S.S. MAMALONI -v- ATTORNEY GENERAL 1st Respondent & GOVERNOR GENERAL 2nd Respondent

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 290 & 291 of 1993
Hearing: 10 September 1993
Judgment: 21 September 1993

R. Teutao for Applicant
Attorney General In person
A. Radclyffe for the Second Respondent

PALMER J: This is an application by way of a summons filed on the 27th of August 1993 by counsel for his Excellency the Governor General of Solomon Islands, who is the Respondent in civil case 291 of 1993 and the Second Respondent in civil case 290 of 1993. I will refer to his Excellency herewith, as the Second Respondent in this judgment.

That summons sought inter alia that the applications against the Second Respondent for Certiorari and for relief under section 83 of the Constitution be struck out on the grounds that:

(a) the High Court has no jurisdiction to deal with the applications of Mr Mamaloni pursuant to paragraphs 10 and 11 of Schedule 2 to the Constitution;

(b) Certiorari is not available against the Second Respondent as Governor General of Solomon Islands and representative of the Head of State and further that the Second Respondent was not acting in a judicial or quasi-judicial capacity which is a requirement for certiorari;

(c) Section 83(1) of the Constitution is expressly stated to be read subject to paragraph 10 of Schedule 2 of the Constitution; and

(d) that the Second Respondent is immune from civil suit in his personal capacity.

The background facts to this case need to be mentioned briefly.

On the 18th of June 1993 the 47 elected members of Parliament met to elect a Prime Minister pursuant to section 33(1) of the Constitution. There were only two candidates contesting for the position of Prime Minister, Hon. Solomon Mamaloni and Hon. Francis Billy Hilly. The election meeting was presided over and conducted by the Second Respondent. There was only one ballot cast. The result of that ballot favoured Hon. Francis Billy Hilly by 24 votes as against 23 votes for Hon. Sunaone Solomon Mamaloni. After announcing the results, the Second Respondent declared Hon. Francis Billy Hilly as the duly elected Prime Minister under paragraph 8 of Schedule 2 to the Constitution. Hon. Francis Billy Hilly was sworn in later that day in a ceremony conducted at Lawson Tama.

In his affidavit filed on the 16th of August 1993, Mr Mamaloni stated at paragraph 8, that he first mentioned to the Second Respondent, what in his opinion was a mistake, made by the Second Respondent in declaring Hon. Francis Billy Hilly, duly elected as new Prime Minister. The mistake alleged was that the 24 votes cast in favour of Hon. Francis Billy Hilly did not constitute an absolute majority as required by paragraph 7(1) of Schedule 2 to the Constitution.

On or about the 12th of July 1993, Mr Mamaloni formally wrote to the Second Respondent to register his complaint. This was followed by another letter dated 5th August 1993. On the 6th of August 1993 the Second Respondent responded to the letter of the 12th July 1993 stating basically that he stood by his declaration of the 18th June 1993.

As a result of that letter, Mr Mamaloni turns to this court for relief. The ground on which the relief by way of certiorari and declarations are sought is that the Second Respondent had in essence made an error of law and therefore acted in excess of his jurisdictional powers and therefore is subject to the review jurisdiction of this court.

For the purposes of this application it is assumed that the letters of Mr Mamaloni dated the 12th of July 1993 and 5th of August 1993 were written pursuant to paragraph 10 of Schedule 2 to the Constitution, to register a dispute, arising out of and in connection with, the election of the Prime Minister.

It is also assumed for the purposes of this application that the letter of the 6th of August 1993 of the Second Respondent was a determination in accordance with paragraph 10 of the Constitution.

I now turn to the first submission of learned counsel for the Second Respondent. This ground refers to the application of paragraphs 10 and 11 of Schedule 2 to the Constitution.

Paragraph 10 and 11 of Schedule 2 to the Constitution read as follows:

> *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.*
>
> *11. The functions conferred upon the Governor-General by this Schedule shall be exercised by him in his own deliberate judgment."*

The argument of the Second Respondent in essence is that once a determination has been made under paragraph 10 of Schedule 2 to the Constitution then that is the end of the matter, and the finality and ouster clause is effective to oust the jurisdiction of this court even if there has been an error of law, a mistake or a non-compliance with the Constitution.

This is quite a bold statement but of great significance in that, it raises the important question, as to how such a Constitutional Clause, should be construed bearing in mind that the Constitution is the supreme law of the sovereign democratic state of Solomon Islands.

In contrast to this is the powerful submission of Mr Teutao, that where there has been an error of law, such that the Second Respondent can be regarded as having exceeded his powers or jurisdiction, then not even paragraph 10 of Schedule 2 to the Constitution can oust the review jurisdiction of this court.

Paragraph 10 of Schedule 2 to the Constitution would only be effective to oust the supervisory jurisdiction of this Court if there was no jurisdictional error of law committed by the Second Respondent.

For the purposes of this application it will have to be assumed that a jurisdictional error of law has been committed by the Second Respondent in his determination. This

is the crucial point in Mr Teutao's submission which must be addressed properly by this court.

It has been well-established in other Commonwealth jurisdictions, the United Kingdom, Australia, New Zealand and Papua New Guinea, that the supervisory powers of the Courts are not ousted, where there is an error of law committed by an administrative tribunal or an inferior court that goes to jurisdiction, even where there is a privative clause or a finality and ouster clause. *(See. The Western Australian Law Review Vol. 23 page 123, Wari and others -v- Ramoi and Another, and the text by Philip A. Joseph Constitutional and Administrative Law in New Zealand 1993, 662.)*

The leading United Kingdom case authority on this is, as referred to by Messrs Radclyffe and Teutao in their submissions, the case of *Anisminic Ltd -v- The Foreign Compensation Commission and another [1969] 1 All E.R. 208.*

I do not see any reason why the basic approach in that case should not be adopted and applied in this country. Orders of Certiorari have been readily available where applicable in this jurisdiction. Perhaps the only difference is in the absence of a case authority which has had to deal specifically with the question of privative and preclusive clause and their effects in this jurisdiction.

There are however a number of differences which would need to be highlighted briefly at this point.

First, the prerogative writ applied for is addressed against the Governor General of Solomon Islands, who is the representative of the Head of State; the Head of State being Her Majesty, (see Section 1(2) of the Constitution).

Secondly, the jurisdiction within which the Second Respondent exercised his powers originates from the Constitution of Solomon Islands, which is the supreme law of the country. (section 2(1) of the Constitution).

Thirdly, section 83(1) of the Constitution expressly states that the jurisdiction of the High Court in constitutional questions shall be subject to, inter alia, the provisions of para. 10 of Schedule 2, to the Constitution.

I do not think, that the fact that, the Second Respondent is the representative of the Head of State or regarded for these purpose as the Head of State, would affect the Applicant's, right to bring an action for certiorari. In the U.K. jurisdiction, there have been clear case authorities in which it was emphatically stated that the prerogative origins of the power being exercised, whether it be a Minister or the Governor General

would not exclude judicial review. In Council of Civil Service Unions -v- Minister for the Civil Service [1985] 1 AC 374 Lord Scarman said:

> "The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of review of the exercise of statutory power." (p.407)

In the Australian jurisdiction, the learned author in the Western Australia Law Review Vol. 23, p. 136 made the following comments with reference to the case of Minister for Arts Heritage and the Environment -v- Peko Wallsend Ltd, (1987) 75 ALR 218,

> *"The case is important however for establishing, as a matter of principle, that executive action is not immune from judicial review merely because it is carried out pursuant to a power derived from the prerogative rather than a statutory source."*

Bowen C.J. in Minister for Arts Heritage & the Environment case said:

> *"In my opinion, subject to the exclusion of non-justiciable matter, the courts of this country should now accept responsibility for reviewing the decisions of Ministers or the Governor-General in Council not withstanding the decision is carried out in pursuance of a power derived not from statute but from the common law or the prerogative".*

So the source of the power as a prerogative, is no bar to the reach of the courts if there is an error of law that goes to jurisdiction.

In the jurisdiction of Zimbabwe, in the case referred to by Mr Teutao *Patriotic Front - ZAPU -v- Minister of Justice, Legal and Parliamentary affairs [1986] LRC (Const.) 672, the same approach was taken by the Supreme Court.*

In Zimbabwe, like in Solomon Islands there are some royal prerogatives which are enshrined in their Constitution. Dumbutshena C.J. of the Zimbabwe Supreme Court, recognised that there were certain prerogatives, exercisable by the President and conferred on the President by the constitution, which the courts, all things being equal, cannot enquire into, because in such instances, the President acting on the advice of the Government is the best judge in these circumstances. The main reason would be that those prerogative powers deal with questions of policy, and the government of the day

would be the best judge. Such examples include the appointment, accrediting, receiving and recognising of diplomatic agents and consular offices, and the declaration of war and the making of peace, amongst other functions.

However, there are certain prerogative functions which the courts may not enquire into. One of these was the granting of a pardon to a prisoner. We have a similar clause in our Constitution in section 45. At page 683 this is what the learned Chief Justice says:

> *"However, should these prerogatives be exercised under unlawful conditions or be performed outside the law, the courts, in my judgment, have a duty to find out whether the facts upon which the prerogative was exercised were lawful. It seems to me that judicial review of executive action now depends more and more on the deprivation of the rights of the citizens. It is my view that, in the absence of procedural impropriety, it is unlikely that the courts would enquire into the exercise of the prerogatives set out in section 67 of the Constitution".*

Section 67 of their Constitution deals with the prerogative mercy. This approach is to be contrasted with the approach in New Zealand in the case referred to by Mr Radclyffe, *Burt -v-Governor General (Court of Appeal) 1989, 3 NZLR 64,* which related to the same royal prerogative of pardon or mercy. New Zealand does not have a written Constitution. Its Royal prerogative of mercy instead originate from the letters Patent Constituting the Office of Governor General of New Zealand 1983 (Sr 1983/225) under the sign mannual of Her Majesty on 28 October 1983.

Whilst Greig J. agreed with the general view, that the right to challenge the exercise of a prerogative power is dependent on the subject matter of the power, rather than its source or origins, he took the view that that approach did not, and I quote at p. 73 line 10,

> *".... underline or overrules the overwhelming and longstanding authority against the reviewability to the direct exercise of a prerogative power, such as the exercise of the prerogative of mercy. Indeed, Council of Civil Service Unions held that, because the reason for the exercise of the power was national security, that removed the question from the purview of a Court. That must, in my view, reinforce the view and the principle that those aspects of the Sovereign's powers which are uniquely the Sovereign's own, unexercisable, under the constitution by any other person or under any private law authority, cannot be subject to review."*

It seems that both Dumbutshena C.J. and Greig J. do agree, that there are certain classes of prerogative powers, which cannot be reviewed by the courts, or which the courts

would decline to exercise their review powers as opposed to others. The only difference in respect of the two cases dealt with by both learned judges is that, for the same prerogative power of pardon or mercy under the Zimbabwe Constitution, Dumbutshena C.J. held the view that that came within the class of possible reviewability by the courts, whilst Greig J. held that such a power in the New Zealand jurisdiction was non-reviewable. And in distinguishing **Patriotic Front -v- ZAPUS's case,** Greig J. pointed out that the Presidents powers were derived from and defined by the Constitution.

In the Solomon Islands context, Mr Radclyffe presses the point that the exercise of the powers by the Second Respondent under Schedule 2 to the Constitution is akin to the prerogative powers in Burt's case and falls within that class of prerogative powers which cannot be subject to review.

The election of the Prime Minister is a creature of the Constitution. Section 33 of the Constitution makes this clear. It reads:

> *"There shall be a Prime Minister who shall be elected as such by the members of Parliament from amongst their number in accordance with the provisions of Schedule 2 to this Constitution".*

Paragraph 6(1) of Schedule 2 to the Constitution stated that the election meeting shall be presided over and conducted by the Governor-General. I do not think this has any more significance than if another person, say the Chief Justice or the Secretary to the Public Service is named, other than the Second Respondent. What is important to bear in mind is that whoever is given that task and in this case, it is the Second Respondent, must comply with the provisions in Schedule 2 to the constitution.

With respect, the same distinction used by Greig J. as applied to the Patriotic Front -v- ZAPU's case is applicable here.

The subject matter of the authority or power which the Second Respondent has been empowered with is the kind which is ordinarily exercisable as referred to by Greig J. by any subject. The only difference is that the Second Respondent has been given that power under the Constitution. This is different from the prerogative of mercy to be exercible by the Sovereign alone, under the Constitution, nor by any other person, or under any private law authority. This is the second distinction in this particular case as described in Burt's case at p. 71 para. 35-40.

The third distinction to Burt's case is that in terms of a prerogative of mercy, *"..... the most .....that could be legitimately expected is that a petition would be considered and that advice would be taken on it before it was rejected or accepted."*

In this particular case, there is definitely a legitimate expection on the part of the Applicant at least, that the requirements of Schedule 2 to the Constitution must be complied with by the Second Respondent. Section 33(1) of the Constitution expressly demands that of him.

In a Malaysian case, Mustapha -v- Mohammad and another [1987]; LRC (Conts) 18 the High Court dealt with a similar situation to ours, where the Head of State was required to appoint a Chief Minister in the Legislative Assembly. One of the things held in that case was that the power conferred on the Head of State under Article 6(3) of its Constitution to appoint a Chief Minister was a constitutional power and not a prerogative power. On that premace, the High Court of Malaysia considered it more relevant to consider Indian precedents which were based on a written Constitution , similar to the written Malaysia Constitution, which we also have (ie. a written Constitution) as opposed to the English precedents concerning public law principles on judicial review of executive action (where based on a prerogative or a statutory power).

The Indian case referred to and this is to be found at page 87 of Mustapha's case, is *State of Rajasthan -v- Union of India (1977) SC 1361.* Quoting Beg C.J. at p.1377 para 35 it says:

> *"This court has never abandoned its constitutional function as the final judge of constitutionality of all acts purported to be done under the authority of the Constitution. It has not refused to determine questions either of fact or of law so long as it has found itself possessed of powers to do it and the cause of the justice to be capable of being vindicated by its actions...."*

And also quoting Bhagwati J. at p. 1413 para 143 (to be found in page 88 of Mustapha's case, the learned Judge said:

> *"..... So long as a question arises whether an authority under the constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so."*

With respect, I find these words from the learned judges in India and embraced by the Courts in Malaysia pertinent to this jurisdiction.

The crucial issue in this case, and which makes or breaks this application, is whether an error of law that goes to jurisdiction, (and at this stage as I have stated earlier it is assumed) in the determination of the dispute, under paragraph 10 of Schedule 2 to the

Constitution, cannot be subject to the review powers of this court by virtue of the finality and ouster clause as contained in para. 10.

It is to be noted here that the Anisminic's case has also been held to be authority for the view that a no certiorari clause would be effective to oust the jurisdiction of the court for review where the error of law apparent on the face of the record was one within jurisdiction.

This is where I think the submission of Mr Radclyffe comes in. At page 213 to 214 in Anisminic's case Lord Reid made the following statement:

> *"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question.*
>
> *But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in* ***Armah -v- Government of Ghana (6)*** *that, if a tribunal has jurisdiction to go right, it has jurisdiction to go wrong. So it has if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the enquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.*

The thrust of Mr. Radclyffe's submission is that, when the dispute was referred to the Second Respondent, for determination, by letter of the 12th July 1993, the Second Respondent was given jurisdiction under paragraph 10 of Schedule 2 to the Constitution, to enquire into the subject matter of the dispute.

The Second Respondent did not commit any of the errors listed in Lord Reid's judgment. He dealt with the question remitted to him and did not decide some other question. He did not refuse to take into account something which he was required to take into account, or took into account something, which he had no right to consider.

In other words, the Second Respondent did everything that was proper before giving his determination on the 6th of August 1993. The Second Respondent therefore was entitled to decide the question wrongly as it is to decide it rightly. This is a perfectly valid submission, but with due respects, inappropriate at this stage of the proceedings. The only way that this court can rule on that submission effectively, is, if it actually considers the substantive issues raised by the applicant as to the errors of law alleged. If the court rules that the error of law committed by the Second Respondent is one within jurisdiction, then the finality and ouster clause will be effective to oust the review jurisdiction of this court in accordance with Lord Reid's view. For the purposes of this application however, the court is confined to the assumption, that an error of law going to jurisdiction has been committed on the 6th of August 1993. Will the finality and ouster clause be effective to oust the review jurisdiction of this court in that case. If yes, then this application must be allowed.

In **Mustapha -v- Mohammed and Another [1987] LRC (Const) 18** at page 87 and 88 the High Court of Malaysia was concerned with the question of whether a judgment had been made by the Head of State under Article 6(3) of its Constitution, in the appointment of a Chief Minister. Mr Justice Tan, held that the question of whether a judgment had been made, was open for review by the court, but not where a judgment had been made and the propriety of that judgment was then questioned. The application of this reasoning to this case in my view is very similar.

The question of whether a determination has been made by the Second Respondent under paragraph 10 of Schedule 2 to the Constitution in my view would be reviewable by this court, and the finality and ouster clause cannot exclude that. That is a jurisdictional question and within the supervisory review powers of this court. But where a determination has been made and what is being questioned, is but the propriety of that determination, then the principle in Anisminic's case, of the effectiveness of the finality and ouster clause would apply. That would be a non-jurisdictional error of law and the review powers of this court would be ousted by the finality and ouster clause.

The submission of Mr Teutao if I can put it in another way is this. When the Second Respondent made a determination on the 6th of August 1993 he committed an error of law which went to his jurisdiction (or a jurisdictional error of law) and therefore his

determination was a nullity. In other words there was no determination. In the words of the various Law Lords in Anisminic's case per Lord Reid at page 213 para D,

> *"Unfortunately such a provision (referring to the preclusive clause) protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word 'determination' as including everything which purports to be a determination but which is in fact no determination at all."*

Per Lord Pearce's judgment; "It has been argued that your Lordships should construe "determination" as meaning anything which is on its face a determination of the commission including even a purported determination which has no jurisdiction. It would seem that, on such an argument, the court must accept and could not even enquire whether a purported determination was a forged or inaccurate order which did not represent that which the commission had really decided. Moreover, it would mean that, however far the commission ranged outside their jurisdiction or that which they were required to do or however far they departed from natural justice, their determination could not be questioned. A more reasonable and logical construction is that by "determination" Parliament meant a real determination, not a purported determination."

And per Lord Pearsons judgment at page 250 he says:

> *"I agree with them also (referring to Lord Reid, Lord Pearce and Lord Wiberforce's judgment) that what has been called the 'ouster provision' in S. 4(4) of the Foreign Compensation Act 1950, does not exclude the courts' intervention in a case where there is a merely purported determination given in excess of jurisdiction."*

It is interesting to note that Lord Pearson dissented on the facts. He did not find any error of law that went to jurisdiction such as would render the determination of the Commission a nullity, and so ruled in their favour. The principle however remains intact and is applicable even in these constitutional provisions.

The learned Attorney General in his submissions has provided useful information as to the origins of Schedule 2 to the Constitution and the background in which the provisions were first drawn up under the Electoral Provisions (Chief Minister) Regulations 1974. When these regulations were drawn up there was no political parties in existence at that time and Regulation 12 which corresponds to paragraph 10 was devised to ensure that there was finality in the election proceedings to be exercised by the Governor.

There is however one notable difference in the wordings of Regulation 9 as compared to Paragraph 7 of Schedule 2 to the Constitution. In Regulation 9, instead of the formula of absolute majority, used in paragraph 7(1) of Schedule 2 a numerical figure is used. Before the total number of constituencies were increased to 47 and before the Constitution came into force in 1978, the number required at any ballot even when there were only two candidates after one or more ballots, was 20. The total number of members then was 38. Before this the total number of members was 24 and the majority required then for the Prime Minister to be elected was 13. It was only after the Constitution came into force that the absolute majority formula, and greater number or simple majority formula were used instead of a specific number of members. In one sense, by using actual numbers that must be obtained, the work of the Governor then was much easier it seems for perhaps purposes of finality. I do not think however this assists the application any further.

The learned Attorney General also made reference to section 83(1) of the Constitution. Ground 2(c) of the Summons specifically mentions that section and accordingly I will now address that ground.

Section 83(1) reads:

> *83(1) Subject to the provisions of sections 31(3) and 98(1) of, and paragraph 10 of Schedule 2 to this Constitution, if any person alleges that any provision of this Constitution (other than Chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for a declaration and for relief under this section."*

The key words used in this section are the words 'subject to'. And it is interesting to note that there are three provisions in the Constitution which that section refers to as being subject to, one of which is paragraph 10 of Schedule 2.

One of the other provisions referred to is section 31(3) of the Constitution. That subsection reads:

> *"Where the Governor General is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any matter so acted shall not be called in question in any court of law."*

There is a similar clause in the Constitution of Papua New Guinea, section 86(4), in which the Supreme Court, in the case referred to also by Mr Teutao, **Wari and others -v- Ramoi and another** at pages 155 and 156 made the following pertinent comments:

> *".....no court has jurisdiction to look into questions relating to the advice given to the Head of State..... This does not mean that the contents of the decision by the Head of State on advice cannot be questioned or contested."*

and in **Minister for Lands -v- Frame [1980] PNGLR 433** also cited with approvel by Kidu C.J. in Wari's case Pratt J. said:

> *"To maintain that because the Governor General has caused a regulation to be published in the Gazette following advice, and because the advice received by the Governor General is non-justiciable, means that no consequent regulation can be challenged as ultra vires is a proposition of law so fundamentally misconceived as to warrant no consideration."*

I think those words with due respects are equally applicable in the particular circumstances of this case.

A determination made under paragraph 10 of Schedule 2 to the Constitution is non-justiciable. The question however whether a determination has been made or not is justiciable and even the finality and ouster clause with respect cannot displace the review powers of this court.

The learned Attorney General has also submitted that the words 'subject to' should be read as 'except'.

The words 'subject to' have been dealt with by this court in some detail in the case of **Bjanner PTY Limited and Roberts -v- The Comptroller of Customs & Exercise, civil case 279 of 1992,** judgment delivered on the 29th of September 1992. Several English cases were relied on in that case, one of which was **Smith -v- London Transport Executive [1951] A.C 555.** Lord Simons made the following statement:

> *"The words 'subject to the provisions of this Act'..... are naturally words of restrictions. They assume an authority immediately given and give a warning that elsewhere a limitation upon that authority will be found."*

And at page 577 Lord MacDermott said:

> *"That is an expression commonly used to avoid conflict between one part of an enactment and another, and I have difficulty in reading into it more than it says."*

The words 'subject to' in essence mean that paragraph 10 of Schedule 2 to the Constitution will prevail where there is a conflict with section 83(1) of the Constitution. Where there is no conflict, section 83(1) remains in force.

Assuming that there is a conflict and paragraph 10 of Schedule 2 prevails, does that also mean that the general review powers of this court are also ousted. With due respects, the Common Law principles of judicial review and the common law remedy of certiorari and their application do not conflict with paragraph 10 of Schedule 2 as the learned Attorney General has submitted. Those fundamental review powers will apply in my view where the question to be decided relates to the jurisdictional limits of the Second Respondent.

It cannot be intended in my view by the Parliament of the day that an invalid determination, or a purported determination, which is a nullity, such that in actual fact, no determination at all has been made, by the Second Respondent, would not be reviewable by this court.

There is a strong presumption recognised in various Commonwealth jurisdictions that such a general but fundamental power of the courts, in the absence of clear and express words cannot be ousted even by a finality or ouster clause. This is both logical and reasonable if one looks at the words used in paragraph 10 of Schedule 2 to the Constitution. The relevant words read:

> "*.....whose determination of the matter in dispute shall be final and conclusive and shall not be questioned in any proceedings whatsoever.*" '

The Second Respondent, with respects believes that he has made a determination on the 6th of August 1993. And that is the force of his learned counsel and the learned Attorney General's submission. I do not disagree with that submission. But the question of whether he has made a determination or not is a matter that with respect, the finality and ouster clause do not cover.

I do not think Parliament would want to enact legislation which would not only enable a particular body, authority or person other than the courts to not only make a final determination but also to be endowed with the power or jurisdiction to be able to make a final decision on the question of whether that body, authority or person has the jurisdictional limits or not. That power or jurisdiction seems to have been left with courts of general jurisdiction, recognising with respect that they have the specialised training and skill to determine such questions. This does not mean that Parliament cannot enact such a preclusive clause - it can, but for the time being it seems that

Parliaments of other jurisdictions have been content to allow the courts to continue with that presumption of a general supervisory power and not to interfere.

I now turn to the second part of paragraph 2(b) of the Summons. That can shortly be disposed of. The requirement of a judicial or quasi-judicial capacity with respect can no longer be sustained.

Certiorari will be available against almost all kinds of administrative acts and decisions. The learned authour in H.W.R. Wade Administrative Law 5th Edition at page 551 made these pertinent remarks:

> *"Originally certiorari and prohibition lay to control the functions of inferior courts, ie. judicial junctions. But the notion of what is a 'court' and a 'judicial function' has been greatly stretched, so that these remedies have grown to be comprehensive remedies for the control of all kinds of administrative as well as judicial acts."*

And at page 554, the learned author cited with approval Fletcher Moulton L.J. judgment in **R -v- Woodnouse [1906] K.B,** in which his Lordship stated:

> *"The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To the latter the process of certiorari does not apply, as for instance to the issue of a warrant to enforce a rate, even though the the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law."*

There are ample case authorities already cited which have shown quite plainly that even the Governor General in the performance of his executive functions and certain prerogative powers may come under the review powers of the court.

Paragraph 2(d) of the Summons would not apply in this case as has already been made clear by Mr Teutao. The Second Respondent is not being sued in his personal or private capacity. He is sued in his official capacity by virtue of a constitutional act as required under Schedule 2 to the Constitution.

He did not perform those acts in his private capacity and accordingly he has not been sued in that capacity.

Mr Radclyffe mentioned paragraph 11 of Schedule 2 to the Constitution. With respect that does not assist him at this stage of the proceedings, where the assumption is that there is an error of law that goes to jurisdiction and therefore no determination has

been made. Even if the Second Respondent has exercised his own deliberate judgment but if the court should rule that no determination has been made then the exercise of his own deliberate judgment would not have made any difference.

I am aware that section 138 of the Constitution was not mentioned in argument before me. However that saving provision could in my view be extended to save the general jurisdiction of this court to determine the question whether the Second Respondent has made a determination under paragraph 10 of Schedule 2 to the Constitution or not. Paragraph 10 requires the Second Respondent to make a determination of the dispute. If no determination is made then it would seem that the question of whether the Second Respondent has performed that function as required by paragraph 10 or not is not precluded from the jurisdiction of the Court to deal with under section 138. And the finality and ouster clause it would seem should not be construed to preclude this jurisdiction of the court. Perhaps the way section 138 is worded may have been the reason for not referring to it. However, some assistance I think can be obtained from it, if it should be held that it cannot be extended, despite giving it a fair, wide and liberal interpretation, to cover paragraph 10 of Schedule 2 to the Constitution.

The application is dismissed.

Costs in the cause.

(A.R. Palmer)
JUDGE