

# THE EXERCISE OF DISCRETION IN A CONSTITUTIONAL LAW APPLICATION IN PAPUA NEW GUINEA

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## CASE NOTE

### **BOOCHANI V INDEPENDENT STATE OF PAPUA NEW GUINEA [2017] PGSC 28; SC1633 (7 NOVEMBER 2017)**

The case that is being discussed is significant because of the constitutional implications, public interest and the serious concern of illegal migration in Papua New Guinea (PNG). It is important to understand what the exercise of discretion is in terms of its application. This was applied in this constitutional law application which was based on section 5 of the constitution which gives the PNG court jurisdiction to grant declaratory and injunctive relief with reference to the protection of breaches of Constitutional rights.

## BACKGROUND AND HISTORY

Mr. Behrouz Boochani (the Applicant) was an asylum seeker who was a resident of the Manus Island Regional Processing Centre (MRPC). The Independent State of Papua New Guinea and Hon. Petrus Thomas (Minister for Immigration) (collectively, the Respondent) were successful in having the application for interim relief dismissed.

The MRPC was closed by the Government of Papua New Guinea (GovPNG) on 31 October 2017 (para 1). The application to the PNG Supreme court (the Court) was for the "grant of

declaratory and injunctive relief to protect actual or imminent breaches of Constitutional rights" pursuant to Section 57 of the Constitution (para 1.) The application was "properly before Injia CJ, as it complied with Order 3 Rule 3(b) and rule 15 of the Supreme Court Rules 2012 (para 1). In a previous ruling on 26 April 2016, the Court "found the detention of asylum seekers held at the MRPC was unconstitutional and illegal and ordered the closure of MRPC by the governments of Australia and Papua New Guinea"<sup>1</sup> (para 2).

The Applicant refused to move out of the closed MRPC and relocate to the new facilities that the PNG authorities had established for him (para 2). The application was contested by the Minister for Immigration who was the second respondent (para 3). The Applicant claimed that "the respondents inflicted extreme forms of punishment on" him and other asylum seekers by seeking to order him to vacate MRPC subsequent to its closure (para 4).

"It is settled principle that the application must persuade the Court that there are serious questions to be tried on the substantive claim, the balance of convenience favours the grant of interim relief and damages would not be an adequate remedy. If damages were an adequate remedy then even if the application has serious issues to be tried, the interim relief may be refused" (para 6).

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Interestingly the learned Injia CJ said, "There is evidence of threats, intimidation and harassment of asylum seekers in the lead up to and during the close of the MRPC and those are recurring daily." Further, the court was persuaded that "some of the Constitutional rights under the provisions of the Constitution", may have been breached and the Applicant remedy for the breach of his Constitutional rights lies in damages (para 11).

The exercise of discretion by a Judge is an aspect of judging which is sacrosanct and unique to each Judge. In this case, the Chief Justice determined in the exercise of discretion that he would not be able "to make any definitive and conclusive finding.....on the question of whether the PNG Government takes sole responsibility, legally speaking, to cater for the future welfare of the asylum seekers after the closure of MRPC" (para 8).

## COMMENTARY

This case brought significant local and regional media coverage on a daily basis leading up to the decision of the court. Further, it generated significant public discourse on the rights of asylum seekers in PNG who seemingly had more benefits and assistance by the PNG Government than its own citizens.<sup>2</sup> "Judges dislike making mistakes."<sup>3</sup> "This judicial aversion to making mistakes leads to judicial self-restraint."<sup>4</sup>

The exercise of discretion by the Judge is such that there can be many outcomes which may or may not be consistent with the ordinary thinking but indefatigable in law. "The term judicial discretion is one of the most general expressions in the law."<sup>5</sup> "Judicial discretion is called for in myriad, intertwined circumstances."<sup>6</sup> In this particular case the Applicant sought to have the enforcement of section 57 of the Constitution of PNG.

*"Enforcement of guaranteed rights and freedoms.*

1. A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.
2. For the purposes of this section—
  - a) the Law Officers of Papua New Guinea; and
  - b) any other persons prescribed for the purpose by an Act of the Parliament; and
  - c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question, have an interest in the protection and enforcement of the rights and freedoms referred to in this Division, but this subsection does not limit the persons or classes of persons who have such an interest.
3. A court that has jurisdiction under Subsection (1) may make all such orders and declarations as are necessary or appropriate for the purposes of this section, and may make an order or declaration in relation to a statute at any time after it is made (whether or not it is in force).
4. Any court, tribunal or authority may, on its own initiative or at the request of a person referred to in Subsection (1), adjourn, or otherwise delay a decision in, any proceedings before it in order to allow a question concerning the effect or application of this Division to be determined in accordance with Subsection (1).

5. Relief under this section is not limited to cases of actual or imminent infringement of the guaranteed rights and freedoms, but may, if the court thinks it proper to do so, be given in cases in which there is a reasonable probability of infringement, or in which an action that a person reasonably desires to take is inhibited by the likelihood of, or a reasonable fear of, an infringement.
6. The jurisdiction and powers of the courts under this section are in addition to, and not in derogation of, their jurisdiction and powers under any other provision of this Constitution."<sup>7</sup>

### **WHAT IS EXERCISE OF DISCRETION?**

"Judicial discretion is exercised when a judge is granted a power under either statute ('statutory discretion') or common law that requires the judge to choose between several different, but equally valid, courses of action."<sup>8</sup> This case was an interlocutory application. Injia CJ exercised discretion given by section 57 of the Constitution. The circumstance surrounding the publicity with this case was the media frenzy to attach a responsibility on to Australia for the MRPC.

"The PNG Government is duty-bound to take all necessary steps under its obligations under the *Migration Act* and its obligations under international law to cater for the future welfare and destiny of asylum seekers...The PNG Government, a sovereign nation, in its own right and with its eyes wide open, accepted full responsibility in the first place to accept these asylum seekers to enter PNG and it is duty-bound under domestic and international law to complete the task in settling their future appropriately in accordance with law" (para 9).

"The exercise of discretion remains largely a "black hole"... Unintended consequences of discretion could occur at many points in the process"<sup>9</sup> It is inevitable that there will be discretion civil and criminal actions.<sup>10</sup> Injia CJ

exercised his discretion based on the powers conferred on him through the PNG Constitution. Moreover, in analysis of the case there was a narrow approach with which the decision was arrived in part due to what is referred to in the Judgment itself.

### **DID THIS HAPPEN IN THIS CASE?**

There was exercise of discretion in this case as while Injia CJ found that there were some Constitutional rights it was insufficient to overcome the hurdle of the balance of convenience which favoured the respondent (para 11).

This is important because it provides a useful understanding of why in presenting arguments before the court advocates ought to consider the likelihood of how the exercise of discretion in a constitutional application may be weighed and provide supporting case law to sufficiently convince the court on the merits of their argument.

The outcome of this case for the future is interesting because there will continue to be other asylum seekers bringing actions against the Government of PNG or organs of the state to seek either interim relief or permanent rulings. The Immigration issue is not unique to the South Pacific or Australia and cases like this are persuasive in courts throughout the Commonwealth, particularly in jurisdictions where there are high levels of illegal migration. Most recently in the Bahamas there has been a lot of debate over the status of asylum seekers who usually arrive in the country illegally. While that is an issue in the Caribbean, the point is the vexing problem of illegal immigration is universal and the exercise of discretion in the application of constitutional law consistently shows up in all jurisdictions.

"Contradiction is inherent in the law.... No legal system can survive in any society without an

acceptable degree of judicial discretion”<sup>11</sup> Ronald Dworkin<sup>12</sup> was one of the leading scholars of discretion and his comments are still relevant today. “<sup>13</sup> “There are cases in which the rules of law dictate no result and which therefore force the judge to choose a solution, that is, to exercise judicial discretion.”

“Questions of law are for judges.”<sup>14</sup> “Courts, judges, and legal scholars often use the term discretion in this sense, referring simply to authority to decide, or unconstrained choice.”<sup>15</sup> The Applicant should have expected the Chief Justice to exercise discretion in this application of enforcement pursuant to Section 57 of the Constitution.

“In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion.”<sup>16</sup> Even in the appeal process there is a difference as referred to in a 2010 New Zealand Supreme Court case. “Judicial discretion, particularly in the exercise of jurisdictional powers, is of questionable value and need.”<sup>17</sup> In the writer’s view, such a position while supported in comparative analysis between civil and common law, in this PNG case the exercise of discretion was valuable and it upheld the rule of law while providing an outcome that was pragmatic given the facts. The exercise of discretion was not an arbitrary use of judicial power but was grounded in a clearly enunciated position of what could not be contemplated in para 8.

“Most judges are nowadays committed to the belief that their job occasionally requires them to make new laws, and, in recent years, there has been a growing tendency for British and Commonwealth judges to comment on this aspect of their work, both in public speeches and in their judgments.”<sup>18</sup> This was not what happened in the present case where Inia CJ carefully and meticulously went through the process of the exercise of discretion in a Constitutional Application in PNG.

This type of case is likely to arise in the future given the propensity of people to want to migrate usurping the proper legal channels. Invariably applicants will be looking at ways to assert their rights through Constitutional enforcement which implicitly allows for the exercise of discretion for the Judge. The greater lesson to be learned from this case is that in putting forward an argument which rests solely on the exercise of discretion in a Constitutional application it is important that the submission looks at case law throughout the Commonwealth that may be persuasive and on the balance of probabilities present a reasonable submission which can anticipate a favourable decision. Albeit with court cases nothing is etched in stone until the sound of the gavel is heard.

## CONCLUSION

In providing for judicial decisions which have constitutional significance the exercise of discretion plays a pivotal role. “The more common situation will be where the authorising law confers a discretionary power to do something, and the authorising law is itself not in conflict’ with a superior law, but the power is exercised in a particular case in a way which is alleged to be in conflict with a superior law.”<sup>19</sup> There have been two motivations for the exercise of discretion: “judicial policy preferences and judges’ aversion to reversal on appeal when the law is unsettled.”<sup>20</sup>

“In the modern era, we have grown suspicious of discretion. To a formalist, discretion seems the very antithesis of law.”<sup>21</sup> “Discretionary decisions are those where the judge has an area of autonomy, free from strict legal rules, in which the judge can exercise his or her judgment in relation to the particular circumstances of the case.”<sup>22</sup>

The Independent State of Papua New Guinea is located northeast of Australia and has the second largest population after Australia and followed by New Zealand. Its jurisdiction is such that it is a

recognized leader in the South Pacific with an emerging economic development.<sup>23</sup> "The exercise of discretion is at the heart of the institutional and social function known as judgment."<sup>24</sup> In the PNG experience the robust use of discretion and its use is evidenced as in this case.

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