IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 87 of 2012**

BETWEEN: 1. **LORD SEVELE OF VAILAHI**
2. **PAUL DAVID KARALUS**
- **Applicants**

AND : 1. **SAMIUELA 'AKILISI POHIVA**
2. **LORD LASIKE**
3. **LORD TU'I'AFITU**
4. **DR. SITIVENI HALAPUA**
5. **POHIVA TU'I'ONETOA**
6. **POSESI BLOOMFIELD**
- **Respondents**

C.R. Pidgeon Q.C with Mrs P. Tupou for the Applicants
Neil Adsett S.C (Attorney General) with Ms Gloria Pole'o for the Respondents

DECISION

[1] On 26 July 2011 the Legislative Assembly approved Parliament Motion No.1 of 2011 establishing a Special Parliamentary Committee to review "all the works that have been carried out" by the Nuku'alofa Development Corporation, a Cabinet Sub-Committee established in 2008 following the Nuku'alofa riots in November 2006.

[2] The Committee's members as approved by the Assembly were the First and Fourth Respondents, together with the Fifth Respondents as Auditor General and the Sixth Respondent as independent legal counsel.

[3] On 20 December 2011 the Assembly approved the appointments of the Speaker and the Deputy Speaker (Second and Third Respondents) to the Committee and also resolved that the Committee become a Select Committee of the Legislative Assembly.

[4] The Select Committee's Report dated 8 June 2012 was presented to Parliament on 3 September 2012 and, according to the Applicants, became public knowledge on that day.

[5] The Applicants are seeking leave to move for judicial review of the whole, or alternatively, parts of the Report, pursuant to Section 5(1) of the Supreme Court Act and subject to the provisions of Order 39 of the Supreme Court Rules 2007. The question of standing is not in issue; the only question is whether the respondents and their Report are immune from judicial review on the ground of privilege.

[6] The only evidence was the two supporting affidavits filed by the Applicants. Both counsel filed learned and helpful submissions for which I am grateful.

[7] The Applicants say that the Select Committee was invalidly constituted since the Fifth and Sixth Respondents, although held out as members of the Committee, were in fact ineligible for membership by virtue of Rule 160. The Applicants also say that the Committee

exceeded its terms of reference. In these circumstances, it is argued, the Respondents who were invalidly appointed could not be privileged while those findings which were beyond the Committee's terms of reference "were beyond the jurisdiction conferred" on the Committee by the Assembly. The Applicants therefore seek:

(a) A declaration that the Select Committee was in breach of its terms of reference;

(b) An order for "mandamus striking out those portions of the Report which are not authorised by the terms of reference and/or are critical of the Applicants"; and

(c) "An order of certiorari removing the Report to the Supreme Court for it to be quashed".

[8] The Applicants' second submission is that by including two members of the Assembly on the Select Committee who were biased against the Applicants and by failing to comply with Rule 170, the Committee denied the Applicants natural justice. Mr Pidgeon argued that this denial provided sufficient ground for the Court to intervene and for it:

(a) to declare that the Select Committee did not comply with Rule 170;

(b) to declare that "the Committee breached the rules of natural justice by failing to warn the Applicants that findings adverse to them were in contemplation and by failing to give them an opportunity to respond"; and

(c) to declare that the Committee acted in further breach of the rules of natural justice by reason of the First and Fourth Respondents being biased against the Applicants.

[9] It seems that the first time that the important question of the limits imposed on the Supreme Court's powers by the rights and privileges of Parliament was considered was in *'Ipeni Siale v Fotofili & Ors* [1987] SPLR 340. After examining a number of English authorities including *Bradlaugh v Gossett* (1884) 12 QBD 271 and *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522; [1971] 3 WLR 434; [1972] 1 All ER 378, as well as a number of authorities from other Commonwealth jurisdictions, Martin J concluded that the position at common law was clear : what is done in Parliament in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action.

[10] Martin J recognised that in Tonga, which has its own written constitution, the Supreme Court has the power to consider whether what has been done in the House is in accordance with the Constitution and statute and that no claim for privilege can remove that power. He, however, concluded that where no breach of the Constitution is involved common law must be applied. He stated:

> "There is one clear thread running through all these cases. Parliament is entitled to absolute privilege over its internal proceedings. This includes speaking and voting on proposals to make law. It includes bringing matters of concern to the attention of the House. It relates to all things said and done for the purpose of carrying out the duties and functions of the

House. It includes all decisions made by the House in its collective capacity. On all these matters the Court has no power to intervene. It is highly undesirable that it should. The Court has no more right to interfere with the proper working of the House than the House has to interfere with the proper working of the Court".

[11] This judgment was the subject of appeal to the Privy Council in *Fotofili & Ors v Siale* [1996] To. L.R 227. After again reviewing the authorities, the Privy Council concluded (231, line 194):

> "There is no jurisdiction in the [Supreme] Court to enquire into the validity of the Assembly's internal proceedings where there has been no breach of the Constitution".

The Privy Council quoted with approval a passage from *British Railways Board & Anr v Pickin* [1974] A.C. 765; [1974] 2 WLR 208; [1974] 1 All ER 609 in which Lord Morris said at 790 (AC):

> "The conclusion which I have reached results, in my view, not only from a settled and sustained line of authority which I see no reason to question and which should I think be endorsed but also from the view that any other conclusion would be constitutionally undesirable and impracticable. It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they

have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attached. It would be impracticable and undesirable for the High Court of Justice to embark on an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an enquiry whether in any particular case those procedures were effectively followed".

[12] Some years after *Fotofili* the third of three applications for Habeas Corpus came before Hampton CJ in *Moala & Ors v Minister of Police* (No.3) [1996] To. L.R.211. After considering *Fotofili* Hampton CJ identified the question before him as being (line 340):

"...whether there has been any breach of the Constitution?"

Hampton CJ answered this question by finding that Clause 70 of the Constitution had been breached since the applicants, who had been convicted of contempt of Parliament, had not been advised in advance of the charges against them, had been given no opportunity to defend themselves at a fair hearing and had not had been given an opportunity to mitigate before sentence was passed (224, lines 690 et. seq.). Although Hampton CJ also examined Rules 88 A to H (as they then stood, since replaced by Division 5 of the Rules) and found that these rules had been breached, it was not the breach of the rules

which led to the Court granting the applications sought but the fact that the breach had resulted in the applicants being deprived of the constitutional protection afforded to them by Clause 70. In the words of the Court of Appeal (1997 To. L.R. 210) dismissing the appeal:

> "Hampton CJ who ordered the release of the [applicants] held in substance that the allegations contained in the form of summons fell outside the terms of Clause 70 of the Constitution. He held that the minimum requirements of a fair trial were not met by the proceedings which occurred in relation to the matter".

[13] Given these clear statements of the law in Tonga it seems to me that only two questions arise:

(i) Are the Applicants asking the Court to enquire into the validity of the Assembly's internal proceedings, and

(ii) Is a breach of the Constitution alleged?

[14] In my opinion, before any of the orders sought in paragraph 6 above could be granted there would have to be an investigation into the way in which the Committee and its members were appointed and a further investigation to determine whether in fact, as claimed, the Committee's terms of reference were exceeded. These investigations would almost certainly involve consideration of the effect of Rules 159(2), 169, 170 as well as Rule 3. In my view such an enquiry plainly would amount to an enquiry into the Assembly's internal proceedings. Unless a breach of the Constitution is alleged such an enquiry is beyond the jurisdiction of the Court.

[15] Mr Pidgeon at paragraph 38 of his submissions suggested that the Court in Moala (paragraph 11 above):

> "took the view that natural justice applied to the actions taken by the Legislative Assembly and that was overriding, even though natural justice was not specifically referred to in the Constitution. It is submitted that this proposition is implicit in the Constitution and arises fundamentally out of the spirit of the Constitution".

[16] As has been seen from paragraph 7 above, Mr Pidgeon suggested that a demonstrated denial of natural justice afforded sufficient ground for the Court to intervene. In support of his proposition he referred to *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1993] NZLR 662; [1984] 3 All ER 201; [1984] 3 WLR 884 and to *Attorney General v Leigh* [2012] 2 NZLR 713. In my opinion these authorities do not assist the Applicants. The first is concerned with the requirement that a Royal Commission, which is quite a different thing from Parliament, abide by the rules of natural justice. The second concerns communications between a civil servant and a minister, not between a Select Committee and the House.

[17] So far as the proceedings of Parliament (and its committees) are concerned my opinion is that an alleged breach of the rules of natural justice which does not directly result in a breach of a discrete provision of the constitution does not afford a jurisdictional basis upon which the Supreme Court can intervene.

[18] Since the only evidence before me is that of the Applicants, I do not know whether an enquiry would reveal that the Applicants have in fact been unfairly or unjustly treated. If in fact they have been then that is a cause for regret and something which the House may well wish to put it right. In my judgment, however, it is not a matter for the Supreme Court.

Result:

The Application for leave is refused.

DATED: 14 May 2013.

SUPREME COURT TONGA

M.D. Scott
CHIEF JUSTICE

N. Tu'uholoaki
14/5/2013