

# TOKELAU'S DAY IN COURT

*Jennifer Corrin\**

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*The first full hearing of a case in the High Court of New Zealand sitting as the High Court for Tokelau took place in Wellington, New Zealand.\*\* Professor Corrin was there in the public gallery and filed the following report.*

*Cet article est le rapport établi par la professeure Corrin après l'audience plénière de la Haute Cour de Nouvelle-Zélande à Wellington (Nouvelle-Zélande), qui pour la première fois statuait en qualité de Haute Cour des Tokelau.*

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On 12 and 13 February 2019, the first substantive hearing of the High Court of Tokelau, sitting in Wellington, took place. *Suveinakama and Puka v Council for the Ongoing Government of Tokelau and Ulu O Tokelau*<sup>1</sup> is only the second case from Tokelau to be filed in the High Court, the first being *Sam v The Council for the Ongoing Government of Tokelau*,<sup>2</sup> which was ultimately settled before trial. The case was attended by dozens of Tokelauans, some being residents of New Zealand<sup>3</sup> and others having travelled from Tokelau. In most cases, it was unclear whether they were supporting the plaintiffs or the defendants; perhaps it was both!

This landmark case was brought by two former public servants, Mr Jovilisi Suveinakama, the former general manager for the government of Tokelau, and Mr Heto Puka, the former finance director. Both employees were based in Samoa, rather than Tokelau. The plaintiffs claimed that they were wrongly dismissed for purchasing two helicopters and some land in Samoa on behalf of the government of

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\*\* [Ed. Judgment was delivered on 26 July 2019 as [2018] NZHC 1787].

1 [2017] NZHC 3287.

2 [2012] NZHC 2775.

3 There are approximately 7000 Tokelauans living in New Zealand, and smaller communities live in Australia, American Samoa, Samoa, Rapa Nui, and Hawaii: Government of Tokelau, Overview, <[www.tokelau.org.nz/Bulletin/Feb+2019/Proverb+sums+up+historic+court+case+for+Tokelau+leaders.html](http://www.tokelau.org.nz/Bulletin/Feb+2019/Proverb+sums+up+historic+court+case+for+Tokelau+leaders.html)> accessed 27 February 2019.

Tokelau. They alleged that they were authorised to make the purchases and that they were singled out to take the blame after the purchases came in for criticism both at home and from the New Zealand Government.<sup>4</sup> They claimed lost income in wages and benefits for the balance of their contracts. The plaintiffs also claimed that the dismissals were unlawful because they were not agreed to by Tokelau's General Fono.

The defendants in the case were the Hon Afega Gaulofa, the Ulu-o-Tokelau (the chief Minister and Head of Government) and the Ongoing Government of Tokelau. The New Zealand Administrator of Tokelau, Mr Ross Ardern, was originally the third defendant in the case. However, he demanded security for costs, which the plaintiffs were unable to pay and the case against him was consequently stayed. The defendants alleged that the purchases were made without authorisation.

The hearing commenced rather differently from a sitting of the High Court of New Zealand. First, the national anthem of Tokelau was sung live in court by two Tokelauan ladies. This was followed by a prayer, first in English and then in Tokelauan. After opening statements, during which Churchman J expressed the view that although he might have the jurisdiction to come to a finding on the claims, he was in doubt whether there was jurisdiction to quash the Tokelau government's decision to terminate the plaintiffs' employment. This echoes a view expressed by the High Court on the possibility of reinstatement at an interlocutory hearing in 2017.<sup>5</sup>

Two witnesses were presented for cross-examination, the first defendant, Mr Afega Gaulofa and Mr Siopili Perez, Tokelau's Minister of Finance, who is also a Faipule (the leader of an atoll) in Tokelau. Afega Gaulofa confirmed there was no authorisation from the Council or the Tokelau General Fono approving the purchase of helicopters, which had cost US\$2.4million, rather than the original proposed amount, which was NZ\$2.5million. Mr Perez also told the court that the plaintiffs were not authorised to buy the helicopters and said that he had not been told about the purchase. He admitted being taken on what he referred to as 'a joyride' to see the helicopters, but denied seeing the Tokelau flag on the side of either helicopter.

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4 Following the purchase of the helicopters the Administrator of Tokelau had imposed a veto on any capital spending by Tokelau over US\$366,000: Mackenzie Smith "Documents reveal NZ-Tokelau rift over helicopters" Radio New Zealand, 3 July 2017 <[www.radionz.co.nz/international/pacific-news/334265/documents-reveal-nz-tokelau-rift-over-helicopters](http://www.radionz.co.nz/international/pacific-news/334265/documents-reveal-nz-tokelau-rift-over-helicopters)> accessed 27 February 2019.

5 15 December 2017.

During the case it was revealed that the plaintiffs were suspended in April 2017 at the suggestion of the New Zealand's Ministry of Foreign Affairs and Trade.<sup>6</sup> Their employment was terminated for serious misconduct on 24 November 2017. During that time there were two investigations into the purchase of the helicopters and land. The first, which focussed on the plaintiffs, was carried out by an officer under the auspices of the Tokelau Employment Commissioner beginning in about May and the report was completed on 22 September. It found the plaintiffs had not obtained relevant approvals in respect of the purchases, and concluded that the plaintiffs had engaged in serious misconduct. The second, commissioned by the Administrator of Tokelau and carried out by New Zealand consultancy company, Martin Jenkins, was a more general inquiry into the Tokelau's capital spending.<sup>7</sup> The Court reserved its judgment. Tokelau's day in court ended with a video performance of a song about Tokelau, featuring a solo guitarist with a background of scenic views of Tokelau and its people.

So, how did a dispute about employment of public servants by the government of Tokelau, a country with a total land area of approximately 12 km and a population of 1499<sup>8</sup> spread amongst three atolls, come to be determined in New Zealand's capital city? The answer lies in the colonial history of Tokelau. Tokelau became a British protectorate in 1877.<sup>9</sup> Under the name of Union Islands, it was originally annexed to His Majesty's dominions, as part of the Gilbert and Ellice Islands Colony.<sup>10</sup> In 1925 it was separated from the Colony<sup>11</sup> and the Governor-General of New Zealand was appointed Governor.<sup>12</sup> The powers and authority of the Governor-General were later delegated to the High Commissioner of Samoa.<sup>13</sup> In 1948, the

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6 On Radio New Zealand, NZ role in Tokelau suspensions questioned in High Court, 13 February 2019 <[www.radionz.co.nz/international/pacific-news/382388/nz-role-in-tokelau-suspensions-questioned-in-high-court](http://www.radionz.co.nz/international/pacific-news/382388/nz-role-in-tokelau-suspensions-questioned-in-high-court)> accessed 27 February 2019.

7 Mackenzie Smith "Documents reveal NZ-Tokelau rift over helicopters" Radio New Zealand, 3 July 2017 <[www.radionz.co.nz/international/pacific-news/334265/documents-reveal-nz-tokelau-rift-over-helicopters](http://www.radionz.co.nz/international/pacific-news/334265/documents-reveal-nz-tokelau-rift-over-helicopters)> accessed 27 February 2019.

8 2016 census.

9 Western Pacific Order in Council 1877.

10 Order in Council 29 February 1916, *Western Pacific High Commission Gazette* 5 May 1916.

11 Union Islands (No 2) Order in Council 1925.

12 Union Islands (No 2) Order in Council 1925.

13 The Union Islands (No 1 of New Zealand) Order 1926, as amended by s3(3) of the Samoa Amendment Act 1947.

United Kingdom and the Government in New Zealand agreed that Tokelau should become part of New Zealand:<sup>14</sup>

Tokelau is now a non-self-governing territory of New Zealand, and its people are New Zealand citizens. Two referendums, in 2006 and 2007, failed to reach the required two-thirds majority required to move to autonomy as a state in free association with New Zealand. The Administrator of Tokelau has technical responsibility for the administration of Tokelau's executive government under the Tokelau Act 1948.<sup>15</sup> Over a period of years Tokelau has become largely self-governing. In 1996, the New Zealand Parliament conferred on the General Fono the authority to make rules for the peace, order and good government of Tokelau.<sup>16</sup> General Fono Rules have legal effect in Tokelau. New Zealand no longer legislates for Tokelau without Tokelauan consent. Its system of government is based on traditional village leadership. The position of Ulu-o-Tokelau is rotated among the Faipule on an annual basis. The General Fono is made up of elected representatives from each atoll. It fulfils the role of a national assembly and typically meets three times a year.<sup>17</sup> Executive authority rests with the Council of the Ongoing Government of Tokelau which is made up of three Faipule (village leaders) and three Pulenuku (village mayors).

The Constitution of Tokelau 2006 provides that the courts of Tokelau are:<sup>18</sup>

- (i) The Commissioner's Court and Appeal Committee of each village;
- (ii) The High Court;
- (iii) The Court of Appeal.

By virtue of the Tokelau Amendment Act 1986,<sup>19</sup> the High Court of New Zealand has jurisdiction to administer the law of Tokelau subject to any applicable Tokelau rules and regulations, to be exercised in the same manner in all respects as if Tokelau was for all purposes part of New Zealand.

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14 Union Islands (Revocation) Order in Council 1948, revoking Union islands (No 2) Order in Council 1925.

15 See also the Tokelau Administration Regulations 1993.

16 Tokelau Amendment Act 1996.

17 Government of Tokelau, Tokelau Government: Political System, <[www.tokelau.org.nz/Tokelau+Government.html](http://www.tokelau.org.nz/Tokelau+Government.html)> accessed 27 February 2019.

18 Rule 8.

19 Section 3(2).

Court procedure is governed by the Crimes, Procedure and Evidence Rules 2003, which provide that:<sup>20</sup>

Every civil case and every criminal appeal in the High Court or in the Court of Appeal shall, unless the court otherwise directs, be decided on the papers.

It would appear that in this case the court did order otherwise at an interlocutory hearing, as two witnesses were presented for cross-examination.

The case revealed further the complexities of the legal system of Tokelau, as it was necessary to consider the law which applies in Tokelau. This consists not only of the Rules made by the General Fono, which include those brought together in the Constitution of Tokelau 2006, but also of the Tokelau Act 1948 (NZ)<sup>21</sup> which is the supreme law. The Constitution sets out the local sources of law, in descending order of priority as the Constitution, General Fono Rules, Village Rules, the custom of Tokelau.<sup>22</sup> The Governor-General of New Zealand may also make Regulations in respect of Tokelau. A few New Zealand statutes apply in Tokelau by virtue of the fact that they expressly provide for this. Acts of the United Kingdom parliament no longer apply.<sup>23</sup> However, by virtue of the Tokelau Act 1948 the English common law (including the principles and rules of equity) 'for the time being' also applies except to the extent—

- (a) That it is excluded by any other enactment in force in Tokelau; or
- (b) That it is inapplicable to the circumstances of Tokelau.<sup>24</sup>

The meaning of the phrase 'for the time being' was at issue in this case and it will be interesting to read how Churchman J interprets it.

Is the hearing of future cases in Tokelau a possibility? The High Court may sit either in Tokelau or in New Zealand, or in such other appropriate place as the Chief Justice may direct.<sup>25</sup> Just prior to the trial, the Ulu stated<sup>26</sup> that the hearing in New Zealand was 'eye-opening', and that, although it would take a lot of work there was

20 Rule 87.

21 See, eg, Tokelau Amendment Act 1986.

22 Rule 12(4).

23 Repeal of Laws Rules 1997 (Tokelau).

24 Tokelau Act 1948, s 4B(1).

25 Tokelau Amendment Act 1986, s 3(3).

26 <[www.radionz.co.nz/international/pacific-news/381689/tokelau-leader-sees-merit-in-establishing-high-court](http://www.radionz.co.nz/international/pacific-news/381689/tokelau-leader-sees-merit-in-establishing-high-court)> accessed 27 February 2019.

a case for Tokelau having its own court in Tokelau, rather than New Zealand.<sup>27</sup> After an interlocutory hearing in July 2018, the High Court rejected the plaintiffs' application to have the case heard in Tokelau, on the basis that that was a more appropriate cultural setting. The Chief Justice held that it would be costly and logistically challenging.<sup>28</sup>

On that note it is important to highlight that Tokelau is only accessible by boat, through the Port of Apia, Samoa. It takes an estimated 28 hours from there to reach the closest atoll, Fakaofu, a further three hours to Nukunonu, and another six hours to Atafu.<sup>29</sup> A minimum of ten days for a round trip visit from New Zealand is a realistic estimate. Tokelau has no main town; each island has its own administrative centre, hospital, school and basic infrastructure.<sup>30</sup> The court considered that it would be time consuming to have the case dealt with there, and took into account the fact that neither plaintiff lived in Tokelau. However, hearing of a future cases in Tokelau was not ruled out and the possibility of an audio-visual recording for later viewing in Tokelau was flagged. The immediate outcome of Tokelau's day in court will be known when Churchman J hands down his judgment. But the repercussions of resorting to formal court proceedings may take longer to percolate. Whoever is successful in this case, it may be a pyrrhic victory when one counts the cost to the spirit of harmony. As reflected in the preamble to the Constitution, Tokelau's "foundation is made manifest in the villages and when the people cooperate and live together peacefully and happily".

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27 "Tokelau Leader Sees Merit in Establishing High Court".

28 *Jovilisi Suveinakama and Hetu Puka v Council for the Ongoing Government of Tokelau et al* [2018] NZHC 1670.

29 Government of Tokelau, Overview, <[www.tokelau.org.nz/Bulletin/Feb+2019/Proverb+sums+up+historic+court+case+for+Tokelau+leaders.html](http://www.tokelau.org.nz/Bulletin/Feb+2019/Proverb+sums+up+historic+court+case+for+Tokelau+leaders.html)> accessed 27 February 2019.

30 Government of Tokelau, Overview <[www.tokelau.org.nz/Bulletin/Feb+2019/Proverb+sums+up+historic+court+case+for+Tokelau+leaders.html](http://www.tokelau.org.nz/Bulletin/Feb+2019/Proverb+sums+up+historic+court+case+for+Tokelau+leaders.html)> accessed 27 February 2019.