

## Banishment and Freedom of Movement in Samoa: *Leituala v Mauga, Kilfifi et al*

[2004] WSSC 9

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In an important decision significantly limiting the powers of village councils (or village *fonos* as they are known in Samoa), Justice Vaai of the Supreme Court held recently that such councils do not have the power to order customary banishment as a punishment. The case raised the vexed and controversial issue of how customary punishments and processes should be treated in light of Constitutional rights to freedom of movement, freedom of residence and a fair trial.

The plaintiff in *Leituala v Mauga, Kilfifi et al*<sup>[1]</sup> was the father of a schoolboy against whom allegations of misconduct towards the village's Methodist pastor and his family were made. As a result of these allegations, the village council met and resolved to banish the plaintiff and his family from the village. The plaintiff had not been permitted to attend the meeting as he was not a *matai*<sup>[2]</sup> and no witnesses were called to give evidence. The council met at 1pm and, after reaching its decision, ordered that the plaintiff and his family leave the village by 4pm the same day. Except for one of the plaintiff's sons, all twenty members of the family left the village by the designated time, leaving behind their home, plantation and animals. The son who remained had been at the plantation when the decision was reached and upon returning home was not informed of the decision. Later that afternoon some men from the village came with instructions to take him before the village council. He was attacked with sticks and stones and only managed to escape from threats to his life after an elderly woman and her *matai* husband from another village begged for his safety before the village council.

The plaintiff brought an action in the Supreme Court claiming damages on the basis that his constitutional rights, specifically his right to move freely and reside in any place of his choice and his right to a fair trial, had been breached by the order of banishment.

The defendants were the village *matai*, who comprised the village council. They claimed that they had a duty to maintain peace and order within the village and that they had the power under the *Village Fono Act 1990* ("the Act") to order banishment. They justified the banishment order on the basis that the village has a pact with the Methodist pastor and is obliged to look after him and his family. They pointed to two incidents, one where the plaintiff's son had allegedly been drunk and taken the pastor's son's bicycle and then swore at the pastor's wife; and another prior incident where the plaintiff was alleged to have fought with a former pastor. In relation to the first incident, the court held that there was not sufficient evidence on which the council could have founded its decision. It found that no witnesses were called and that the allegations were entirely hearsay, noting that while a tribunal is not bound by rules of evidence like a court, hearsay evidence can only be relied upon by a tribunal if it has given the other side a fair opportunity of commenting on it and of contradicting it. In relation to the second incident, the court found that in fact the former pastor had been the one to assault the plaintiff, noting '[b]efore being ordained as a pastor he most probably lacked the skill and the courage to throw any punch at a man of his size but given

the protection of the village pact and the clerical trademark his arrogance and boxing skills magically emerged’.

The issue before the court was whether the Act gives a village council the power to order banishment as a punishment in these circumstances. The Act, which was introduced as ‘a move to reinforce and strengthen rural self-reliance’<sup>[3]</sup> provides in section 6 that the village *fono* can impose punishment in accordance with the ‘custom and usage of its village’, and it specifies a number of punishments, including the power to impose fines and to impose work orders, but significantly does not explicitly include banishment. Section 3(2) gives the village *fono* ‘authority to exercise power or authority in accordance with the custom and usage of that village’. The defendants claimed that banishment is a custom of the village and that according to the custom of the village it was appropriate to impose it as a punishment where there was a misdeed or offence carried out against a pastor, bearing in mind the special relationship a pastor holds in the village. They claimed that the exercise of these powers constitute a reasonable restriction in the interests of public order on the exercise of the rights of freedom of movement and residence guaranteed by article 13(1)(d) of the Constitution. They relied on article 13(4) which provides:

Nothing in subclause (d) of clause (1) shall . . . prevent the State from making any law in so far as that existing law or the law so made imposes reasonable restrictions on the exercise of the right conferred under the provisions of that subclause in the interests of . . . public order .

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Justice Vaai rejected the defendant’s arguments, finding that the Act does not grant the village council power to banish anyone from the village, and that within the meaning of article 13(4) banishment from a village is not a reasonable restriction on the exercise of the right of freedom of movement and residence conferred by article 13(1). The basis for his decision was that banishment is not specifically mentioned as a punishment that village councils can give in the Act, and that as a matter of statutory construction this omission was intentional on the part of the legislature so as not to confer on the village council the authority to impose banishment. He gave three justifications for reaching this decision. First, he referred to the legislative history of the power of banishment in Samoa, noting the historical trend towards legislative limitations on banishment and observing that to confer on village councils legal authority to order banishment ‘would [be] tantamount to winding back the clock of progress’. Second, the *Lands and Titles Court Act 1981* gives the Land and Titles Court (“the Court”) the jurisdiction to make banishment orders, which he seemed to imply excluded the possibility of any other body having such jurisdiction, without explaining why this would be the case. Third, he noted that the Court is required to comply strictly with the rules of natural justice in exercising its power of banishment, whereas he inferred that village councils could not comply with rules of natural justice, stating that according to custom and usage they ‘cannot give notice; cannot allow an accused person to be present to question witnesses and present [a] defence and cannot guarantee to an accused person a fair trial as provided by article 9 of the Constitution’. In light of this, he concluded that it would be “difficult, in fact impossible to comprehend” why the Legislature would have given them the power to make banishment orders.

Justice Vaai’s decision evidences an ambiguous approach towards the obligations of village councils to follow the rules of natural justice. On the one hand he clearly rejected the defendants’ arguments that the rules of natural justice be examined in terms of the custom and usage of the village, and that the procedures of not giving notice and the right to be heard are fair in the context of village custom and usage, stating ‘if the Village Councils are by law given the power, authority and mandate as argued by the defendants then they must also comply with the requirements of the law’. However, he then used the village councils’ inability to guarantee a fair trial as the basis for holding that the Legislature can not have intended to give them the power of banishment. This attitude perhaps reflects the difficulties faced by the judiciary in resolving the competing demands of custom and the law in a system which appears to have given them a mandate to exist “side by side” without much guidance as to how this can be achieved in