IN THE COURT OF APPEAL
CIVIL JURISDICTION
HELD AT FUNAFUTI
TUVALU

Court of Appeal Civil Appeal No 1 of 2005

BETWEEN: **MASE TEONEA**

Appellant

AND: **PULE o KAUPULE OF NANUMAGA**

First Respondent

AND **NANUMAGA FALEKAUPULE**

Second Respondent

Before: Tompkins JA
Fisher JA
Paterson JA

Counsel: *Akuila Naco* for appellant
Daniel Gorman for respondents

Date of Hearing: 8 and 9 September 2009

Date of Judgment: 4 November 2009

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JUDGMENT OF TOMPKINS JA

Introduction

[1] At the commencement of the hearing of the appeal, counsel for the appellant sought leave to amend the grounds of appeal. The respondents not objecting, leave was granted.

[2] Nanumaga is a Tuvaluan Island with approximately 800 inhabitants. About June 2003 the appellant, who was born in Tuvalu, now a citizen of Fiji and a pastor in the Brethren Church, with his wife and another leader of the church, came to Nanumaga. Within a short time, there were about 40 converts to the church. On 4 July 2003 the Falekaupule passed a resolution that had the effect of banning the Brethren Church from seeking converts in Nanumaga.

[3] As a result, the appellant commenced proceedings in the High Court against the respondents, the Pule o Kaupule and the Falekaupule of Nanumaga, seeking a declaration that the resolution of the Falekaupule was null and void as contrary to the Constitution. These proceedings came before the Chief Justice on 6 October 2004 and 18 May 2005. By his judgment of 11 October 2005, he dismissed the appellant's application. From that decision the appellant has appealed to this court.

[4] In Tuvalu the Falekaupule is the traditional assembly of elders being all family heads or *matais* on each island and is the traditional method of decision making. On Nanumaga there are around 80 families, so that the Falekaupule on that island is made up of about 80 *matais.*

The sequence of events

[5] In November 2001 the Falekaupule resolved that the four religions already present on Nanumaga were enough. According to Namoto Kelisiano, the Member of Parliament for Nanumaga, the decision was made " . . . in pursuance of strengthening the social structure, traditions, peace and order on Nanumaga." The following resolution was passed.

> "For the Falekaupule to review and consider new religion
>
> **Resolution** Any new religion coming to the island, after the already church/religion on the island, shall stay only in their own place and are not allowed to spread their belief on the island."

[6] The appellant came to Funafuti about July 2001 to establish the Brethren Church. The decision to establish the church was taken in February 2002. On 2 September 2002 the Tuvalu Brethren Church was registered under the Religious Bodies Registration Act (Cap 28). In April 2003 it was agreed that the church should expand its message to the outer islands.

[7] Earlier in 2003 members of the Assemblies of God Church sought permission to preach their faith to the people of Nanumaga. Permission was refused. They left the island. The Falekaupule passed the following resolution:

> "New church/religion
>
> Resolution No new religion or church is allowed to establish on the island except these already existing churches – the Seventh Day Adventist, Jehovah's Witnesses and Bahai faith."

[8] In early July 2003 the appellant came to Nanumaga. He commenced to conduct bible lessons and preach on behalf of the Brethren Church. He was joined by other members of the church.

[9] The community became concerned at this development. The outcome was a special meeting of the Falekaupule held on 4 July 2003 that, according to the minutes, more than 70 people attended. The appellant and Sakaio Vakafua, one of the leaders of the Tuvalu Brethren Church, were present. The future of the Brethren Church was discussed. According to the members present, there was no opportunity to discuss the proposed resolution, although the minutes of the meeting indicate otherwise.

[10] According to the minutes there was considerable discussion of the proposal in the presence of the appellant and his supporters. At one stage the discussions became heated and those arguing were asked to calm down.

[11] The meeting passed the following resolution as recorded in the minutes of the meeting:

> "Resolution- New religions are restricted except the ones that are already on the island which includes Jehovah's Witnesses, Bahai and Seventh Day Adventist."

[12] This was followed in the minutes by the following comment:

> "A letter from the Brethren Church followers addressed to the Falekaupule was read in the meeting and it stated their wish to join the religion and that they do not intend to change their mind. Their names were listed in the letter. Pasama asked the Falekaupule to reconsider their decision but the Falekaupule told him that the decision had been made. The Pulefenua mentioned his sympathy for this unfortunate situation but this could have been avoided would the leaders of the new religion had taken appropriate steps to get permission."

[13] Lopati Samasoni, the secretary of the Falekaupule, wrote to the Attorney General a letter dated 4 July 2003 but which was probably sent the day before as it refers to "a meeting tomorrow." He expressed his concern that the meeting may be a 'bit intense" as the issue is a sensitive one, that it may turn into a more complicated issue and that "the talk tomorrow could turn into a disorder where people in their resentment of the new religion could act violently."

[14] She replied by letter date 5 July 2003. After referring to ss 23 and 29 of the Constitution and the effects of these sections, she stated her informed opinion to be that the members of the Brethren Church on Nanumaga must abide by the resolution of the Falekaupule.

[15] The appellant and the other members of the Brethren Church decided to continue with their church meetings. On Sunday 6 July 2003, as a bible meeting was being conducted, a number of young men, the Talafai, threw stones at the building where the meeting was being held, causing some damage to property and minor injuries to some of those attending.

[16] As a result and after discussions with the Ulu Aliki, the High Chief of the island, the local policeman and others, and after being there for about a month, the

appellant and other leaders of the Brethren Church left the island. By that time there were 59 members of the church.

The relief sought

[17] The appellant's proceedings in the High Court sought the following relief:

> 1. that the decision of the second respondents on or about 4 July 2003 that the Kaupule prohibits any other Church on the island apart from the EKT [the Ekalesia Kelisiaqno Tuvalu] be declared to be contrary to section 23(l) of the Constitution of Tuvalu 1986 as it hinders freedom of belief and worship and is therefore null and void;
>
> 2. that the above decision is in breach of section 24(l) and 25(l) in so far that it seeks to prohibit freedom of expression, and freedom of association as a gathering of Church members is therefore null and void;
>
> 3. that the above decision is discriminatory and contrary to section 27(l) in so far that it treats the applicant in a way that gives him and his Church congregation less favourable treatment than other such groups and persons and is therefore null and void;
>
> 4. that constitutional redress be provided for at an amount to be assessed by the Court;
>
> 5. further and in the alternative that this resolution of the Falekaupule is ultra vires as it is in breach of section 40 and schedule 3 Falekaupule Act 1997 and therefore should be quashed.

The provisions of the Constitution relating to rights and freedoms

[18] The Preamble of the Constitution sets out the Principles of the Constitution. These Principles are adopted and affirmed as the basis of the Constitution, and as the guiding principles to be observed in its interpretation and application at all levels of government and organized life. Relevant to the present appeal are:

> 3. While believing that Tuvalu must take its rightful place amongst the community of nations in search of peace and the general welfare, nevertheless the people of Tuvalu recognise and affirm, with gratitude to God, that the stability of Tuvaluan society and the happiness and welfare of the people of Tuvalu, both present and future, depend very largely on the maintenance of Tuvaluan values, culture and tradition, including the vitality and the sense of identity of island communities and the attitudes of co-operation, self-help and unity within and amongst those communities.

> 4. Amongst the values that the people of Tuvalu seek to maintain are their traditional forms of communities, the strength and support of the family and family discipline.
>
> 5. In government, and in social affairs generally, the guiding principles of Tuvalu are -
>
> > agreement courtesy and the search for consensus, in accordance with traditional Tuvaluan procedures, rather than alien ideas of confrontation and divisiveness:
> >
> > the need for mutual respect and co-operation between the different kinds of authorities concerned, including the central Government, the traditional authorities, local governments and authorities, and the religious authorities.
>
> 6. The life and the laws of Tuvalu should therefore be based on respect for human dignity, and on the acceptance of Tuvaluan values and culture, and on respect for them.
>
> 7 Nevertheless, the people of Tuvalu recognise that in a changing world, and with changing needs, these principles and values, and the manner and form of their expression (especially in legal and administrative matters), will gradually change, and the Constitution not only must recognise their fundamental importance to the life of Tuvalu but also must not unnecessarily hamper their expression and their development."

[19] These provisions emphasise the importance placed on the maintenance of Tuvalu values, identity and unity of island communities, consensus, traditional Tuvaluan procedures, and respect for Tuvaluan values and culture, while also recognising that these principles and values will gradually change.

[20] Section 10 of the Constitution is significant in two respects. First, it emphasises again the importance of the Principles set out in the Preamble. Secondly, the section does not deny cultural, family or religious obligations nor prevent those obligations being given effect by law so far as is appropriate while considering the right to freedom based on law as set out in subs (2). The section provides:

> **10. Freedom under law**
>
> (1) Freedom based on law consists of the least restriction on the activities of individuals consistent with the public welfare and the maintenance and development of Tuvalu and Tuvaluan society in

accordance with this Constitution and, in particular, in accordance with the Principles set out in the Preamble.

(2) Everyone has the right to freedom based on law, and accordingly, subject to this Constitution -

(a) everyone has the legal right to do anything that

(i) does not injure others, or interfere with the rights and freedoms of others-, and

(ii) is not prohibited by law-. and

(b) no-one may be

(i) legally obliged to do anything that is not required by law; or

(ii) prevented by law from doing anything that complies with the provisions of paragraph (a).

(3) This section is not intended to deny the existence, nature or effect of cultural, social, civic, family or religious obligations, or other obligations of a non-legal nature, or to prevent such obligations being given effect by law if, and so far as, it may be thought appropriate to do so.

[21] We refer to other sections of the Constitution when determining the grounds of appeal. But taken together with the sections to which we have referred, they demonstrate the very strong emphasis the Constitution places on Tuvaluan society and culture, unity and respect for Tuvaluan values. As will be seen, this emphasis becomes important when considering the grounds of appeal.

Grounds 2 and 3 of the amended notice of appeal

2. That the learned Chief Justice was wrong in finding that the appellant's actions were divisive, unsettling and a direct threat to the values and culture of Nanumaga.

3. The learned Chief Justice failed to properly characterise the resolution as prohibiting individual worship and was wrong in law in finding that the resolution fell within the exceptions provided by s 29 of the Constitution.

[22] These grounds require a consideration of ss 23, 24, 25 and 29 of the Constitution. They can conveniently be considered together and before we consider Ground 1. We first set out the relevant parts of the sections.

The relevant provisions of the Constitution.

[23] Section 23 of the Constitution relevantly provides:

> 23 **Freedom of belief**
>
> (1) Subject to the provisions of this Part, and in particular to;
>
> (a) the succeeding provisions of this section; and
>
> (b) section 29 (*protection of Tuvaluan values, etc*);
>
> except with his consent no-one shall be hindered in the exercise of his freedom of belief.
>
> (2) For the purposes of this section, freedom of belief includes freedom of thought, religion and belief; and
>
> (b) freedom to change religion or belief; and
>
> (c) freedom, either alone or with others, to show and to spread, both in public and in private, a religion or belief, in worship, teaching, practice and observance.
>
> . . .
>
> (6) Nothing in or done under a law shall be considered to be inconsistent with this section to the extent that the law makes provision which is reasonably required -
>
> (a) in the interests of
>
> (i) public safety- or
>
> (ii) public order-, or
>
> (b) for the purpose of protecting the rights or freedoms of other persons, including the right to observe and practice any religion or belief without the unsolicited intervention of members of any other religion or belief.
>
> (7) Nothing in or done under a law shall be considered to be inconsistent with this section to the extent that the law makes reasonable provision
>
> (a) requiring a person who proves that he has a conscientious objection to performing some reasonable and normal traditional, communal or civic obligation, or to performing it at a particular time or in a

particular way, to perform instead, some reasonably equivalent service of benefit to the community" or

(b) for the exclusion of such a person and his household from any benefit arising out of the performance of those obligations by others until the equivalent service has been performed.

(8) The protection given by this section to freedom of religion or belief applies equally to freedom not to have or hold a particular religion or belief, or any religion or belief.

(9) A reference in this section to a religion includes a reference to a religious denomination and to the beliefs of a religion or religious denomination.

[24] The right to freedom of belief guaranteed by s 23 is, by subs (1), subject to s 29 of the Constitution. That section provides:

29 Protection of Tuvaluan values, etc

(1) The Preamble acknowledges that Tuvalu is an Independent State based on Christian principles, the Rule of Law, Tuvaluan values, culture and tradition, and respect for human dignity.

(2) This includes recognition of -

(a) the right to worship, or not to worship, in whatever way the conscience of the individual tells him; and

(b) the right to hold, to receive and to communicate opinions, ideas and information

(3) Within Tuvalu, the freedoms of the individual can only be exercised having regard to the rights or feelings of other people, and to the effect on society

(4) It may therefore be necessary in certain circumstances to regulate or place some restrictions on the exercise of those rights, if their exercise;

(a) may be divisive, unsettling or offensive to the people-, or

(b) may directly threaten Tuvaluan values or culture.

(5) Subject to section 15 nothing contained in a law or done under a law shall be considered to be inconsistent with section 23 or 24 to the extent that the law makes provision regulating or placing restrictions on any exercise of the right -

(a) to spread beliefs; or

(b) to communicate opinions, ideas and information;

if the exercise of that right may otherwise conflict with subsection (4).

[25] Section 24 relates to freedom of expression and s 25 to freedom of assembly and association. Both have subsections identical to subs 23 (1).

The issue

[26] The resolution of the Falekaupule restricting the Brethren Church from practicing its beliefs and from holding its assemblies in Nanumaga is contrary to the rights conferred by ss 23, 24 and 25 unless that refusal is within subs (1) of each of the sections as being consistent with the protection of Tuvaluan values. In particular, it requires consideration of whether the Brethren Church practising its beliefs and holding its assemblies can be regulated or restricted pursuant to subss 29 (3) and (4) of the Constitution in that they may be divisive, unsettling or offensive to the people of Nanumaga or may threaten Tuvaluan values or culture, contrary to subs 29 (4), recognising, as provided in subs (3), that these freedoms can only be exercised having regard to the rights or feelings of other people and to the effect on society.

[27] On this issue the Chief Justice concluded:

> "I am satisfied there were grounds for the Falekaupule's decision that the introduction of the applicant's church was likely to be divisive and unsettling (as, indeed, it subsequently demonstrably was) and constituted a direct threat to the values and culture of the vast majority of the approximately 800 members of the island community. There was clear evidence that the result of a failure to act would allow a situation that would be divisive and would threaten the traditional values of Nanumaga. As a result, the Falekaupule was entitled to consider imposing such a restriction on the applicant's rights under sections 23-25."

[28] Before deciding whether those considerations are sufficient to displace the rights and freedoms conferred by ss 23, 24 and 25, that is in the words of subs 29 (4) "to regulate or place some restrictions on the exercise of these rights," it is necessary to balance such restrictions against the loss of some of the basic human rights referred to in those sections. This becomes a matter of degree. In the circumstances of the case, how important is the exercise of those rights, how serious for the community would be the disruption of the community by that exercise and whether there is need for change recognised by s 23 (7) at para [21] above, are some of the factors to be weighed.

[29] The Chief Justice did not expressly determine that the factors to be considered under subs 29 (4) outweighed the rights and freedoms in ss 23, 24 and 25. But his conclusion that the application should be dismissed obviously means that he decided, as a matter of fact in the circumstances of this case, they did. When that conclusion is a matter of fact and degree that involves a balancing of different factual considerations, it requires very compelling reasons for this court on appeal to reach a different conclusion.

[30] This conflict was referred to in the Review of the Constitution of Tuvalu that was prepared following the decision of the Tuvaluan Parliament on 24 November 1982 to refer the bill containing an amended Constitution to a select committee. While this review has no statutory effect, it provides some insight into what the bill was intended to achieve. Paragraph 1.2 reads:

> " . . . The Preamble recognises the conflict between human rights assured by the United Nations Charter and the highly developed sense of community which binds island populations. . . the maintenance of Tuvaluan values and culture depends on an effective preservation of traditional forms of community. Any widespread exercising of constitutional freedoms without regard to the effect on others in highly interdependent societies will dramatically change the way of life of people and the character of the country. . . Law is to be based on respect for human dignity and acceptance of Tuvaluan values and culture."

[31] Commenting on s 23 the Review states at paragraph 3.15.1:

> "Freedom of belief is a right which is potentially destructive of the island communities and traditional lifestyles. The introduction of new religions has already been the source of disharmony on several islands. Further diversification may aggravate this. The majority expression in all maneabas is that some curtailment is necessary. . . . The general tolerance for dissidents is low. The freedom given to religious beliefs is the least accepted of the constitutional rights."

[32] Also of particular relevance is the Review's comments on s 29 in paragraphs 3.21 and 3.22:

> Section 29 is wholly new. This reinforces the need to protect Tuvaluan values. The validity of any right must be determined by the effect on society. This section introduces constitutional restraints on the exercise of fundamental freedoms should these be found to be divisive, unsettling or

> offensive to the people or directly threaten Tuvaluan values or culture. . . . The provisions of s 21 [clearly a reference to s 29] will control religious exploitation which is unacceptable to island communities. *The section provides the reassurance sought by most maneabas to prevent social breakdown which has recently been associated with "new" religions* (emphasis added).

The evidence of the effect of the Brethren Church coming to the island

[33] The following is a summary of the evidence given in the High Court about the effect and likely future effect were the Brethren Church to remain on the island:

1. Opeta Mumuni is the Pule Kaupule of Nanumaga. He was called on to assist the police following the stoning of the house. He concluded his evidence:

> "For the first time in my life I have witnessed a strange incident like this happening on Nanumaga. That is seeing unrest and tension on the island because someone disobeyed the decision of the Falekaupule, which is a body of traditional leaders of Nanumaga. . . they deserve respect"

2. Namoto Kelisiano is the Member of Parliament for Nanumaga. Describing the meeting of 4 July 2003 he said:

> "The main reason [for the resolution] is that while he preaches he criticises the traditions of the island, especially those which are favourable to the Pastor. These comments are affecting the feeling of the majority of the people of Nanumaga and have put unrest to the whole community"

3. Patou Teakaka was the Pulefenua of Nanumaga. He said:

> "The reason [for the resolution of November 2001] is that it has been proved that the introduction of new faiths has broken up the spirit and togetherness of Nanumaga community . . .those who have followed the new introduced faiths have refused to perform moral obligations to the community. They normally make opposition to the Falekaupule by saying it is forbidden under their new faith to perform or offer such moral obligations
>
> I really want Mase to leave as well. That is because I am very concerned about the men of my island who are going to commit serious offences if they do something to Mase who has disobeyed the Falekaupule"

4. Lolesi Aleke CPL was the Police Officer on Nanumaga. He described in detail the events that occurred and concluded:

> "It was a great relief to my officers and me. Had Mase not left there could have been bloodshed on Nanumaga."

Conclusion

[34] To reach a conclusion it is necessary to balance the importance of the human rights guaranteed by ss 25, 26 and 27 with the need to protect Tuvaluan values expressed in s 29. The following are relevant

[a] The values protected by ss 25, 26 and 27 are of great significance. They are fundamental human rights of which a person or persons should not be deprived save for compelling reasons.

[b] This is particularly so with freedom of religion. Counsel for the appellant referred to *Church of the New Faith v Commissioner of Payroll Tax (Victoria)* (1982-1983) 154 CLR 120 where the High Court of Australia said:

> "Freedom of religion, the paradigm of conscience, is the essence of a free society. The chief function in the law of the definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint."

[c] Section 29 recognises that, on the grounds set out in subs (4), it "may . . .be necessary to regulate or place restrictions on those rights."

[d] The Preamble and the Principles make very clear the intention of Parliament that if there be a significant tension between the rights conferred by the sections and Tuvaluan customs and values, the latter is to prevail.

[e] On the evidence there can be little doubt that had the Brethren Church remained, the result would be divisive, unsettling or offensive to the majority of the people on the island.

[i] Of the 800 approximately who live on the island, some 700 belong to the EKT Church. So the proportion of the

population likely to be affected by the divisive presence of another church is large.

[ii] Nanumaga is a small isolated community. Disagreements and divisiveness will be more destructive than in a larger less isolated community.

[iii] The attack by the Talafai, although occurring after the passing of the resolution, is indicative of the depth of the feelings caused by the presence of the Brethren Church and the refusal of its members to accept the decision of the Falekaupule.

[f] For several years the Falekaupule had recognised the likely disruptive effect of further religions coming to Nanumaga, hence the earlier resolutions set out in paras [5] and [7]. This was not an isolated decision. Rather it was a decision made with practical experience of the likely consequences of the arrival of a further religion.

[g] Those who belong to the Brethren Church on the island have not been prevented from practising their faith in private. The effect of the resolution of the Falekaupule has been to prevent them attempting publicly to obtain more adherents.

[h] Finally, there is a further significant consideration. An impressive body of those very familiar with Tuvaluan culture has concluded that the happening to which the resolution is directed, namely the introduction of the Brethren Church, may be divisive, unsettling, or offensive to the Nanumaga community. The Falekaupule itself, those who gave the evidence to which I have referred, the Attorney General and the Chief Justice, who has had many years in this role in Tuvalu, have all reached that conclusion. In the face of these views of what is in essence a matter of fact, it would not be appropriate for an appellate court with no prior knowledge of Tuvalu or its culture to overrule that factual finding.

[35] When regard is had to all of these factors, and placing appropriate weight on the importance of fundamental human rights, particularly of religion, I am in no doubt that, in the circumstances here, the protection of Tuvaluan values and culture should be the dominant consideration. If the resolution be set aside, with the result that the Brethren Church returns to Nanumaga, the result will be a disaster for that small island community. Its coherence and sense of community will be badly damaged. The authority of the Falekaupule will have been challenged successfully.

[36] The social breakdown that the admission of a further religion into the community of Nanumaga is likely to cause is precisely the situation against which the Parliament sought to protect communities when it introduced s 29 into the Constitution in 1982.

[37] These consequences far outweigh the benefit to the members of the Church being able to exercise their rights under the relevant sections of the Constitution by preaching their faith to others.

[38] It follows that the Chief Justice was correct to apply the criteria in subs 29 (4) and to conclude that the resolution should not be declared in breach of the relevant provisions in the Constitution. This ground of appeal cannot succeed

Ground 1 of the amended notice of appeal.

> That the learned Chief Justice was wrong in law in finding that the resolution was not a law or an Act done under a law and therefore not affected by s 15 of the Tuvaluan Constitution.

The finding in the High Court

[39] The Chief Justice held that the effect of the Falekaupule Act "is to formalise many of the powers, duties and obligations on the Falekaupule but it was not the intention of Parliament to replace that body's traditional role of decision making nor the manner is which it was done." An innovation introduced by the Act is the power given to the Falekaupule to make bye-laws which will be written laws subject to the provisions of the Constitution relating to such laws. He considered that "Resolutions made in relation to the general management of the community are not bye-laws and

so those provisions in the Constitution which relate to the effect of laws and acts done under such laws do not apply to them." He concluded "as a matter of fact that the manner in which the Falekaupule reached the decision expressed in the resolutions of 2001 and 2003 was in accordance with their traditional role and not in exercise of any power under the Act."

The appellant's submissions

[40] The case for the appellant turns on the application of s 15 of the Constitution. It relevantly provides:

> 1 5. "Reasonably justifiable in a democratic society"
>
> (1) Notwithstanding anything to the contrary in this Part, ... all laws, and all acts done under a law, must be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity.
>
> (2) Any question whether a law is reasonably justifiable in a democratic society that has a proper respect for human rights is to be determined in the light of the circumstances existing at the time when the decision on the question is made.
>
> (3) Subsection (2) does not affect any question whether an act done under a law was reasonably justified in a democratic society that has a proper respect for human rights and dignity
>
> (4) . . .
>
> (5) In determining whether a law or act is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity, a court may have regard to -
>
> (a) traditional standards, values and practices, as well as previous laws and judicial decisions, of Tuvalu; and
>
> (b) law, practices and judicial decisions of other countries that the court reasonably regards as democratic ; and
>
> (c) international conventions, declarations, recommendations and judicial decisions concerning human rights; and
>
> (d) any other matters the court thinks relevant."

[41] Counsel for the appellant submitted that the resolution was a law or an act done under a law within s 15. He submitted that it was in exercise of its powers

under the Falekaupule Act and was therefore a decision in law. The decision taken by the Falekaupule was in accordance with the law and accordingly was an act of law made under that Act. It is therefore subject to s 15

[42] If that is not so, he submitted that, even if the resolution were one of customary law, it became part of the laws of Tuvalu by paragraph (b) of subs 4 (2) of the Laws of Tuvalu Act. That provides:

> (2) In addition to the Constitution, the Laws of Tuvalu comprise:
>
> (a) every Act:
>
> (b) customary law
>
> (c the common law of Tuvalu;
>
> (d) every applied law.

[43] As customary law, the appellant submitted, it was therefore subject to s 15.

[44] In support of his submission that the resolution was a law under the Act, he referred to s 40 relating to the functions of the Falekaupule and from there to clause 12 (d) of the third schedule which includes in the functions of the Falekaupule "to protect and preserve the culture of the Falekaupule area . . ." As the resolution was for this purpose, it was within this function and therefore, he submitted, a law enacted by the Falekaupule that brought it within s 15 of the Constitution.

[45] He further submitted that the matters to which the court may have regard set out in subs 15 (5) support the conclusion that the resolution is not reasonably justified and therefore contrary to s 15.

The respondents' submissions

[46] Counsel for the respondents submitted that the Chief Justice's conclusion that the relevant resolutions were made in relation to the general management of the community, and were therefore not bye-laws with the result that the provisions of the Constitution relating to the effect of laws and acts done under laws do not apply to them, is correct.

[47] He referred to the provisions of the Falekaupule Act as setting out the functions to be performed pursuant to that act, submitting that the passing of the resolution in this case was not pursuant to the powers conferred on the Falekaupule by that act. Thus it was not the exercise of a statutory power.

[48] He submitted that the Chief Justice was correct to hold as a fact that the decision of the Falekaupule was taken as part of the traditional manner of decision making of the community for guiding the community and caring for the people's welfare. The resolution was not a law nor an act done under a law.

Falekaupule Act

[49] The first issue to be determined in considering whether the resolution is within s 15 that is whether the resolution is within the phrase "all laws and all acts done under a law,". This requires consideration whether the resolution was a law made under the powers in the Falekaupule Act.

[50] On this issue the respondents relied on the decision of the High Court of Australia in *Griffith University v Tang* [2005] HCA 7 where the majority said at [89]:

> "The determination of whether a decision is 'made . . . under an enactment' involves two criteria: first the decision must be expressly or impliedly required or authorised by the enactment; and secondly, the decision itself must confer, alter or otherwise affect legal rights or obligations, and in that sense, the decision must derive from the enactment."

[51] As to the first of these criteria, this was not a decision expressly or impliedly authorised by the Falekaupule Act. Certainly it was carrying out a function within the third schedule to protect and preserve the traditional culture of the Falekaupule area, but that was not the source of the power to make the resolution. That source was, as the Chief Justice found, a power derived from the customs and traditions of the island, not from the Act.

[52] I see no reason for departing from the Chief Justice's finding of fact that the manner in which the Falekaupule reached the decision expressed in the resolutions

was in accordance with their traditional role, not in exercise of a power under the Falekaupule Act. The *matai* who make up the Falekaupule were, as the elders of the community, expressing their decision that, in the light of past experience, it is in the interests of the community that further religions should be restricted on the island. Certainly, in accordance with custom, they expected their view to be adopted by the community. None of this makes the resolution made under the Act.

[53] Even if that were not so, the resolution does not affect legal rights or obligations. Rather it determines that the inhabitants, represented by the Falekaupule, do not wish to have further religions in their community. This does not give rise to legal obligations. Its effect rests on the custom that the wishes of the elders of the Falekaupule will be adhered to by the community.

[54] It follows from these considerations that the resolution of the Falekaupule was not derived from the Falekaupule Act.

The Laws of Tuvalu Act 1987

[55] The next issue is whether the resolution was within subs 4 (2) of the Laws of Tuvalu Act set out in para [40] as being customary law, that is a law deriving its authority not from a statue but from custom.

[56] I have already held that the resolution was adopted by the Falekaupule in the exercise of its customary traditional role of regulating the affairs of the island and its inhabitants. If the resolution were a law, it was a customary law. So the second issue becomes whether the resolution was a customary law.

[57] Customary law is defined in subs 5 (1) of the Laws of Tuvalu Act:

> (1) Customary law comprises the customs and usages, existing from time to time, of the natives of Tuvalu.

[58] It is difficult to see how the resolution can come within that definition. It was not part of the customs and usages of Tuvalu nor of the community on Nanumaga. It was, as the Chief Justice found, passed by the Falekaupule in exercise of its customary powers, but that does not make the resolution itself part of those

customs. It was simply a direction by the Falekaupule to the community which no doubt it expected the community to obey. But that expectation cannot mean that the resolution is to be regarded as a law. There has never been any suggestion that the resolution is to be enforced by any legal means. It could not be because it is not a law. A resolution of the Falekaupule can only be a customary law if the Falekaupule was intending to express what it considered was, at that time, part of the customs and usages of Nanumaga. This resolution was not purporting to do that.

[59] The evidence is that some members of the community are continuing to follow the Brethren faith. According to the evidence, there have been no steps taken to enforce the resolution as may have been the case if it were considered an act done under a law or if the resolution was within the local customs.

[60] There is evidence to support the view that the resolution was not regarded as a law or an act done under a law. Mr Opete Mumuni, the then Pule o Kaupele, was asked whether there was a bye-law to control religious activity on the island. He replied:

> "No. It was a Falekaupule resolution. I have never been instructed by Falekaupule to make bye-laws to regulate religious activity on Nanumaga. There was just a resolution."

[61] My conclusion is that the resolution was not a customary law and therefore not a law for the purposes of s 15.

Conclusion on the first ground of appeal

[62] This ground of appeal cannot succeed for three reasons.

[63] First, the resolution was not a law for the reasons I have expressed.

[64] Secondly, even if the resolution were a law for the purposes of s 15, it was reasonably justifiable in a democratic society pursuant to subs 15 (5) of the Constitution. That section sets out some matters to which the court may have regard. These include traditional standards, values and practices . . . of Tuvalu. Those traditional standards, values and practices will include the clearly recognised

tradition that the resolutions of the Falekaupule will be recognised and followed by the community. This cannot be conclusive, as it is conceivable that a Falekaupule may adopt a resolution that is so unfair and unjust that it must be held to be unreasonable even when made in accordance with traditional standards etc. But that is not the situation here.

[65] They also include such other matters as the court thinks relevant. Clearly, such other matters can, indeed should, include the matters set out in subs 29 (4), which bear directly on whether the resolution is reasonably justifiable. To put it another way, if the resolution is within subs 29 (4), that is a matter to which the court can have regard when considering whether the resolution is reasonably justifiable. I have already held that the resolution is within subs 29 (4). For the same reasons, the resolution was reasonably justifiable for the purposes of s 15.

[66] That a customary law is within subs 29 (4) will not necessarily mean that it is reasonably justifiable under subs 15 (5). That subsections lists a number of matters to which the court can have regard. There could be circumstances where those other matters outweigh the effect of being within subs 29 (4). But in the circumstances of this case that I have set out in paras [34] and [35], I do not consider those other matters outweigh the effect of the resolution being within subs 29 (4).

[67] Thirdly, also relevant is subs 29 (5). I set out the subsection again:

> (5) Subject to section 15 nothing contained in a law or done under a law shall be considered to be inconsistent with section 23 or 24 to the extent that the law makes provision regulating or placing restrictions on any exercise of the right -
>
> (a) to spread beliefs; or
>
> (b) to communicate opinions, ideas and information;
>
> if the exercise of that right may otherwise conflict with subsection (4).

[68] The resolution does make restrictions on the exercise of the right to spread beliefs. I have held that the exercise of that right conflicts with subs 29 (4). The effect of subs 29 (5) is that nothing in the resolution is to be considered to be inconsistent with ss 23 or 24 of the Constitution.

[69] Subsection 29 (5) is expressed to be subject to s 15. I take that to mean that if the resolution is a law that is not reasonably justified in a democratic society, it will not be saved by subs 29 (4). But in considering whether the law is reasonably justified, I consider that the fact that the law is within subs 29 (5) is a factor that can be taken into account.

[70] For these three reasons, this ground of appeal cannot succeed.

Grounds 4 and 5 of the amended notice of appeal

> Ground 4 – That the learned Chief Justice was wrong in law in declining to make the third declaration.
>
> Ground 5 – That the judgment of the learned Chief Justice was wrong and ought to be set aside.

[71] These are not separate grounds of appeal. They have already been determined by the conclusions I have reached. They cannot succeed.

[72] As I have concluded that none of the grounds of appeal have been made out, I would dismiss the appeal

Result of the appeal

[73] In accordance with the judgments of Fisher and Paterson JJA, the appeal is allowed. The judgment of the Chief Justice is set aside. In lieu thereof there will be a declaration that the resolution of the Falekaupule of 4 July 2003 is contrary to the Constitution.

[74] Included in the relief sought was what the appellant referred to as constitutional redress. No submissions were advanced to us concerning this relief. Leave is reserved to apply to the High Court if this relief is to be pursued.

[75] Costs are reserved.

JUDGMENT OF FISHER JA

[76] As the background and facts have been fully outlined in the judgment of Tompkins JA, I can move directly to the following:

[a] Meaning and effect of the Falekapule resolutions

[b] Status of the Falekapule resolutions

[c] Importance of Tuvaluan stability and culture

[d] The relevant freedoms

[e] Limitations inherent in the relevant freedoms themselves

[f] The need for compromise between competing values

[g] Whether the scales are always weighted in favour of Tuvaluan stability and culture

[h] Weighing the competing considerations in this case

[i] The threat of violence

[j] Striking the balance – conclusions

[k] Other grounds of appeal

[l] Remedy.

[a] Meaning and effect of the Falekaupule resolutions

[77] The sole point of these proceedings is to challenge the constitutional validity of three resolutions of the Falekaupule of Nanumaga:

Minute Number 2 of November 20, 2001

"For the Falekaupule to review and consider new religion"

Resolution: Any new religion coming to the island, after the already existing church/religion on the island, shall stay only in their own place and are not allow to spread their belief on the island.

Minute of Meeting on June 10, 2003

"New church/Religion"

Resolution: No new religion or church is allow to establish on the island, except these already existing churches – the Seven Day Adventist, Jehovah's Witness and Bahai faith.

Minute of Meeting on July 4, 2003

Resolution: New religions are restricted except the one that are already on the island which includes Jehovah's Witness, Bahai and Seventh Day Adventist.

[78] Before the Constitution can be applied to the resolutions it is necessary to consider their meaning. It was common ground that they prohibited the establishment of any new religion on the island beyond those that were already well-established there. It was also clear that those religions which qualified for continuation were Ekalesia Kelisiaqno Tuvalu (EKT), Seventh Day Adventist, Jehovah's Witness and Bahai. Less clear was the precise scope of the prohibition.

[79] The natural meaning of the first resolution appears to have been to prohibit the proselytising of a new religion to prospective converts but not observance, individually or collectively, by those who were already members. The second resolution appears to have gone further in its statement that no new religion or church could be "established" on the island. "Established" normally means to set up on a permanent basis and "religion" the belief in, and worship of, God or gods. The resolution was not drafted by lawyers and involves a translation into English. However the most natural meaning appears to be to that no new religion was to be started or observed on the island. On the face of it that would stop anyone acting out, or expressing a belief in, any new religion there. It does not make exceptions for family or friends. The third resolution is expressed in more general language but appears to have been simply a confirmation of the second.

[80] On their face, the combined effect of the 2003 resolutions was therefore to prohibit the establishment on the island of any additional religion or church in any shape or form.

[81] Mr Gorman sought to mitigate the sweeping nature of that prohibition through evidence as to what an individual who attended the meetings, Opeta Mumuni, thought that they meant. However the subjective understanding of an individual is a notoriously unreliable way of construing the resolutions of a collective body. The problem is that each of the 70 people at the Falekapule probably had his or her own opinion as to what was intended. The only way in which a collective body can speak is through its resolutions.

[82] Mr Gorman also sought to mitigate the scope of the prohibition by reference to the way in which the resolutions have been subsequently enforced, or not enforced, in practice. He pointed out that during the trial counsel for the appellant conceded "there are private meetings in homes. No more than three families together". The difficulty there, however, is the potential gap between what the Falekaupule decided and the extent to which that body subsequently knew about, and endorsed, the way in which particular individuals then conducted themselves. This was illustrated by the indignation of certain members of the Falekaupule that the 2001 resolution had not been enforced in accordance with its terms.

[83] The meaning of a rule is to be derived from the way in which it is expressed, not the way in which particular individuals may or may not have acted upon it after it was made. The fact that individuals may disobey a law does not mean that the law is abrogated or diminished. The remedy sought here is to set aside the resolutions, not the way in which people may or may not have acted upon them.

[84] The effect of the resolutions is therefore a simple prohibition against the establishment of an additional religion or church on the island. No exceptions have been made for the privacy of one's home or gatherings of family or friends. In constitutional language, the resolutions hinder the people of Nanumaga in worshipping in accordance with their own religious beliefs, changing religions, either alone or with others showing and spreading, in public or private, a new religion, providing instruction for members of the community in any new religion, communicating ideas and information in relation to any new religion, or coming together with others in any form of association or assembly for that purpose.

[85] The final point to note about the resolutions is the generality of their application. They were not confined to any specific individual, transaction or event. They were couched in the terms of a universal rule which would impact upon all persons living on, or visiting, the island unless and until the rule is revoked. These are rules, not single instance vetoes.

[b] Status of the Falekaupule resolutions

[86] Each Tuvaluan island has a Falekaupule. A Falekaupule is an island's assembly of matais, family heads, or elders, constituted in accordance with the "aganu" or customs of that island. The function of a Falekaupule is to make the decisions for the island at its "ahiga" or island meeting house. On Nanumaga the Falekaupule consists of about 80 matais or family heads representing an equivalent number of families.

[87] The authority of a Falekaupule was explained by Opeta Mumuni, the Pule o Kaupule of Nanumaga. He pointed out that the Nanumaga Falekaupule has "all the authority and power on the running of the affairs of Nanumaga" and that "a Falekaupule resolution is carried out on the island despite there being no by-laws". The authority of a Falekaupule stems from custom and tradition and the fact that it is widely representative of the island community.

[88] Three examples will suffice to illustrate the force of its authority. One was that following the 2001 resolution, a group from the Assembly of God Church arrived on the island and sought to preach their faith there. They were not permitted to do so and left the island.

[89] A second was the correspondence referred to in the judgment of Tompkins JA in early July 2003. The Secretary of the Falekaupule wrote to the Attorney-General outlining his concerns in the present matter. In her reply the Attorney General discussed the relevant provisions of the Constitution and then pointed out that "the Falekaupule, if minded, may make by-laws regulating or plac[ing] restriction on the exercise of those rights including the freedom of belief if the exercise of the rights may be derisive, unsettling or offensive to the people" and concluded that "having carefully stud[ied] the issue as submitted and in light of the

above provisions of the Constitution it is my informed opinion that considering the prevailing circumstances the members of the Brethren Church on Nanumaga must abide with the resolution of the Falekaupule". Quite sensibly, she did not seek to draw any technical distinctions between the Falekaupule's by-laws and resolutions; its word prevailed.

[90] A third example was the reaction which greeted the defiance of the Falekaupule's resolutions by the Brethren Church. As the Chief Justice found, "the violence by some people on the island was not the result of the introduction of the applicant's denomination per se but a reaction to his clearly shown determination not to abide by the decision of the Falekaupule".

[91] To summarise, the resolutions created rules of general application and were made by the body having "all the authority and power on the running of the affairs of Nanumaga".

[92] With that background I am unable to accept Mr Gorman's submission that for the purpose of s 15 ("all laws, and all acts done under a law, must be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity"), the Nanumaga Falekaupule's resolutions did not qualify as laws, or even as acts done under law. Mr Gorman submitted that the resolutions should be relegated to some lesser form of custom or practice unworthy of such recognition in law.

[93] If the status of Falekaupule resolutions were really as contended for by Mr Gorman, the situation would be an odd one. On the one hand it would not be disputed that rulings and decisions made by the Falekaupule in the exercise of their traditional powers have the effect of law in all respects other than name – observed, and if necessary enforced, by the community and, it would seem, even the local police officer. Yet on the other hand the Falekaupule would be free to ignore all constitutional constraints – including the many other rights and freedoms associated with life, personal liberty, slavery, forced labour, inhuman treatment, property rights, privacy of home and property, protection of law and freedom of movement - on the

ground that its decisions were beyond the reach of the Constitution if not expressed in the form of by-laws.

[94] The law would be ass if that truly were the position. I do not think it is. Rights and obligations under constitutions are not to be interpreted in any formalistic or technical fashion. In my view rules of general application made by Falekaupules should be respected as laws for the purpose of the Constitution of Tuvalu without more. As Donne CJ said in *Alama v Tefasa* [1987] SPLR 385, at 393:

> The authority of the matais is founded in the values and cultures of Tuvalu. It is the linch pin of the life and laws of Tuvalu protected by the Constitution.

[95] There is no need to descend into further technicality to justify that conclusion.

[96] However, even if one did have to descend into technicality, there is in my view an acceptable argument that rules of general application made by a Falekaupule qualify as "laws" for present purposes. A Falekaupule's resolutions derive their authority from the "aganu", or customs and usages, of the island in question and of Tuvalu. These customs and usages empower a Falekaupule to make rules of general application. Once a Falekaupule makes a rule of general application, the rule derives its status from custom or usage. It is then reasonable to regard the rule itself as having the status of custom or usage. Custom or usage is constantly changing. The definition of "customary law" in s 5(1) of the Laws of Tuvalu Act 1990 is "the customs and usages, *existing from time to time*, of the natives of Tuvalu."

[97] Once the general rule of a Falekaupule is to be regarded as customary law, it is clear that it also constitutes part of the law of Tuvalu in a more general sense. Section 5(2) of the Laws of Tuvalu Act 1990 provides that "Subject to section 4(1) [which recognises the supremacy of the Constitution] customary law shall have effect as part of the law of Tuvalu, except to the extent that it is inconsistent with an Act or an applied law published under s 11(1) and subsidiary legislation made thereunder and so published". In the present case there is nothing materially to the contrary in any of those four sources, namely the Constitution, an Act, s 11(1) of the Laws of Tuvalu Act, or subsidiary legislation. To similar effect s 4(2)(b) provides

that "in addition to the Constitution, the laws of Tuvalu comprise...(b) customary law".

[98] The status of customary law is reinforced by s 5(3) of the Laws of Tuvalu Act. It provides that "Schedule 1 has effect with respect to the determination and recognition of customary law". Schedule 1 relevantly provides:

> 2. Subject to this Schedule, customary law shall be recognised and enforced by, and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest.
>
> ...
>
> 4. Subject to this Act and to any other enactment, customary law may be applied in a case other than a criminal case in relation to –
>
> ...
>
> (j) the reasonableness or otherwise of an act, default or omission by a person.

[99] The effect of cl 2 of Schedule 1 is that customary law will be recognised and enforced by the courts subject only to a discretion to the contrary where, in the opinion of the court, it would cause injustice or be contrary to the public interest. The reference to civil cases in cl 4 is in my view simply an extension of that principle to allow customary law to supplement or qualify even common law principles in certain circumstances.

[100] I do not see anything in the Falekaupule Act to detract from that analysis. Mr Gorman pointed out that under the Falekaupule Act, Falekaupules were given the express power to make by-laws and that in the case of these resolutions the procedure prescribed for the making of by-laws had not been followed. That is accepted. However it does not follow that the *only* means by which a Falekaupule can make a law is to make a statutory by-law. As Mr Gorman pointed out:

> The **Falekaupule Act** was enacted to give recognition to the authority of the Falekaupule, but not to codify it or to cover the field of Falekaupule traditional authority. This is apparent from the **Explanatory Memorandum**, which provides:
>
> 'The main purpose of this Bill is to give further and comprehensive statutory recognition for the Falekaupule and to vest in them greater control over the

> activities and affairs of the islands by transferring to them the functions of the local government councils'.

That is scarcely the description of an Act designed to cut down the scope or status of a Falekaupule's traditional powers. Under s 50 of the Act, the Minister of Government has very limited statutory control over the Falekaupule. It may also be noted that pursuant to s 40(1) and cl 12(d) of Schedule 3 to the Falekaupule Act, a Falekaupule is given the function, among others, of acting "to protect and preserve the traditional culture of the Falekaupule…".

[101] For those reasons I consider that these resolutions created a rule of general application, that the rule amounted to customary law, and that as such it also constituted law for the purpose of s 15 of the Constitution.

[102] Even if that had not been so, and the resolutions had not themselves amounted to law, they would at least have been "acts done under law" for the purposes of s 15 of the Constitution. As to what "act done under law" means, I accept Mr Gorman's submission that the test is analogous to the one used for acts done "under any enactment". To be an act done under any enactment it must (i) be expressly or impliedly required or authorised by the enactment and (ii) confer, alter or otherwise affect legal rights or obligations: *Griffiths v Tang* [2005] HCA 7 at para 89. In the present case it would therefore be sufficient if the resolutions were (i) authorised by a law and (ii) affect legal rights.

[103] As to (i), the law which authorised these resolutions was clearly customary law. The effect of ss 4(2)(b) and 5(1) of the Laws of Tuvalu Act 1990 is that the customs and usages of the natives of Tuvalu constitute one of the categories of law in Tuvalu. It is not disputed that in passing its resolutions, the Nanamaga Falekaupule was exercising powers derived from native custom and usage. For reasons previously outlined, I consider that the native custom and usage that authorised Falekaupules to make decisions as to the way in which the local community was to conduct itself was itself customary law.

[104] As to (ii), its seems to me that where customary law confers upon a Falekaupule the power to make decisions as to the way in which citizens may

behave, a decision made in the exercise of that power must at least affect their rights under customary law. And since customary law is itself "law", the decision must affect those citizens' legal rights. Certainly that was the view of Donne CJ in *Alama v Tefasa* supra.

[105] I respectfully agree with the Attorney General that these resolutions must be complied with - unless of course they are struck down by the courts. So long as the Falekaupule resolutions stand, no person from on or off the island can establish a new religion there.

[106] For those reasons I consider that even if the Falekaupule resolutions had not themselves amounted to law, they would at least be acts done under law for the purposes of s 15 of the Constitution.

[c] The importance of Tuvaluan stability and culture

[107] The Constitution of Tuvalu goes to unusual lengths to preserve a set of values which could be broadly described as unity, stability and the preservation of Tuvaluan values and culture. General provisions to that effect include paras 3 to 6 of the Preamble and ss 9(2)(e) and (f), 15(5)(a) and 29(3) and (4). It will be convenient to refer to these ends collectively as "Tuvaluan stability and culture". The details are well covered in the judgment of Tompkins JA and need not be repeated.

[108] In any application of the Constitution, preservation of Tuvaluan stability and culture must be to the forefront. Some caution is therefore necessary before applying international treaties and conventions, and the decisions of courts in other countries, to Tuvalu. It will be important not to lose sight of this in the discussion that follows.

[d] The relevant freedoms

[109] The freedoms of belief, expression, assembly and association (ss 23, 24 and 25) are individually powerful and collectively more so. To take freedom of belief alone, Courts around the world have regarded it as the very essence of a free society. Decisions to that effect include *Sefo v Attorney-General* (Supreme Court of Samoa 12 July 2000, Wilson J); *Tapu Aeae Lafaialii & Ors v The Lands and Titles Court & Ors* (Samoan Supreme Court, Sapolu CJ 24 April 2003); *R v Big M Drug Mart*

(1985) 18 DLR (4th) 321 and *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1982-1983) 154 CLR 120.

[110] As the Supreme Court of Canada pointed out in the *Big M Drug Mart* case:

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. What may appear good and true to a majoritarian religious group, or the State acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from threat of "tyranny of the majority".

[111] To similar effect the High Court of Australia put it this way in the *Church of the New Faith* case:

> Religious freedom is a fundamental theme of our society ... Religious discrimination by officials or by courts is unacceptable in a free society. In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members.

[112] Put shortly, what the courts of Samoa, Canada and Australia all thought was that a society in which individuals were not free to choose their own religion could no longer describe itself as a free society. The same assumption is embodied in Art 18 of the United Nations of Universal Declaration of Human Rights and Art 18 of the International Covenant on Civil and Political Rights (which happens to be the source of the wording of s 23 of the Tuvaluan Constitution).

[113] There is nothing to the contrary in the United Nations Declaration on the Rights of Indigenous Peoples (2007). Arts 18, 35 and 36 referred to by Mr Gorman are essentially matters of governance – the right to self-determination within a people's own borders and across their borders. Art 31 is the article of substance in the present case, providing as it does that "indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions...". However, it is important to note that in the present case the four religions which the Nanumaga Falekaupule has sought to protect – EKT, SDA, Bahai and JW – were progressively introduced from abroad over the last 150 years. In terms of Art 31 of the United Nations Declaration they do

not form part of Tuvaluan's "cultural heritage" or "traditional knowledge" in the usual sense of those words.

[e] Limitations inherent in the relevant freedoms themselves

[114] Mr Gorman submitted that even without resorting to competing values under the Constitution, the freedoms in ss 23, 24 and 25 were circumscribed by limitations in the scope of the freedoms themselves.

[115] That is certainly true in the case of religion. The effect of s 23(6)(b) of the Constitution is that even where a law might otherwise limit freedom of religion, it is acceptable if "reasonably required...for the purpose of protecting the rights or freedoms of other persons, including the right to observe and practice any religion or belief without the unsolicited intervention of members of any other religion or belief". It follows that under the Constitution of Tuvalu everyone has the right to observe and practice a religion or belief without the unsolicited intervention of the members of any other religion or belief. Existing members of the EKT, Jehovah's Witness, Assembly of God, and Bahai churches on Nanumaga therefore have the right to practise their religions free from the unsolicited interventions of members of other religions, whether or not already on the island.

[116] There does not appear to be any analogous limitation in the way in which freedom of expression is defined in s 24 or the freedoms of assembly and association in s 25. Sections 24(3) and 25(3) limit those freedoms where necessary to protect the rights and freedoms of others but it is difficult to see how steps taken by a new church to observe, or even spread, its own religion could be contrary to the rights and freedoms of others in any normal sense, at least if carried out in the non-intrusive way contemplated in s 23(6)(b). Sections 24(3) and 25(3) also permit potential encroachments upon their respective freedoms in order to promote competing values but that is something to which I will return shortly in a different context. Those potential encroachments do not amount to limitations in the way in which the freedoms themselves are defined.

[117] The result appears to be that the Nanamaga Falekaupule could use s 23(6)(b) to justify a resolution which went no further than to prohibit unsolicited proselytising

among the members of existing religions on the island. So s 23 itself may allow a rule prohibiting the active canvassing of the members of existing churches by knocking on their doors or approaching them in public in order to persuade them to join a new religion. If such a rule were adopted all the members of a new church could probably do on Nanumaga would be to observe their own religion among themselves, hold meetings to which the general public were invited, advertise, and speak in public in circumstances which were not so intrusive as to amount to "unsolicited interventions". All of that would probably stay within the Constitution.

[118] Of course the resolutions passed by the Falekaupule went well beyond that. They did not stop at unsolicited approaches to existing church members. They purported to prohibit the observance of new religions on the island by anyone, including even the members of a newly arrived church. They also purported to prohibit non-intrusive activities which the members of other churches were free to ignore, such as public meetings, advertisements, and approaches to anyone who was not already practising a religion or belief. It cannot be seriously disputed that the resolutions were contrary to the primary freedoms contained in ss 23, 24 and 25. The real question is whether the values inherent in those freedoms were outweighed by other values in the Constitution.

[f] The need for compromise between competing values

[119] The Constitution is a framework of checks and balances. No individual provision operates in isolation. In nearly all cases the value which one provision promotes is tempered by values found in other provisions bearing upon the same issue. Interpreting the Constitution is largely about resolving the tension between these competing values in the instant case.

[120] The Constitution contains many provisions which are effectively fulcrums upon which these competing values are to be balanced. Many have been discussed in the present case although in my view the balancing exercise is largely the same in each case.

[121] The first set of fulcrums arises in ss 23, 24 and 25 themselves. Sections 23(6) and (7), 24(3) and 25(3) permit encroachments upon the relevant freedoms for a

number of stated purposes. Of particular relevance to the present case is the fact that a law which would offend against the relevant freedoms may be permitted if "reasonably required ... in the interests of ... public order" (s 23(6)) or "to the extent that [it] makes provision ... in the interests of ... public order" (ss 24(3) and 25(3)). Accordingly ss 24, 25 and 26 themselves require a choice between the freedoms they espouse and "public order". "Public order" is an elastic concept but considered in isolation it could easily justify the suppression of a religion in the interests of avoiding violence in the community. So without even leaving ss 24, 25 and 26, a choice between competing values is unavoidable.

[122] A second series of fulcrums is found in ss 10, 11 and 12 of the Constitution. These are discussed in more detail in the judgments of Tompkins and Paterson JJA. Broadly speaking each provision requires that an appropriate balance be struck between the rights and freedoms of different individuals and also requires that a balance be struck between rights and freedoms, on the one hand, and the maintenance of Tuvaluan stability and culture, on the other. In a similar vein, the effect of s 12(2) is that an act done under a valid law that in the particular case is harsh or oppressive or unreasonable is unlawful. So even the valid power to make local laws or decisions in the governance of Nanumaga is tempered by the possibility that the law or decision will be struck down as "harsh or oppressive".

[123] A third fulcrum is found in s 15 of the Constitution. In determining whether a law or act is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity, a court may have regard to a number of values between which there will inevitably be tension. Thus the "traditional standards, values and practices ... of Tuvalu" (s 15(5)(a)) must be balanced against the "practices ... of other countries that the court reasonably regards as democratic" and "international conventions ... concerning human rights" (s 15(5)(b) and (c)).

[124] However the fulcrum which has received the greatest attention in this case is the one found in s 29(4). For present purposes the effect of s 29(4) is that notwithstanding the reference to freedom of religion in s 29(2), it may be necessary to restrict that freedom if its exercise might be divisive or directly threaten Tuvaluan

values or culture. Again one sees the tension between the competing values involved.

[125] On one possible interpretation of his judgment, the Chief Justice thought that once a case came within the "divisive or directly threatening to Tuvaluan values or culture" criteria referred to in s 29(4), those values would automatically prevail over the freedom of religion referred to in s 29(2). If that is what he intended, I regret that I cannot agree. The words "in certain circumstances" and "may" in s 29(4) are a clear signal that a discretion was intended. A discretion imports the need to choose between Tuvaluan stability and culture, on the one hand, and the freedom referred to in s 29(2), on the other. The issue can be resolved only by reference to the circumstances of each particular case. In some it will be appropriate to give priority to Tuvaluan stability and culture; in others religious freedom.

[126] In the end I do not think that there is any escape from the need to weigh and compare the competing values which all of the foregoing provisions require. The balancing exercise is unavoidable whether approached under ss 23, 24 and 24, ss 10, 11 and 12, s 15(5), or s 29(4).

[127] The final point to note about these fulcrums is that the ultimate responsibility to choose is placed on the High Court. With respect to the Chief Justice, I am unable to accept that "if the court is satisfied the actions of the Falekaupule were taken as part of the traditional manner of decision making in that community and were taken because of a reasonable belief that the circumstances arising from the introduction of any religion to the island might have one or more of the effects in s 29(4), it must accept the Falekaupule was entitled to consider some restriction of the applicant's rights were necessary." Nor can I accept that the issue is "whether the reason for its decision was the preservation of Tuvaluan or, in the context of this case, Nanumagan traditional values". With respect, the question is not what motivated the Nanumagan Falekaupule. It is whether, viewed objectively, its resolutions were consistent with the Constitution. On that issue the High Court, and on appeal this Court, must approach the matter afresh.

[g] Are the scales always weighted in favour of Tuvaluan stability and culture?

[128] Read as a whole, I do not see in the Constitution any intention that from the outset the scales are always to be weighted in favour of Tuvaluan stability and culture at the expense of constitutional freedoms.

[129] Freedom based on law is said to consist of the least restriction on the activities of individuals consistent with competing values (s 10(1)) and everyone has the legal right to do anything that does not injure others or interfere with the rights and freedoms of others and is not prohibited by law (s 10(2)). Whether the establishment of a new religion on Nanamaga is "prohibited by law", in the sense of a law that is constitutional, is the very question which this court is required to address. Nor could it be said that the introduction of a new religion, in circumstances where there are to be no unsolicited approaches to the members of other religions, might injure others or interfere with their rights and freedoms.

[130] I agree that in deciding whether more weight is to be given to one value than another, the primary place to look is the Preamble to the Constitution. The Constitution is to be interpreted and applied in the light of the Principles in the Preamble – see s 4 and Rule 1 of the First Schedule.

[131] Principles 3, 4, 5 and 6 of the Preamble undoubtedly place much emphasis upon what I have broadly described as Tuvaluan stability and culture. Had the Constitution stopped at that point, there is no doubt that the scales would have been heavily weighted in favour of Tuvaluan stability and culture at the expense of other values. But the fact is that the people of Tuvalu went on to do two things to which I attach much significance.

[132] The first is that they adopted Principle 7 of the Preamble. Principle 7 recognises that in a changing world traditional values will gradually change. While recognising the fundamental importance of traditional principles in the life of Tuvalu, the Constitution says that they should not unnecessarily hamper the manner and form in which traditional principles are expressed and developed. For reasons which I will return to later, there is a strong argument that for Nanumaga to move from four foreign-sourced religions to five or more foreign-sourced religions is no

more than the type of change contemplated in Principle 7 of the Preamble. Tuvaluan culture is not frozen in time.

[133] The second point is that the people of Tuvalu deliberately chose to adopt a Bill of Rights. They did not have to do so. They would not have done so if they had not wanted the freedoms it contains. The freedoms they adopted included freedom of religion. Nanumaga is part of Tuvalu. Tuvalu has gone out of its way to say that it wants freedom of religion.

[134] I am therefore unable to accept the argument that the Principles in the Preamble mean that whenever there is a tension between what I have described as Tuvaluan stability and culture, on the one hand, and the freedoms contained in the Bill of Rights, on the other, the former will always prevail. What the Constitution requires is that in every case one set of values is to be compared with the other.

[h] Weighing the competing considerations in this case

The opposing points of view

[135] At a lay level the opposing points of view are captured in the evidence of the Member of Parliament, Namoto Kelisiano and one of the Brethren Church leaders, Sakaio Vakafua. The way Mr Kelisiano saw it was this:

> One of the resolutions made during that meeting is a prohibition on any other new religion brought in and advocated by any person on Nanumaga. The Falekaupule resolved that the four existing religions on Nanumaga are enough. These religions are EKT, Jehovah's Witness, the Bahai faith and the SDA. This decision was made in pursuance of strengthening the social structure, traditions, peace and order on Nanumaga.
>
> ...
>
> When Mase [the appellant] left I see that the island has been relieved from tensions. However, Mase's followers are still secretly preaching their faith and the worst of it is that some of them have abstained from the community's gatherings and meetings. Nanumaga people have been divided and are no longer having the spirit of togetherness and oneness".

[136] Mr Sakaio, on the hand, saw it this way:

> The problem seemed to be that the effect of the [Brethren] Church growth was to deprive the main Church – the EKT – of part of its congregation. That has never been our intention – it has simply been to preach the Word of

> God and let the people themselves decide for themselves. I believe that it was this that led to tension and to the problems that took place within the Kaupule...
>
> I appreciate that this is a sensitive issue as Tuvaluans are a religious rather than a secular people. At no time has there been any intention to have or seek conflict. On the contrary all that has been done is to preach the Gospel in accordance with our message. That is precisely the same as the EKT. It is our intention to spread the Word not to force people to join us. That is a matter of choice. The concern that the [Brethren] Church has is that [it] was stopped because of its growth, not because of its message".

Arguments for giving priority to Tuvaluan culture

[137] The arguments for giving priority to Tuvaluan culture are powerful ones. They are perhaps best captured in para 1.2 of the report of a Select Committee in 1982 entitled *Review of the Constitution of Tuvalu.* There it is pointed out that "any widespread exercising of constitutional freedoms without regard to the effect on others in highly interdependent societies will dramatically change the way of life of people and the character of the country". The arguments in support are thoroughly canvassed in the judgments of the Chief Justice in the High Court, and Tompkins JA in this Court, and there is no point in repeating them. It is sufficient to say that they make a powerful case for giving priority to the status quo.

[138] What has not been so far articulated are the opposing arguments. In my view it is not possible to make a fully informed choice between the two until the latter are expressed as well. Only then will it be possible to compare them.

[139] To my way of thinking the competing arguments are

[i] The importance of freedom of religion on Nanumaga;

[ii] The evolving nature of Nanumaga; and

[iii] Other more moderate ways in which intrusive conduct by new churches could be controlled on Nanumaga

I will deal with each in turn.

[i] The importance of religious freedom on Nanumaga

[140] The freedom to adopt one's own religion or belief is a mark of a free society. It is one thing to stop people from behaving in a way that harms others. It is another to tell them what they can and cannot believe. The danger is that without freedom of religion the majority on Nanumaga could tyrannise anyone who disagrees with them.

[141] There are already disturbing signs that this is happening. It is a matter of public record that in mid-2006 the Nanumaga Falekaupule decided to dismiss all Kaupule employees who were members of the Brethren Church (judgment of the Chief Justice 27 August 2008 in *Tehumu Lamese v Kaupule of Nanumaga and Pule o Kaupule of Nanumaga*).

[142] The four plaintiffs in that case were respectively a qualified mechanic, the manager of the local handcraft group, the local primary school teacher and a Kaupule orderly. They were all respected and useful members of the Nanumaga community.

[143] The Falekaupule identified the plaintiffs as Brethrens. They were given no opportunity to respond. The first three were told that they were dismissed for failing to make an appropriate contribution of coconuts to the EKT Church and for worshipping the Brethren Church. On unchallenged evidence the Chief Justice found that at all times they had in fact complied with their obligation to contribute coconuts. The fourth plaintiff, Puaniu Pelike, denied that he was a Brethren but his denial was rejected.

[144] In those proceedings the Chief Justice noted that the sole reason for the dismissal was the plaintiffs' actual or perceived membership of the Bethren Church; that but for the wrongful dismissal the plaintiffs would have continued with their employment with the Kaupule; that as a result of the dismissals they were widely ostracised and would be unable to obtain any other paid employment on Nanamaga; and that they would probably have to rely on farming or fishing for their income from then on. He found that in the case of Tehumu Lamese, who was a mechanic, customers would be limited to other members of the Brethren Church. The Chief Justice awarded heavy damages against the Kaupule for employment breaches which he described as "blatant".

[145] With respect, the damages awarded by the Chief Justice were entirely appropriate and his condemnation of the Falekaupule's conduct well-merited. But it is impossible to divorce the dismissals in that case from the resolutions in this one. It gives the lie to any notion that the resolutions can be watered down in their practical impact. More importantly, it illustrates what can happen when the tyranny of the majority is left to run unchecked. It was to prevent excesses of that kind that Tuvalu adopted a Bill of Rights.

[ii] Evolving nature of Nanumaga

[146] Like every other community, Nanumaga is an evolving society. This is not a matter of choice but inevitability. The state of religious observance which the Falekaupule sought to freeze in 2001 and 2003 was itself merely a snapshot taken during a long journey. The Chief Justice records that the first conversion of the island to Christianity occurred in the mid-19th century when the London Missionary Society converted the island to Christianity and laid the foundations for the EKT. More recently the London Missionary Society was followed by representatives of the Seventh Day Adventists, Bahai faith and Jehovah Witnesses. Then when the Brethren held their first Bible studies on the island 30 to 40 people attended. Within about a month this had grown to 59.

[147] The Brethren Church had been established in Tuvalu since 2001 and was registered under the Religious Bodies Registration Act 2002. There is a constant flow of travel and interaction between Nanumaga and the rest of Tuvalu. Nanumaga already has telephones, television, the internet, a regular boat service from Funafuti and links of a family, social and political nature with the rest of Tuvalu and the world. I do not see how the development of fresh ideas and beliefs on Nanumaga cold be halted in its tracks even if one ignored the aspirations found Principle 7 of the Preamble and ss 23, 24 and 25 of the Constitution.

[iii] Other more moderate ways of controlling intrusive conduct by new churches

[148] Earlier in this judgment I analysed the apparent meaning of the resolutions. The respondents have instinctively recoiled from the consequences of that meaning. But if a more moderate approach is desired, the answer lies in the hands of the

Falekaupule. All it has to do is to pass another resolution of a more moderate nature. In particular, s 23(6)(b) of the Constitution appears to authorise laws which would prohibit unsolicited and intrusive approaches to people who are already members of another religion.

[149] As *The Review of the Constitution of Tavalu* pointed out (para 3.22) "the provisions of s 21 [meaning s 29] will control religious *exploitation* which is unacceptable to island communities" (emphasis added). What the Review Committee was concerned with was not religious observance per se but "religious exploitation". There is a big difference.

[150] Consistent with the Review Committee's objective, s 23(6)(b) itself preserves any law reasonably required to protect "the rights or freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited intervention of members of any other religion or belief". For reasons developed earlier, it would seem legitimate to make laws or rules prohibiting unsolicited approaches by the members of one religion to the members of another if that be the wish of the Nanumaga Falekaupule.

[151] Nor is that the only means by which existing religions can be protected against unwarranted attacks by others. Defamatory criticisms of existing pastors and church members already attract liability under the laws of defamation. Excessive noise from a new church could constitute a public nuisance. An exploitative tithing system can be controlled through principles associated with undue influence, fiduciary duties and unconscionable bargains. Public order can be controlled through the criminal law.

[152] The law already provides adequate controls and avenues without the need to resort to extreme resolutions of the kind presently in dispute.

[i] The threat of violence.

The concern

[153] The Chief Justice was understandably concerned with the violence which might follow if the Falekaupule resolutions were interfered with. Defiance of the

Falekaupule resolution by the Brethren Church has already led to stoning of the building in which a Brethren meeting was taking place and injury to some of its members. The local police officer concluded that when the appellant left "it was a great relief to my officers and me. Had Mase not left there could have been bloodshed on Nanumaga".

[154] In my view the threat of violence is not a reason for upholding the constitutional validity of the Falekaupule resolutions. There are essentially two reasons for that view.

[i] The threat of violence could never be conclusive

[155] Every community needs stability, but not at any price. It cannot be the case that those who threaten disruption will get their own way. If that were so, a society would be governed not by the rule of law but by the rule of violence. No worthwhile legal system can afford to bow to bullies.

[ii] Whether there is violence is for the Falekaupule to decide

[156] The Chief Justice found as a question of fact, amply supported by the evidence, that "the violence by some people on the island was not the result of the introduction of the applicant's denomination per se but a reaction to his clearly shown determination not to abide by the decision of the Falekaupule".

[157] The solution lies in the hands of the Falekaupule. If the existing resolutions would otherwise be unconstitutional, it would be wrong for this court to say that they are constitutional simply because disobedience to the unconstitutional law would lead to violence. All the Falekaupule has to do is to revoke its resolutions or replace them with more moderate ones which comply with the Constitution. There is no reason to think that there would then be violence on Nanumaga any more than elsewhere in Tuvalu.

[j] Striking the balance - conclusions

[158] Balancing the competing values in this case is not easy. I can well understand the view that the threat to Nanumaga stability, culture and unity is a high

a price to pay for permitting the introduction of another religion on the island. However in the end I have concluded that the time has come to allow the people of Nanumaga their constitutional freedoms. In summary my reasons are these:

[a] This is not a choice between pre-European Tuvaluan traditions and the modern world. It is a choice between having a Tuvaluan island with four foreign-sourced religions and having a Tuvaluan island with five or more foreign-sourced religions.

[b] The preservation of Tuvaluan culture is only one of many values which the people of Tuvalu said they wanted when they adopted the Constitution. If they had wanted stability and culture above all else they could easily have said so. What they in fact opted for was a more sophisticated formula which requires competing values to be carefully balanced on a case by case basis.

[c] To deny the appeal would be to place Nanumaga in that minority of countries in which freedom of religion is denied. Most of the countries in that category have been dictatorships or totalitarian states. Nanumaga is neither. The only rationale for denying freedom of religion would be that Nanumaga society is still so immature and fragile that it is incapable of handling freedom of conscience among its own people. I cannot accept that the people of Nanumaga deserve that insult.

[d] Nanumaga has already seen sweeping changes. Television, the telephone, the internet and regular interaction with the rest of Tuvalu will produce change at an ever-increasing pace. For good or bad, the growth of new ideas and beliefs is unstoppable.

[e] In their present form the Falekaupule resolutions go much further than they need to. There are other more moderate ways in which intrusive conduct by new religions could be validly controlled.

[f] It is the responsibility of the Falekaupule to ensure that disruption does not result from religious freedom. The solution lies in its hands.

[159] My conclusion is that the constitutional freedoms should take priority in this case. As the resolutions conflict with those freedoms they are unconstitutional. It follows that the resolutions are invalid.

[k] Other grounds of Appeal

Reasonably justifiable in a democratic society (s15)

[160] The other main ground of appeal was that in terms of s 15, the Falekaupule resolutions should be rejected on the basis that they were laws, or acts done under laws, which were not reasonably justifiable in a democratic society that has a proper respect for human rights and dignity.

[161] It was not disputed that the power to restrict the general freedoms under s 29(4) is subject to s 15. On that point s 29(5) provides:

> *Subject to section 15* ... nothing contained in a law or [act] done under a law shall be considered to be inconsistent with [ss 23 or 24] to the extent that the law makes provision regulating or placing restrictions on any exercise of the right-
>
> (a) to spread beliefs; or
> (b) to communicate opinions, ideas and information;
>
> If the exercise of that right may otherwise conflict with subsection (4) (emphasis added).

[162] The implication is that the contrary also applies, namely that where anything contained in a law or act done under a law regulating or placing restrictions on any exercise of the rights referred to in s 29(5) does conflict with s 15, the latter will prevail.

[163] For reasons outlined earlier I consider the resolutions to be laws, and if not laws, then at least acts done under law. In deciding whether the resolutions were reasonably justifiable in a democratic society a similar balancing exercise is required. For the reasons already traversed I consider that these resolutions were not

reasonably justifiable in a democratic society. I would therefore invalidate them under s 15 also.

Discriminatory (s 27)

[164] For similar reasons I consider that the way in which the resolutions distinguish between existing and possible religions on Nanumaga is discriminatory for the purposes of s 27. There is no need for me to develop that point given the conclusions I have already outlined.

[I] Remedy

[165] The fundamental remedy sought by the appellant was to have the resolutions declared contrary to the Constitution. I would make that declaration.

[166] Sitting on appeal I do not think it necessary or appropriate for this Court to go any further. A simple declaration will suffice. Pursuant to s 40(1) of the Constitution the High Court has original jurisdiction not only to determine any application for enforcement of the Bill of Rights but also to make any orders, and give any directions, that it thinks appropriate for enforcing or securing its enforcement. We have not heard argument on those matters. They can be left for the High Court in the unlikely event that that proves necessary.

JUDGMENT OF PATERSON JA

[167] I have had the benefit of reading in draft the proposed judgments of the other two members of this Court. That both judgments are well reasoned but come to different views on the ultimate issue demonstrates the difficulty of the basic issue before this Court. That issue is the extent to which universally accepted human rights can be modified or restricted by the customs and traditions of Tuvalu.

[168] The background facts and the relevant constitutional provisions are set out in the judgments of the other two members of this Court with the facts being well stated in the judgment of Tompkins JA. In the circumstances, it is only necessary in this judgment to refer to such of the constitutional provisions and the facts which are relevant which I have come to.

[169] The case raises two fundamental issues:

[a] Can a Falekaupule, by resolution, restrict the fundamental rights contained in sections 23, 24, 25 and 27 of the Tuvaluan constitution? and

[b] If the Falekaupule does have the right, should the High Court have granted the relief sought in this case?

The resolutions and the Brethren Church

[170] The appellant commenced Bible studies on Funafuti in mid-2001. The Tuvalu Brethren Church was established in 2002 and it was registered as a religious body under the Religious Bodies Registration Act 1981 (the Act) on 2 September 2002.

[171] At the time that the Church was registered, the requirement of the Religious Bodies Regulation Ordinance was that a religious body must have at least 50 members over the age of 18 years before it was able to register. The Church obviously had at least that number of members in Tuvalu, possibly all in Funafuti, in September 2002.

[172] The Religious Bodies Registration Order 2005, which came into force on 1 January 2006, provides that the "number of persons of the age of 18 years and above required to constitute a religious body, within the meaning of section 2 of the Act, shall not be less than 2% of the total population of Tuvalu at the last census". The order contained a provision, for the avoidance of doubt, that religious bodies already registered under the Act are exempt from the order. The order appears to impose a reasonably high barrier for further registrations under the Act, but does not apply to the Brethren Church as it had registered in 2002.

[173] The three resolutions are set out in the judgments of the other members of the Court and I agree that they have the effect suggested by Fisher JA. The first resolution of 20 November 2001 was passed before the appellant endeavoured to spread the Brethren religion in Nanumaga.

[174] It is unclear from the evidence the date on which the appellant and his wife arrived on Nanumaga. The Chief Justice in his judgment said it was in June 2003, which is consistent with the appellant's evidence. The respondents' witnesses suggested the arrival was in early July 2003. Another witness suggested that the June resolution was to stop the appellant preaching on the island, although the Chief Justice noted that the June 2003 resolution was "shortly prior to the arrival of the applicant's church group". If this is correct the June 2003 resolution may have been motivated by an attempt by members of the Assembly of God to come to the island to set up a Church in early 2003 and/or by knowledge that the appellant intended to come to Nanumaga to spread his religious beliefs.

[175] The effect of the three resolutions was to prohibit the establishment on Nanumaga of an additional religion or Church. In my view, this prohibition is plain from the wording of the June 2003 resolution and the resolutions would have been passed if the proposed religion had been any religion.

[176] If the resolutions are effective, they prevent the establishment of a new religion, and restrict the religions on the island to EKT, Seventh Day Adventist, Jehovah Witness and the Bahai Faith. Section 29 of the Constitution notes, among other things, "that Tuvalu is an Independent State based on Christian principles ...." The Preamble to the Constitution includes a statement that "the people of Tuvalu

desire to constitute themselves as an independent State based on Christian principles, the Rule of Law, and Tuvaluan custom and tradition". The resolutions of the Falekaupule permit the continuance of a religion not based on Christian principles and two others which would not normally be considered to be in the mainstream of Christian religions. They prevent the establishment of another Christian Church.

The Constitution and the Falekaupule Act 1997

[177] The Chief Justice resolved the issue by a consideration of sections 23 – 25 and 29 of the Constitution. He said:

> I consider that the express subjection of the rights under sections 23 – 25 to the provisions of section 29 mean that, if the Court is satisfied the actions of the Falekaupule were taken as part of the traditional manner of decision-making in that community and were taken because of a reason or belief that the circumstances arising from the introduction of a new religion to the island might have one or more effects in section 29(4), it must accept that the Falekaupule was entitled to consider some restriction of the applicant's rights was necessary. In that case, although there was an infringement of the applicant's rights per se under sections 23 – 25, the Court cannot declare the restrictions contrary to the Constitution if interpreted consistent with the Principles set out in the preamble.

The Chief Justice also dismissed the application of section 27 (the discrimination section).

[178] The preamble is an important indicator of the manner by which the provisions of the Constitution are to be interpreted. There are provisions of the Constitution other than those referred to by the Chief Justice which also have relevance. Further, I am not persuaded that it is possible to dismiss the application of section 27 in the manner which the Chief Justice did, or that other sections of the Constitution, particularly sections 10 and 11 do not also have relevance to the issues in this case.

[179] Section 10 of the Constitution is set out in paragraph 20 of the judgment of Tompkins JA. Section 10(2) provides that everyone has the right to freedom based on law and subject to the provisions of the Constitution has the legal right to do anything that does not injure others or interfere with the rights and freedoms of others and is not prohibited <u>by law</u>. Section 10(3) provides, amongst other things, that the section is not intended to deny the existence, nature or effect of cultural family or religious obligations or other obligations of a non-legal nature, or to prevent such obligations being given effect <u>by law</u> if, and so far as, it may be thought

appropriate to do so. This provision suggests that a religious obligation is not a legal obligation.

[180] Section 11(1) of the Constitution gives every person in Tuvalu, whatever his religious beliefs or lack of religious beliefs may be, certain fundamental rights. These include freedom of belief (section 23), freedom of expression (section 24), freedom of assembly and association (section 25). Subsections 11(2) and (3) read:

> (2) The rights and freedoms referred to in subsection (1) can, in Tuvaluan society, be exercised only -
>
> (a) with respect to the rights and freedoms of others and for the national interest, and
>
> (b) in acceptance of Tuvaluan values and cultures, and with respect for them.
>
> (3) The purposes of this Part is to protect those rights and freedoms, subject to limitations on them that are designed primarily to give effect to subsection (2).

[181] Section 12 of the Constitution, which deals with the application of Part II of the Constitution (being the Part which contains the relevant sections) provides that an act is unlawful, even if done under a valid law, in certain circumstances. The circumstances include:

> (b) is not reasonable in the circumstances; or
>
> (c) is otherwise not reasonably justifiable in a democratic society having a proper respect for human rights and dignity.

[182] Section 15 of the Constitution is also relevant. The relevant portions read:

> (1) Notwithstanding anything to the contrary in this Part, ...all laws, and all acts done under a law, must be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity.
>
> (2) Any question whether a law is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity is to be determined in the light of the circumstances existing at the time when the decision on the question is made.
>
> (3) Subsection (2) does not affect any question whether an act done under a law was reasonably justifiable in a democratic society that has a proper respect for human rights and dignity.

Subsection 15(5) reads:

(5) In determining whether a law or Act is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity, a Court may have regard to –

(a) traditional standards, values and practices, as well as previous law in judicial decisions, of Tuvalu; and

(b) law, practices and judicial decisions of other countries that the Court reasonably regards as democratic; and

(c) international conventions, declarations, recommendations and judicial decisions concerning human rights; and

(d) any other matters that the Court thinks relevant.

Are the resolutions of the Falekaupule "law"?

[183] Sections 10, 11 and 15 raise the following issues:

[a] Are the resolutions of the Falekaupule "law" in terms of the meaning of that word as it appears in sections 10 and 15? If not, the appellant is entitled to the freedoms bestowed by section 10(1) of the Constitution and the prohibition by law provision in section 10(2)(a) has no application.

[b] Similarly, the provisions of section 10(3) have no application if the resolutions are not "law".

[c] If the resolutions constitute "law", what cultural or religious obligations were "being given effect" in terms of section 10(3)?

[d] Were the proposed activities of the Brethren Church on Tuvalu disrespectful to the rights and freedoms of others and contrary to Tuvaluan values and culture? If the Church has not infringed the provisions of section 11(2), and the resolutions of the Falekaupule are not "law", then the appellant has the necessary freedoms under section 11(1).

[e] If the resolutions of the Falekaupule are law, are they reasonably justifiable in a democratic society that has a proper respect for human rights and dignity? In this respect it would be necessary to consider the matters referred to in subsection 15(5).

[184] The Chief Justice, in his decision, dealt with the effect of the Falekaupule Act 1997 (Falekaupule Act). He noted that an explanatory memorandum which accompanied the Bill stated that the main purpose of that Act was to give further and comprehensive statutory recognition for the Falekaupule and to vest and have greater control over the activities and affairs of the island by transferring to them the functions of the Local Government Council. The Chief Justice further noted that nowhere in the Falekaupule Act is there a provision limiting or removing any traditional powers of the Falekaupule. They were given more powers and a greater control of the affairs of the island by transferring to them the powers and procedures previously held by Local Government. An innovation introduced by the Falekaupule Act was to give Falekaupules the right to make bye-laws.

[185] Section 53(1) of the Falekaupule Act gives the power to make bye-laws for carrying out any statutory function. It states that such bye-laws shall have "the force of law in the Falekaupule area". Such bye-laws are to be construed "subject to this Act and to any other law for the time being in force in Tuvalu" (section 53(5)). The resolutions at issue in this case were not bye-laws.

[186] The functions of a Falekaupule are set out in Schedule 3 of the Falekaupule Act. A function contained in a section headed "Miscellaneous" in Schedule 3 is:

> (d) to protect and preserve the traditional culture of the Falekaupule area ...

[187] The explanatory memorandum to the Falekaupule Act states:

> The main purpose of this Act is to give further and comprehensive statutory recognition for the 'Falekaupule' and to vest in them greater control over the activities and affairs of the islands by transferring to them the functions of the Local Government Council and making them more responsible for each island's affairs. A second purpose of the Act is to confer greater autonomy on the islands in the conduct of their affairs as regards finance, staff and decision-making generally.

[188] The Chief Justice determined as a matter of law that the traditional form of decision-making on Nanumaga is vested in the Falekaupule and that the effect of the Falekaupule Act was to formalise many of the powers, duties and obligations on the Falekaupule. It was not in his view the intention of Parliament to replace the Falekaupules' traditional role of decision-making nor the manner in which it is done.

[189] The practical effect of a Falekaupule resolution and the "status" which resolutions had on Nanumaga are well explained in the judgment of Fisher JA. On Nanumaga they obviously have at least strong persuasive value, and possibly the "status" of a law. The question is whether they are "law" as that term is used in sections 10, 12 and 15 of the Constitution. The Chief Justice did not think so.

[190] The Laws of Tuvalu Act 1987 provides that the supreme law of Tuvalu is the Constitution and the other laws of Tuvalu have effect subject to its provisions. Section 3 of the Constitution states that the "Constitution in the supreme law of Tuvalu and ... any act (whether legislative, executive or judicial) that is inconsistent with it is, to the extent of that inconsistency, void."

[191] Customary law is defined as "the customs and usages, existing from time to time, of the natives of Tuvalu". It has effect as part of the law except to the extent that it is inconsistent with an Act. It follows that it has no effect if it is inconsistent with the Constitution. The Schedule to the Laws of Tuvalu Act provides that questions of the existence and nature of customary law in relation to a matter and the application of customary law in, or its relevance to, any particular circumstances are to be determined as questions of law.

[192] Once customary law has been recognised in a case, it is to be enforced except if its recognition or enforcement would result, in the opinion of the Court, in injustice or would not be in the public interest: s 2 Schedule 1 Laws of Tuvalu Act.

[193] The Chief Justice concluded that the resolutions in issue which were made in relation to the general management of the community "are not bye-laws and so those provisions in the Constitution which relate to the effective laws and acts done under such laws do not apply to them." If this finding is correct, then on the application of section 10(2) of the Constitution, it is difficult to see how the resolutions can be given legal effect. The freedoms involved in this case are freedoms based on law. The exercise of them will not injure others or interfere with the rights and freedoms of others and is not prohibited by law, if the resolutions are not "law". Section 10(2) of the Constitution when applied, must lead to the upholding of the freedoms.

[194] The Chief Justice did not consider whether the resolutions were part of customary law and therefore "law" for the purposes of sections 10 and 15. If it is

accepted, as I do, that the resolutions were passed by the Falekaupule as part of their customary role in the administration of Nanumaga, then the resolutions were made under the customary law tradition of the island. Clearly, decisions of this type are respected by the greater majority of those living on the island. The resolutions are, in my view, part of the law of Tuvalu, as under customary law resolutions of this nature are within the scope of the matters that can be considered by Falekaupules. Under the provisions of clause 2 of Schedule 1 of the Laws of Tavalu Act, they are to be recognised and enforced unless in the opinion of the Court the result would be an injustice or not be in the public interest. Presumably "enforced" means being upheld by the Court.

[195] Mr Gorman, counsel for the respondents, submitted that the Falekaupule had the power to pass bye-laws on this subject pursuant to its power "to protect and preserve the traditional culture of the Falekaupule area". The resolutions are not bye-laws. This does not prevent them being part of customary law. They were passed by the Falekaupule in exercising its traditional role according to Tuvaluan culture.

[196] An alternative interpretation is that the resolutions are part of the laws of Tuvalu, but not "law" within the meaning of that word in sections 10 and 15. There are some indications in the Constitution that this may be so. As an example section 84(4) vests the law making power in Parliament. There is no reference to the Falekaupule having law making powers. As will be noted later there is an issue as to whether Falekaupule can regulate or place restrictions under section 29(4) of the Constitution, and this issue will be further discussed then.

[197] The Chief Justice did not consider whether the resolutions, if enforced, would result in an injustice and not be in the public interest. It is likely on the findings he made that if he had considered the point, he would have determined that they were in the public interest. If this matter were determinative of the final result, it may be necessary to refer this point back to the Chief Justice to seek his findings. However, in the circumstances, this is not necessary.

[198] On the information available, and I concede that it is limited information, and on the basis that a resolution of the Falekaupule can be law for the purposes of

section 29(4), I would be hesitant to enforce the resolutions on the basis that the resolutions are lawful prohibitions of the exercise of the rights. The freedoms granted by the Constitution, which is the supreme law of Tuvalu, are internationally recognised freedoms. The Constitution allows for restrictions on these freedoms but in my view any restriction on fundamental freedoms granted by the superior law, should be applied by Parliament and not by a resolution of the Falekaupule exercising a traditional right. An example of Parliament imposing a restriction is the Religious Bodies Registration Order 2005.

[199] In the circumstances, my provisional view is that it would not be in the public interest to override a fundamental freedom by allowing a resolution of the Falekaupule to limit or restrict the freedoms granted under the Constitution. In expressing this provisional view, I have not overlooked the fact that the Falekaupule is likely to be in a better position than Parliament to assess the impact of the Brethren Church in Nanumaga, or that a Falekaupule can impose a local restriction which it may be difficult for Parliament to impose.

[200] The reason why it is not necessary to consider this matter further is my view, set out below, on the fundamental question of whether the resolutions, assuming that they amount to law, should be enforced to restrict the freedoms contained in the Constitution. For the same reason it is not necessary to consider further the issues raised in paragraph 182(c), (d) and (e) above.

[201] For the same reason it is not necessary to consider in depth the application of section 27 of the Constitution. It is the freedom from discrimination provision. Discrimination includes treating different people in different ways, wholly or mainly because of their different religious beliefs in such a way that one person is for some reason give more favourable treatment or less favourable treatment than another such person. This section provides that no-one shall be treated in a discriminatory manner. The section is not stated to be subject to section 29 as are the sections dealing with the other freedoms under consideration.

[202] The Chief Justice recognised this fact but determined that although the resolutions were discriminatory, they were justified under sections 23 – 25 and it

would therefore be inconsistent to find that those actions were unconstitutional because they were discriminatory. He said that having been:

> satisfied that, where actions restricting an individual's right to other freedoms are justifiable under the Constitution, any discrimination arising from the same actions must also be considered justifiable. Subsection (6) allows such a conclusion in relation to law and I accept the same logic must apply to the resolution of the Falekaupule.

Subsection 6 provides that nothing that is done under law shall be considered inconsistent to the obligation not to treat a person in a discriminatory manner. If a Court would not enforce the resolutions under customary law, it is not so easy to avoid the application of section 27. In my view, this section also assists the appellant when the balancing exercise is considered.

The balancing exercise

[203] The Chief Justice and Tompkins and Fisher JAs have all come to their conclusions on the basis that it is necessary to balance the freedoms granted by sections 23 to 25 against the right under section 29 of the Constitution to regulate or place some restrictions on the exercise of those rights.

[204] The Chief Justice in his decision compared the constitutional provisions with other Constitutions in the Pacific area. He noted however that the Tuvaluan Constitution differed because the emphasis in the Constitution on the importance of traditional values as an overriding condition for the exercise of some rights, had no parallel in other jurisdictions. He said:

> Where our Constitution is different is that it is firmly founded on the desire of the legislature, as an expression of the wish of the people, to hold to their traditions even if to do so means that some individual rights may be curtailed or restricted.

He accepted that the freedoms in sections 23 – 25 of the Constitution had been breached in respect of the appellant but noted that these freedoms were subject to the qualification contained in section 29. The Chief Justice held that there had been a breach of the appellant's rights under sections 23 – 25 of the Constitution and that is not seriously challenged by either party in this case.

[205] The rationale for the Chief Justice's decision is set out in the quotation appearing at paragraph 176 above. He accepted that if the actions taken by the Falekaupule were taken as part of the traditional manner of decision-making in the

community and were taken because of the Falekaupules' reasonable belief that the provisions of section 29 existed, then the Court could not interfere. In my view, it is for the Court in a matter such as this, if there is a challenge to the validity of the resolutions, to objectively assess whether the Falekaupule was within its legal rights to impose the prohibition that it did, and the matter is not to be determined on the subjective combined view of the Falekaupule. If this were not so aberrant decisions of a Falekaupule would become binding without legal challenge.

[206] The Chief Justice determined that the manner in which the Falekaupule reached the decisions expressed in the resolutions was in accordance with their traditional role and not in exercise of any power under the Falekaupule Act. He determined that his role was to decide whether the reason for its decision was the preservation of Tuvaluan, or in the context of this case, Nanumagan traditional values. He determined that this was the reason for the decision.

[207] As stated, it is my view that it is for the Court to determine whether the circumstances are such that it is necessary to regulate or place some restriction on the exercise of the rights at issue in this case. The balancing act requires a consideration of the importance of the freedoms in question and whether it is necessary to regulate or place some restrictions on the exercise of those freedoms if the exercise:

[a] may be divisive, unsettling or offensive to the people; or

[b] may directly threaten Tuvaluan values or culture.

[208] Section 29(5) of the Constitution makes it clear that a restriction may be lawful even if it restricts religious freedom, if the exercise of the rights would lead to the results specified in section 29(4). This provision is subject to sections 12 and 15 which provides that any restriction must be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity when considered in the light of the circumstances existing at the time.

[209] The importance of freedom of religion is well established internationally. The High Court of Australia in *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1982/83) 154 CLR 120 stated:

> Freedom of religion, the paradigm freedom of conscience, is the essence of a free society ...
> Religious freedom is a fundamental theme of our society ... Religious discrimination by officials or by Courts is unacceptable in a free society. In the eyes of the law, religions are equal. There is no religious club with a monopoly on State privileges for its members.

[210] The international acceptance of the importance of the freedom was recognised at the World Conference on Human Rights held in Vienna in 1993. The participating 171 member states of the United Nations unanimously adopted the Vienna Declaration. That Declaration included:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in fair and equal manner, on the same footing and with same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

[211] The starting point for the balancing act, is in my view, the international obligation of Tuvalu to promote and protect all human rights and fundamental freedoms. This obligation is reinforced by the provisions of section 15(5) of the Constitution. The regulation or restriction of the right to religious freedom must be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity. A democratic society tolerates minority views and does not suppress such views lightly, if at all. Further, the actions must be determined in the light of the circumstances existing at the times the resolutions were passed. Finally, the freedoms are contained in Tuvalu's supreme law, albeit that the Constitution also permits regulations and restrictions in appropriate circumstances.

[212] In summary, I share the views of Fisher JA, and consider that the circumstances at the time do not support the view that the resolutions were reasonably justifiable in a democratic society. Some of these reasons are briefly commented on below.

[213] The restrictions imposed by the resolutions were not in my view motivated by the actions of the appellant and the Brethren Church, although the resolution of 10 July 2003 was obviously as a result of the appellant being in Nanumaga. However, that resolution was confirming the effect of two previous resolutions. It is

apparent from the judgment of the Chief Justice that there was more than one factor involved which led to the resolutions. Because of the historical sequence of the resolutions, it can be accepted that the existence of three religions other than EKT, had caused some erosion of the communal spirit previously existing on the island. The tradition of the island community being based on the concept of a single Church had to a limited extent been challenged and was likely to be challenged further by the advent of a new Church whether it be the Brethren Church, the Anglican Church, the Catholic Church or some other church or religion.

[214] While accepting that the presence of another Church may be divisive, unsettling or offensive to the majority of the people, and as such may threaten Tuvaluan values or culture based on the single Church concept, I do not accept that a resolution of the Falekaupule to that effect should automatically override the freedoms in question, particularly in a nation based on Christian principles. This is particularly so where the restriction is imposed before the Church commences to spread its belief. A right to spread beliefs is contained in section 23(2). The first two resolutions were passed before the appellant came to Nanumaga.

[215] The Principles of the Constitution as noted in the Preamble, do give support to the right to regulate and restrict religion and the maintenance of traditional forms of communities. However, the Principles also state that "the people of Tuvalu recognise that in a changing world, and with changing needs, the principles and values, and the manner and form of their expression ... will gradually change, and the Constitution not only must recognise their fundamental importance to the life of Tuvalu, but also must not unnecessarily hamper their expression and their development."

[216] Other provisions in the Preamble are also relevant. Included in the guiding principles is the search for consensus, in accordance with Tuvaluan procedures, rather than alien ideas of confrontation and divisiveness; the need for mutual respect and co-operation between religious authorities; and that laws should be based on respect for human dignity. These provisions balance in part contrary indications in the Preamble.

[217] The maintenance of Tuvaluan traditional forms of communities must be balanced against the development of the Tuvaluan people and the fact that their principles and values will gradually change and the desire expressed in the preamble to the Constitution "that Tuvalu must take its rightful place amongst the community of nations". The Vienna Declaration clearly states that the international community must treat human rights globally in fair and equal manner and that while keeping regional particularities and cultural and religious backgrounds in mind, the State must promote and protect all human rights and fundamental freedoms.

[218] The resolutions prevent a Church which is a registered religious body in Tuvalu, and which is allowed to exercise its right to freedom of religion in other parts of Tuvalu, from exercising its freedom of thought, religion and belief in Nanumaga. Nanumaga already has four religions and seeks by the resolution to deny a Christian religion from practising its beliefs in part of Tuvalu.

[219] Section 29(4) allows regulation and restriction. The resolutions are a prohibition. Given their usual meanings a total prohibition goes further than regulation or restriction. They prohibit the exercise by a person of his conscience. In a matter of conscience the majority is imposing its will.

[220] The fact that section 29(3) does not apply to discrimination is not an accident. While restrictions and regulations may be applied, section 27 provides no-one shall be treated in a discriminatory manner. The appellant is being discriminated against by the resolutions.

[221] I accept the possibility of divisiveness but find it difficult to accept that unlawful acts, such as the stoning of the building, should be a major factor in the balancing act. If individuals are prepared to break the law in an endeavour to drive a Church from the island, then it is for the authorities to take action against those individuals. The fact that it appears as though the only way to enforce the effect of the resolutions is to take action contrary to law, is to my mind a factor which should tell against upholding the resolutions.

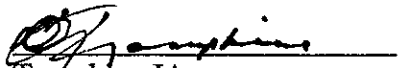
[222] An added factor is that it is necessary under section 15(4) of the Constitution to consider the circumstances at the time the resolutions were passed. I am not persuaded that the circumstances existing up until 10 June 2003 were reasonable justification for the resolution passed on that date. The stoning of the building was after the resolutions were passed although I accept that it may have been symptomatic of unease at the 4th July 2003.

[223] The Falekaupule may have had a concern but more than a concern is needed, in my view, to impose blanket restrictions on the exercise of fundamental freedoms.

Conclusions

[224] As noted I have doubts whether the resolutions of the Falekaupule can impose the restrictions under section 29(4) of the Constitution. However, it is not necessary to determine this issue, as if it does have the power, the effect of the resolutions can not be reasonably justified in terms of section 29(4).

[225] For the reasons given, I am prepared to grant the relief sought by making a declaration that the resolutions were contrary to the provisions of sections 23 – 25 and 27 of the Constitution.



Tompkins JA

Fisher JA

Paterson JA