"Judicial Review in Papua New Guinea"
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Introduction

It would be a conceit to pretend that this paper is a comprehensive treatise on judicial review.

My aim is more modest: to offer, in a summary way, an account of the jurisdictional foundation for judicial review in Papua New Guinea, the limits of judicial review, the principal grounds of review, the remedies available and applicable practice.

As to comprehensive treatises, and for reasons which follow, the definitive English text, *De Smith's Judicial Review*[2] is probably the more pertinent in Papua New Guinea than the no less fine Australian equivalent, *Judicial Review of Administrative Action and Government Liability,* [3] although the latter is useful.

Especially given exchange rate conversions with the kina, the current editions of these texts may well be prohibitively expensive to many in the profession. However, even an edition or two before then, purchased on the second-hand

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1 A judge of the Supreme and National Courts of Justice of Papua New Guinea and, in Australia, a judge of the Federal Court of Australia and President, Defence Force Discipline Appeal Tribunal. The views expressed in this paper are personal, not institutional. Further, because some of the subjects canvassed might arise in a future case in the Supreme Court, the author reserves the right to depart from views expressed in this paper if so persuaded in a given case in court.

2 Ivan Hare KC, Catherine Donnelly SC, Dr Joanna Bell and Lord Robert Carnwath (eds), *De Smith's Judicial Review* (Sweet & Maxwell, United Kingdom, 9th ed, 2023).

3 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co., Australia, 7th ed, 2021).

market via the internet, coupled with some innovative legal research using freely available public legal research resources, can offer a thorough understanding of principle.

As to freely available public legal resources, I recommend:

(a) For English authority, the website of the Incorporated Council of Law Reporting for England and Wales,[4] which gives access to the authorised report, if available, of a case or the unreported version, plus a note as to later consideration of that case. and

(b) For Australian authority: the website of the Australian Legal Information Institute,[5] the Australian equivalent of the Pacific Legal Information Institute.

Judicial review jurisdiction

Papua New Guinea's Constitution distributes the sovereign national power of its People between:

(a) the National Parliament, which is an elective legislature with, subject to the Constitutional Laws, unlimited powers of law-making; and

(b) the National Executive; and

(c) the National Judicial System, consisting of a Supreme Court of Justice and a National Court of Justice, of unlimited jurisdiction, and other courts.[6]

The *Constitution* envisages that, "in principle", these arms of government "shall be kept separate from each other".[7] It also envisages that, within the National Executive, the Prime Minister and other Minsters will be members of parliament.[8] These features of a separation of powers between legislative, executive and judicial arms of government and of a ministry drawn from members of parliament

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4 ICLR website search page: https://www.iclr.co.uk/search/fullSearch?redirect=noredirect (accessed online 1 August 2024).

5 http://www.austlii.edu.au/ (accessed online 1 August 2024).

6 s 99(2), *Constitution*.

7 s 99(3), *Constitution*.

8 s 141(a), *Constitution*.

are also found in the United Kingdom (hence the term "Westminster system of government") and in most other Commonwealth countries.[9]

In relation to the judicial arm, s 155(4) of the *Constitution* provides that both "the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders…". Pursuant to s 155(2)(b) of the *Constitution*, the Supreme Court has an inherent power to review all judicial acts of the National Court. This power of review is truly plenary, derived from the vesting, by s 158 of the *Constitution*, of the judicial power of the people of PNG in the National Judicial System.[10]

Likewise, by s 155(3)(a) of the *Constitution*, the National Court has an inherent power to review any exercise of judicial authority. By virtue of the exclusion found in s 155(3)(c) of the *Constitution*, that inherent power of the National Court necessarily excludes a power to review the judicial acts of the Supreme Court. Subject to that limitation, the inherent power of the National Court to review subordinate judicial acts is, necessarily flowing from the like language of s 155(3)(a) to that employed in s 155(2)(b), likewise plenary.

In combination with s 158, these provisions within s 155 of the *Constitution* are the jurisdictional source of the judicial review jurisdictions of the Supreme Court and of the National Court to review subordinate judicial decisions and administrative decisions.

The reference in s 155(4) to "in the nature of prerogative writs" indicates that it is envisaged that the judicial review jurisdiction so conferred is intended to be no less than that available at common law via writs once issued in England by the Crown in the exercise of prerogative power to call to account government

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9 Detail as to the common understanding of Commonwealth member countries with respect to relations between the three arms of government is found in the Commonwealth (Latimer House) Principles, adopted by Commonwealth Heads of Government in 2003: https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf (accessed online 5 August 2024).

10 *Aihi v The State (No 1)* [1981] PGSC 9; [1981] PNGLR 81; *Balakau v Torato and Openakali* [1983] PGSC 8; [1983] PNGLR 242; *Avei v Maino* [1998] PGSC 53; [2000] PNGLR 157.

officials and, since the reforms made by the *Judicature Acts 1873 and 1875* (UK), issued by the High Court of Justice. The writs are:

(a) *habeas corpus* – this writ requires a custodian of a person held in custody to bring that person before the court to determine whether there is lawful authority to detain the person.

(b) *quo warranto* – this writ requires an office holder to show by what authority they exercise the authority of an office in which a power is conferred.

(c) *mandamus* – this writ requires a subordinate court or an administrative official to perform mandatory duties according to law.

(d) *certiorari* – this writ calls up into the issuing court a decision of a subordinate court or an administrative official made contrary to law and quashes it.

(e) *prohibition* – this writ prohibits a subordinate court or an administrative official from performing an unlawful act.[11]

The reference to "and such other orders" means that remedies in the nature of prerogative writs are not exhaustive of the remedies available on judicial review. The Supreme Court or the National Court might further or alternatively grant declaratory relief or issue an injunction.[12]

Given the breadth of jurisdiction conferred on both the Supreme Court and the National Court by the *Constitution*, it is important not to confine one's thinking about the availability of declaratory relief just to judicial review of decisions by or under statute. *Field v NSW Greyhound Breeders, Owners and Trainers Association Ltd*,[13] a judgment of the New South Wales Supreme Court, offers an example of this from a court the jurisdiction of which, like that of the PNG Supreme Court and the National Court, was materially unlimited. Mr Field was a bookmaker who fielded bets at Harold Park Raceway. A voluntary association,

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11 *Kalinoe v Paul Paraka Lawyers* [2014] PGSC 38; SC1366, at [45].
12 *Kalinoe v Paul Paraka Lawyers* [2014] PGSC 38; SC1366, at [45].
13 [1972] 2 NSWLR 948 (Street J, as his Honour then was).

of which Mr Field was not a member, conducted greyhound races at that raceway. As a sequel to an event at the raceway, the association's stewards, acting under its rules, imposed a life disqualification on Mr Field. Those rules were part of a contract between that association and its members. As a non-member, Mr Field was not a party to that contract. Thus, he did not have a contractual right to enforce the rules. Nonetheless, the Court held that the case was one appropriate for the granting of declaratory relief. Having concluded that Mr Field's disqualification was unlawful and invalid, the court issued a declaration to that effect.

If, and only if, a basis for judicial review is established, the Supreme Court or the National Court may also make an award of damages to the plaintiff if he –

(a) includes in the statement in support [14] of his application for leave to review a claim for damages arising from any matter to which the application relates; and

(b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.[15]

In England and Wales, it has been held that that the judicial review procedure equivalent to that found in Order 16 of the National Court Rules (see below) is not exhaustive of an ability to raise illegality of government action in judicial proceedings, at least by way of a defence.[16]

Other examples of such a permissible "collateral challenge" might be an action against the State for money unlawfully extracted under colour of office (*colore officii*) or paid by mistake, or where a plaintiff challenges the legality of statutory

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14 See Order 16, rule 3, National Court Rules.

15 *Kalinoe v Paul Paraka Lawyers* [2014] PGSC 38; SC1366, at [45].

16 *Wandsworth London Borough Council v Winder* [1985] AC 461, distinguishing *O'Reilly v Mackman* [1983] 2 AC 237 and *Cocks v Thanet District Council* [1983] 2 AC 286. The equivalent English rule is Order 53.

authority relied upon by a defendant representing the State as an answer to an alleged trespass, detinue or conversion by the State.

A cautionary note about what is "the common law"

Although the origins of remedies available on judicial review may be traced to the common law of England, it is necessary to remember that Papua New Guinea's Constitution is truly "autochthonous" - "indigenous, or native to the soil". Part of PNG's Constitution is s 20, which authorised the Parliament to provide for what would be PNG's "Underlying Law" and made provision[17] for the content of that pending such legislative provision. The legislative provision was made via the *Underlying Law Act* 2000. By s 3(1) of that Act, the sources of the underlying law are:

(a) the customary law; and

(b) the common law in force in England immediately before the 16th September, 1975.

Further, subject to exceptions for which that Act provides, the Underlying Law Act gives primacy to customary law over the common law.[18] The exceptions in that Act in relation to customary law, especially consistency with constitutional rights, as well as finding custom applicable to subordinate judicial or administrative actions, mean that in practice custom is not, in my experience, encountered in a judicial review case. Nonetheless, the possibility cannot in law be excluded.

That means that care must be taken not uncritically to apply overseas case law. As to the common law, there was a time when one would not have discerned a difference between English common law and that of Australia. Indeed, for a very long time after Australian Federation, s 80 of the *Judiciary Act 1903* (Cth), much like PNG's original, underlying law provision in the *Constitution*, adopted English common law as a "fallback", insofar as there was no, or no inconsistent,

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17 In Schedule 2 to the *Constitution*.

18 *Underlying Law Act* 2000, s 6.

constitutional or legislative provision applicable in the exercise of Australian Federal jurisdiction. However, in Australia in 1988, s 80 of the Judiciary Act was amended by omitting "common law of England" and substituting "common law in Australia".[19]

That is one reason why care needs to be taken when reading Australian cases, especially those decided after appeals to the Judicial Committee were finally completely abolished in 1986,[20] to appreciate that the statement of administrative law principle may not represent English common law, but rather an Australian idiosyncrasy. That is not to say Australian case law should not be consulted, only to sound a cautionary note.

Another reason is that, unlike Papua New Guinea, Australia has no comprehensive, constitutionally entrenched charter of fundamental rights and freedoms against the background of which administrative law cases are decided. In contrast, modern English administrative law cases are decided against the background of a comprehensive, charter of fundamental rights and freedoms found in the *Human Rights Act 1988* (UK) and, before "Brexit", related jurisprudence from The European Court of Human Rights at Strasbourg. That may mean that English judicial review cases since the enactment of that legislation offer a better guide in PNG to the development of the common law than do those decided in Australia.

As to that development, it is always necessary in administrative law cases to bear in mind the exhortation, found in s 60 of the *Constitution*, that "particular attention shall be given to the development of a system of principles of natural justice and of administrative law specifically designed for Papua New Guinea, taking special account of the National Goals and Directive Principles and of the Basic Social Obligations, and also of typically Papua New Guinean procedures and forms of organization".

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19 *Law and Justice Legislation Amendment Act 1988* (Cth), s 41(1).

20 *Australia Act 1986* (Cth), s 11.

The best modern authorities in relation to the review of administrative decisions

Such is the volume of case law in modern times in the field of administrative law it is easy to become overwhelmed. Cases which chart out the course of authority and summarise resultant principle are therefore especially helpful. Of course, the following choice is subjective, but I recommend reading the following:

(a) From the United Kingdom: *Council of Civil Service Unions v Minister for the Civil Service*.[21]

(b) From Australia: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.[22]

(c) From Papua New Guinea: *Avei v Maino*.[23]

Taken as a whole, these cases offer a comprehensive guide to the nature of judicial review, standing, which decisions are reviewable and on what grounds.

The nature of judicial review

Judicial review is concerned with the legality, not the evaluative merits, of a decision. The difference is summed up in two passages from *Avei v Maino*:

- [Judicial review is concerned with whether] "a court or authority acts outside the jurisdiction given it by law, that is where it makes determinations it is not authorized to make. It can intervene where there is error of law on the face of the record, procedural irregularity or when it is plain that the decision reached is such as to be unsustainable in law or reason."
- "But it is not part of this jurisdiction for the Court to substitute its own findings or opinions for that of the authority that Parliament has appointed to determine the matters in question."

A misunderstanding of this difference is all too common.

Standing

Only a person aggrieved by a decision has standing or, as it is alternatively termed, *locus standi*, to institute a judicial review proceeding.

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21 [1985] AC 374.
22 [1986] HCA 40; (1986) 162 CLR 24.
23 [1998] PGSC 53; [2000] PNGLR 157.

In *Council of Civil Service Unions v Minister for the Civil Service*,[24] Lord Diplock (with whom some of the other members of the House agreed) summarised the test for standing in this way:

> *To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:*
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> *(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or*
>
> (b) *by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a "legitimate expectation" rather than a "reasonable expectation," in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences.*

No different understanding as to standing is evident in Papua New Guinea. In *Mondiai v Wawoi Guavi Timber Co. Ltd*,[25] the Supreme Court summarised

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24 [1985] AC 374, at 408-409.
25 [2007] PGSC 6; SC886.

considerations relevant to determining whether a plaintiff had a sufficient interest[26] to institute a judicial review proceeding in the National Court:

(a) Is the party complained about a public body?

(b) Does that party have duties to perform at law; ie statutory duties?

(c) What is the nature of the alleged breach of duty; are they duties in law or do they fall within management or administrative guidelines for decisions to be taken within a lawful discretion?

(d) What is the Plaintiff's relationship to the duties alleged to have been breached:

  (i) are they merely busy bodies or

  (ii) are they genuinely concerned

  (iii) do they objectively point to some duty in law which (arguably at the leave stage) has not been observed?

Which decisions are reviewable on judicial review?

Not every decision which aggrieves a person in the way described by Lord Diplock is open to judicial review. A good rule of thumb is first to ask oneself whether the source of the decision is private or public in character?[27] By private, I mean is the source a private contract or arbitration award? If the decision is private in this way, it is most unlikely that it can be challenged on judicial review. An exception might be where the decision has a "blended" quality. By that, I mean that if the source of the power to contract or arbitrate is statutory then, depending on the terms of the statute, whether the question as to whether the contract itself or the arbitration itself was authorised may be amenable to challenge on judicial review. Even then, if the statutory power to contract is just of a general nature, as opposed, for example, to a contract requiring the consent of a Minister or other public official, the odds are that a decision to enter into the

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26 For the purposes of Order 16 r3(5), National Court Rules.

27 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 409.

contract or one made under it is not judicially reviewable via an order in the nature of a prerogative writ.

However, an exception permitting judicial review may arise where the entity concerned, although not owing its existence to statute but only to a private contract, performs a public duty. Thus, in *The Queen v Panel on Takeovers and Mergers; ex parte Datafin plc*,[28] judicial review was permitted by the Court of Appeal of a decision of a non-governmental private body, the Takeovers and Mergers Panel, which was an unincorporated association. The Panel enforced a code which, although recognised by legislation, was nonetheless just the subject of a contract between individual and institutional members. Unlike Australia, where the focus of Federal judicial review is on decisions of "officers of the Commonwealth"[29] or on a "decision under an enactment",[30] in Papua New Guinea, the plenary jurisdiction of the Supreme Court and the National Court is more akin to that of the superior courts of England and Wales or to that of the State and Territory Supreme Courts in Australia in State jurisdictional matters.

In contrast, if the source of the power to make the decision is found in the *Constitution*, an Organic Law, an Act or subordinate legislation or a statutory instrument, the decision will be reviewable, subject to any constitutional stipulation to the contrary that it is not justiciable.[31]

In relation to *legislative*, as opposed to subordinate judicial or administrative, decisions, although the source of the power of the Parliament to legislate is found in the *Constitution*,[32] the legislative power so conferred is plenary – to "make laws, having effect within and outside the country, for the peace, order and good

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28 [1987] QB 815.

29 *Australian Constitution*, s 75(v).

30 As defined in, and for the purposes of statutory judicial review under, the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

31 For example, s 143(3) of the *Constitution* provides that, "The question whether the occasion for the appointment of an Acting Prime Minister or for the exercise or performance of a power, function, duty or responsibility by an Acting Prime Minister, under this section has arisen or has ceased, is non-justiciable." Another example offered by the *Constitution* is whether the procedures prescribed for the Parliament or its committees have been complied with: see s 134.

32 s 109, *Constitution*.

government of Papua New Guinea and the welfare of the People" – subject only to such limitation as found within the *Constitution* itself. That means that any challenge on judicial review to the validity of legislation must identify the constitutional limitation concerned. For example, a provision in an Act which provided for compulsory deprivation of property or an interest in property contrary to s 53 of the *Constitution* would not be valid.

Grounds of review

A succinct summary of the available grounds of judicial review was offered by the Supreme Court in *Kalinoe v Paul Paraka Lawyers*,[33] in which it was stated that it was available if a decision-making authority:

(a) Lacked power to make the decision;
(b) Exceeded or abused its power;
(c) Committed an error of law;
(d) Breached the principles of natural justice;
(e) Arrived at a decision which no reasonable tribunal would have reached;
(f) Took into account irrelevant considerations in its decision making process.
(g) Failed to take into account relevant considerations in its decision making process.

In *Council of Civil Service Unions v Minister for the Civil Service*,[34] Lord Diplock synthesised such grounds into three broad bases upon which a decision might be challenged on judicial review:

(a) illegality;
(b) irrationality; and
(c) procedural impropriety.

Later, in *Boddington v. British Transport Police*,[35] in referring to this categorisation, the then Lord Chancellor, Lord Irvine of Lairg, observed, "these

[33] [2014] PGSC 38; SC1366, at [44].
[34] [1985] AC 374, at 410-1.
[35] [1999] 2 AC 143.

are not water tight compartments because the various grounds for judicial review run together".[36] A like view as to the scope for overlap of grounds of review is evident in views expressed by Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.[37]

Even so, Lord Diplock's taxonomy, and his Lordship's related explanations, offer a good general guide to the bases of judicial review.

Adopting Lord Diplock's taxonomy and explanations, and adding some additional commentary:

(a) *illegality* – "[T]he decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."[38]

Under this heading and flowing from a failure correctly to understand the requirements of the provision concerning decision-making authority would fall the failure to take into account a relevant consideration and the taking into account of an irrelevant consideration.

A *failure to take into account a relevant consideration* will be found where a decision-maker has not taken into account a consideration which he is, expressly or by necessary implication by the provision concerned, *bound* to take into account; and conversely the *taking into account of an irrelevant consideration* will be found when a decision-maker takes into account a consideration that he is, expressly or by necessary implication, *bound not* to take into account.[39]

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36 [1999] 2 AC 143, at 152.

37 (1986) 162 CLR 24, at 41 – in relation to an overlap between a failure to take a relevant into account or the taking of an irrelevant consideration into account and unreasonableness.

38 [1985] AC 374, at 410.

39 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 39-40.

A consideration is not "relevant" merely because a person makes reference to it in a response or submission to an administrative decision-maker. If, however, the provision conferring the power to make a decision obliges the decision-maker, before making a decision, to consider a response or submission by a person, a failure so to do will constitute either or each of a failure to comply with the terms of the provision or a denial of procedural fairness. On either basis, the decision will be invalid.[40]

(b) *irrationality* – [This is] "what can by now be succinctly referred to as 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."[41]

Given the constitutional separation of powers, Lord Diplock's "irrationality" basis for review (embracing as it does what has been termed "Wednesbury unreasonableness") is, in my view, the most fraught for judges. To repeat the cautionary note sounded by the Supreme Court in *Avei v Maino*, it is not

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40 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088.

41 [1985] AC 374, at 410-411.

for a court to substitute its own opinion for the decision-maker chosen by Parliament by legislation. Yet a decision-maker who has acted in a way in which no reasonable person could is hardly acting fairly.

It is in respect of "unreasonableness" as a ground of judicial review that, in my view, there exists the greatest scope for divergence between Papua New Guinean and Australian authority.

In *Council of Civil Service Unions v Minister for the Civil Service*,[42] Lord Diplock allowed for "the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community".

More recently, in the United Kingdom Supreme Court, in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs*,[43] a sharp difference of views is evident in relation to whether there should be any departure from a rationality or "*Wednesbury*" based understanding of unreasonableness as a ground of review and a proportionality based approach to the content of that ground of review. On the one hand, Lord Neuberger of Abbotsbury PSC, Lord Mance and Lord Hughes JJSC, while not rejecting outright a proportionality-based approach, did not consider it appropriate for a five member Supreme Court to determine whether that approach should be adopted. That was because a proportionality-based approach had profound implications in constitutional terms and was very wide in applicable scope, because it would involve the court considering the merits of the decision at issue. On the other hand, Lord Kerr JSC[44] and Baroness Hale of Richmond DPSC,[45] referring to *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)*, [46]

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42 [1985] AC 374, at 410.
43 [2016] AC 1355.
44 [2016] AC 1355, at [283].
45 [2016] AC 1355, at [304].
46 [2015] 1 WLR 1591.

were at least prepared to countenance a proportionality analysis to an interference with, or limitation of, a fundamental right but considered it another thing to apply it to an ordinary administrative decision such as whether or not to hold some sort of inquiry.

In Australia, it can confidently be stated that a proportionality-based approach to judicial review on the basis of unreasonableness has been rejected in modern times.[47]

Although Lord Diplock's formulation of unreasonableness was expressly adopted and approved by the Supreme Court in *Kariko v Korua*,[48] the court found it unnecessary to refer to his *obiter dictum* in relation to proportionality. Whether the unreasonableness ground of review extends to proportionality-based assessment remains an open question in Papua New Guinea. However, arising from the entrenchment in PNG's Constitution of many individual rights and freedoms, there may perhaps be scope for argument that a proportionality-based approach should at least inform the content of the unreasonableness ground of review in cases touching on such rights. Yet, given the separation of powers in PNG's Constitution, the same "profound implications" concerning the role of the judiciary as referred to by Lord Neuberger of Abbotsbury PSC, Lord Mance and Lord Hughes JJSC in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* are also present in this jurisdiction. The legitimacy of judicial review depends on a court undertaking its proper role, nothing less but also nothing more. For the present, the metes and bounds of the unreasonableness ground in Papua New Guinea is, in my view, an open question.

(c) *procedural impropriety* – "I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or

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47 The Australian position is summarised by Gageler J in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541, at [51] and following under the heading, "The nature of a legally unreasonable decision".

48 [2020] PGSC 29; SC1939, at [41].

failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."[49]

In Papua New Guinea, this obligation is not left to implication in relation to the exercise of administrative or judicial power but is instead created expressly by s 59 of the *Constitution*. [50] Reflecting terminology current in the common law in 1975, the term "natural justice" is used in s 59. However, the reference in s 59(2) to, "The minimum requirement of natural justice is the duty to act fairly and, in principle, to be seen to act fairly" makes it clear, I suggest, that this obligation is one and the same as Lord Diplock's understanding of "procedural impropriety". Section 59 makes clear that the existence and extent of the obligation is subject to such qualifications as are found in the *Constitution* or the legislation concerned.

A duty to afford natural justice or to act fairly is generally regarded as having two limbs:

(a) absence of bias or the appearance of bias in a decision-maker; and

(b) the affording of an opportunity to be heard, which is to say that a person who may be affected by the decision (in the sense that it directly relates to personal liberty, status, preservation of livelihood and reputation or proprietary rights and interests) knows the essential details of the case

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49 [1985] AC 374, at 411.

50 Section 59 provides:

59. PRINCIPLES OF NATURAL JUSTICE.

(1) Subject to this *Constitution* and to any statute, the principles of natural justice are the rules of the underlying law known by that name developed for control of judicial and administrative proceedings

(2) The minimum requirement of natural justice is the duty to act fairly and, in principle, to be seen to act fairly.

put against him or her and, before the decision is made, has a reasonable opportunity to respond to that case.[51]

"*Jurisdictional Facts*"

Sometimes legislation will condition the power of an administrative decision-maker to make a decision on the existence of a particular fact. Such a fact is commonly termed a "jurisdictional fact". Where such a condition is imposed, a court can determine whether the fact exists. If that fact does not exist, then there will be no "jurisdiction" to make the decision.

Sometimes, however, with a view to removing the ability of a court to find for itself whether the fact exists, parliament conditions the power to make the decision on an administrator's "satisfaction" that the fact exists. Put another way, the "jurisdictional fact" becomes a state of administrative satisfaction. Although that removes the ability of a court to decide, on the merits, whether the fact exists, it does not render the administrative decision unreviewable. It may be reviewed on the basis that the satisfaction reached was unsupported by any material upon which such satisfaction could be based, was unreasonable, that relevant considerations were not taken into account or that irrelevant considerations were taken into account.[52]

Practice – commencing proceedings in the National Court

In the National Court, for all types of relief in the nature of prerogative writs, save for an application for a writ of *habeus corpus*, the practice is set out in Order 16 of the National Court Rules.

For *habeus corpus* applications, the practice is as set out in Order 17.

Where the remedy sought is not in the nature of a prerogative writ but rather a declaration or an injunction in relation to an administrative decision, a plaintiff

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51 *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550, at 582-585.

52 The difference between these types of jurisdictional facts and the basis for the judicial review of a "satisfaction" based decision was discussed in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259, at 274-276; see also in the High Court of Australia, *Australian Heritage Commission v Mount Isa Mines Ltd* [1997] HCA 10; (1997) 187 CLR 297.

may choose to commence the proceeding in accordance with the practice found in Order 16.

In *Kalinoe v Paul Paraka Lawyers*,[53] the Supreme Court summarised "the whole process" in relation to applications for judicial review under Order 16 in this way:

(1) An Originating Summons is filed seeking only one relief, namely leave for judicial review together with a Statement as described by O.16, r. 3(2)(a) and an affidavit verifying the facts relied by the applicant.

(2) Copies of the documents under (1) above should then be served on Secretary for Justice, not less than 2 days before the date set for its hearing (O.16, r.3).

(3) If leave for judicial review is granted, a notice of motion seeking judicial review must then be filed and served in accordance with the provisions of O. 16, r.5 (2) and proceed to a hearing in accordance with and in due compliance of the provisions of r.5 (3) - (5).

(5) If any urgent or interim relief is also sought this should be included in the notice of motion and may be argued earlier if need be or otherwise in accordance with motions rules prior to a hearing and determination of the substantive review.

(6) After attending to any pressing urgent or interim matter, the substantive review application should proceed to a hearing without delay, a date for which, should be fixed within 21 days from the grant of leave.

[Sic – the absence of an item 4 in this list is an apparent typographic and proofing error]

Deliberately, PNG did not set out to "reinvent the wheel" when prescribing the practice with respect to judicial review applications. Inspiration for Order 16 was

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53 [2014] PGSC 38; SC1366, at [26]. The Court cited with express approval the practice described in *Peter Makeng v Timbers (PNG) Limited* [2008] PGNC 78; (2008) N3317 (Injia DCJ, as his Honour then was). The description of the practice requirements remains authoritative: *National Executive Council & The Attorney General v Toropo* [2023] PGSC 106; SC2451, at [10].

found in the former Order 53 of the Rules of the High Court of Justice for England and Wales.

That means that, in addition to local authorities concerning practice and procedure, assistance by analogy may be obtained by reference to the annotations to Order 53 in the 1999 Edition of the *Supreme Court Practice for England and Wales* (the White Book). The 1999 Edition was the final published edition of the White Book covering the Supreme Court and County Court Rules as they stood before the *Civil Procedure Rules* (CPR) came into effect as a result of the "Woolf" Reforms. This edition was reprinted by the publisher, Sweet & Maxwell, in 2020. Once again, while a new copy is expensive, any second hand copy available via the internet would suffice. Further, as the pre-Woolf Reform court rules in England and Wales were otherwise very similar to those of the National Court, annotations in that work concerning other rules are also useful by analogy in PNG.

For like reasons, pre-1999 editions of the English publication *Atkin's Court Forms* which contains precedents in respect of initiating documents and supporting affidavits, based on those actually used in court cases, together with a succinct commentary in relation to applicable law and practice, can also be a source of inspiration by analogy. In *Atkins*, consult the title "Crown Practice" in relation both to *habeus corpus* and judicial review precedents and commentary.

Each of these English works must always be read with a careful eye to the local rules and case law.

Notice to the State

Although, apart from the requirement in Order 16, rule 3 to give notice to the Secretary for Justice not later than two days before the application is made, and lodge with the Secretary copies of the statement in support and every supporting

affidavit, there is no need separately to give notice to the State[54] under s 5 of the *Claims By and Against the State Act 1996*,[55] s 8 of that Act provides, "Notwithstanding anything in any other law, a court hearing an application for leave to apply for judicial review in a matter in which the State is a defendant shall not grant leave unless the State has been afforded an opportunity to be heard."

Judicial review remedies are discretionary.

Remedies in the nature of prerogative writs or the granting of a declaration or injunction are discretionary remedies.

One basis upon which such a remedy may, not must, be refused is where an adequate alternative remedy exists otherwise to challenge the decision. If, for example, it is possible to seek the review on the merits of the decision concerned by an official or tribunal, the peremptory institution of a judicial review proceeding before the exhaustion of such an alternative may be an abuse of process.[56] This is not an inflexible rule. For example, if the difference between the parties arises from a settled view of government as to the meaning of a statute, the most just way of resolving the grievance of a person affected by a decision made in conformity with that settled view may be to grant leave to review, rather than awaiting the decision of another official or tribunal which is obliged to adhere to the government's view of the meaning of the statute.

Where no utility can be shown in respect of the granting of a judicial review remedy, it may also be refused on discretionary grounds.

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54 As to whether an entity is part of the State, see *PNG Power Ltd v. Augerea* [2013] PGSC 53; SC1245. If an administrative decision is not a decision of "the State" as described in that case it is unlikely that it will be amenable to judicial review.

55 *Kalinoe v Paul Paraka Lawyers* [2014] PGSC 38; SC1366, at [49] to [56]. There had been a minority view in earlier authority that such notice was needed but it was accepted in this case that no section 5 notice was necessary.

56 *Kekedo v Burns Philp (PNG) Ltd* [1988] PGSC 19; [1988-89] PNGLR 122.

Appeals in judicial review cases.[57]

The practice in relation to appeals from orders made by the National Court under that court's judicial review jurisdiction (under O 16 of the *National Court Rules*) is separate and distinct from the practice in relation to an appeal or application for leave to appeal under s 14 of the *Supreme Court Act* from a judgement of the National Court in its general civil jurisdiction. Such an appeal is instituted by a notice of motion under O 10 of the Supreme Court Rules (SCR) and is authorized by O 16 r 11 of the National Court Rules, not by a notice of appeal under O. 7 of the SCR.

The Supreme Court has emphasised this difference in a number of cases.[58] In these cases, the Supreme Court emphasised that the requirements of O 10 SCR in relation to initiation by notice of motion are mandatory such that a non-compliance would render an appeal incompetent.

A noteworthy feature of these cases is that the appellant did not seek to have the effect of non-compliance ameliorated by a special direction under s 42 of the Supreme Court Act.

Order 10, r 3(b) of the SCR requires that the notice of motion:

(a) show where appropriate the particulars set out in a notice of appeal under Order 7 Rule 8; and

(b) have annexed—

  (i) copies of all document which were before the Judge of the National Court appealed from; and

  (ii) a copy of the order made, certified by the Judge's Associate or the Registrar; and

(c) be in accordance with form 15; and

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57 I reproduce under this heading an extract from a paper on appellate practice which I prepared for a session I present at the Legal Training Institute as part of the Queensland Bar's annual Commercial Litigation Workshop.

58 *Felix Bakani v. Rodney Daipo SC659*; *State v David S Nelson* (2004) SC766; *Dr Arnold Kukari v. Honourable Don Pomb Polye* [2008] PGSC 4; SC907; *National Capital Ltd v Bakani* [2014] PGSC 34; SC1392 and *Lukom Trading Ltd v Yuku* [2023] PGSC 4; SC2350.

(d) be signed by the appellant or his lawyer; and

(e) be filed in the registry.

The annexure of the documents that were before the National Court takes the place of an appeal book. If, at the directions hearing before the Supreme Court following the filing of the notice of motion, it is shown that additional documents such as transcript of proceedings, an affidavit or a court order are needed, these may be ordered to be filed separately as additional documents (whether it be through affidavits or otherwise) and are then treated as part of the appeal documents that would be before the Supreme Court for hearing.[59]

Deciding whether to institute a judicial review proceeding.

Advising a client whether to institute a judicial review proceeding requires a lawyer dispassionately to assess, by reference to the applicable source of power to make a decision, whether the person who made that decision possessed such power and, if so, whether they complied with the conditions both as to what could or could not be considered and otherwise complied both with any procedure ordained by statute or with the requirements of natural justice.

A legal practitioner must therefore consult the applicable statute, the terms of the decision and the reasons for it. Those reasons must be read fairly, not narrowly and with an eye for error.[60] He or she must impress on the client the difference between judicial review and a review on the merits. That can be no easy thing for some lawyers to understand, let alone a client without the benefit of an education in law.

The legal practitioner must also determine whether the client is given some remedy alternative to judicial review and, if so, whether that remedy is adequate in the circumstance of the case.

Sometimes, even if a decision is flawed by jurisdictional error, it may be obvious that, if this error is addressed after a successful judicial review challenge, the

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[59] *Lukom Trading Ltd v Yuku* [2023] PGSC 4; SC2350.

[60] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

supporting materials which might permissibly be considered by a fresh decision-maker are highly likely to lead to an adverse outcome on the merits for the client. If so, there may be little point in instituting a judicial review proceeding. The client might just achieve a tactical victory but nonetheless suffer, ultimately, a strategic loss.

Finally, the lawyer must impress on the client that, in certain circumstances (see below), a particular respondent might be able to "move the goalposts".

"Movement of the goalposts"

It is necessary to sound another cautionary note.

As mentioned, above, subject to the *Constitution*, Papua New Guinea's parliament has unlimited legislative authority. Thus, subject always to this limitation and to the concurrence of a majority of the parliament to the legislation, if a judicial review proceeding exposes a result in law inconvenient to the government, remedial legislation might be enacted to reverse the result, perhaps with retrospective effect but in any event to close that result off for the future. I saw this happen to clients or, when acting for government, recommended this, several times when in practice. And I have seen its since as a judge in relation to judicial decisions inconvenient to government.

Cases exposing a large ongoing threat to consolidated revenue offer one example where remedial legislation is a likely response. But anything entailing subjects of high public policy can generate such a response.

This is not a reason not to institute a judicial review proceeding. Securing a favourable outcome might, for example, form part of a wider strategy by a client dealing with government. It is, however, a reason always to remind a client when advising about possible judicial review proceedings about why litigating against government is different to private litigation.

Conclusion

Judicial review is how, in the *Constitution*, PNG's Founding Fathers envisaged its People could ensure that they were governed according to law. It is thus

important for the rule of law in Papua New Guinea that its legal profession understand the related applicable law and practice.