HIGH COURT OF SOLOMON ISLANDS

ULUFA'ALU (PRIME MINISTER)

V

GOVERNOR-GENERAL

High Court
Muria CJ
7-8 September 1998

Constitutional law – Governor-General – Powers – Convening of Parliament – Prime Minister no longer having majority – Motion of no confidence – Acting Governor-General declining to convene Parliament – Governor-General later convening Parliament – Whether Governor-General having power to convene Parliament contrary to Prime Minister's advice – Whether lawful for Governor-General to disregard standing orders of Parliament – Whether lawful for Governor-General to alter decision of acting Governor-General – Constitution of Solomon Islands 1978, ss 31(1), 32, 62, 72(1) 83(1), 139.

In 1997 the plaintiff was elected Prime Minister of Solomon Islands. On 3 August 1998, when the Solomon Islands Parliament was not in session and was not due to meet until October to debate the budget, six members of Parliament who had formerly supported the government joined the opposition, thereby giving it a majority in Parliament. On 7 August the Governor-General (while the Governor-General was overseas) refused the opposition's a motion of no confidence in the Prime Minister. On 15 August the Governor-General resumed his duties and met both the Prime Minister and the leader of the opposition and asked them to substantiate their respective support in declined, on the ground that he was not required by the Constitution to submit a list of his supporters to the Governor- General as that was a matter to be determined on the floor of Parliament. The Prime Minister further advised the Governor-General that there was no justification for a special meeting before Parliament was set to meet on 12 October, that there were no funds for a special meeting, that the government was continuing to perform its duties and was not acting unlawfully, that it would not be in the national interest and would set a precedent for political instability if a special meeting of Parliament was called merely to debate a no confidence motion. On 1 September 1998 the Governor-General issued a proclamation convening a special meeting of Parliament on 8 September 1998. The Prime Minister, instructed by the cabinet, applied to the High Court of Solomon Islands by way of an originating summons under s 83(1) of the Constitution, seeking the determination of the following question: (i) whether it was lawful for the Governor-General to convene a special meeting of Parliament on 8 September 1998, contrary to the advice of the Prime Minister, for the sole purpose of debating a motion of no confidence in the Prime Minister; (ii) whether it was lawful for the Governor-General to convene the special meeting in disregard of parliamentary standing orders requiring 13 days' notice and (iii) whether it was lawful for the Governor-General to alter the decision made by the acting Governor-General not to call a special meeting. On the direction of the court the Governor-General was represented by counsel at the hearing of the application. The court also directed that the motion of no confidence be not debated in Parliament before judgment had

been delivered. The Attorney General contended that although the Governor-General had power under s72(1) of the Constitution to summon Parliament and to determine the date of the commencement of a session of Parliament, that power was subject to s31(1) of the Constitution, which provided that in the exercise of his functions under the Constitution or any other law, the Governor-General was required to 'act in accordance with the advice of the cabinet or of a [Prime] Minister acting under the general authority of the Cabinet'. The Attorney General further contended that the Governor-General's proclamation contravened parliamentary standing orders, that there was no emergency justifying the required notice being dispensed with and that the Governor-General had no power to alter the prior decision of the acting Governor-General not to call a special meeting of Parliament.

HELD: Questions answered affirmatively; lawfulness of Governor-General's proclamation upheld.

It was a practical principle of democratic government in Solomon Islands that an absolute majority in Parliament was the criterion both for identifying the candidate for Prime Ministership and for supporting the right to govern. Although s 31(1) of the Constitution required the Governor-General to act in accordance with the advice of the Cabinet or the Prime Minister acting under the general authority of the Cabinet, the Governor-General was obliged to act on such advice only where it was legitimately given, since advice contrary to law or lacking legitimacy or which was unconstitutional could not be the type of advice contemplated under s 31(1). The Prime Minister lost the right to tender advice to the Governor-General when the defection of six members of Parliament deprived him of a majority. Although the Governor-General could not convene Parliament on the advice of any authority or outside agency other than the cabinet through the Prime Minister, in circumstances where the normal machinery provided by the Constitution became unworkable or impracticable the Governor-General, exercising his own deliberate judgment, was entitled to exercise his powers under s 72(1) to direct Parliament to convene in whatever form without the advice of the Prime Minister or Cabinet. Although standing orders of Parliament required 13 days' notice to be given of parliamentary sessions, the power to make standing orders conferred by s 62 of the Constitution was expressly subject to the provisions of the Constitution; no standing orders could override the Governor-General's power under s 72(1) to direct Parliament to convene. Therefore, non-compliance with standing orders was not fatal to the Governor-General's proclamation, although normally the standing orders would apply when the Governor-General convened Parliament, acting on the Prime Minister's advice. Moreover, under s 139 of the Constitution the Governor-General had power to alter or even revoke an earlier decision made on his behalf by the acting Governor-General. Accordingly, it was lawful for the Governor-General, being aware that the Primer Minister had lost his majority, to issue a proclamation convening a special meeting of Parliament contrary to the advice of the Prime Minister, for the sole purpose of debating a motion of no confidence in the Prime Minister (see pp 431-435, 438, 440, post). *Hilly v Governor-General* [1994] 2 LRC 27 followed.

Per curiam (i) It is now firmly established that the central feature of the structure of government under the Solomon Islands Constitution is majority rule. If the leader of the government, the Prime Minister, loses the support of an absolute parliamentary majority on a motion of no confidence the Governor-General must remove him from office under s 34 of the Constitution. It is inconsistent with the principle of majority rule in a parliamentary democracy, and therefore unconstitutional, for a government without a majority to remain in office knowing well that it no longer has majority support (see p 437, *post*).

(ii) Under s 32 of the Constitution the Prime Minister was under an obligation to provide such information regarding the government as the Governor-General might request, including information about the Prime Minister's numerical support in Parliament (see p 439, *post*).

[*Editors' note*: Sections 31, 32, 83 and 139 of the Constitution, so far as material, are set out at pp 432, 439, 431, 439, *post*.

Section 34(1) of the Constitution, so far as material, provides: 'If a resolution of no confidence in the Prime Minister is passed by an absolute majority of the votes of members thereof the Governor-General shall remove the Prime Minister from office ...'

Section 72(1) of the Constitution, so far as material, provides: '... each session of Parliament shall be held at such place within Solomon Islands and shall commence at such time as the Governor-General may appoint by proclamation published in the Gazette.']

Cases referred to in judgments
Abe v Minister of Finance [1994] 2 LRC 10, Sol Is HC
Governor-General v Mamaloni (Civil Appeals Nos 1 and 3/1993, unreported), Sol CA
Hilly v Governor-General [1994] 2 LRC 27, Sol Is HC and CA
Huniehu v A-G and Speaker (Civ App No 5 1996, unreported), Sol Is CA
Kenilorea v A-G [1986] LRC (Const) 126, [1983] SILR 61, Sol Is CA
Minister of Home Affairs v Fisher [1979] 3 All ER 21, [1980] AC 319, Berm PC
Nori's Application, Re [1989] LRC (Const) 10, [1988 - 89] SILR 99, Sol Is HC
Speaker v Philip (Civ App No 5 /1990, unreported), Sol Is CA
Tozaka v Hata Enterprises Ltd (3 June 1997, unreported), Sol Is HC

Legislation referred to in judgments
1994 Appropriation Act 1993
Constitution of Solomon Islands 1978, ss 30, 31(1), 31(3), 32, 33, 34, 62, 72(1), 73, 83(1), 98(1), 139, para 10 of Schedule 2

Other sources referred to in judgment
Howard, Colin, *Australian Federal Constitutional Law* (3rd edn, 1985)
Standing Orders 7(2), (3) (Solomon Islands Parliament)

Appeal
The plaintiff, the Hon Bart Ulufa'alu MP, the Prime Minister, applied by way of originating summons for the determination of the High Court of certain questions (set out at p 428, post) arising out of the issuing by the Governor-General of a proclamation on 1 September 1998 convening a special meeting of Parliament on 8 September 1998 contrary to the advice of the Prime Minister. The Governor-General was represented by order of the court. The facts are set out in the judgment.

PAfeau (Attorney General) and B Titiulu for the plaintiff.
C Hapa for the Governor-General.

10 September 1998. The following judgment was delivered.

MURIA CJ. This is an application by the plaintiff by way of an originating summons seeking the determination of a number of questions against His Excellency the Governor-General of Solomon Islands. The plaintiff is the Prime Minister of Solomon Islands who was elected to that office on 27 August 1997 pursuant to the provisions of Sch 2 to the Constitution.

The questions posed by the plaintiff for the determination by the court are as follows:

> (1) Whether or not in the circumstances that prevailed or obtained on 1 September 1998 it was lawful for the Governor-General, by proclamation, to convene a special meeting of Parliament on 8 September 1998 contrary to the advice of the Prime Minister for the sole purpose of debating a motion of no confidence in the Prime Minister.
>
> (2) Whether or not in the circumstances that prevailed or obtained on 1 September 1998 it was lawful for the Governor General to convene a special meeting of Parliament on 8 September 1998 in total disregard of the Parliamentary standing orders.
>
> (3) Whether or not it was lawful for the Governor-General to alter the decision of his office made by the acting Governor-General on 11 August 1998 9 not to have a special meeting of Parliament, as a Parliament meeting had already been set for 12 October 1998.
>
> (4) If the answer to all or any of the above questions is in the. negative should the court make the following consequential orders: (a) any meeting of Parliament held pursuant to the said proclamation is null and void; (b) any actions, proceedings or decisions taken pursuant to the said proclamation or taken at any such meeting is null and void; (c) any expenditure or costs incurred on for or in respect of such a meeting is unauthorised and unlawful.

I set out the circumstances giving rise to these proceedings. Following the last general election in August last year (1997), the Hon Bart Ulufa'alu MP was elected Prime Minister on 27 August 1997. After 3 August 1998, almost a year later, the SIAC government had been said to lose six of its members (three ministers and three backbenchers) to the opposition. In the meantime the Prime Minister had advised that the Parliament was to meet on 12 October 1998 mainly for the 1999 budget and several government Bills. Accordingly, the clerk to Parliament on 12 October 1998.

On 7 August 1998 the opposition wrote to His Excellency advising him that the government did not have majority support in the House and urged His Excellency to convene an urgent meeting of Parliament so that a motion of no confidence could be moved against the Prime Minister. His Excellency the Acting Governor-General advised the Prime Minister of the opposition's letter and thereafter wrote to the opposition on 11 August 1998 advising them that Parliament would still meet as scheduled, that is, on 12 October 1998. Obviously, the opposition were not happy with His Excellency's response because they wrote again to His Excellency urging him to change his decision and to convene Parliament earlier than 12 October 1998.

The Governor-General returned from his medical trip overseas and resumed duties on 15 August 1998. Thereafter, the Prime Minister consulted with His Excellency on two occasions regarding the political situation and the numerical strength of the government and the question of calling Parliament earlier than 12 October 1998. It is worth noting what the Prime Minister said took

place on the two occasions when he called on His Excellency the Governor-General. He said in para 18 of his affidavit:

> '18. On those two occasions I tendered advice to the Governor-General as required as follows-
>
> (1) The Prime Minister was not required by the Constitution to submit a list of his supporters to the Governor-General. That would be determined on the floor of Parliament.
>
> (2) Parliament was set to meet on 12 October 1998 and there was no justification for an urgent special meeting.
>
> (3) There were no funds for such special meeting of Parliament.
>
> (4) The Acting Governor-General had decided to have a Parliament meeting on 12 October and he himself had confirmed it and there was no reason or justification to alter the decision.
>
> (5) A decision to call a special meeting of Parliament just for a motion of no confidence in the Prime Minister in these circumstances will set a bad precedent for political instability in this country.
>
> (6) He must take into account the national interest and that political stability at this time was crucial now that the government was beginning to put things right by settling some of country's huge debts, as well as undertaking the Structural Reform Programme Exercise. Maintaining the confidence of our development partners was crucial.
>
> (7) The government continued to perform its duties and was not doing anything unlawful.'

It is also suggested that His Excellency had met with opposition members since 15 August 1998 and they continuously urged him to convene a special meeting of Parliament earlier. The implication here is that the decision by His Excellency to order Parliament to convene on 8 September instead of waiting for 12 October 1998 as earlier agreed to by His Excellency the Acting Governor-General was the result of the pressure from the opposition.

The third occasion the Prime Minister met with His Excellency was on 1 September 1998. The Prime Minister was called to Government House in the afternoon on that day. After some discussion on the political situation, His Excellency handed to the Prime Minister a letter dated 31 August 1998 in which His Excellency ordered by proclamation that Parliament meet at 09.30 am on Tuesday 8 September 1998 to consider the motion of no confidence. Naturally the Prime Minister was very disappointed and displeased at the action taken by His Excellency and as a result of the circumstances described, the government instructed the Attorney General to institute these proceedings.

At the hearing on 7 September 1998 Mr Nori appeared and applied to have the leader of opposition joined in as a party to these proceedings. The court refused that application on the basis that the questions posed for the determination by the court arose out of the decision made

by His Excellency. No question had been asked for the court to determine regarding any conduct or action taken by the opposition. The issues arising out of the action taken by His Excellency and posed in the questions raised in the originating summons are purely legal issues in respect of which the presence of the leader of opposition as a party would not matter. The court agreed that the leader of opposition is an interested party in this case but in the circumstances of this case, that interest does not justify this court making an order joining him as a party. These proceedings are not between the government and opposition. This case challenges the lawfulness of the Governor-General's decision and will be decided on that basis.

Also on 7 September 1998 the court directed that His Excellency be legally represented in these proceedings, in view of the constitutional importance of the case, not only to the public and the government but also to the office of the Governor-General. As a result of that direction, His Excellency has now been legally represented in the matter.

As the hearing of this case would not obviously be concluded before the scheduled meeting of Parliament on 8 September 1998 as ordered by His Excellency, the court, bearing in mind that one of the businesses, or perhaps the only business, for the meeting on 8 September 1998 is the motion of no confidence, directed that the said motion be not debated until the determination of this case. It is obvious that the court does not intend to interfere with the lawful authority of those persons empowered to summon Parliament to meet. Hence the direction of the court is confined to the subject matter to be debated in Parliament and which is pending in court.

It is to be noted that the plaintiff has not raised any argument that His Excellency does not have the power to summon Parliament. Section 72(1) of the Constitution vests the function of appointing the place and time of holding of sessions of the Parliament in His Excellency the Governor General. This is now confirmed by *Hilly v Governor-General* [1994] 2 LRC 27. While possessing the power to summon Parliament, it must be exercised in the light of the circumstances warranting its exercise. The Court of Appeal found that the circumstances which obtained on 13 October 1994 warranted the exercise of the power under s 72(1) and so the Governor-General's action in directing the Speaker to convene Parliament was lawful in that case.

The plaintiff in the present case raises a number of issues. But essentially, as noted in the submission by the learned Attorney General, it is the lawfulness of the exercise of the Governor-General's power under s 72(1) that concerns us in these proceedings. As to the facts giving rise to these proceedings, these are not in dispute.

The Attorney General firstly impressed upon the court that the plaintiff's case is brought under s 83(1) of the Constitution despite the restriction that it is subject to the provisions of ss 31(3), 98(1) and para 10 of Sch 2 of the Constitution. Section 83(1) reads:

> '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 11) 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.'

It remains, of course, a matter for the discretion of the court to decide whether an applicant alleging a breach of any provision of the Constitution ought to be heard because of his interest being affected or are likely to be affected: see *Kenilorea v A-G* [1986] LRC (Const) 126. In this case counsel for the defendant conceded the plaintiff's standing to bring this proceedings and for the court to deal with the issues raised arising out of the action taken by His Excellency the Governor-General despite the limitations specified in the section. With respect, the concession by counsel was properly made.

In questioning the lawfulness of the exercise by His Excellency of his power under s 72(1), the Attorney General raised a number of issues. He has taken the court through a number of areas of the law relevant for the consideration of the validity of His Excellency's action. The court is indebted to the Attorney for his very helpful submission in this matter.

The principles to be applied in interpreting the provisions of the Constitution are well settled. The Attorney General referred the court to the leading case of *Minister of Home Affairs v Fisher* [1979] 3 All ER 21. Accepting that the principles set out in that case are applicable in this jurisdiction, I must also reiterate the point made by this court in *Tozaka v Hata Enterprises Ltd* (3 June 1997, unreported). This court stressed the need to build up our own case law in this jurisdiction. So where a legal principle has been firmly established in cases decided by our courts, we must build upon them instead of continuing to rely on outside authorities all the time. This court said in that case:

> 'I note that both counsel in this case had appeared in some of those cases mentioned and yet either forgot or ignored to cite those authorities. We must develop and build up our case law in our jurisdiction instead of borrowing authorities from foreign jurisdictions all the time. Once a legal principle has been firmly established in our jurisdiction it serves no point to keep referring to the authorities from foreign jurisdictions. But in order to do this, we in the courts and counsel appearing before these courts must strive to build up our own body of case law.'

We must all strive to achieve this.

That the court should adopt a generous approach to the interpretation of constitutional provisions is well received in this jurisdiction. The principles set out in *Minister of Home Affairs v Fisher* have been adopted and applied by the Solomon Islands Court of Appeal in *Speaker v Philip* (Civ App No 5/1990, unreported) and *Huniehu v A-G and Speaker* (Civ App No 5/1996, unreported). There are other cases decided by the Court of Appeal and High Court which have adopted the said principles.

The Attorney General then made submissions on the modifications of the Westminster system of government adopted by the framers of our Constitution to suit our circumstances. One of these is the process of appointment and dismissal of the Governor-General which is largely now governed by s 27 of the Constitution. The case of *Re Nori's Application* [1989] LRC (Const) 10 (*The Governor-General's Case*) established that the Governor-General's appointment (and so his removal) is now governed by s 27 of the Constitution and not by the exercise of any royal prerogative.

The second modification submitted by the Attorney General is in the appointment and dismissal of the Prime Minister. Again in this jurisdiction, the question of appointment and dismissal of the Prime Minister have been well settled. He is elected and can be removed pursuant to the provision of ss 33 and 34 of and Sch 2 of the Constitution. He can only be removed by the Governor-General after a vote of no confidence. This is established in *Hilly v Governor-General* [1994] 2 LRC 27.

The third modification referred to by the Attorney General is in regard to the power to prorogue or dissolve Parliament. The power is exercisable by the Governor-General only after a decision to do so is made by Parliament pursuant to s 73 of the Constitution. No discretion is vested in the Governor-General in this regard, nor is there any power in any other person or authority to advise the Governor-General as to the exercise of his power under that section.

The fourth instance where our system of government based on the Westminster system is modified is in the restrictions placed on the discretionary powers of the Governor-General. One such restriction is found in s .31(1) of the Constitution. As this section will be dealt with later in this judgment, I shall set it out here:

> '**31.** (1) In the exercise of his functions under this Constitution or any other law, the Governor-General shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority other than the Cabinet or in his own deliberate judgment.'

The restriction therein is that the Governor-General 'shall act in accordance with the advice' of the Cabinet or of a minister acting under general authority of the Cabinet except in cases where he is required by the Constitution to act in accordance with the advice of some other person or authority. In this regard the Prime Minister as the head of the Cabinet can render advice to the Governor-General who shall act in accordance with that advice. But the legitimacy of such advice is a matter which must be regarded as crucial for the Governor-General to act upon. An advice contrary to law or lacking legitimacy or which is unconstitutional cannot be the type of advice contemplated under s 31(1) and the Governor-General must be entitled to disregard it or refuse to act upon it. One such instance where the Governor-General is not obliged to act on the advice of the Prime Minister is where 'a Prime Minister conceding he has no majority is in no position to insist that the Governor-General's functions can only be exercised on his advice': see *Hilly v Governor-General* [1994] 2 LRC 27.

The Attorney General, in view of the restrictions placed on the powers to be exercised by the Governor-General, argued that the Governor-General's role is largely formal. Whether that is so or not can await another day. For our present purposes, it is sufficient to be content with the fact the Governor-General is the representative of the head of state in Solomon Islands. The head of the executive is the head of state and the executive authority of the people in this country is vested in the head of state and exercised on her behalf by the Governor-General (s 30 of the Constitution). The Governor-General is a creature of the Constitution with executive powers conferred on him by the Constitution.

The matter now before this court turns largely on the exercise by His Excellency the Governor-General of his power under s 72(1) of the Constitution. This, in some way, is a re-visitation of

this Constitution provision. About four years ago this court and the Court of Appeal dealt with this provision in the constitutional challenge of *Hilly v Governor-General* [1994] 2 LRC 27 (referred to earlier in this judgment). The Court of Appeal said of this provision in that case (at 33):

> 'Section 72(1) vests in the Governor-General the function of appointing the place and time of the holding of sessions of the Parliament. His Excellency has ordered the Speaker to convene the National Parliament on Monday 31 October next. In the circumstances there can be no doubt about the validity of that order.'

A week later in an appeal the Court of Appeal reiterated what it said earlier (at 46):

> 'The court (Connolly P, Williams and. Los JJA) declared that in the circumstances which obtained on 13 October last it was lawful for the Governor-General to direct the Speaker of the National Parliament to convene Parliament as directed by the Governor-General in whatever form.'

The Attorney General has not disputed that the Governor-General has power under s 72(1) of the Constitution to summon Parliament. What the Attorney General says is that in the circumstances of the present case the Governor-General was not justified in exercising his power under s 72(1). He said that s 72(1), although giving the Governor-General the power to determine the date of the commencement of a session of Parliament, does not specify that the determination is to be made in the deliberate judgment of the Governor-General. Hence, the Attorney General says, the exercise of the functions under s 72(1) must be governed by s 31(1), that is to say, the Governor General must act on the advice of the Prime Minister as head of the Cabinet and cannot convene Parliament on his own motion or on advice from any other authority other than the Cabinet. While it is correct to say that the Governor-General cannot convene Parliament on the advice of any other authority other than the Cabinet through the Prime Minister, I cannot accept the contention that the Governor-General cannot convene Parliament in the exercise of his own deliberate judgment. There are circumstances in which, when the normal machinery provided by the Constitution becomes unworkable or impracticable, the Governor-General is entitled to exercise his powers under s 72(1) without the advice of the Prime Minister. Such a position is clearly established in *Hilly v Governor-General* [1994] 2 LRC 27, where it was held that the Governor-General can lawfully direct the Speaker to convene Parliament in *whatever* form.

I would venture to add that in recognition of such a situation, the framers of the Constitution sought to add, in s31(1), after providing that 'the Governor-General shall act in accordance with the advice of the Cabinet or of a minister' that the Governor-General can also act 'in his own deliberate judgment'. Hence one is disposed to the conclusion that the Governor-General must exercise his powers under the Constitution or any other law in accordance with the advice of cabinet. But he can also exercise his powers in his own deliberate judgment and there may be circumstances which warrant him to do so. Of course, there are matters specifically provided in respect of which he can exercise his own deliberate judgment, such as provided for under cl 11 of Sch 2 of the Constitution (matters in connection with the election of the Prime Minister).

The position noted by the Court of Appeal regarding our Constitution in *Hilly v Governor-General* is real in my respectful view. The Court of Appeal said:

> 'It is a very strong step for us to decide, although it may possibly be correct, that the Constitution of this country is not a full statement of the constitutional position ...' (See [1994] 2 LRC 27 at 46.)

I hold that the Governor-General has the power to direct Parliament to convene in whatever form. I do so on the authority of *Hilly v Governor-General* [1994] 2 LRC 27. I further hold that the Governor-General can direct Parliament to convene even without the advice of the Cabinet or the Prime Minister. Having said that, I now turn to the circumstances of the present case. I bear in mind that each case must be determined on its own facts.

Mr Hapa, counsel for His Excellency the Governor-General, sought to rely on the cases I have just mentioned. Counsel also relied on the case of *Speaker v Philip* (Civ App No 5 / 1990, unreported) (referred to earlier in this judgment), which reiterated the principle of 'majority rule'. The Attorney General, on the other hand, strenuously sought to distinguish the present case from that of *Hilly v Governor-General* [1994] 2 LRC 2; the court to accept that in the pre government in 1994 that warranted scheduled meeting on 12 October 1998

As reliance has been placed on *Hilly v Governor-General* [1994] 2 LRC 27, it is necessary to see briefly what the circumstances of the case were. Mr Hilly was elected Prime Minister on 18 June 1993, with 24 votes of members of Parliament over his rival who received 23 votes, a majority of one vote. That was held by the Court of Appeal in *Governor-General v Mamaloni* (Civil Appeals Nos 1 and 3/1993, unreported) to be an 'absolute majority'. Parliament sat in January 1994 and had not sat since. By the beginning of October 1994 the Hilly government had been borrowing money in excess of the sum authorised by the 1994 Appropriation Act 1993, without the authority of the Parliament. In addition, six members of his government left (five ministers and one backbencher) to join the opposition. Mr Hilly was left with 19 MPs while the opposition had 28. He admitted to the Governor-General that he had lost support and he deliberately delayed the calling of the Parliament because he was not sure that he had the number to pass legislation and defeat motion of confidence in him. He acknowledged that he had two options, to delay Parliament indefinitely or resigned. The Governor-General dismissed Mr. Hilly as Prime Minister and directed Parliament to meet to elect a Prime Minister. The Court of Appeal held that the Governor-General had power to direct Parliament to meet so that Mr Hilly would face the no confidence motion.

In the present case the Prime Minister was elected on 27 August 1997. Parliament last sat in April/ May 1998. By the beginning of August 1998 six MPs in the SIAC government left to join the opposition. In fact there were four ministers and three backbenchers who resigned to join the opposition. However, the fourth minister withdrew his resignation on 22 August 1998 and returned to the government. This was confirmed to the Governor-General in a letter from the leader of opposition to His Excellency, which letter had attached to it the individual letters of resignation by each of the SIAC MPs and pledging their support to the opposition. The Prime Minister, therefore, by 25 August 1998 was only left with 24 MPs supporting him while the leader of opposition clearly had 25. The Governor-General met with both the Prime Minister and the leader of opposition on separate occasions on which the Governor-General requested both leaders to substantiate their support in Parliament. The leader of the opposition did but the Prime Minister refused, on the basis, he said, that the Constitution did not require him to do so. In the meantime, Parliament had already been notified that a meeting of Parliament was scheduled for 12 October 1998 and MPs had already been notified. The Prime Minister therefore advised the Governor-General that there was no need for an earlier meeting of Parliament to debate the no

confidence motion. The Governor-General thereafter being convinced that the Prime Minister had lost support in the House directed Parliament to meet on 8 September to debate the no confidence motion.

When one looks at the set of circumstances of the two cases, there are obviously some distinguishing factors, such as the absence of concession by the Prime Minister in the present case of not having majority support in the House; there has been no financial irregularity on the part of the present government; and the number of MPs supporting the Prime Minister in the present case is only one less than those supporting the opposition. On the other hand, in both cases a date had been fixed for Parliament meeting before the Governor-General's direction. Both cases were concerned with the Prime Minister losing the majority support of MPs and in both case a motion of no confidence against the Prime Minister was pending before Parliament. The Attorney General argued that when one compares the situation of the two cases, those in the present case did not show that a constitutional crisis of the type described in *Hilly v Governor-General* [1994] 2 LRC 27 was present. In any case, he argued, .if there was a crisis it could easily have been resolved at the sitting of Parliament on 12 October 1998. This, of course, assumes that Parliament will sit on 12 October 1998. But as was pointed out in *Hilly v Governor-General* [1994] 2 LRC 27 at 35:

> '... even if Parliament met on 18 November certain constitutional problems may not be overcome. If the Prime Minister lost a vote of confidence on that date there would have to be an election of a new Prime Minister and the swearing in of a new Cabinet before the new government could direct its attention to appropriation for 1995. It is unlikely that could occur before 31 December 1994.'

The court went on to say that this was of particular importance in that case because of the decision of the High Court in *Abe v Minister of Finance* [1994] 2 LRC 10 which held that the government had contravened the 1994 Appropriation Act 1993 by borrowing in excess of its limit without authority from Parliament.

As in *Hilly v Governor-General* [1994] 2 LRC 27, the Prime Minister in the present case had taken steps to have Parliament convened, but there is no guarantee that will occur. However, even if it meets on 12 October 1998 certain constitutional problems may still not be resolved. His Excellency described those problems in his letter dated 31 August 1998 to the Prime Minister as follows:

> 'It appears to me that following the recent resignation of six Members of Parliament who now openly pledge their support for the Opposition, there is some cause for concern that you may not have the confidence of the majority of the democratically elected MPs to enable you to proffer me advice on the government of Solomon Islands. This observation, coupled with the Opposition's intimation to me of their proposed withdrawal of support for the budget which your government plans to introduce on 12 October 1998, has prompted me to reconsider my earlier views based on the political situation obtaining at the time of my return to Honiara.'

In my judgment, such a situation described by His Excellency the Governor-General is equally of serious concern. It has been demonstrated that the Prime Minister does not have majority support and there is the intimation from the opposition that they will not support the budget. That is equally as serious as that described in *Hilly v Governor-General* [1994] 2 LRC 27 and one that

necessitates the resolution of the question of support for the government before the debate on the budget.

The cases in this jurisdiction have now firmly established that the central feature of the structure of government under our Constitution is majority rule. The leader of the government, the Prime Minister, is identified with an absolute majority through an electoral procedure set out in Sch 2 to the Constitution. If he loses that support on a motion of no confidence the Governor-General must remove him from office (s 34 of the Constitution). It is inconsistent with the principle of majority rule in a parliamentary democracy, and therefore unconstitutional, for a government without a majority to remain in office knowing well that it no longer has the majority support. As was pointed out in *Speaker v Philip* (Civ App No 5/1990, unreported):

> 'The result could be that the mechanism provided by the Constitution for the removal of a government may become inoperative, and even a government which does not have the confidence of the House may continue in an unchallenged position for many months. In our judgment, such a conclusion would be quite unsatisfactory and inconsistent with the principle for which Mr Nori strongly and, as we think, rightly contended, that is, the principle of majority rule in a Parliamentary democracy. Mr Nori pressed us with the proposition that it is our duty to interpret the Constitution in a way which advances rather than impedes the principles of majority government.'

If the criterion for identifying the candidate for Prime Ministership is an absolute majority then it follows in my judgment that the same criterion also applies as to the right to govern. It is a practical principle of government: see Professor Colin Howard in *Australian Federal Constitutional Law* (3rd edn, 1985) p 123, referred to in *Hilly v Governor-General* [1994] 2 LRC 27 where it was also pointed out (at 33) that -

> 'a Prime Minister who hangs on to office while conceding that he has no majority is in no position to insist that the Governor-General's functions can only be exercised on his advice.'

Although the Prime Minister had not conceded that he has only 24 members of Parliament, the evidence clearly demonstrates that he only has 24 members of Parliament. That being so, he must be in the position described by the Court of Appeal as being not in a position to tender advice to the Governor-General.

This is the position strongly contended for by Mr Hapa who simply and in a forthright manner put the case for the Governor-General based on the application of the constitutional provisions and the legally established precedents that go with it.

I do not need to dwell into the argument of reserved powers in this case. It is clear to the court that the Governor-General was not relying on any reserved powers but on s 72(1) of the Constitution. As I indicated earlier, this case is a revisitation of that section, only now it is much clearer than it was in 1994.

The Attorney General urged that the Governor-General before exercising his power under s 72(1) ought to have taken into consideration seven factors, namely: (a) the fact that the Acting Governor-General had decided not to call a special meeting of Parliament; (b) a Parliament meeting had already been set for 12 October 1998 - only a matter of weeks away; (c) the

government was not operating unlawfully; (d) there was no urgency for a meeting; (e) he would be setting a precedent for political uncertainty leading to instability; (f) the financial constraints in having a special meeting of Parliament and (g) the national interest.

The Attorney General submitted that the Governor General failed to take these into account and so the exercise of the function by the Governor-General was not a real exercise of the function and therefore unlawful. With respect, that contention presupposes the existence of the criterion of majority support for the government. If that support is not present, then the law as enshrined in the Constitution which is 'the supreme law' in Solomon Islands must be complied with. Political expediency cannot take precedent over the rule of law, however inconvenient the result may be. The national interest is a factor closely associated with stable, government which is achieved by maintaining the majority support to run it. The fear of members crossing the floor every now and then is bound to happen under our present system of government. That is a matter for the legislature to resolve.

On the question of standing orders, it is argued that the Governor-General contravened Standing Orders 7(2) and (3) in that the required 13 days' notice had not been given and there was no case of emergency to dispense with that required notice. Standing orders are made pursuant to s 62 of the Constitution. The power of Parliament to make standing orders for regulating its proceedings is itself expressed to be subject to the provisions of the Constitution: see *Huniehu v A-G and Speaker* (Civ App No 511996, unreported). One of the provisions of the Constitution to which any standing orders is subject is s 72(1) which empowers the Governor-General to direct Parliament to convene 'at such place ... and at such time' as he may appoint by proclamation. No standing orders can override the effect of the Governor-General's power expressed in those words.

Where, however, the Governor-General acts on the advice of the Prime Minister in the normal situation and calls Parliament, Standing Orders 7(2) and (3) must apply. In this regard, I venture to say that the initial decision by His Excellency on 11 August 1998 to call Parliament was a decision made acting on the advice of the Prime Minister and the provision of Standing Orders 7(2) and (3) applied. That meeting scheduled a debate on the budget and therefore 12 October 1998 was for debate on the budget and government Bills. The decision made by His Excellency on 31 August 1998 was for Parliament to convene to debate the motion of no confidence in the Prime Minister before the budget meeting. The reasons for this special meeting were made known by His Excellency in his letter to the Prime Minister dated 31 August 1998. Non-compliance with Standing Orders 7(2) and (3) is not fatal to His Excellency's decision of 31 August 1998.

This change of decision by His Excellency has been argued to be outside His Excellency's power. I do not think so. I accept Mr Hapa's argument that s 139 of the Constitution would apply. That provision reads:

> '**139**. Where any power is conferred by this Constitution to make any proclamation, regulation, order or rule, or to give any direction or instructions, the power shall be construed as including the power, exercisable in like manner, to amend or revoke any such proclamation, regulation, order, rule, direction or instructions.'

That provision clearly confers power on His Excellency to alter or even revoke his earlier decision. Prior to 25 August 1998 the evidence shows that His Excellency's position remained as

that obtaining on 11 August 1998. On the two occasions when the Prime Minister called on His Excellency, as deposed in paragraph 18 of the Prime Minister's affidavit, the Prime Minister tendered advice to His Excellency. I have reason to suggest that His Excellency did not consider the advice given to him then. His Excellency had taken steps to have the situation resolved. His attempt to have a meeting with the Prime Minister and the leader of opposition together was unsuccessful due to the refusal by the leader of opposition to attend. This is regrettable, as rightly stated by the Prime Minister in his letter to His Excellency on 25 August 1998. The opposition, no doubt, were relying on their numbers. His Excellency requested the Prime Minister to confirm his numerical support but the Prime Minister said that he had no obligation under the Constitution to do such a thing. Had he been properly advised, I have no doubt he would have appreciated that he has the obligation to do so pursuant to s 32 of the Constitution which reads:

> '**32**. The Prime Minister shall keep the Governor-General fully informed concerning the general conduct of the government of Solomon Islands and shall furnish the Governor-General with such information as he may request with respect to any particular matter relating to the government of Solomon Islands.'

Nothing is clearer than the words of that provision as to the duty of the Prime Minister to 'furnish the Governor-General with such information as he may request' regarding the government of Solomon Islands.

The public and people of this country do not know the true position of what causes the situation we are now in. This court has before it the necessary evidence because of these proceedings, which clearly demonstrate that the situation we now have must be resolved as soon as possible His Excellency recognises the need to have it so resolved and he took the legally provided h measures demanded of him by the Constitution. In so doing His Excellency was doing no more than subjecting the expediency of politics to the rule of law as enshrined under our Constitution.

Having anxiously considered all the matters placed before the court and having heard all arguments from both the learned Attorney General and counsel for the Governor-General, the court answers the three questions posed in the affirmative.

The result is that Parliament must meet to debate the motion of no confidence. The Governor-General had already lawfully directed Parliament to convene on 8 September 1998. By order of this court the debate of the motion of no confidence in the Prime Minister could not take place on that date. The Speaker of National Parliament will now have to fix a new date so that Parliament can resume and have the motion debated in the House which is the place where the people of this nation, through their Constitution, intend the present dispute to be resolved.

This is not a personal matter for His Excellency whose decision gave rise to these proceedings. He was performing a constitutional duty. He should therefore not have to bear the costs of defending his decision personally. I therefore order that any expenses incurred by counsel in representing His Excellency must be paid out of public funds.

The orders of the court are:

> Question 1: Answer, Yes.
> Question 2: Answer, Yes.
> Question 3: Answer, Yes.

The consequential orders sought do not, therefore, arise for determination.
