The Independent State of Papua New Guinea v. Kapal

Supreme Court
Kidu C.J., Kapi Dep C.J., Woods J.
21 December 1987

Constitutional law – federalism – suspension of provincial government – whether proper test is whether the matter can only be put right by suspension – whether suspension must be the last resort – section 91A(a) of Organic Law on Provincial Government.

Constitutional law – supremacy of constitution – whether section 91A(a) of the Organic Law on Provincial Government can fetter discretion under section 187E(1) of the Constitution.

Administrative law – judicial review – whether applicant had exhausted other remedies provided by law – courts to have caution when dealing with questions related to policy which politicians are to perform.

The Western Highlands Provincial Government was suspended by the National Executive Council under section 187E(1)(b) for "gross mismanagement of the financial affairs of the province" on 19 March 1987. On 11 September 1987, Hinchliffe J. in the National Court declared the suspension to be void and of no effect. Hinchliffe J. found that the National Executive Council had not concluded, per section 91A(d) of the Organic Law on Provincial Government, that "the matter can only be put right by suspension". On 15 September 1987, Hinchliffe J. declined to stay that declaration. The Independent State of Papua New Guinea appealed from the decision of Hinchliffe J.

HELD: Appeal allowed. The declaration of the trial judge was quashed.

(1) Section 91A(d) of the Organic Law on Provincial Government, which purports to impose a condition precedent on the exercise of the discretion conferred on the National Executive Council by section 187E(1) of the Constitution cannot fetter the constitutional authority therein conferred: *l.* 230 per Kidu C.J. and Woods J., *l.* 330 per Kapi Dep. C.J.

(2) One of the requisite preconditions, contained in section 187E(1) of the Constitution, "gross mismanagement of financial affairs of the province" was found to be present by the trial judge: *l.* 100 per Kidu C.J. and Woods J., *l.* 260 per Kapi Dep. C.J.

(3) Judicial review of decisions of the National Executive Council ought not to proceed until other legal remedies available have been used: *l.* 240 per Kidu C.J. and Woods J.

(4) There is no legal requirement that a senior official of the Provincial government in question be heard, either in personam, or by letter, before a decision under section 187E(1) is made by the National Executive Council:

l. 200 per Kidu C.J. and Woods J., *l.* 400; Kapi Dep. C.J. *Tindiwi* v. *Nilkare* [1984] P.N.G.L.R. 191 applied.

(5) Judicial review of decisions of a statutory body can only be successful (after all other remedies are exhausted) where the Court finds that the statutory body in question:

(a) exceeded its powers; or

(b) abused its powers; or

(c) made a decision which no reasonable authority could have made.

R. v. *Inland Revenue Commissioners, ex parte Preston* [1985] A.C. 835; [1985] 2 W.L.R. 836; [1985] 2 All E.R. 327

R. v. *Chief Constable of the Merseyside Police, ex parte Calveley* [1986] Q.B. 424; [1986] 2 W.L.R. 144; [1986] 1 All E.R. 257 (C.A.)

Other cases referred to in judgment:

C.R.E.E.D.N.Z. Inc. v. *Governor-General* [1981] 1 N.Z.L.R. 172

S.C.R. No. 3 of 1986: Ref by Simbu Provincial Executive [1987] P.N.G.L.R. 151

R. v. *Epping & Harlow General Commissioners, ex parte Goldstraw* [1983] 3 All E.R. 257

Legislation referred to in judgment:

Constitution, section 187E

Organic Law on Provincial Government, sections 90 and 91

Other materials referred to in judgment:

Constitutional Planning Committee Report, Ch. 10

The Annotated Constitution of Papua New Guinea, paragraphs 199, 203 and 204.

J. Baker for the appellant

P. Kopunye for the respondent

KIDU C.J. AND WOODS J.

Judgment:

On 19 March 1987 the National Executive Council (the N.E.C.) provisionally suspended the Western Highlands Provincial Government under section 187E of the Constitution, which provides as follows:

(1) Where –

(a) there is widespread corruption in the administration of the Province; or

(b) there has been gross mismanagement of the financial affairs of the province; or

(c) there has been a breakdown in the administration of the province; or

(d) there has been deliberate and persistent frustration of, or failure to comply with, lawful directions of the National Government; or

(e) the provincial government has deliberately and persistently disobeyed applicable laws, including the National Constitution, an Organic Law, the Provincial Constitution or any national legislation applicable to the province,

the National Executive Council *may provisionally* suspend the Provincial

Government concerned, subject to confirmation by a simple majority vote of the Parliament.

(2) Organic Law may make provision for and in respect of the procedures to be followed in the exercise of the powers under Subsection (1).

It was the ground of suspension in section 187E(1)(b) – gross mismanagement of the financial affairs of the province – that was used by the N.E.C. and in the opinion of the learned trial judge (the judge hereon) the N.E.C., after considering the Auditor-General's report of 23 February 1987 ... was quite entitled to be of the opinion that ... there had been gross mismanagement of the financial affairs of the Western Highlands Province."

Although a ground for suspension was shown the learned trial judge ruled that the N.E.C. was wrong in law when it said that "the matter can only be put right by suspension". The reasons for his ruling are contained in the following passage from his judgment:

> *As I have stated the Council, on the facts before it, was quite entitled to be of the opinion that a ground for suspension existed. The next question is,* "could the matter only be put right by suspension?" There is no doubt that a large amount of thought and consideration should be undertaken before a provincial government is suspended:

In *S.C.R. No. 3 of 1986: Ref. by Simbu Provincial Executive* [1987] P.N.G.L.R. 151, Barnett J. said at 175-176:

> The National Government's "reserve" power to suspend are set out in section 187E and they can only be exercised in carefully defined circumstances, including various types of what could be called "bad government" set out in section 187E(1) ...

Amet J., in the same case, said (at p. 165) referring to the Constitutional Planning Committee:

> that provincial governments should be suspended only in the most serious of circumstances, and even then as a last resort.

And at 168 Amet J. said:

> The spirit of these provisions is that once it was found necessary to suspend a provincial government, a power which is to be exercised as a very last resort measure ...

The Constitutional Planning Committee report at Ch. 10, p. 23, paragraphs 198 to 204 refers to the suspension of the Provincial Government. The said paragraphs are reproduced at pp. 404 and 405 of "The Annotated Constitution of Papua New Guinea". Paragraphs 199, 203 and 204 provide:

> 199. The Committee believes that provincial governments should be suspended only in the most serious of circumstances and even then as a last resort. The suspension of a provincial government would represent at least a temporary breakdown in the system of government recommended in this Chapter. Care should be taken to see that it also provides an opportunity for a fresh start to be made in any province in

which the provincial government has been suspended.

203. The Committee believes that provincial governments should be suspended in only the most serious of circumstances. But, the national government should exercise its power before the orderly development and constitutional government of the country as a whole are imperilled.

204. The national government should do all that it can to prevent circumstances requiring the suspension of a government from arising. Every effort should be made to restore a province in which the government has been suspended to normal as soon as possible.

I am satisfied that the National Executive Council was wrong in law when it said that "the matter can only be put right by suspension". In view of what the Auditor-General said in the final paragraph of his report of 23 February 1987, and also the matters that should be considered as seen in *S.C.R. No. 3 of 1986* and the thoughts of the Constitutional Planning Committee I am quite satisfied that the National Executive Council was wrong to the extent that a declaration should be made by this Court in terms requested by the plaintiff. (My emphasis).

The finding of the trial judge that section 187E(b) was made out is not challenged in this Court. We should mention here that the trial judge found that the N.E.C. decision to suspend the Provincial Government provisionally was not based on political considerations and this finding is not challenged by the respondent.

We are in total agreement with the trial judge and the majority view of this Court in *S.C.R. No. 3 of 1986; Ref by Simbu Provincial Executive* that provincial governments ought not to be suspended too readily.

Mr Baker for the State submitted that this view based on the C.P.C. Report is inapplicable to section 187E as this provision was introduced into the Constitution in 1983, nine years after the original C.P.C. Recommendations on Provincial Governments. The fact that there has been a lapse of time and further amendment to the constitutional provisions relating to Provincial Government, does not alter the position that section 187E, apart from minor changes brought about by the 1983 amendment, remains the same – i.e. a provincial government may be suspended and for reasons which the C.P.C. recommended and which are embodied in section 187E. So what the C.P.C. recommended still applies to the construction of section 187E. Be that as it may the decision to provisionally suspend still lies within the discretion of the N.E.C.

In this case there is evidence that the N.E.C. did consider the matter of whether suspension of the Western Highlands Provincial Government was the only way to put right the matter of gross mismanagement of the financial affairs of the Province. The N.E.C. submission under the heading *"Constitutional Implications"* contains the following paragraph:

> The Organic Law on Provincial Government provides that where a ground may exist for suspension the National Executive Council must be of the opinion that "the matter can only be put right by suspension" (s. 91A(d)).

So, as the N.E.C. did take into account what section 91(A)(d) says, we consider that the error on which the trial judge based his decision to declare the N.E.C.

decision invalid must be in the exercise of the discretion by the N.E.C. In this respect the onus was on the respondent to show that the N.E.C.

(a) exceeded its power; or
(b) abused its powers; or
(c) made a decision which no reasonable authority could have made.
(See *R.* v. *Inland Revenue Commissioners, ex parte Preston* [1985] A.C. 585; [1985] 2 All E.R. 327 and *R.* v. *Chief Constable of the Merseyside Police, ex parte Calveley* [1986] Q.B. 424; [1986] 2 W.L.R. 144; [1986] 1 All E.R. 257.)

The error seems to be that the N.E.C. did not consider the reply of the Secretary for Western Highlands dated 17 March 1987 to the letter sent to him dated 19 February 1987 by the Auditor-General. There are two things wrong with this. The first one is that there was no clear evidence that this letter was not tabled before the N.E.C. or made known to the N.E.C. The fact that the letter was not specifically mentioned by the Minister for Provincial Affairs in his affidavit dated 11 June 1987 did not mean that the letter was not before the N.E.C. It was the responsibility of the respondent to prove this and no such proof was forthcoming.

The second thing wrong with the trial judge's basis for quashing the N.E.C. decision is that the N.E.C. is not obliged by law (in this case sections 90 and 91 of the Organic Law on Provincial Government) to hear or require the Provincial Government to give an explanation: see *Tindiwi* v. *Nilkare* [1984] P.N.G.L.R. 191, per Bredmeyer J. (with Amet J. concurring).

The trial judge *thought* that if the N.E.C. had seen the letter of 17 March 1987 from the Secretary it may not have suspended the Provincial Government. As has been pointed out already there was no evidence that the N.E.C. did not see this letter.

But even if it did not the letter discloses no evidence of matters being actually put right. It only contained evidence of intentions to try.

As there was no evidence that the N.E.C. exceeded its powers or abused its powers or made a decision no reasonable tribunal or authority could make or made any other errors of law, the learned trial judge erred in declaring its decision void and of no effect.

We would allow the appeal, quash the order of the trial judge and declare the N.E.C. decision valid.

Although there is no need to comment on other matters raised in this appeal, we give our views on them.

The first of these matters is the question whether section 91A(d) of the Organic Law on Provincial Government is contrary to section 187E(1) of the Constitution. It must be borne in mind in considering section 91A(d) that it is part of the Organic Law made under section 187E(2) of the Constitution:

(2) An Organic Law may make provision for and in respect of the procedures to be followed in the exercise of the powers under Subsection (1).

Because section 91A(d) is only part of the procedure the N.E.C. is to go through in deciding whether to provisionally suspend a Provincial Government, it does not legally bind the N.E.C. with the result that failure to consider it is an error of law.

The second matter we wish to comment upon is what we would call a "threshold question" in the decision as to whether or not to judicially review the N.E.C. decision

to provisionally suspend. One of the fundamental rules in relation to judicial review is the question as to whether the applicant for judicial review has exhausted other remedies provided by law, e.g., statutory provisions for appeal. Generally it is the rule that the judicial review jurisdiction will not be exercised where other remedies
240 available have not been used: see, e.g., *R.* v. *Epping & Harlow General Commissioners, ex parte Goldstraw* [1983] 3 All E.R. 257, 262 per Sir John Donaldson M.R. (with Purchas L.J. concurring). This rule is subject to cases where facts and circumstances show that judicial review is more appropriate or convenient to do justice.

In this case we emphasize that the N.E.C. only has the power to provisionally suspend and that such suspension is subject to confirmation by Parliament. The Organic Law sets out very elaborate procedures for confirmation or otherwise. These include calling for evidence on oath.

We consider that in this case the learned trial judge should have considered
250 whether or not to exercise the Court's powers of judicial review. In view of what we have already said on the merits, the fact that the trial judge did not exercise his mind on this matter makes very little difference. But in future, we consider that this threshold question be decided before the National Court invokes its judicial review jurisdiction.

KAPI DEP. C.J.

The power of provisional suspension is given to the National Executive Council by section 187E(1) of the Constitution. This provision sets out the grounds upon which a provincial government may be provisionally suspended. These are specific grounds and section 89 of the Organic Law on Provincial Government requires that a
260 provincial government may be suspended only on a ground set out in section 187E(1) of the Constitution. The ground upon which the National Executive Council provisionally suspended the Western Highlands Provincial Government, was gross mismanagement of the financial affairs of the province under section 187E(b) of the Constitution. In this respect, the trial judge concluded:

> As I have stated, the National Executive Council, on the facts before it, was quite entitled to be of the opinion that a ground for suspension existed.

The respondent has not cross-appealed on this finding.
The trial judge in the next line went on to say,

270 The next question is, could the matter only be put right by suspension?

After having given an interpretation of this provision, the trial judge continued:

> I am satisfied that the National Executive Council was wrong in law when it said that "the matter can only be put right by suspension". In view of what the Auditor General said in the final paragraph of his report of 23 February 1987, and also the matters that should be considered as seen in *S.C.R. No. 3 of 1986* and the thoughts of the Constitutional Planning Committee I am quite satisfied that the National Executive Council was wrong to the extent that a declaration
280 should be made by this Court in the terms requested by the plaintiff.

It is clear from his Honour's decision that as a matter of legal requirement, he had to be satisfied with section 91A(d) of the Organic Law on Provincial

Government. The question then arises as to whether or not this requirement is inconsistent with section 187E(1) of the Constitution, in that it has singled out one particular consideration to be satisfied before the National Executive Council may exercise the discretion to suspend. This point was raised during the hearing and both counsel made submissions on the point.

Counsel for the appellant has submitted that section 187E(1) of the Constitution exclusively defines the only grounds upon which the National Executive Council may exercise its discretion on whether to provisionally suspend or not to suspend. He submitted that in considering whether to exercise the discretion, the National Executive Council may have regard to the spirit of this provision and may in that process have regard to the Constitutional Planning Committee which has expressed the view that,

> Provincial Governments should be suspended only in the most serious of circumstances, and even then as a last resort. The suspension of a provincial government would represent at least a temporary breakdown in the system of government recommended in this chapter.

He conceded that this consideration is built into the terms of section 187E(1) and that it is one of many considerations which the National Executive Council may take into account in exercising its discretion. He further submitted that the Parliament in introducing this amendment in section 91A(d) of the Organic Law on Provincial Government, has gone beyond the scope of section 187E(1) of the Constitution in that it has created an extra legal requirement with which the National Executive Council has to be satisfied before it can exercise the discretion to suspend a provincial government.

Counsel for the respondent has submitted that the Organic Law on Provincial Government is a law which is made pursuant to section 187E(2) of the Constitution, and therefore, it is within the provisions of the Constitution.

I agree that when the National Executive Council is exercising its discretion under section 187E(1) of the Constitution, it may have regard to this consideration. This, however, is only one of many considerations that are relevant under the provision. The discretion given by section 187E(1) is wide and no consideration is designated by the provision of which the National Executive Council must be satisfied before it can exercise its discretion in favour of suspension. The matter in which the discretion may be exercised is left entirely up to the discretion of the National Executive Council. Such a wide discretion is given to the National Executive Council by the words of section 187E(1),

> ... The National Executive Council *may* provisionally suspend ... (my emphasis).

Section 91A(d) of the Organic Law has singled out this one consideration from any other relevant considerations and requires that the National Executive Council must be satisfied before it may suspend. It is no longer a matter the National Executive Council may take into account. By this provision, it must now be satisfied before it can suspend. This provision in my view has altered the nature of the discretion given by section 187E(1) of the Constitution. To this extent, section 91A(d) is inconsistent.

The only other question to be determined in this regard is, whether, or not,

section 91A(d) is a provision which is authorized by section 187E(2) of the Constitution. This provision is in the following terms:

> (2) An Organic Law may make provision for and in respect of the procedures to be followed in the exercise of the powers under Subsection (1).

The question then is, whether section 91A(d) is a matter of procedure. The meaning of the word "procedure" is to be determined within the context in which it has been used here. In this case, a power has been granted to the National Executive Council to provisionally suspend a provincial government on any of the grounds listed under section 187E(1) of the Constitution. Under the same provision, this decision is subject to approval by the National Parliament. Within this context, "procedure" must relate to matters concerning how any ground under section 187E(1) may be investigated and brought before the National Executive Council. Such matters also would relate to how the decision of the National Executive Council may come before the National Parliament and how the Parliament may investigate the matter before a decision is made. Matters of "procedure" in my view cannot relate to the head of power granted to the National Executive Council by section 187E(1) and the exercise of such power.

Clearly, the Organic Law on Provincial Government does provide for "procedure" relating to the exercise of this power. For instance, section 90 of the Organic Law provides that the Minister for Provincial Affairs may initiate the proceedings and then a report is forwarded to the National Executive Council. Under section 91 of the Organic Law, the National Executive Council may require the Minister to make other enquiries or may require the head of the Provincial Executive Council to attend and make explanations before it. Section 91A then makes provision for how all these reports are then brought before the National Executive Council for its decision. Other provisions in the Organic Law, which are not necessary to be referred to here, relate to how a decision by the National Executive Council is investigated and a report made to the National Parliament before it makes a decision.

The question is whether section 91A(d) is a matter of "procedure"? In my view, this provision does not deal with the "procedure" of how such a matter may come before the National Executive Council. It deals with the actual exercise of power by the National Executive Council. This provision cannot be saved by section 187E(2) of the *Constitution*. It would follow from this that the trial judge erred in law when he held that the National Executive Council had to be satisfied as a matter of law that suspension was the only way to put the matter right.

Even if the trial judge was right in addressing section 91A(d) of the Organic Law as a legal requirement to be satisfied before exercising the discretion to suspend, I find that he based his decision on facts which were not supported by the evidence before him. In dealing with the question of the exercise of discretion by the National Executive Council, the trial judge dealt with a letter dated 19 February 1987, written by the Auditor-General's office to the Secretary of Western Highlands Provincial Government, in which the Auditor-General sought further information. The Secretary to the Department in a letter dated 17 March 1987 provided this information to the Auditor-General. The trial judge inferred from the whole of the evidence that these two letters were not brought to the attention of the National Executive Council. He went on to find that had the two letters been brought before

the National Executive Council, they would not have reached the decision they did. There is no evidence from either party on whether or not these materials were presented to the National Executive Council before it made its decision. On the question of appeal against inferences of fact, the authorities are quite clear that the appellate court is in as good a position as the trial judge when inferring this from primary facts which are not disputed. On this question, the onus was on the respondent in the trial below, to prove that these papers were not brought before the National Executive Council. I find that there is no evidence in the trial from which the trial judge could have inferred that these documents were not presented to the National Executive Council.

Again the trial judge in supporting his conclusion does refer to an unsigned document which was annexed to the affidavit of Mr Kopunye, the lawyer acting for the Western Highlands Provincial Government. Mr Kopunye was not competent in deposing to the truth and accuracy of this document. In brief, this document is alleged to contain the evidence of matters which were brought before the National Executive Council. I note from the transcript of evidence that Ms Young who appeared as counsel at the trial objected to this particular document. I find that this document was wrongly admitted and the trial judge was not entitled to rely on it.

It seems to me that the essence of this trial judge's decision was that he found that the National Executive Council erred in law by not taking into account the letter of 19 February 1987 written by the Auditor-General's office to the Secretary of Western Highlands Provincial Government and the reply to that letter by the Secretary in a letter dated 17 March 1987. The trial judge appears to be suggesting that because these two letters were not brought to the attention of the National Executive Council, the exercise of the discretion cannot stand. This is an error of law. In the case of *Tindiwi* v. *Nilkare* [1984] P.N.G.L.R. 191, the Supreme Court held that the National Executive Council has a discretion as to whether or not the head of the Provincial Executive should be given an opportunity to be heard on the matters which are being considered under section 187E(1) of the Constitution. It would follow from this case that whether or not these letters were brought to the attention of the National Executive Council, it would not affect the decision of the National Executive Council. If, as the trial judge found these letters were not brought before the notice of the National Executive Council, this did not prevent the National Executive Council going ahead and considering the suspension of the provincial government. This is permissible under section 91 of the Organic Law on Provincial Government.

The trial judge further fell into error, when he found that these two letters were not brought before the National Executive Council; he assumed the role of the National Executive Council and decided that they would not have suspended the provincial government. Here, the trial judge was not even reviewing the exercise of the discretion of the National Executive Council on the material it had before it. He actually assumed the role of the National Executive Council and decided the matter on new materials relevant to the question of suspension. In my view, the trial judge fell into error in assuming and exercising the power of the National Executive Council.

The trial judge erred not only in assuming the role of the National Executive Council, but he also entered into functions designated to the Permanent Parliamentary Committee on Provincial Government Suspensions and the National

Parliament. Counsel for the appellant has referred to a number of overseas authorities dealing with the principles which are applicable to judicial review of exercise of discretionary power. These authorities are not directly relevant as I have held that the trial judge did not review the decision of the National Executive Council on matters which came before it but he reviewed the decision on the basis of new materials which were brought before him in the National Court. It would only be necessary to refer to one particular authority which expressed the caution which all courts must have regard to when dealing with questions related to policy which are given to politicians to perform. In *C.R.E.E.D.N.Z. Inc.* v. *Governor-General* [1981] 1 N.Z.L.R. 172, 1978, Richardson J. said:

> Finally, it is important to remember, . . . that there is no universal rule as to the principles on which the exercise of a discretion may be reviewed, each statute or type of statute must be individually looked at. The willingness of the courts to interfere with the exercise of discretionary decisions must be affected by the nature and subject matter of the decision in question and by consideration of the constitutional role of the body entrusted by each statute with the exercise of the power. Thus the larger the policy content and the more the decision making is within the customary sphere of the elected representative the less well equipped the courts are to weight the considerations involved and the less inclined they must be to intervene.

This is an appropriate warning to bear in mind when the courts are given the power to review an exercise of such discretionary power. However, in this particular case, the trial judge ought not to have interfered with the process provided for by law. The discretion to suspend a provincial government and the power to review such a suspension has been given by the law to the elected representatives of the people. An elaborate system has been set up under the Organic Law on Provincial Government which sets out the manner in which the National Executive Council may suspend a provincial government. The Organic Law also provides for a system of reviewing the correctness of that decision. First, the National Executive Council makes a decision to suspend a provincial government, the matter is then referred to the National Parliament either to be confirmed or rejected. In this process, a Permanent Parliamentary Committee on Provincial Government Suspensions which is established under section 91D of the Organic Law is given the function to investigate and then to report on the matters giving rise to the provisional suspension by the National Executive Council. This report is then presented to the National Parliament for consideration. The provisions of the Organic Law make it quite clear that the question of suspension of a provincial government is a matter for the elected members of the Parliament to deal with. Until that process has been exhausted, the courts would be well advised not to interfere with that process.

In this case, the proceedings in the trial court were brought immediately after the National Executive Council suspended the provincial government. The trial judge ought to have allowed the process set out under the terms of the Organic Law on Provincial Government to go ahead.

I order that the declaration by the trial judge be quashed and the suspension by the National Executive Council reinstated. The matter should now be allowed to proceed in accordance with the provisions of the Organic Law on Provincial Government.

Appeal allowed
Order of National Court of 11 September 1987 quashed
The provisional suspension of the Western Highlands Provincial Government made on 19 March 1987 declared to be valid

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Reported by: L.K.