WALE V GOVERNOR-GENERAL: THE BOUNDS OF JUDICIAL REVIEW IN SOLOMON ISLANDS

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This case note considers the 2019 decision of the High Court of Solomon Islands in Wale v Governor-General.[1] *It is significant from a general legal point of view because it considers issues regarding constitutional interpretation, conflict between constitutional and statutory provisions, and the boundaries of judicial review.*

Ce commentaire d'arrêt analyse la décision rendue en 2019 par la Haute Cour des Îles Solomon dans l'affaire Wale/Governor-General. Cette décision véritable arrêt de principe, clarifie les normes d'interprétation des règles constitutionnelles et de leurs rapports avec les règles législatives. L'arrêt précise également le périmètre du contrôle juridictionnel de la légalité.

I INTRODUCTION

The first National General Election (NGE) in Solomon Islands since the end of RAMSI was held in 2019. Following the NGE, the Solomon Islands Parliament met to elect a Prime Minister. The prime ministerial election was controversial because at the time of the Meeting to elect the Prime Minister, there was an issue around the validity of candidacy of one of the nominees. This issue was to be brought before the High Court. Notwithstanding this, the Governor-General proceeded to and facilitated the prime ministerial election.

On 24 May 2019, Palmer CJ in the High Court of Solomon Islands delivered judgment in *Wale v Governor-General & Others* affirming, inter alia, the traditional Common Law approach to judicial review that courts are conservative and not always willing to review the exercise of certain powers.[2] This case determined two things: first, it showed the Court's approach to constitutional interpretation when

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1 *Wale v Governor-General and Others* HCSI-CC 244 of 2019 (unreported) [*Wale*].

2 See below Part III.

potential contradictions arise between the Constitution and supporting legislation, and second, it builds on the limited jurisprudence in Solomon Islands on judicial review.

A The Facts

On 16 January 2019, an application was lodged with the Political Parties Commission (PPC) to register OUR Party, the political party of the Hon Sogavare (second defendant). On 5 February, the date for the NGE was set. The NGE was conducted on 3 April 2019 and the results were declared on 4, 5, 6 and 7 April by the Returning Officers of the constituencies. On 9 April, the PPC met and approved the registration of OUR Party. On 14 April, a coalition agreement was entered into by OUR party with other political parties. On 16-18 April, nominations for Prime Minister were invited by the Governor-General that resulted in two candidates being nominated: the Hon Wale and the Hon Sogavare. On 19 April, the applicant wrote to the Governor-General challenging the nomination of Hon Sogavare, taking issue with the registration of OUR Party. The Governor-General stated that he would "make a decision at the election meeting of the Prime Minister on 24th April".[3] On 23 April, Hon Wale applied to the High Court for an interim order to postpone the prime ministerial election meeting until the nomination issue was resolved. On 24 April, the date of the prime ministerial election meeting, the High Court granted an interim order directing the Governor-General to postpone the election of the Prime Minister. The Governor-General disregarded the Court order and the election meeting proceeded. At that election meeting, Hon Sogavare was elected as Prime Minister.[4]

In a statement released by the Governor-General's Office, the Governor-General gave reasons for the decision to ignore the High Court order. He stated that Sched 2 para 11 of the Constitution states that the functions given him "shall be exercised in his own deliberate judgment." The use of the word "shall" together with "in his own deliberate judgment" indicated to him that the decision to go ahead with the election was a constitutional power vested in him.[5] Further, he noted that the High Court order was contrary to his constitutional powers under Sched 2 para 10 and that although "he had much respect for the High Court order… he was not obliged to

3 *Wale*, above n 1, at [17].

4 *Wale*, above n 1, at [9]-[19].

5 Government House of Solomon Islands "Statement from the Governor-General Sir Frank Kabui" (26 April 2019) Solomon Times <https://www.solomontimes.com/news/statement-from-the-governor-general-sir-frank-kabui/9020>.

accept it."[6] He reasoned that such disputes are to be determined by the Governor-General alone and should "not be questioned in any proceedings". There was no reason to give priority to the case before the High Court case on the procedural issue in the Political Parties Integrity Act 2014 over postponing the prime ministerial election for the claimants.[7]

As a result of these occurrences, Hon Wale claimed in the High Court that the Governor-General had acted outside his powers by not taking into consideration the issues surrounding the validity of Hon Sogavare's nomination and by then proceeding with the election meeting despite the High Court interim order. He sought judicial review of the Governor-General's action[8] and a determination from the Court on the actions of the PPC and the Registrar of Political Parties for the registration of OUR Party.

B The Legal Regimes for Nomination of Prime Minister

The Political Parties Integrity Act 2014 (PPI Act) prescribes that nominations for Prime Minister be of the leader of a political party. Schedule 2 of the PPI Act states:[9]

> After a general election, the parliamentary party leader of the political party in the Coalition of Political Parties with the highest number of seats in Parliament shall be the Leader…to be nominated as Prime Minister when the Governor-General calls for nomination for the election of Prime Minister in accordance with Schedule 2 of the Constitution.

The PPI Act does not expressly state any restrictions on the timing of registration for a political party; whether this is before or after the NGE. The only exception to this is s 22(2) which prohibits the PPC from considering registrations during a defined period, "being from the day the Governor-General appoints a day for the NGE and ending on the day the results of the election are declared."[10]

Regarding the eligibility of political parties entering coalition agreements, the PPI Act states in ss 45(1) and 53(1) that:

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6 Above n 6.

7 Above n 6.

8 Pursuant to Solomon Islands (Civil Procedure) Rules 2007 rule 15.3.

9 Political Party Integrity Act 2014 (Solomon Islands), Sched 2 para 2.

10 Political Party Integrity Act 2014, s 22(2). Emphasis added.

> 45(1) Unless a political party is registered under this Act, it shall not be eligible to participate in an election and is prohibited from selecting, endorsing or nominating any person as its candidate for election to Parliament.
>
> …..
>
> 53(1) A political party may, before or after an election, negotiate and enter into a coalition agreement with other political parties….

These provisions suggest that valid registration of a political party will ensure that coalition agreements may be appropriately entered into, and eventually validate the candidacy of a nominee from a coalition.

However, the Constitution of Solomon Islands also deals with nominations for Prime Minister. The Constitution states in Schedule 2:

> **Candidature**
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> 3. (1) All members shall be eligible for candidature.
>
> (2) No member shall be a candidate unless he is nominated as such by four other members, and no member may nominate more than one candidate.

The only requirement in the Constitution is for a candidate to be a Member of Parliament and to be nominated by four other Members of Parliament. There is no reference to the PPI Act in the Constitution, although the PPI Act states that after a Leader of a political party is chosen, calls for nomination are to be done "in accordance to Schedule 2 of the Constitution".

II ISSUES

The Court considered five issues: this note addresses the three main issues. First, whether OUR Party was properly registered as a political party; and if so, whether OUR Party was entitled to enter into a coalition agreement which would have validated Hon Sogavare's candidacy. Second, whether the PPI Act should be interpreted in accordance with the Constitution. And third, whether the Court had jurisdiction to judicially review the decision of the Governor-General to proceed with the election. These three issues required interpretation, at the very least, of the Constitution and the Political Parties Integrity Act 2014.

A Whether OUR Party was Validly Registered and Eligible to Enter into a Coalition

Honourable Wale questioned the registration of OUR Party on the ground that it was registered during the period the PPC was prohibited from considering the registration of political parties. Consequently, because OUR Party was not registered

properly, it could not have entered into a legitimate coalition agreement, resulting in the invalidity of Hon Sogavare's candidacy as the Leader of the OUR Party coalition.

Hon Wale claimed that the registration of OUR Party was done on 9 April, when it should have been done on 10 April, or presumably any time after that, when the results were officially published in the *Solomon Islands Gazette*.[11] In the claimant's view, the restricted period for PPC to consider registrations began on 5 February, when the Governor-General announced the election date, and ended on 10 April when the Governor-General released the election results.

The claimant argued that the phrase "results of the election are declared" in s 22(2) of the PPI Act refers to the official publication of the results in the *Solomon Islands Gazette*. Since OUR Party was registered on 9 April this breached the PPI Act.[12] However, counsel for Hon Sogavare argued that "declared" meant the announcement of election results from Returning Officers in the constituencies; this happened between 4 April and 7 April. The restricted period was therefore over as soon as the results were announced.[13]

The Court agreed with this reasoning using comparisons to former legislation and taking a literal interpretation of s 22(2) of the PPI Act. The Chief Justice stated that there was a clear distinction between the 'declaration of results by Returning Officers' and 'publication of the results by the Governor-General.'[14] He was therefore satisfied that Hon Sogavare's OUR Party was registered according to the PPI Act.

The sub-issue of whether OUR Party could validly enter into a coalition agreement was based on ss 45(1) and 53(1) of the PPI Act.

The claimant argued, based on s 53(1), that a party could enter into a coalition agreement only if that party had been registered "before" the NGE. Further, based on s 45(1), that unless a party is registered before the NGE, it is prohibited from nominating any person as its candidate for election as Prime Minister.[15]

Counsel for Hon Sogavare and the PPC argued that once registration had occurred there were no more restrictions and a literal interpretation had to be taken of those sections. They argued that a political party can be registered at any time, either before or after a NGE as long as the requirements of a political party under the PPI Act are

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11 *Wale*, above n 1, at [23].

12 At [26].

13 At [27]-[28].

14 At [38].

15 At [43]-[44].

met;[16] there was no restriction on the PPC other than the restricted time limits imposed during election period.

Palmer CJ stated that there was a serious flaw in the claimant's argument in stating that s 53(1) put a requirement that only political parties registered before a NGE could enter into coalition agreements. Interpreting s 53(1) that way, he said, was to add restrictive and limiting words which did not exist.[17] There is no prerequisite expressly stating that parties must be registered before the NGE, and if it had been the intention of Parliament to do so, then it was also Parliament's role to consider amendments to make this clear; not the Court's role to do that by interpretation.[18]

There was therefore no restriction on OUR Party to enter into the coalition agreement even though it was registered after the NGE.

As to the whether Sogavare's nomination was invalid, this was largely dealt with when dealing with the registration of OUR Party, and subsequently whether it could enter into coalition agreements. On the other hand, bearing in mind the Constitution states that "all members are eligible for candidature" nomination, the obvious argument would be that these provisions would trump all requirements under the PPI Act.

B Whether the PPI Act should be interpreted as an Extension to the Constitution

This issue refers to whether the PPI Act provisions for nomination should be interpreted as an extension to the Constitution.

The claimant argued that the Governor-General was obliged to consider the requirements under the PPI Act when proceeding with the prime ministerial election. His submission stated that Sched 2 to the PPI Act should be read as complementing Sched 2 of the Constitution.[19] This meant that the PPI Act was not contradictory to the Constitution but directive and places an obligation on the Governor-General to make sure that any nominee is the leader of the largest political party rather than generally qualifying all members of Parliament to be eligible for nomination.

Solomon Islands' courts have previously upheld the Common Law doctrine of *generalia specialibus non derogant* which states that special rules cannot be made

16 At [45].

17 At [47].

18 At [51]-[52]

19 *Wale*, above n 1, at [84].

to be read as subject to general requirements.[20] An interpretation according to this would have potentially seen the general provision in the Constitution making all members eligible as yielding to the provision in the PPI Act that only a Leader of the political party would be qualified for nomination. No reference was made to this rule in the judgment.

The Chief Justice took a safer view and stated that the processes described in each were distinct. The problem with the provision in the PPI Act, and essentially the argument that it should be interpreted as an extension to the Constitution, is that it was not supplemented by a corresponding amendment(s) to Sched 2 of the Constitution.[21] If such a clause had existed, then it would not have been an issue for the Court. Therefore the argument that the PPI Act should be read as complementing Sched 2 of the Constitution cannot be sustained and the provisions of the Constitution must prevail if any doubt of conflict.[22]

C Whether the Court had Jurisdiction to Review

The third issue refers to whether the Court has jurisdiction to judicially review the Governor-General's action in proceeding with the election meeting without taking into account the nomination issues under the PPI Act and the interim court order. The judgment provides clear recognition of the doctrine of the separation of powers which is alluded to in the Preamble to the Constitution and which provides the basic structure for the Constitution.

The powers of the Governor-General to facilitate an election for the Prime Minister are set out in the Constitution. Section 33 of the Constitution generally provides the powers of the Governor-General in the exercise of these functions. Schedule 2 of the Constitution elaborates on these powers specifically in reference to the election of a Prime Minister. This Schedule outlines the obligations of the Governor-General to oversee the election of a Prime Minister promptly after national general elections[23] and to countermand or suspend the election of the Prime Minister if it cannot be successfully completed.[24]

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20 *Turanga v Solomon Islands National Teachers Association* [1992] SBHC 68.

21 *Wale*, above n 1, at [86].

22 At [87].

23 Constitution of Solomon Islands 1978 (Solomon Islands), Sched 2 para 1.

24 Schedule 2 para 4.

Regarding disputes and the functions of the Governor-General, the Constitution states:[25]

> **Disputes**
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> 10. Any dispute arising out of or in connection with the calling or conduct of any election meeting or the election of the Prime Minister under this Schedule shall be determined by the Governor-General whose determination of the matter in dispute shall be final and conclusive and shall not be questioned in any proceedings whatsoever.
>
> **Functions of Governor-General**
>
> 11. The functions conferred upon the Governor-General by this Schedule shall be exercised by him in his own deliberate judgment.

Paragraphs 10 and 11 indicate the authority of the Governor-General in facilitating elections for a Prime Minister. Further, para 10 provides that the Governor-General's determination shall be final and conclusive whenever disputes arise regarding the election of the Prime Minister.

The claimants argued that the Governor-General erred in law when he decided to proceed with the election meeting and not take into account the requirements of nomination for a Prime Minister under the PPI Act.[26] Claimant counsel submitted that the actions of the Governor-General were not protected by the ouster clause in this instance since there was a breach of what he referred to as "lawful and legitimate administration."[27] Further, he claimed that judicial review principles had evolved from the traditional Common Law boundaries[28] to a point where all powers can be appropriately reviewed.[29] Since the Governor-General had failed to consider the

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25 Schedule 2 paras 10 and 11.

26 *Wale*, above n 1, at [71].

27 At [73] counsel referred to *Ulufa'alu v Attorney-General and Others* [2001] SBHC 178 which endorsed *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 – "The House of Lords had expanded the powers of the Court to intervene not only on errors that traditionally been described as jurisdictional errors, but errors that which may have been committed within jurisdiction that will equally result in the decision of a tribunal being a nullity." Counsel expanded on this, at [77], and referred to *Judicial Review of Administrative Action* by de Smith, Woolf and Jowell, which suggests that the Court has an overarching discretion to review any decision if erroneous in point of law where the decision maker failed to take into account all necessary considerations. It should be noted however that the Court in *Ulufa'alu* did not accept the submission that the Governor-General could be judicially reviewed.

28 See *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410-411 for the traditional Common Law approach to judicial review by Lord Diplock; *Wale*, above n 1, at [76].

29 *Wale*, above n 1, at [77].

requirements under the PPI Act, the Court had power to direct or impose on the Governor-General the obligations set out in PPI Act when conducting his duties to facilitate prime ministerial elections.[30]

Counsel for Hon Sogavare and the PPC denied that there was a requirement placed on the Governor-General to ensure that any candidate nominated for Prime Minister would have to fulfil the requirements of the PPI Act. If such a requirement existed the Governor-General would have had to enquire into the nominee's eligibility through OUR Party and consider the requirements under the PPI Act in the exercise of his role under the Constitution. Further, they claimed that having determined that the party was registered, the Governor-General had done all that was necessary under the Constitution.[31]

Palmer CJ further noted there were two reasons the ouster clause encompassed the nominations for Prime Minister contrary to claimant counsels argument. First, because the dispute raised fell within the powers of the Governor-General to determine. Schedule 2 para 10 covered "any dispute arising out of or in connection with the calling ... of any election meeting".[32] Second, the claimant counsel's submission stated a mere administrative role of the Governor-General when dealing with nominations and that it was therefore excluding it from the bounds of the ouster clause. Palmer CJ stated it was wrong to argue that the Governor-General's role was a mere administration of nominations. The acceptance or non-acceptance of nominations by the Governor-General under Sched 2 para 3(1) of the Constitution automatically placed any dispute resolution under para 10 within the Governor-General's discretion to determine.[33]

Palmer CJ further noted that the claimants were wrong to assume that the decision-maker was the Governor-General, and that in failing to take into account considerations under the PPI Act, he had erred in law. The correct decision-maker in respect of the issue of political parties was the PPC and the Registrar of Political Parties.[34] The Governor-General was therefore not obliged to enquire into any dispute to do with registration of OUR Party or whether this happened before or after the NGE. Further, there was no requirement to check whether this would in any way invalidate the coalition agreement that OUR Party had entered into. Any

30 At [81].

31 At [82].

32 At [102].

33 At [106].

34 At [109].

responsibilities that fell under the PPI Act fell within the ambit of the PPC and the Registrar of Political Parties, not of the Governor-General.[35]

III COMMENTARY

This case highlights three things: first, it affirms the supremacy of the Constitution; second, it shows the adherence of Solomon Islands' courts to the Common Law principles[36] of judicial review;[37] and third, it highlights the inadequacy of the PPI Act in relation to the Constitution.

As noted above, it was the claimant's argument that the Court should extend the boundaries of judicial review to encompass all powers based on what he submitted was "lawful and legitimate administration". Essentially, he was submitting that the Court had the authority to review the constitutional powers of the Governor-General. Such a submission if accepted would have set a precedent that would have extended the powers of judicial review to weaken the powers of the Governor-General under the Constitution. Previous decisions by courts in Solomon Islands confirm the approach taken in *Wale*.

In *Ulufa'alu v Attorney-General and Ors*,[38] the issue of justiciability of the Governor-General's powers to convene a prime ministerial election also arose. The High Court held that the phrase "Any dispute arising out of…" the convening of a prime ministerial election referred to matters specified in the functions of the Governor-General in Sched 2 of the Constitution, including nomination issues.[39] The Governor-General therefore has power to determine any disputes arising out of these functions. The view there was that anything that would render or affect the validity of the election meeting would have been considered beforehand by the Governor-General in deciding whether to continue with the meeting or not. And in any case the Court was not permitted to pursue it because of the ouster clause in Sched 2 para 10.[40]

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35 *Wale*, above n 1, at [110].

36 *O'Reilly v Mackman* [1983] 2 AC 237; *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

37 Constitution of Solomon Islands 1978, s 2.

38 *Ulufa'alu v Attorney-General and Others* CAC [2001] SBHC 178.

39 At 13.

40 *Ulufa'alu*, above n 36, at 14.

In an earlier decision of *Governor-General v Mamaloni*, the Court of Appeal referred to the ouster clause in para 10 as:[41]

> …one which excludes the jurisdiction of the Courts to determine the correctness of the determination, provided always that the tribunal (here the Governor-Genera) has acted within jurisdiction. The expression "within jurisdiction" is a legal phrase meaning no more than that such a law requires the Courts to hold their hands where the tribunal in question has done the very task assigned to it, in this case the Constitution….

The Court in *Mamaloni* then referred to *Anisminic Ltd v Foreign Compensation Commission*[42] and stated that although *Anisminic* provided a possibility to review decisions based on a tribunal not taking into consideration significant factors which should have been considered, the Governor-General's actions did not fall into that category.[43]

The very same approach was taken by the High Court in *Wale*. There was no contention by Palmer CJ that the Governor-General had acted outside his powers in convening the election meeting. The fact that he had prior notice of the nomination issue was taken into consideration but disregarded when he convened the prime ministerial election according to Sched 2. Similar circumstances were present in *Ulufa'alu*, where the applicant had submitted that the Court should declare that the election meeting should not have taken place because the country was going through a period of crisis, and the rule of law was not totally upheld. Parliamentarians were under social pressures to not attend Parliament and therefore the Governor-General's actions in convening the prime ministerial election meeting were called into question. The Court held that "whether a meeting is valid or not, is a matter [in] which his Excellency must have an interest and jurisdiction." This would therefore fall within the ambit of the Governor-Generals powers under Sched 2 and beyond judicial review.

On a separate note, if the Court had preferred to interpret the PPIA Act in conformity with the Constitution, this would have also potentially extended the manner in which courts approach constitutional interpretation. The implications such a precedent would have had for any future conflicts between the Constitution and legislation would be a questioning of the Constitution's supremacy or, as claimed by the claimant, "an extension to the Constitution".

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41 *Governor-General v Mamoloni* [1993] SBCA 1 at 4.

42 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

43 At 6.

As indicated earlier, Solomon Islands' courts have considered Common Law principle of *generalia specialibus non derogant* which refers to interpretation of general provisions and their conformity with specific provisions. However, given that the general provision in this case was a constitutional provision, the Court was reluctant to consider the principle.

The reluctance of the Court centred on the notion that it would have required an interpretation of the PPI Act as an extension to the Constitution in the absence of express provisions in the legislation to do so. Considering the different implications of this for future constitutional interpretation issues, and the fact that Constitution expressly provides for its supremacy in s 2, such an interpretation would have added uncertainty to constitutional interpretation.

What is apparent is the necessity for amendments to either or both the PPI Act and the Constitution regarding the nomination issue. Realistically, the easier route would be amendments to the PPI Act. The redundancy of nomination eligibility for Prime Ministers under Sched 2 para 2 of the PPI Act against the Constitution's nomination criteria is clearly shown by the Chief Justice's determination in *Wale*.

The most reasonable amendment would be to Sched 2 para 2 of the PPI Act to remove the inconsistency. Alternatively, a repeal of the paragraph in its entirety could avoid any other unforeseeable inconsistencies. Since the whole of Sched 2 of the PPI Act is centred on "Minimum Rules for Coalition Agreements", a repeal of Sched 2 para 2 should not have any implications for the purpose of the Act.

Given that the issues for nomination and entering into coalition agreements in this case involved interpretation of the PPI Act, the question of the integrity of the PPI Act in its entirety is raised: Are there other provisions in the Act, which in different circumstances, could come under scrutiny? It has been suggested that the PPI Act was made in haste to halt party-switching and to regulate elections; the result has left contradictions between the Act and the Constitution.[44] If this is the case, a more drastic but beneficial alternative would be to repeal the whole Act and start anew.

IV CONCLUSION

The judgment in *Wale* shows the High Court's approach towards judicial review and a reluctance to extend the boundaries of judicial review. The literal interpretation of the Constitution regarding the Governor-General's functions was predictable at the outset. Although claimant counsel's submissions could be seen as courageous,

44 Jon Fraenkel "The Politics of Riots in the Solomon Islands" (30 April 2019) The Solomon Times <https://www.solomontimes.com/news/the-politics-of-riots-in-the-solomon-islands/9025>.

the Court seemed not to appreciate the claims and proceedings which is evident through its order of indemnity costs.[45]

This case shows the flaws in the PPI Act. Now that the Court has given its view on the issues, there should be a strong incentive to amend the Act to conform with the Constitution and remove uncertainties. Whether this be to repeal the provision in Schedule 2 of the PPI Act which is redundant under the Constitution, or amend the Constitution, is for the Legislature and Government to decide. Hopefully, there will be the political will to amend the provisions and correct the inconsistencies to avoid a repeat of this scenario in the next round of prime ministerial elections.

45 Pursuant to Solomon Islands (Civil Procedure) Rules 2007 rule 24.30.