

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Judicial Review Case No. 5 of 2012

BETWEEN: SANMA LOCAL GOVERNMENT COUNCIL
Claimant

AND: GEORGE WELLS as MINISTER OF INTERNAL AFFAIRS
First Defendant

AND: ATTORNEY GENERAL
Second Defendant

Judicial Review Case No. 6 of 2012

BETWEEN: MALAMPA PROVINCIAL COUNCIL
Claimant

AND: GEORGE WELLS as MINISTER OF INTERNAL AFFAIRS
First Defendant

AND: ATTORNEY GENERAL
Second Defendant

Judicial Review Case No. 7 of 2012

BETWEEN: PENAMA LOCAL GOVERNMENT COUNCIL
Claimant

AND: GEORGE WELLS as MINISTER OF INTERNAL AFFAIRS
First Defendant

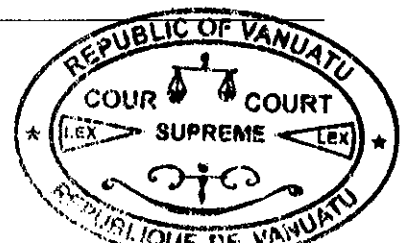
AND: ATTORNEY GENERAL
Second Defendant

Hearing: 5 & 7 April 2012

Before: Justice Robert Spear

In attendance: Nigel Morrison for the Sanma and Penama Local Government Councils
Felix Laumae for Malampa Local Government Council
Viran M Trief for the Minister of Internal Affairs and the Attorney General

ORAL JUDGMENT
Spear J (7 April 2012)

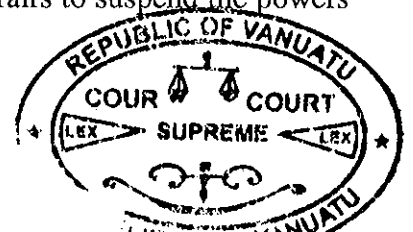


Introduction

1. On 9 March 2012, the Minister of Internal Affairs made a series of orders relating to the SANMA, MALAMPA, PENAMA and TORBA Local Government Councils (*the LGCs*). First, he appointed one Pierro Willie to enquire into certain matters relating to the affairs of each of the 4 LGCs. Secondly, he suspended the exercise by each LGC of all its powers for a period commencing 9 March 2012 and expiring on 13 June 2012. Thirdly, and incidental to such suspension, he appointed a different public servant in respect of each LGC to exercise all the powers of the LGC so suspended.
2. This is the claim by each of the SANMA, MALAMPA and PENAMA LGCs for the judicial review of the decision by the Minister of Internal Affairs to suspend the powers of those LGCs. Specifically, the claims seek to have the suspension decision quashed and the various statutory orders giving effect to this suspension decision declared to be of no effect. The case for the LGCs is that the decision was unlawful in various respects.
3. The claims are opposed by the State on behalf of the defendants - the Minister of Internal Affairs and the Attorney General.

Preliminary Issue

4. A preliminary issue was raised for the State by Mrs Trief as to the standing of each LGC to pursue this judicial review claim. I ruled against the State on this issue at the commencement of this hearing. However, for completion, I reiterate that the 3 LGCs, the claimants in this case, have standing to bring this claim for their respective claims. The real question was whether the claims have been initiated appropriately by the LGCs given that the suspension order effectively applies to the powers exercisable by the LGCs through their respective counsellors. More exactly, are Mr Morrison and Mr Laumae really acting for the LGCs as they have announced and declared.
5. These claims for judicial review raise matters of significant public interest. They relate to the lawfulness of the decision of the Minister of Internal Affairs to suspend the powers

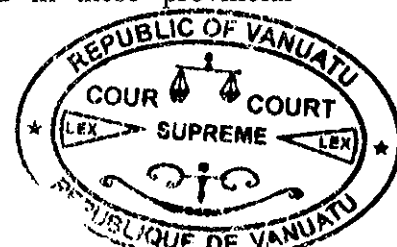


of a largely representative public body. If the decision to suspend is lawful, the LGCs could only instruct counsel to initiate the claims through the public servant who has been appointed by the Minister of Internal Affairs to exercise the suspended powers and that has not occurred. If the decision to suspend is unlawful, however, and it is quashed, then, at least arguably, Mr Morrison and Mr Laumae have been appropriately instructed to advance these claims on behalf of the LGCs. So, the question is not one strictly relating to standing. It is a far more difficult issue relating to whether the 3 LGCs have actually commenced these claims. Accordingly, this preliminary issue turns on the substantive issues raised by the claims; that is, was the decision to suspend unlawful and, if so, should it be quashed.

6. Legal counsel appearing for the LGCs do so on the disclosed basis that they have instructions to act in each case. The Court should be slow to go behind that announcement particularly where the legitimacy of legal counsel's position largely depends upon the outcome of the substantial issue for determination. In any event, the counsellors involved could have brought these claims personally and the LGCs would then have had to be additional defendants. This is a matter more of form than substance and it should not operate to restrain the court from dealing with these significant public issues without delay.

Urgency

7. The claims were only commenced in mid March 2012 approximately a week or two after the suspension orders. The matters then came before me at short notice for a preliminary conference and it was accepted for the State that the claims demanded urgent attention; and rightly so. A timetable to address the claims was then imposed which involved an accelerated program for the filing of defenses and evidence by Friday 30 March 2012, an evaluation conference (Rule 17.8) on Monday 2 April 2012 and time being set aside on Thursday 5 April 2012 to hear the case if it was determined that this was a case that should be heard. This recognised the degree of urgency that was required by these claims. It has meant, however, that other work has unfortunately had to be put aside but it is clearly of significant importance that all those involved in these provincial



governance matters know exactly where they stand and that they are put into that position without delay.

8. This urgency is the reason why this decision is being given orally today rather than reserved so that a written decision could be delivered. Accordingly, this decision will not have the same *polish* or extensive content that might be expected from a decision where greater time has been taken for its preparation.

The Special Nature of the Judicial Review Jurisdiction

9. It is always important to keep in mind that judicial review is not an appeal on the merits of the decision in question. The judicial review jurisdiction of this Court is a supervisory jurisdiction concerned with legal error; that is, was the decision in question unlawful – not, was this the right decision.

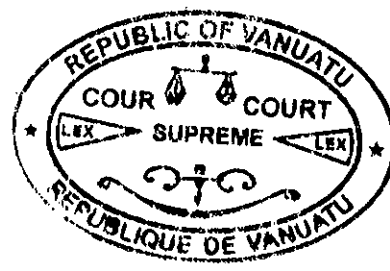
Important consideration

10. Pursuant to the Decentralization Act [Cap. 130], an LGC is deemed to be a body corporate (s. 4B), composed of both elected and appointed members (s. 5).
11. In keeping with the body corporate model adopted by the Decentralization Act, it is specifically provided (s. 18E) that the Public Service Commission appoint the secretary of each LGC. That secretary is to adopt the role of the Chief Executive Officer (*CEO*) of the LGC and to have the charge and custody of and be responsible for the books, records and other documents (s. 18E(2)). Furthermore, it is specifically provided (s. 18E (3)) that no LGC shall have the power to suspend or dismiss its secretary general with any such employment issues left for the Public Service Commission.
12. Relevant provisions of the Act are as follows:

PART 2 – CREATION OF LOCAL GOVERNMENT REGIONS

3. Establishment of Local Government Regions

- (1) *The Prime Minister may by Order:*



- (a) declare a Local Government Region;
 - (b) give a name to a Local Government Region;
 - (c) define the boundaries of a Local Government Region and alter them.
- (2) The number of Local Government Regions to be so declared under subsection (1) shall not be less than 4 and not more than 6.

4. Establishment of Local Government Councils

When the Prime Minister declares a Local Government Region under section 3(1), he shall in the Order establish a Local Government Council for that Region.

4A. Division of Local Government Region into Area Council Divisions

The Minister on the advice of each Local Government Council shall by order divide a local government region into area council divisions or districts and may alter those divisions or districts.

4B. Local Government Councils to be bodies corporate

A Local Government Council shall be a body corporate with perpetual succession and power to:

- (a) sue and be sued in its corporate name; and
- (b) purchase, acquire, hold, manage and dispose of movable and immovable property.

4C. Seal

Each Local Government Council shall have a seal of a design approved by such Local Government Council which shall be kept in the custody of the Secretary to the Local Government Council.

PART 3 – COMPOSITION, NAME AND DUTIES OF LOCAL GOVERNMENT COUNCILS

5. Composition of Local Government Councils

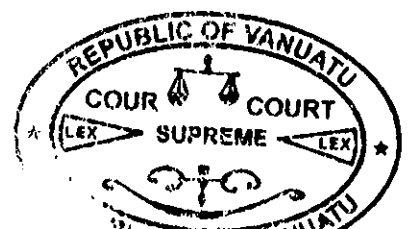
Each Local Government Council shall be composed of elected members and appointed members.

6. (Repealed)

7. Appointment of members of Local Government Councils

(1) The Minister may by Order provide for appointed members of each Local Government Council in respect of its Local Government Region and such members shall consist of:

- (a) chiefs appointed by the Minister from among persons nominated by representative bodies of chiefs;
- (b) women appointed by the Minister from among persons nominated by representative bodies of women;
- (c) youth representatives appointed by the Minister from among persons nominated by representative bodies of youth;



- (d) *church representatives appointed by the Minister from among persons nominated by representative bodies of churches.*
- (2) *The appointed members –*
 - (a) *shall hold office for a period of four years and shall be eligible for reappointment; and*
 - (b) *shall be consulted on any matter, question or issue coming before the Local Government Council for its decision.*
- (3) *The appointed members shall not be entitled to vote at the meetings of the Local Government Councils.*
- (4) *The appointed members shall not be more than half the number of elected members.*

18E. Secretary to Local Government Council

- (1) *The Public Service Commission shall appoint a fit person, who is a public servant, to be Secretary for each Local Government Council.*
- (2) *The Secretary shall be the Chief Executive Officer of the Local Government Council for which he is appointed and shall have the charge and custody of and be responsible for all books, records and other documents of the Local Government Council.*
- (3) *For the avoidance of doubt, no Local Government Council shall have power to suspend or dismiss the Secretary.*

13. The secretary has become generally known and described as the secretary general but nothing turns on this distinction. For ease and consistency of reference, I will refer to the secretary / CEO as the secretary general.

14. The powers of an LGC are specifically defined by s. 18J and, of course, those are the powers that are the subject of the suspension orders.

18J. General powers and duties of Councils

- (1) *Every Local Government Council shall be generally responsible for the good government of its Local Government Region and shall do all such things as it lawfully may and as it considers expedient to promote the health and welfare of the people therein.*
- (2) *The provisions of this Act relating to the powers and duties of Local Government Councils are in addition to, and not in derogation of, the provisions of any other written law relating to such powers and duties and in the exercise of their powers and the performance of their duties in relation to any matter for which provision is made by other law, a Local Government Council shall act in conformity therewith.*



15. So, an LGC is essentially based on a body corporate model with the elected and appointed members taking up the role of a board of directors and with the secretary general as the CEO. The LGCs are also clearly important component parts of Parliament's decentralisation of local governance policy and the Act provides accordingly for provincial government. That is evident from the very name of the Act and also from its long title:

DECENTRALIZATION

An Act to make provisions for the decentralization and establishment of Local Government Regions and for matters connected therewith.

16. I mention this as it must be kept clearly in mind that LGCs have become vital components of the governance and administration structure of the Republic of Vanuatu. There is, accordingly, public expectation that matters within an LGC's designated statutory responsibility will be dealt with by that LGC without central government's intervention or interference expect where permitted and where necessary. The Act does, however, address directly how central government, through the Minister of Internal Affairs, may intervene and particularly through s. 18L

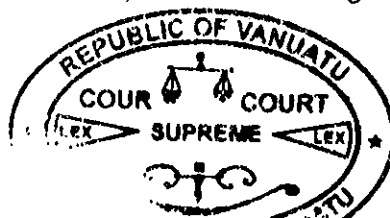
18L. *Inquiries and suspension*

(1) *If the Minister –*

- (a) *has cause to suspect that a Local Government Council has failed to observe and perform any of the duties and powers conferred or imposed upon it by the provisions of this Act or any other law; or*
- (b) *has cause to suspect that a Local Government Council has done or performed any act, matter, or thing without due authority; or*
- (c) *is otherwise of the opinion that an investigation should be made into the affairs of a Local Government Council;*

he may in his discretion, appoint a person or persons to inquire into such matter.

(2) *If upon an inquiry under this section the Minister is satisfied that the Local Government Council has done or suffered any of the act, matter or thing*



contained in paragraphs (a) and (b) of subsection (1), he may by directive in writing require the Council to remedy the same within such time as he may appoint.

(3) If a Local Government Council fails to comply with the terms of a directive of the Minister made under subsection (2) or if the Minister, having appointed a person or persons to make an inquiry under subsection (1) considers it expedient so to do, the Minister may in addition to any other powers conferred upon him by the provisions of this Act –

(a) suspend the exercise by the Council of any of the powers conferred upon it by this or any other Act for such period as he may think fit; or

(b) dissolve the Council and, in his discretion, appoint or direct the election of new councillors;

and during such period, or, as the case may be, pending the appointment or election of new councillors, confer upon a public servant the exercise of any powers so suspended or of the powers of the Council so dissolved.

(4) The expenses incidental to –

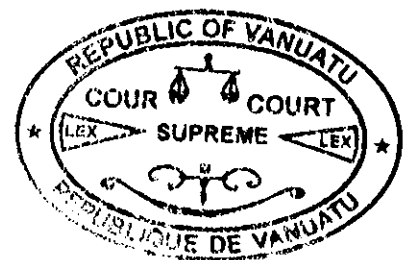
(a) any inquiry under this section; or

(b) the exercise of any of the powers of the Council under this section;

shall be a debt due by the Local Government Council to the Government and shall be paid and discharged out of the funds or revenues of the Council in such manner as the Minister shall direct. Any such direction may include a direction that the expenses shall be deducted from any grant payable by the Government to the Local Government Council.

17. Section 18L(1) provides that if the Minister has legitimate concerns about the performance of an LGC, the Minister may appoint a person or persons to enquire into those matters of concern. Section 18L(2) provides that if, upon that particular ministerial enquiry, the Minister of Internal Affairs still has those concerns, he may give written directives to the LGC concerned to remedy certain matters within a period of time. Section 18L(3) provides that if there is a failure by an LGC to comply with the Minister's directives or, if an enquiry has been instigated and the Minister considered that it is expedient to do so, he may suspend the exercise by the LGC of any power lawfully conferred on it for such period as he may seem fit or dissolve the LGC.

18. If, in the event of suspension or dissolution, the Minister also has the power to confer on a public servant the powers so suspended.



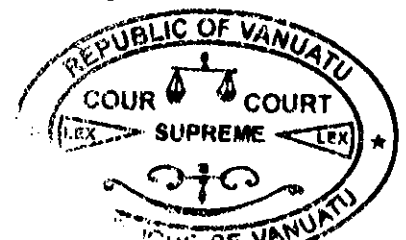
19. Section 18L accordingly gives significant and potentially intrusive supervisory powers to the Minister of Internal Affairs. However, any Minister of Internal Affairs exercising such powers under s. 18L must do so lawfully and, in particular, must not act arbitrarily, capriciously or otherwise for a purpose inconsistent with the spirit and intention of the Decentralization Act.

The case for the LGCs

20. The 3 LGCs involved in this case principal claim is that the decision to suspend them in each case was unlawful in that it was for an improper purpose. That is, the Minister of Internal Affairs had an ulterior and thus an illegitimate motive for suspension. Furthermore, it is argued that there was otherwise a breach of natural justice as the Minister did not give notice of his concerns to the LGCs before the suspension order was made, he consequently failed to allow the LGC the opportunity to respond or be heard on his concerns, and finally he failed to give reasons for his decision to suspend.
21. This case rises and falls principally, indeed almost exclusively, on the question of whether the Minister's decision was for an improper and thus illegitimate purpose.
22. The case for each of the 3 LGCs is that the Minister decided to suspend the LGCs so that he could take effective control of NISCOL.

NISCOL

23. NISCOL (*Northern Islands Stevedoring Company Limited*) is a private company based in Luganville and it is principally involved in the commercial business of stevedoring work at that port. Its shareholding is split between the 4 suspended LGCs, SANMA, MALAMPA, PENAMA and TORBA. So, those 4 LGCs are the shareholders of NISCOL.
24. The evidence before me is that there have been long standing concerns held by the various solicitors general of the LGCs, the Director of Local Authorities and the Minister of Internal Affairs, with their advisers, as to the governance and management of NISCOL



and, in particular, the apparent absence of any financial return to the shareholders LGCs by way of dividends for a number of years.

25. Exactly one week after the orders were made suspending the LGCs , the 4 public servants (appointed by the Minister under s. 18L (3) to exercise the suspended powers) met. They resolved, purportedly as NISCOL’s shareholders, to dismiss the existing NISCOL board of directors and appoint a new board. Of significance, the minutes kept of that meeting recorded that resolution in these terms,

“the proposal for termination for the current board of NISCOL as directed by the Honorable Minister of Internal Affairs – All members agree”.

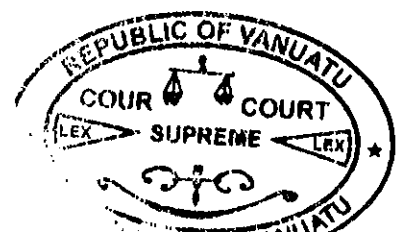
(emphasis added)

26. It is surely beyond coincidence that all 4 shareholder members of NISCOL ()were suspended on the same day and, only 1 week later, the 4 appointed public servants undertaking the governance role for those LGCs met and resolved to sack the NISCOL board. The resolution to sack the board is, indeed, acknowledged in the minutes to be pursuant to the direction of the Minister of Internal Affairs. The conclusion is inescapable that, when the Minister of Internal Affairs made the decision to suspend the 4 LGCs, he had in mind that this would provide a means by which he could exercise some control over NISCOL by the appointment of a new board of directors. However, is that fatal to the suspension decision? The claimants argued that it must be.

27. In response, the State points to the overall circumstances surrounding suspension that are addressed in the evidence. Mrs Trief argues that the suspension decision was a legitimate step for the Minister to take even if the court was to find that he had in mind, at that time, the strategy to deal with NISCOL that was implemented by his appointees only one week later.

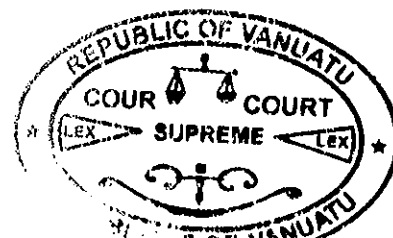
Some further evidential detail

28. The decisions of the 9 March 2012 to suspend did not come entirely out of the blue or without notice as asserted by counsel for the LGCs. Despite the protestations to the



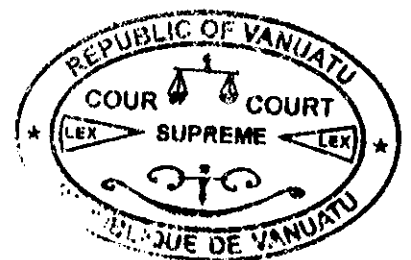
contrary, by the presidents of the LGCs, there had been concerns held, expressed by the solicitors general of the LGCs, the director and other members of the Department of Local authority and the Minister of Internal Affairs, and conveyed to the LGCs, in relation to the performance of the LGCs for quite some time. Indeed, on 1 April 2011, the then Acting Minister of Internal Affairs directed an enquiry to be made under section 18L (1) into a number of matters pertaining to the governance and management of the 3 claimant LGCs. The report that followed did not deal directly with the NISCOL issue but matters of a more general nature. The reports delivered to the Minister were different in outcome and recommendation for each of the LGCs. I know nothing about the involvement of TORBA in this respect.

29. SANMA received a report critical of its performance in a number of respects particularly in relation to claims of interference by the counsellors in management matters (the province of the solicitor general) and the purported suspension of the same solicitor general by the counsellors notwithstanding the clear dictates of section 18E (3), "*for the avoidance of doubt, no LGC shall have the power to suspend or dismiss the secretary*" and the unauthorised expenditure of LGC funds by some counsellors.
30. No directives were given to SANMA by the Minister at that time. The collective decision reached by the Director of Local Authorities and the Minister of Internal Affairs was to await the outcome of the local authority elections in late 2011 with the hope that a new team of counsellors would render the concerns of historical interest only. While suspension was then considered, restraint was exercised in that respect for the reasons just mentioned. The restraint indicates that the Minister of Internal Affairs and his officials were reluctant to take such a significant and intrusive step.
31. In respect of MALAMPA and PENAMA LGCs, the related reports expressed certain concerns but not to the same extent as in the case of SANMA. Those concerns were met by the Minister of Internal Affairs issuing directives in August 2011 requiring, in particular, each of those two LGCs to provide a detailed financial report covering the preceding 3 months and then to provide monthly updates. While a response was received



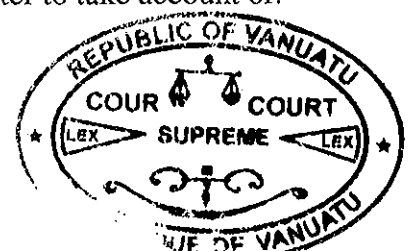
to that directive, it was more an objection to the directives. In any event, that Ministerial directive was not complied with either by MALAMPA or PENAMA. That failure to comply with that directive remained the case as at 9 March 2012 when the suspension decisions were made.

32. From about November 2011 to March 2012, considerable attention was given by the Director of Local Authorities and her staff together with the Minister of Internal Affairs to the position of the 4 LGCs and how the concerns held by them should best be addressed. The NISCOL issue was also becoming more pressing given the publicity attaching to the Chief Executive Officer of NISCOL having been arrested and charged with the misappropriation of NISCOL funds. Additionally, there was the continuing uncertainty, not resolved by earlier reports, whether any dividends had been paid by NISCOL. It was understood that NISCOL had made some payments directly to some counsellors and there was continuing uncertainty as to the basis of such payments and whether they were received appropriately into the accounts of the relevant LGC.
33. The Attorney General and the State Law Office become actively involved earlier this year in those considerations by the Minister of Internal Affairs, the Director of Local Authorities and other officials as legal advice was sought as how to deal with all these matters.
34. This is all been explained by the detailed sworn statements that have been filed.
35. In early March 2012, the Minister of Internal Affairs instructed the Attorney General to prepare the appropriate orders for a further and more specific enquiry into the performance of the 4 LGCs and also to suspend those LGCs with the subsequent appointment placing those powers in the hands of 4 public servants. The initial documentation produced and executed by the Minister on 8 March 2012 was withdrawn and a more appropriate version was promulgated by the Minister on 9 March 2012.



Consideration

36. It is clear that while the NISCOL issue appears to have been of pressing concern to the Minister of Internal Affairs and his officials, it was not the only concern held by them in respect of the LGCs. It is also clear that the decision to suspend was a carefully considered and restrained step by the Minister of Internal Affairs which was fully supported by his officials. It is not, however, a final step to address the concerns held by the Minister. The suspension is for a fixed period which will expire on 30 June 2012 which the evidence indicates was the period considered by the Minister to be required for the more specific 2012 enquiry to be completed. Once the 2012 report is received, the Minister will have various options available to him; particularly, (1) that he take no further action allowing the suspension to expire and the counsellors to return to power; (2) that he issue further directives tailored to each LGC and allow the counsellors to return to power to respond to those directives; (3) that he extend the suspension; and (4) that he dissolve the LGC and appoint or direct new counselors s. 18L (3) (d). However, this will be a fluid situation.
37. The evidence supports the conclusion that the NISCOL issue alone required the Minister of Internal Affairs to act decisively and without warning or notice so that the perceived (by the Minister and his officials) threat to the NISCOL assets could be minimized.
38. While the decision to suspend appears to have been appropriate, that is not the issue for this court. The issue is in respect of the lawfulness of the Minister's decision to suspend and not its merits. It is timely to note that the claims relate not to the decision of the 4 officials to sack the board of NISCOL and appoint a new board but to the decision of the Minister to suspend the LGCs.
39. In particular, I do not accept that there was any improper or (what might be termed) illegitimate motive behind the Minister's decision to suspend. NISCOL is, and remains an integral part of the financial makeup of each of the claimant LGCs. How that is addressed by the LGCs can justifiably be a matter for the Minister to take account of.



40. The further complaints made by the LGCs that there was no prior consultation, that there was no opportunity to be heard in response to those concerns, and also that there were no reasons given do not require further attention. This is because section 18L confers certain specific supervisory powers on the Minister of Internal Affairs and, in this case, he has exercised them in apparent accordance with the scheme of the act. That is not to say, however, that this Court considers that the Minister of Internal Affairs should have acted in this way, just that he was lawfully entitled to do so.

Conclusion

41. The claims are dismissed for the reasons given.

Costs

42. I have now heard from counsel on the question of costs. I had suggested that costs be approached in a certain way given first the rather unusual nature of this case which has ensured that it has attracted significant public interest. Perhaps, more importantly, the reasons behind the Minister's decision (to suspend the LGCs) has now emerged as part of the evidence adduced by the State. My suggestion, floated to counsel, was that costs lie where they fall with the rider that the individual legal costs of counsel appearing for the 3 claimant LGCs be payable by the LGC responsible but with those costs first to be agreed with the Solicitor General or taxed. Counsel have taken time to consider their positions in respect of that suggestion. It has now been confirmed by counsel that costs can be ordered on that basis and I so order.

BY THE COURT

