Vanuatu

Sope et al. v. Attorney-General and Speaker

Supreme Court
Ward C.J.
2 August 1988

Constitutional law—standing to seek judicial review—whether Member of Parliament has standing to seek review under Constitution—whether M.P., indirectly affected by Speaker's ruling expelling other M.P.s, may seek review—Constitution, art. 51.
Constitutional law—Constitution, art. 19—requirement of quorum in Parliament—requirement of "simple majority" by art. 19(4)—whether twenty-three members present of total membership of forty-six equals a quorum.
Constitutional law—proceedings of Parliament—lack of quorum—whether lack of quorum can be retrospectively proven in courtroom—whether challenge of inquorate Parliament is necessary prerequisite to finding of lack of quorum.

The Members of Parliament (Vacation of Seats) Act 1983 requires that Members of Parliament continuously retain party membership. Five of the petitioners (Barak Sope, William Edgell, Charles Godden, Jimmy Simon, and Anatole Lingtamat) had allegedly been deemed to have resigned from the Vanuaaku Pati for bringing a no-confidence resolution. The sixth petitioner, Maxime Carlot, had remained a member of the Opposition Party.

A session of Parliament had been called for 21 July 1988, presumably for the purpose of expelling the five petitioners named above. The Constitution provides that the quorum for such a session shall be two-thirds of the members. It was common grounds that such two-thirds were not present on that day.

The Constitution further provides that after such an inquorate sitting, a session three days later shall be quorate with a simple majority: Constitution, article 19(4). When Parliament sat again, on 25 July 1988, twenty-three of the forty-six elected members were present. The Speaker made declarations pursuant to the Members of Parliament (Vacation of Seats) Act 1983, and the first five petitioners were expelled from Parliament.

The petitioners sought declarations that the meetings on 21 and 25 July were both inquorate, and that the declarations made by the Speaker were in breach of the Constitution and invalid.

HELD:

(1) The sixth petitioner, Maxime Carlot, M.P., although not personally effected directly by the Speaker's declaration regarding the first five petitioners, had standing to apply to the Court for review.

(2) A simple majority, as prescribed in article 19(4) of the Constitution, would be twenty-four, not twenty-three, in a Parliament of forty-six elected members.

(3) There was, therefore, no quorum of Parliament on 25 July 1988.

(4) A retrospective head-count by a court, however, is not sufficient to establish invalidity of parliamentary business when Standing Orders provide for challenges and notice to the Speaker in such situations.

(5) The Constitution places the responsibility of regulating its own procedure on Parliament, and where there is no unconstitutionality, the Court will assume sittings of Parliament were proper.

Case referred to in judgment:

In re Hartley Baird [1954] 3 All E.R. 695

Legislation referred to in judgment:

Constitution of Fiji [1970], article 58
Constitution of Kiribati, article 74
Constitution of Solomon Islands, article 67
Constitution of Tuvalu, article 66
Constitution of Vanuatu, articles 19 and 51
Constitution of Western Samoa, article 57
Members of Parliament (Vacation of Seats) Act 1983 (No. 33)
Standing Orders, No. 38

Other sources referred to in judgment:

May's Parliamentary Practice, 18th. edn.

Editorial Observation:

Article 19 of the Constitution 1979, entitled "Procedure of Parliament", provides:

19. (1) Parliament shall meet twice a year in ordinary session.

(2) Parliament may meet in extraordinary session at the request of the majority of its members, the Speaker, or the Prime Minister.

(3) Unless otherwise provided in the Constitution, Parliament shall make its decisions by public vote by a simple majority of the members voting.

(4) Unless otherwise provided in the Constitution, the quorum shall be two thirds of the members of Parliament. If there is no such quorum at the first sitting in any session, Parliament shall meet three days later, and a simple majority of members shall then constitute a quorum.

(5) Parliament shall make its own rules of procedure.

The instant decision represented an attempt by petitioners to seek a judicial review of a parliamentary proceeding. Similar attempts in Tonga, also unsuccessful, were reported in the 1987 *South Pacific Law Reports*. See *Fotofili and Others* v. *Ipeni Siale* [1987] S.P.L.R. 339, and *Sanft and Fuko* v. *Fotofili and Others* [1987] S.P.L.R. 354. See also *Bavadra* v. *A-G* [1987] S.P.L.R. 95, and *Madhavan* v. *Falvey* (1973) 19 Fiji L.R. 14.

In a subsequent judgment of the Vanuatu Court of Appeal (Cooke C.J.), the relevant sections of the disqualifying statute (sections 2 (f) and 4(1) of the Members of Parliament (Vacation of Seats Act) 1983) were found to be unconstitutional, in violations of the article 5 protection of freedom of expression and freedom of association. The first five petitioners (Barak Sope, William Edgell, Charles Godden, Jimmy Simon, and Anatole Lingtamat) were reinstated to Parliament.

In the same appellate judgment, the appeals of eighteen former Members of

Parliament, expelled from Parliament for missing three consecutive sessions (page 2(d) of the same Act) were rejected. After the five reinstated members took their seats, they promptly resigned, leaving twenty-three vacancies. The subsequent by-elections, the boycott by the Opposition, and the attempted dissolution of Parliament by President Sokomanu are all discussed in the print media of December 1988.

The Members of Parliament (Vacation of Seats) Act 1983 (chapter 174 of the *Laws of the Republic of Vanuatu*, revised edn., 1988) provides in part as follows:

Section 1 declares (in paraphrase) that a person is disqualified for membership of Parliament who holds office as President, judge, magistrate, constable, a member of the National Council of Chiefs, public servant, or teacher.

Section 2 declares (verbatim) that:

2. Vacation of seats of members

A member of Parliament shall vacate his seat therein —

(a) Upon the dissolution of Parliament;
(b) If he becomes disqualified by section 1 for membership of Parliament;
(c) If he ceases to be a citizen of Vanuatu;
(d) If he is absent from three consecutive sittings of Parliament without having obtained from the Speaker or, in his absence, the Deputy Speaker the permission to be or remain absent;
(e) If he is adjudged or declared an undischarged bankrupt by a competent court;
(f) If having been a candidate of a party and elected to Parliament he resigns from that party;
(g) If he resigns his seat therein by writing under his hand addressed to the Speaker or, in his absence, to the Deputy Speaker.

Section 3 provides (in brief) that a Member loses his seat if he is convicted of an offence and sentenced to imprisonment for two years or more.

Section 4 is entitled "Vacation of Seat where Member Resigns from Party", and provides (verbatim) that:

4 (1) Where circumstances such as referred to in section 2(f) arise, the leader in Parliament of the party as a candidate of which the member was elected, shall so inform the Speaker in writing of those circumstances, and the Speaker shall, at the sitting of Parliament next after he is so informed, make a declaration that the member has resigned from the party.

(2) Where within a period of 30 days of the declaration by the Speaker the member does not institute legal proceedings to challenge the allegation that he has resigned, he shall vacate his seat at the end of the said period of 30 days.

(3) Where within 30 days of the declaration by the Speaker, the member institutes legal proceedings as aforesaid, he shall not vacate his seat unless and until either the proceedings are withdrawn or the proceedings are finally determined by a decision upholding the resignation, the decision being one that is not open to appeal or in respect of which the time allowed for an appeal has expired without an appeal being filed.

(4) From the date of the declaration by the Speaker under subsection (1), the member shall cease to perform his functions as a member of parliament and he shall resume the performance of such functions only if and when the legal proceedings referred to in subsection (3) are finally determined within the meaning of that subsection in favour of the member.

(5) Standing Orders of Parliament shall make provision for the identification and recognition of the leader in Parliament of every political party and for otherwise giving effect to this section.

WARD C.J.

Judgment:

The six petitioners, who are all elected Members of Parliament, seek a number of declarations that the provisions of the Constitution have been infringed in relation to them.

The declarations sought are:

a. a quorum of Parliament on 21 July 1988 would have been not less than thirty-one members attending Parliament in person;
b. there was no quorum of Parliament on 21 July 1988;
c. a quorum of Parliament [on 25 July 1988] would have been not less than twenty-four members attending Parliament in person;
d. there was no quorum of Parliament on 25 July 1988;
e. the declarations purported to have been made by the second-named respondent, the Speaker, on 25 July 1988 pursuant to the Act of 1983 were, and each of them are, in breach of the Constitution, invalid, and of no effect, and are set aside;
f. in the event that a further session of Parliament is called, the quorum therefore shall be not less than thirty-one members attending Parliament in person;
g. if no such quorum is present, that Parliament shall meet three days later and that a quorum then be not less than twenty-four members attending Parliament in person;
h. the constitutional rights of any one or more of the petitioners have been infringed.

In his reply to counsel for the petitioners, the learned Attorney-General raised objection to the inclusion of the sixth petitioner. This matter would have been better raised as a preliminary point, and it is conveniently dealt with first.

By article 51(1) of the Constitution, anyone who considers that a provision of the Constitution has been infringed in relation to himself may apply to the Supreme Court for redress. It appears the learned Attorney-General does not dispute the right of the first five petitioners to seek redress as they were affected by the Speaker's declaration under section 4(1) of the Members of Parliament (Vacation of Seats) Act. He objects to the sixth petitioner who is the leader of the Opposition, because he was not the subject of the Speaker's declaration.

It would seem to me that, as a Member of Parliament, he has an interest in seeing that parliamentary procedures do not infringe the Constitution. Any such infringement must relate to him in that capacity, and I rule that he has a right to apply to this Court for redress.

These proceedings arise from an extraordinary session of Parliament called on 21 July, this year. The Court has not been told who requested it or the matters to be discussed, but it appears one of the items of business was to be a declaration by the Speaker under section 4(1) which would possibly state the first five petitioners had resigned from their party.

Such a declaration was made on 25 July, and they challenge its validity in view of an alleged breach of article 19(4) of the Constitution. That article reads:

> Unless otherwise provided in the Constitution, the quorum shall be two thirds of the members of Parliament. if there is no such quorum at the first sitting in any session, parliament shall meet three days later, and a simple majority of members shall then constitute a quorum.

No challenge is made of the first sitting on 21 July. The petitioners accept that there were insufficient members present to make up two-thirds of the members, and the Speaker adjourned for three days. The next sitting was on 25 July, the three days having expired on a Sunday.

The first two declarations sought (paragraphs 3(a) and (b)) relate to the sitting on 21 July. As there is no allegation of any infringement, I decline to make those declarations.

In relation to the remaining declarations, both parties agree that, on 25 July, there were forty-six elected Members of Parliament and that only twenty-three were present at the sitting.

The third and fourth declarations (3(c) and (d)) relate to the quorum necessary at that sitting (although the date is not stated in 3(c)). The dispute relates to the meaning of "simple majority".

The learned Attorney-General seeks to persuade the Court that, when the total is divisible into two equal parts, one of those parts will constitute a simple majority. He has cited various provisions relating to quorum from the constitutions of neighbouring States. I find no assistance in those references when defining those words.

It is well settled now that, when interpreting a statute, words are to be given their natural and ordinary meaning unless the context otherwise requires or the result would be a patent absurdity. I see no reason to consider the word "majority" in the Constitution in any other way.

The *Concise Oxford Dictionary* defines it as the greater number or part. It defines "absolute majority of votes" as more than half the number of electors or actual voters; the number by which votes cast on one side exceed those on the other.

I attempt no better definition. A simple majority must include an excess of votes on one side. The contention of the learned Attorney-General that it means an equal number is manifestly wrong.

Thus under article 19(4) a simple majority must mean at least one person more than half the members when the total is divisible into two equal parts. If the total is not an even number and, therefore, not divisible into two equal parts, a simple majority must mean the greater of the two parts.

Thus it is clear that paragraphs 3(c) and (d) of the petition are correct, and I declare accordingly.

Declarations 3(f) and (g) also deal with the majorities needed to constitute a quorum, and I now move to consider these.

It is clear from article 19(4) that the usual quorum is two-thirds of the members. Where the division of the total number of members does not result in a whole number, the quorum must be taken to the next whole number above as, to do otherwise, would not include two-thirds of the total. Thus where there are forty-six members, two-thirds would be 30.6, so a quorum would require thirty-one members.

I therefore make the declaration sought in paragraph 3(f).

If, on the first sitting of the session and only the first sitting, that quorum of two-thirds is not present, and Parliament sits again three days later, a simple majority is required to establish a quorum. As I have already ruled, that would require twenty-four members in a House containing a total of forty-six members, and so I make the declaration sought in paragraph 3(g).

I add, for the sake of completeness, that, as the Speaker is an elected member, all counts of the members present will include him.

Paragraph 3(e) seeks a declaration by the Court that, as Parliament had insufficient members to make a quorum on 25 July, the Speaker's declarations under section 4(1) were made in breach of the Constitution and were, therefore, invalid and of no legal effect, and should be set aside. This paragraph goes to the essence of this case.

It raises two main questions: first, how is a lack of quorum to be proved and, second, if it is, what is the effect of any business then transacted?

Mr. Coombe submits on the second point that, as the Constitution states what makes a quorum, it must be a requirement of any sitting of Parliament, failure to attain a quorum at any such sitting is a breach of the Constitution and, therefore, any business conducted must be invalid.

He points to the paucity of constitutional cases on the point but seeks support from a number of cases decided under the English Companies Acts where the absence of a quorum was held to prevent the conclusion of binding resolutions by the company. It is important to remember, when considering these cases, that the articles of association of a company will usually set out clearly the effect of lack of quorum and the steps to be taken. Such provisions are shown in articles 52 and 53, quoted in *Re Hartley Baird Ltd.* [1954] 3 All E.R. 695.

Article 19(4) of the Constitution is not so specific, but I accept that, as a matter of inference,the clear intention is that parliamentary business should cease in the absence of a quorum. Any business transacted, therefore, would be in breach of the Constitution and, therefore, invalid.

However, it is still necessary to answer the first question: "How is lack of quorum to be proved?" As I have said, article 19(4) gives no assistance.

By article 19(5), Parliament is directed to make its own rules of procedure to provide a workable framework within which it can carry out the functions ascribed to it by the Constitution. The Court will only question those rules if they breach the provisions of the Constitution.

Standing order no. 38 deals with the assessment of quorum in this way:

> If at any time the attention of the Speaker is directed to the fact that a quorum is not present, he shall order the bells to be rung and if at the end of (5) five minutes a quorum is not present, he shall adjourn Parliament without question put; but if it be shown at any time that a quorum is present, it shall not be in order to draw the attention of the Speaker to the absence of quorum until after the end of one hour from that time.

That order accepts that, once a lack of quorum is established, the sitting must be adjourned, and clearly accords with the intention of the Constitution. It sets up a procedure whereby the quorum can be challenged and the manner in which it must then be ascertained. Thus compliance with the Constitution is assured.

No duty is placed in the Speaker to take the initiative in this, but it equally does not try to limit in any way the means by which his attention may be directed to the question. This is a sensible provision because the nature of parliamentary proceedings is so different from the public meetings of, say, a company. During a debate in Parliament, members may not be present in the chambers. They may be seeing constituents or discussing the topic under debate with other members outside. As the Speaker is unable to leave the chair whilst business continues, he is not in a position to assess the true number of people present at the sitting.

It is for that reason standing order 38 sets a procedure that allows five minutes for the members present to attend the chamber itself where the count is to take place.

Normally, once the Speaker takes the chair, Parliament is made and the responsibility for quorum lies on the members. As has already been said, once his attention is drawn to the lack of quorum, for example, by a member raising it or when the total votes cast in a division is below the required number, he must follow the prescribed procedure and, if a lack of quorum is proved, adjourn the House. Failure to do so would lead to the result I have already described.

It is also good sense that no procedure is prescribed to ascertain the quorum during business conducted immediately prior to the count, although it is probable the House has not been quorate for some time. It is assumed to be properly made and any business transacted until the lack of quorum is proved. Thus, in this case, until there is evidence before the Court that the Speaker's attention was drawn to the lack of quorum, it will assume a properly constituted House. It would seem unlikely that anything should rebut that assumption other than a count by the Speaker.

Provisions in a number of Pacific Island constitutions which require a quorum also make the challenge a necessary step to obtain the adjournment of the sitting.[1]

Parliamentary practice here is clearly based on the Westminster model and I am fortified by similar procedures there as described in *May's Parliamentary Practice*(18th. edn.).

Prior to the removal in, I think, 1979 of the Members' right to call for a count, Standing Orders in the House of Commons required a quorum of forty members. If the quorum was challenged, procedure required the Speaker to ring the division bell to enable members outside the chamber to return. Whilst the count was being conducted, the outer door was kept open to allow members who were still approaching to be counted.

Standing Orders also allowed times where a sitting could not be interrupted by a count and so, even if apparently not quorate, the matter could not be ascertained.

I accept these rules were made under the doctrine of legislative supremacy whereby the English courts cannot hold an Act of Parliament to be invalid or unconstitutional. Where,as here, there is a written constitution entrusting the Court with the interpretation of the constitution and the determination of infringements, the situation is different.

1. I refer to the constitutions as follows: Fiji, article 58; Kiribati, article 74; Solomon Islands, article 67; Tuvalu, article 66; Western Samoa, article 57.

Thus, if it is shown to the Court that any proceeding was in breach of a provision of the Constitution, it may make any order it considers appropriate to remedy the breach. That may include declaring any parliamentary business, including Acts, to be invalid.

In this case I cannot accept that standing order No. 38 is in breach of the Constitution. Neither has any evidence been brought to suggest the Speaker's attention was brought to the lack of quorum at any time on 25 July prior to the ruling of the declaration under section 4(1) or, indeed, after it. Only in that way can this
330 Court accept a lack of quorum has been proved.

Article 19(5) clearly places the responsibility of regulating its own procedure on Parliament and, where the procedures do not breach the Constitution and have been followed, the Court will assume the sitting was properly made. To do otherwise could lead to the absurd position that if, years after a Bill has been passed without complaint and the Act brought into effect, it is discovered that, unknown to Parliament at the time, one or some of the members present were disqualified and the House was thereby not quorate, the Act would be declared invalid.

In these circumstances I decline to make the declaration sought in paragraph 3(e).

340 The final declaration is paragraph 3(h) [which] is couched in very vague terms. In view of the declarations already made, I decline to make one in the terms of paragraph 3(h).

The declarations having been made as set out in the judgment, I order each party to pay its own costs.