

CLEMENT WAIWORI -v- THE ATTORNEY GENERAL

High Court of Solomon Islands

(Ward C.J.)

Civil Case No. 191 of 1990

Hearing: 13 December 1990

Judgment: 22 January 1991

T. Kama for the Plaintiff

P. Afeau for the Defendant

WARD CJ: On 29th June 1990 the, then, Minister of Home Affairs, Danny Philip, ordered the cancellation of the warrant establishing the Honiara Town Council, by another warrant established the Honiara Municipal Authority to take over the affairs of the Town Council and gave directions for the winding up of the Council's affairs. All these actions were under section 3 of the Local Government Act, Cap 14.

"3(1) The Minister may by warrant under his hand establish such Councils as he may deem necessary or expedient for the purposes of local government:

Provided that the Minister may at any time by order amend, vary or cancel any such warrant, after having (unless precluded from so doing by the urgency of the matter) given to a Council reasonable notice of his intention so to do and having considered the representations, if any, of the Council thereon"

(2)(a) Where, under subsection (1), the Minister cancels a warrant establishing a Council, he may direct that such Council shall be wound up."

When the Minister cancelled the warrant, he did not give the Council any notice of his intention and therefore was unable to consider any representations on that intention.

The plaintiff who was an elected member of the Honiara Town Council challenges his actions and seeks answers to the following questions:

- "1. Whether it is justified in the circumstances for the Honourable Minister of Home Affairs to cancel the Warrant Establishing the Honiara Town Council (Legal Notice No. 44 1982)?
2. Whether the circumstances relied upon by the Honourable Minister of Home Affairs were so urgent that it justified an exercise of discretion under the proviso of section 3(1) of the Local Government Act (Cap. 14)?
3. Has the Honourable Minister of Home Affairs properly exercised his discretion under the proviso of section 3(1) of the Local Government Act (Cap. 14) in the circumstances?
4. Whether the Honourable Minister of Home Affairs had exceeded his powers under section 3 of the Local Government Act when he had effectively dissolved the Honiara Town Council without satisfying himself that the Honiara Town Council had been wound up."

On the basis of the answers sought he seeks various consequential orders:

- "1. That the order dated 29th day of June, under the hand of the Honourable Minister of Home Affairs be nullified and void.
2. That the Warrant Establishing the Honiara Municipal Authority dated 29th day of June, 1990 be cancelled.
3. That the Warrant Establishing the Honiara Town Council 1982 be enforced and the only elected Full

Council of Honiara Town Council be restored to their position.

4. That the Direction dated 29th day of June, 1990 be nullified and void."

The events leading up to the Minister's decision are described in the various affidavits filed. There is nothing in that evidence to suggest the Honiara Town Council was failing to carry out its duties but there were a number of political problems amongst the councillors. In April 1990 a motion of no confidence in the President was passed but it was then successfully challenged in the High Court by the defeated President on the ground that there had been a failure to comply with standing orders. On 4th May, the same day as the High Court decision, a requisition notice was served on the President for another motion of no confidence.

The next day, the Town Clerk spoke about these problems to the Permanent Secretary and the Under-Secretary at the Ministry of Home Affairs and, on 11th May, was required by the Minister, under section 122 of the Act, to submit a report. I would question whether the Minister had the power under that section to require such a report from an employee of the Council without the Council's knowledge but, notwithstanding, a confidential report by the Town Clerk was sent to the Minister on 23rd May. That report set out a number of matters relating to the conduct of the Council and the Clerk's opinion on them.

On 30th May he sent a further confidential report containing his opinion on the political situation in the Council prior to the pending vote of no confidence (scheduled at that time for 5th June). It concludes with a recommendation;

"In further assessing the future implication of the intentions of the second No Confidence Motion, one has reasons to believe that the political squabbling will continue. The Town Clerk's Office is therefore strongly in favour of any future considerations to dissolve the full Council."

The Minister states in his affidavit that,

"after examining the Report and discussing it fully with my officials I considered that the situation at the Honiara Town Council was very serious and required urgent action. I however, decided to defer any action until the outcome of the Motion of No Confidence in the President."

That motion was eventually moved at a full Council meeting on 22nd June 1990 and received eight votes in favour and 4 against. Section 15 of the Act requires a majority of three fourths of the members voting and so the motion failed leaving the President in office but apparently with little support from the Councillors. However the minutes record that the meeting closed after the President and one of the opposition members each appealed for a spirit of forgiveness and co-operation in the future.

During that meeting, some remarkable statements were made largely by, or relating to, the Member for Naha, Mr Wa'ako. They culminated in claims by the member that he had been bribed followed by the production of sums of money and a video unit to be returned, he said, to the persons responsible. The minutes also show that, just prior to the vote, one of the members gave an explanation of these matters and denied any impropriety.

The next day, the Minister was briefed on events at the meeting and, in his affidavit, states:

"I was informed that the Motion failed and the President was still in power but with no Executive Committee to work with.

I was further told at the briefing that Mr Wa'ako, one of the Members of the Council revealed and produced during the debate \$1,000 in cash and a TV/Video Recorder set which some of the Members opposing President Maesua have given to him in order to vote in support of the Motion. I considered these revelations very serious and in fact an important factor in the decision that I eventually took in dissolving the Council without giving notice to the members."

Counsel for the plaintiff, Mr Kama, points out these were allegations only, had been denied at the meeting and had never been investigated further.

The Minister continues:

"After obtaining legal advice from the Attorney General and further discussing the matter with my officials I decided to exercise my powers under s.3 of the Local Government Act and revoke the 1982 Warrant establishing Honiara Town Council and to dissolve the Council and to replace it with the Honiara Municipal Authority. I further considered and decided not to give notice to the Members of the Council of my intended course of action because I was completely satisfied that the situation was very serious and it required urgent and effective action on my part.

To sum up, my decision to revoke the 1982 Warrant which established Honiara Town Council and to dissolve the Council and to replace it with the Honiara Municipal Authority and further not to give notice to the Members were based on the following -

- (a) the Report from the Town Clerk
- (b) the revelations at the Council Meeting on 22/6/90 that some of the Members attempted to buy the vote of another Member to oust the President.
- (c) My discussions with the former President, David Maesua and the fact that the President no longer had majority support, and yet not prepared to step down.
- (d) my own observations and discussions with and comments from members of the public in Honiara concerning the Honiara Town Council.
- (e) too costly to call for fresh elections for the Council.
- (f) the council could not work effectively without an Executive Committee and it would be difficult to control Council expenditures, particularly in view of the situation regarding advances of allowances by Members of the Council.
- (g) creating the Honiara Municipal Authority to replace the Honiara Town Council was the cheapest and quickest way to get services going for the Honiara residents."

No further evidence was given to amplify, paragraphs (d), (e) and (g). Indeed, as I have already stated, the evidence before the Court does not suggest any failure by the Council to carry out its duties. Paragraph (f) refers to the Town Clerk's opinion that the Executive committee would not be able to function because of the lack of support for the President, and also an earlier problem that had arisen over allowances advanced to some of the Councillors.

Mr Kama does not dispute that the Minister had power under section 3(1) to cancel the warrant and, having done so, to direct that the Council be wound up under section 3(2). He questions the exercise of the Minister's discretion in deciding to cancel the warrant and in deciding it was so urgent that he was precluded from following the procedures set out in the proviso to section 3(1).

Section 3 does not give any guidance as to the grounds on which a Minister may cancel the warrant of a Council. However, it is well established that the fact there are no limitations in the act does not mean the power is absolute and the exercise of such a discretionary power must be exercised in accordance with well established principles. Equally, if it is alleged the Minister has not acted in accordance with those principles, the power of the Court to consider his decision is limited.

In *Associated Picture Houses v. Wednesbury Corporation* (1947) 2 All E.R. 680, the local authority, when granting a licence, had added a condition that the plaintiff claimed was ultra vires. At 682, Lord Greene M.R. explains the power of the courts and the limits of the discretion of the authority:

"What, then, is the power of the courts? The courts can only interfere with an act of an executive authority if it be shown that the authority have contravened the law. It is for those who assert that the local authority have contravened the law to establish that proposition. On the face of it, a condition of this kind is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like local authorities will exceed their powers, and the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for the local authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.

What, then, are those principles? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters

to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty - those, of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration."

He later summarised his views in the often quoted passage at 685:

"I do not wish to repeat what I have said, but it might be useful to summarise once again the principle, which seems to me to be that the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it."

Mr Kama and Mr Afeau both rely on the authority of that case to set the standard by which this Court can decide this issue. Mr Kama's case is that the Minister did not exercise his discretion within the "four corners of those principles." He suggests the report of the Town Clerk was not properly required under section 122 and contained only opinion and allegations and should not have been considered by the Minister. The allegations made at the Council meeting, unsubstantiated as they were, should have been disregarded also. He also points to the Minister's failure to follow the procedure in the proviso to section 3(1) and argues that these all suggest the Minister acted unreasonably or unlawfully.

That this Court is entitled to consider the Minister's decision is clear but it must be careful not to look at the merits of the decision in such a way as to usurp the functions

that the Act has given to the Minister and substitute its own opinion.

The first question on the summons asks if the Minister's decision to cancel was justified in the circumstances of this case. I feel such a consideration is beyond the power of this court involving, as it does, a subjective assessment of the merits of the decision.

In *Short v. Poole* (1926) Ch 66, Warrington LJ, at page 91, pointed out that once an opinion was shown to be within the power of the authority, the Court cannot consider its merits.

"I do not know, and if I did I should have no right to criticise favourably or unfavourably, the arguments on which such an opinion was formed. With the question of whether a particular policy is wise or foolish the Court is not concerned; it can only interfere if to pursue it is beyond the powers of the Authority."

This Court must consider the Minister's actions and the reasons given for those actions and decide objectively whether he acted lawfully; whether he had exercised his discretion reasonably, fairly and justly (per MacNaghten LJ in *Williams v. Giddy* (1911) AC 381 @ 385). The manner in which I consider the reasons was suggested by Lord Upjohn in *Padfield v. Minister of Agriculture* (1968) 1 All E.R. 694 @ 717.

"So I must examine the reasons given by the Minister, including any policy on which they may be based, to see whether he has acted unlawfully and thereby overstepped the true limits of his discretion, Unless he has done so the court has no jurisdiction to interfere. It is not a court of appeal and has no jurisdiction to correct the decision of the Minister acting lawfully within his discretion, however much the court may disagree with its exercise."

As has already been stated, the Minister clearly had the power to cancel the warrant of the Council. Was he acting lawfully and reasonably in so doing in relation to the points raised by Mr Kama?

First the report of the Clerk. I feel it was unfortunate such a report was requested from an individual officer of the Council under a section that authorises the Minister to require the Council to furnish information. The report he received was an expression largely of the Town Clerk's opinion and was given without any attempt to obtain the opinion or authority of the Council as such. However, the report did refer to a number of matters that were substantiated by documents included with the report and by the events that had occurred. Those matters having been brought to his attention, the Minister had every right to consider them. Indeed had he not done so he would have been acting capriciously.

Second the so-called revelations at the Council meeting on 22nd June. I agree with Mr Kama that it undoubtedly would have been wiser to have them investigated before acting on them. However, such matters must be within the range of subjects over which the Minister could exercise his discretion to cancel the warrant. It is not for this court to consider whether it would have come to the same conclusion without further substantiation of the allegations but whether the Minister was entitled to consider such matters and if it was reasonable to do so. I am satisfied those were all matters he was entitled to consider.

Finally there is the requirement, imposed by Section 3, that he should give the Council reasonable notice and consider any representations it makes as a result before he cancels the warrant. To fail to do so would render his actions unlawful unless the urgency of the matter was such that it precluded him from so doing. Whether or not he considers the matter was so urgent is also a matter within the Minister's discretion and this court can consider his exercise of it within the same parameters.

Clearly, the decision whether the situation is so urgent that he may ignore the requirements of section 3 must be made separately from and prior to the decision to cancel. The Minister explains in his affidavit that he based both

decisions on the same factors. That does not, of course, mean he did not give it separate consideration but this court is entitled to consider those factors to decide if the conclusion on the urgency was reasonable. I accept that the points listed by the Minister were all things he was entitled to take into account for this decision but the Court must still pass on to consider Mr Kama's suggestion it was a conclusion so unreasonable that no reasonable authority could ever have come to it as is referred to in the Associated Picture Houses case.

Mr Kama suggests that the evidence clearly shows that, even if the Minister considered the situation was urgent, his actions demonstrate that he could still have satisfied the requirements of section 3 and was, therefore, wrong to say he was precluded from so doing. Indeed Mr Kama goes further and says it suggests the Minister had no intention of seeking the Council's views having already made his decision to cancel on the information he had received.

In his affidavit the Minister refers to the fact that he twice considered the situation was very serious and required urgent action. The first was at the end of May (stated as "on or about 23/5/90" but clearly on or after 30th May, the date of the additional confidential report) when he decided to defer any action until the outcome of the motion of no confidence. Initially that was a period of six days but the motion was postponed and the Minister still deferred action for a further seventeen days.

The second was the day after the Council meeting of 22nd June. On that occasion he allowed a further six days to pass before he cancelled the warrant.

Does that evidence show, as Mr Kama suggests, that the decision was so unreasonable no reasonable person could have made it? It must be remembered that it is not for the Court to impose its own view of whether he was right but to decide solely whether he had acted reasonably.

In *Secretary of State for Education v. Tameside Metropolitan Borough Council* (1977) AC 1014 Lord Hailsham points out that not every reasonable exercise of judgement is right and not every mistaken exercise of judgement is unreasonable. Lord Diplock said @ 1064 -

"The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

Urgency is very much a subjective matter but the test for the Court is not whether it was urgent so much as whether the urgency was such that it precluded the Minister from complying with the requirements of section 3.

The evidence quoted above shows two relevant periods. The first ran from 30th May to 22nd June but during that time the Minister was willing to defer action until after the vote of no confidence. I should not speculate too far but, had the vote on 22nd June produced overwhelming support for the President, it seems likely the Minister would have taken no further action. It was clearly reasonable at that time to say and do nothing with regard to giving the Council notice. Indeed such notice may have been interpreted as putting pressure on the Councillors as to the way they would vote.

The second period ran from 23rd June to the date of the notice, the 29th June.

The Act requires "reasonable notice" and that must mean reasonable in all the circumstances of the case. Mr Kama suggests that the period the Minister allowed it to go before he acted would have allowed him to give notice. Admittedly such notice would have been short but in the circumstances, Mr Kama says, it would have been reasonable.

I am not sure the true picture is composed just of the time available. The Minister was briefed and decided it was an urgent situation on a Saturday and the notice was dated on the Friday following. The earliest he could have given notice

to the Council was Monday. I accept Mr Kama's suggestion that two or three days may often be sufficient notice to give the Council to make its representations. However the circumstances do not solely relate to the period. The Minister, as he has explained in his affidavit, was confronted with a situation where the Council was deeply divided. The President had been shown to have minority support and yet refused to step down. There had been a bitter, rancorous debate on the motion and there was a suggestion there was no longer an Executive Committee. In those circumstances, could the Minister reasonably believe the Council, as a body, would have been able to prepare its representations? Would he not, by giving notice, have run the risk instead of opening a lengthy debate by each of the factions within the Council and, if he had tried to limit it to a few days, have immediately been confronted with demands for more time and risked being accused of rushing them?

As I have stated already, it is not for the Court to decide what it would have done in that situation but to consider whether the decision reached could have been reasonable. As was stated by Lord Greene, it is not to be assumed prima facie that the Minister exceeded his powers, it is on the Plaintiff to prove it. On balance, I am not satisfied that he did act unreasonably in deciding the urgency was such that it precluded him from giving notice to the Council.

I feel that sufficiently answers the second and third questions.

The fourth question in the summons refers to the requirement of section 3(2) the relevant parts of which I set out.

*3(2) (a) Where, under subsection (1), the Minister cancels a warrant establishing a Council, he may direct that such Council shall be wound up.

(b) On any direction being made under paragraph (a) with respect to a Council, such Council shall, until dissolved, continue in existence for the purpose only of winding

up, and to that end shall, without undue delay, take such steps as may be necessary to wind up its affairs, and in particular shall do such acts as may be required by any direction given by the Minister under paragraph (c) of this subsection.

(c) In order to facilitate any such winding up the Minister may by notice give such directions as he may deem necessary or desirable, and particularly, but without prejudice to the generality of the foregoing to ensure -

- (i) that all or any property, movable and immovable, vested in or belonging to such Council or to which the Council is entitled and all or any assets and claims to which the Council is entitled, shall be transferred to and vested in such other person or body as exists or may be established for the area for which such Council was established;
- (ii) that all or any appointments made, powers conferred and notifications served or published by the Council shall be deemed respectively to have been made, conferred, served or published by such other person or body as aforesaid;
- (iii) that all or any works and undertakings authorised to be executed, all rights, liabilities, contracts and engagements of the Council existing, and all actions, suits and legal proceedings pending by or against the Council, shall be transferred to, vested in, and be enforced, carried on and prosecuted by or against such other person or body as aforesaid.
- (iv) that all rates, fees, charges and debts of whatsoever description due or payable to or recoverable by the Council shall be payable to or recoverable by such other person or body as aforesaid;
- (v) that all or any licences, registrations and permits issued, made or granted by the Council shall continue in force for the period, if any specified in such licences, registrations or permits, unless the same are sooner suspended or cancelled by such other person or body as aforesaid;
- (vi) that all or any bye-laws made by the Council shall be deemed to be the bye-laws of such other person or body as aforesaid, and shall continue in full force and effect within the area to which they apply until amended or cancelled by such other person or body.

(d) On the Minister being satisfied that the winding up of a Council is completed, he shall by notice declare it to be dissolved with effect from such date as shall be specified in such notice."

The question, I feel, confuses two different things. The Minister by notice cancelled the warrant and further directed that the Council should be wound up. Once that is complete, the Minister may by further notice declare it to be dissolved.

Until then the Council continues to exist but only for the purpose of winding up. Thus the question confuses the effects of cancellation of the warrant and dissolution of the Council.

It follows that I must refuse the declarations sought.

However before I pass from this case I would deal briefly with a further matter that appeared during the hearing. It is not one that was advanced by the parties and as such would not normally be considered by the Court in this action. However, a case of this nature, whilst a private action, involves consideration of the rights of many people. Cancellation of the warrant of the elected Council and the substitution of a body appointed by the Minister was a step that involved the rights of the electorate of Honiara. The removal of the right of an electorate to choose its own representatives is a step so serious that it should only be taken in extreme cases and with careful consideration of the powers involved. I therefore felt I should seek the views of counsel before I completed this judgment.

The point is simply stated. The warrant establishing the Honiara Municipal Authority is made under section 3. That gives the Minister power to establish Councils. Paragraph 2 of the Warrant (LN 69/90) states:-

"There shall be established an Authority to be known as the Honiara Municipal Authority (hereinafter called the "Authority") which shall continue in force unless the warrant is sooner cancelled."

Whatever name is used, the power is to establish a Council and that is what the Minister has done. A Council so established is subject to the provisions of the Act. For example, section 6 provides that the members of a Council (or at least four fifths of them) must be elected.

The Minister has power under section 125 to suspend or restrict the operation of parts of the Act and make an appointed council lawful but no such action was taken here. In such circumstances, the Minister's purported appointment of

the eleven members of the Honiara Municipal Authority would appear to be ultra vires.

As I have said this was not a matter on which the parties have sought a ruling but that does not mean it is without relevance to this case. One of the reasons the Minister gave for dissolving the Council was that it would be too costly to call fresh elections. As the law stood (and as I have said he took no steps to alter it), he had no power to appoint a Council without elected members and so his decision on that was clearly wrong.

Mr Afeau suggests that the power to establish such an authority of appointed members may be implied by the use of the words in section 3(2)(c)(i) - (vi)

"..... such other person or body as exists or may be established"

I accept the words there used envisage handing over the function of the Council to some body other than another Council but I cannot accept that creates the power to establish such a body.

As I have said this is not a matter on which I can rule in this case as no action has been sought on it. I can only express the view that, when taking such an extreme course of action, the Minister and his advisers should ensure that they are complying strictly with the provisions of the law. The act sets out the intentions of Parliament and safeguards the interests of the people involved. The Minister had less drastic powers in section 6 whereby he could have appointed some additional members to the existing Council. It is a pity that in a case such as this the Minister was so badly advised over the courses available and the procedures required to implement them. Such carelessness, spawns unnecessary actions in the Courts. No one benefits and confusion of the public is the likely result.

In this case the plaintiff, Mr Waiwori, and the other councillors had been usurped by an executive act of the Minister. They have every right to expect that to be done lawfully. Mr Waiwori has exercised his undoubted right to test the decision in the Court and I have no doubt that sprung from an underlying feeling that things were not correct. As it happens I have found against him on the point he raised but the case has shown a serious failure in the procedure adopted by the Minister. No doubt it can be corrected but I consider Mr Waiwori should not pay the costs of the other side. I therefore make no order for costs.

(F.G.R. Ward)
CHIEF JUSTICE