rather than to make declarations, I would quash the declarations made by the Court of Appeal in favour of the following summary:

- First, I accept that denominational or cultural schools that do not receive State aid are free to appoint their Heads of School and teaching staff themselves. As I understand it, this is not in dispute.

- Second, denominational schools that receive State aid (including the provision of Government teachers) are entitled to provide religious instruction and may employ, at their expense, religious instructors. However, they may not require pupils to undergo such instruction, nor may they require Government teachers to provide or participate in it.

- Third, when providing Government teachers to State-aided denominational schools, the Permanent Secretary is obliged to act consistently with the constitutional and legislative constraints upon her as a public servant. These include acting consistently with the OMRS Guideline. This means that she must make appointments based on merit rather than religious affiliation.

- Fourth, in relation to key appointments to State-aided schools such as Head of School, the Permanent Secretary is entitled, within the context of the OMRS Guideline, to consult with the relevant cultural or religious organisation in the course of making an appointment. In these circumstances, the relevant organisation will not have a power of veto but will be able to express its views as to the appointment, including concerning cultural affinity or religious affiliation (as the case may be). Where candidates are evenly matched, cultural affinity or religious affiliation may assume some significance.

- Finally, a denominational or cultural school which is registered under the Education Act and receives State aid has the right to close or become a private

school. However, this right is subject to the regulatory power of the Permanent Secretary under s 19(2) of the Education Act. The Permanent Secretary is entitled to require that the relevant organisation allow a reasonable time to enable satisfactory arrangements to be made for teachers and students who will not be continuing at the school in order to minimise disruption and hardship to them.

[87] In the circumstances, I would make no order as to costs.

Young, J

[88] I have read the judgment of Arnold, J in draft and I am in complete agreement with it.

[89] **Orders**

1. *The Petition for leave to appeal is granted.*
2. *The declarations made by the Court of Appeal are quashed.*
3. *There is a summary of conclusions at paragraph [86] above.*
4. *There is no order as to costs.*

.....
The Honourable Acting Chief Justice Salesi Temo
Acting President of the Supreme Court

SUPREME COURT FIJI

.....
The Honourable Justice Terence Arnold
Judge of the Supreme Court

.....
The Honourable Justice William Young
Judge of the Supreme Court