MARGO LLECHOLCH, ALFONSO DIAZ, and SHERRY TADAO
Appellants,

v.

REPUBLIC OF PALAU,
Appellee.

CIVIL APPEAL NO. 14-003
Civil Action No. 13-008

Supreme Court, Appellate Division
Republic of Palau

Decided: July 24, 2014

[1] **Appeal and Error**: Reviewability

Decisions committed to the sole discretion of the executive are unreviewable as to their merits.

[2] **Appeal and Error**: Reviewability

Even when an action is committed to the discretion of another branch of government, this Court may review whether that entity exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations.

[3] **Constitutional Law**: Pardon Power

The Executive Clemency Act imposes imposes only procedural requirements and does not infringe upon the president's substantive pardon power.

[4] **Constitutional Law**: Statutes

One cannot challenge a statute's constitutionality on the ground that it might injure some hypothetical individual.

[5] **Constitutional Law**: Facial Challenge

A facial challenge to a statute requires a showing that the law always operates unconstitutionally.

[6] **Constitutional Law**: Equal Protection

To establish an equal protection violation based on selective enforcement of a statute, the plaintiff must establish that he was treated differently than others who were similarly situated and that the selective treatment was motivated by an intention to discriminate on the basis of an impermissible consideration or by malice.

Counsel for Appellants Alfonzo Diaz and Margo Llecholch: Siegfred B. Nakamura
Counsel for Appellant Sherry Tadao: Yukiwo P. Dengokl
Counsel for Appellee: Craig D. Reffner

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Trial Division, the Honorable R. ASHBY PATE, Associate Justice, presiding.

PER CURIAM:

Appellants Sherry Tadao, Alfonso N. Diaz and Margo Llecholch appeal the Trial Division's November 29, 2013 Order granting the Republic's Motion for Summary Judgment and its December 20, 2013 Final Judgment. For the reasons set forth below, the decision of the Trial Division is **AFFIRMED**.

BACKGROUND

The underlying lawsuit in this case arises out of former President Toribiong's decision to grant executive clemency to Appellants Sherry Tadao, Alfonso N. Diaz, and Margo Llecholch during the waning days of his administration.

Pursuant to the Constitution, the President is afforded the power to "grant pardons, commutations and reprieves subject to procedures prescribed by law." Palau Const. Art. VIII, § 7(5). The Executive Clemency Act (the "Act"), in turn, establishes the procedures by which the President may exercise that power. 17 PNC § 3201. Under the Act, any person convicted of a crime may file a petition for executive clemency, or the President may initiate the process himself by providing notice of his intent to exercise clemency to the Minister of Justice (the "Minister"). 17 PNC §§ 3201, 3206. After the Minister receives the petition, or notice of intent, as the case may be, the Minister must distribute copies of it to the Attorney General, the Director of the Bureau of Public Safety, and the Parole Board. 17 PNC § 3204. Those entities then have 60 days in which to review the petition or notice and submit written recommendations to the Minister. 17 PNC § 3204. Within five days of the receipt of all the written recommendations, the Minister must prepare his own recommendation and submit the petition or notice, along with all of the recommendations, to the President. 17 PNC § 3205. "Based on these documents, the President shall decide whether or not to grant executive clemency." 17 PNC § 3205.

In late 2012 and early 2013, Appellants, who have been convicted of a variety of crimes, submitted petitions for executive clemency. Fewer than 60 days after those petitions were filed, former President Toribiong granted them. The Attorney General's office did not issue the required recommendations before the President signed the orders granting executive clemency to Appellants.

On February 5, 2013, the Republic of Palau (the "Republic") filed an action seeking a declaratory judgment that Appellants' pardons are null and void because the President failed to follow the procedures prescribed by the Executive Clemency Act. Appellants timely filed their Answers. The Republic then moved for summary judgment. After the matter was fully briefed, the Trial Division granted the Republic's Motion in an Order dated November 29, 2013. A Final Judgment in the matter was entered on December 20, 2013. Appellants' subsequent Motion for Reconsideration was denied. Thereafter, Appellants filed timely appeals.

APPLICABLE STANDARDS

We review a lower court's grant of summary judgment de novo. *See Becheserrak v. Eritem Lineage*, 14 ROP 80, 81 (2007). Our review is plenary, considering both whether there is no genuine issue of material fact and whether substantive law was correctly applied. *Ulechong v. Palau Pub. Utils. Corp.*, 13 ROP

116 (2006); *Dalton v. Bank of Guam*, 11 ROP 212 (2004).

Summary judgment is proper when the pleadings, affidavits, and other papers show no genuine issue of material fact, and that moving party is entitled to judgment as a matter of law. *Ulechong*, 13 ROP at 119 (citing ROP R. Civ. P. 56(c)). Summary judgment is therefore not appropriate when genuine issues of material fact persist. *See id.* A factual dispute is "material," as that term is used in Rule 56(c), if it must be resolved before the fact-finder can determine whether an element of the claim has been established. *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 110 (1995). Summary judgment is appropriate against the party who fails to make an evidentiary showing sufficient to establish a question as to a material fact on which that party will bear the burden of proof at trial. *Becheserrak*, 14 ROP at 82. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]" *Wolff*, 5 ROP Intrm. at 110. In considering whether summary judgment is appropriate, all evidence and inferences are viewed in the light most favorable to the non-moving party. *See Obeketang v. Sato*, 13 ROP 192, 194 (2006).

In cases before this Court, United States common law principles are the rules of decision in the absence of applicable Palauan statutory or customary law. *Becheserrak v. ROP*, 7 ROP Intrm. 111, 114 (1998).

ANALYSIS

It is undisputed that former President Toribiong neglected to follow the procedures established by the Executive Clemency Act when he granted Appellants' pardons without receiving or considering any recommendations from the Attorney General and before the time for submission of those recommendations had expired.[1] Accordingly, the Trial Division, after rejecting Appellants' arguments in opposition, granted summary judgment and declared the pardons null and void.

On Appeal, Appellants assert that the Trial Division erred in several respects. First, Appellants Diaz and Llecholch argue that it is not within the purview of the Court to set aside or declare void a facially valid pardon issued by the President. Next, Appellants contend that the Executive Clemency Act's recommendation requirement is unconstitutional because it intrudes on the President's pardon power. Finally, Appellant Tadao asserts that there exists an issue of material fact as to her equal protection argument, thus, an affirmative summary judgment ruling was inappropriate.

I. Reviewability

As an initial matter, we first address whether the Court may set aside or void a pardon issued by a President. Appellants Diaz

[1] Although Appellants Llecholch and Diaz continue to frame the Attorney General's failure to provide a recommendation as a "supposed" event (*See* Llecholch and Diaz Opening Brief at 3), as the Trial Court noted in its Order granting Summary Judgment, the Republic attached the affidavit of the Attorney General at the time, R. Victoria Roe to their reply. Ms. Roe's affidavit contains her sworn statement, made with personal knowledge, that the Office of the Attorney General did not issue the required recommendations before former President Toribiong signed each of the Appellants' orders of pardon and commutation. Appellants do not introduce evidence to contradict Ms. Roe's affidavit with their appeal. Therefore, no genuine dispute exists as to this issue. *See Wolff*, 5 ROP Intrm. at 110 (holding that "the nonmoving party must offer evidence to dispute the facts advanced by the movant.").

and Llecholch argue that the separation of powers doctrine prevents a Court from doing so and on appeal they contend that the Trial Division should have refrained from setting aside or voiding the pardons issued by the former President.

[1][2] Case law does indicate that the merits of the President's decision to grant a pardon are not reviewable by the Court. *See Kruger v. Doran*, 8 ROP Intrm. 350, 351 (Tr. Div. 2000) (observing that the Constitution "affords the President broad, unreviewable discretion to grant pardons"). However, the Republic has not asked the Court to review the merits of former President Toribiong's decision to issue the pardons. Rather, the Republic has asked the Court to determine whether former President Toribiong's issuance of the pardons was proper from a procedural standpoint. In making this determination, the lower court stated,

> It is "the Court's province and duty . . . to decide whether another branch of government has exceeded whatever authority has been committed to it by the Constitution." *Francisco v. Chin*, 10 ROP 44, 49-50 (2003). Thus, even when an action is committed to the absolute discretion of another branch of government, this Court may review whether that entity "exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations." *Guadamuz v. Bowen*, 859 F.2d 762, (9th Cir. 1988)[.]

Republic of Palau v. Diaz, et al., Civil Action No. 13-008, slip op. at 6-7 (Trial Div. Nov. 29, 2013) (internal citations omitted). We agree with the lower court's analysis and are persuaded by the case law it cited. Therefore, we determine that the question of whether former President Toribiong exceeded his legal authority by granting pardons without following the procedures prescribed by the Act falls squarely within the purview of the Court.[2]

II. Constitutionality

Appellants concede that former President Toribiong did not follow the procedures prescribed by the Executive Clemency Act when he granted their pardons. However, Appellants argue that former President Toribiong did not exceed his legal authority by issuing pardons in violation of the Act because the Act, itself, is unconstitutional. Appellants allege that the Act infringes upon the President's Executive Clemency power by

[2] Appellants rely on *In re: Hooker*, 87 So.3d 401 (Miss. 2012) in support of their contention that the judicial branch may not set aside or void a pardon based solely on a procedural deficiency. The Trial Court reviewed that case and its applicability to the case at hand:

> That case, which provoked vigorous dissents from several Mississippi Supreme Court Justices, is an outlier. The majority opinion relies on antiquated precedent and "fails to consider decisions of other states; fails to consider legal encyclopedias confirming that that conditions precedent to granting a pardon have repeatedly been found reviewable; contradicts learned treatises and encyclopedias on Mississippi law; and fails to consider that the United States Supreme Court has reviewed whether pardons were

imposing impermissible substantive, rather than procedural, limitations.[3]

[3] The Trial Division addressed this argument and ultimately determined that the Act's requirements are procedural in nature and do not impermissibly intrude on the President's discretion to exercise pardon power. Specifically, the Trial Division stated,

> The Palau Constitution explicitly contemplates the enactment of legislation establishing procedures by which the President must exercise his pardon power. *See* ROP Const. art. VIII § 7 (providing that the President shall have the power "to grant pardons, commutations and reprieves *subject to procedures prescribed by law*.") (emphasis added). And, "[w]here a constitution directs that the pardoning power shall be vested in the [executive], under regulations and restrictions prescribed by law, the legislature may make such regulations and restrictions[.]" 59 Am. Jur. 2d *Pardon and Parole* § 33 (2012). Accordingly, the plain text of the Constitution empowers the legislature to enact laws establishing procedural requirements for the exercise of executive clemency. *See Ucherremasech v. Hiroichi*, 17 ROP 182, 190 (2010) ("The first rule of construing a statute or constitutional provision is that we begin with the express, plain language used by the drafters and, if unambiguous, enforce the provision as written.").

The question, then, is whether the Executive Clemency Act imposes legitimate procedural requirements, as expressly sanctioned by the Constitution, or whether it goes too far by imposing substantive restrictions on the presidential pardon power. In answering this question, "[t]his Court presumes that the legislature intended to pass a valid act and construes an act to be constitutional, if possible." *Nicholas v. Palau Election Comm'n*, 16 ROP 235, 239 (2009).

"The purpose of [the Executive Clemency Act] is to set procedures by which the President may exercise his power pursuant to Article VIII, Section 7(5) of the Palau Constitution." 17 PNC § 1301. The Act requires the president to obtain and consider recommendations from the Attorney General, the Bureau of Public Safety, the Parole Board, and the Minister of Justice. 17 PNC §§ 3204-05. The president need not heed those recommendations; he must simply consider them. *See* 17 PNC § 3205. Nothing prevents the president from issuing a pardon even when all four entities recommend that the pardon be

within the President's power on numerous occasions." *Id.* at 421-22 (J. Randolph, dissenting). Moreover, *In re: Hooker* concerned a constitutional provision that itself established procedural requirements for the exercise of the pardon power, not a statutory provision enacted by the legislature, as is the case here. Thus, the separation of power concerns in this case are distinguishable from those presented by *In re: Hooker*. This Court remains unconvinced that *In re: Hooker* is either correct or analogous to the instant case.

Republic of Palau v. Diaz, et al., Civil Action No. 13-008, slip op. at 7, n. 5 (Trial Div. Nov. 29, 2013). We agree with the Trial Court's thorough analysis and decline to follow the rogue and controversial holding in *In re: Hooker*.

denied. The Act thus imposes no substantive limits on the president's power to grant pardons—indeed, his discretion to pardon whomever he pleases for whatever reason remains wholly unfettered. *See Makowski v. Governor*, 299 Mich.App. 166, 175 (2012) (holding that statutory provisions requiring the governor to consider recommendations from the parole board before granting commutations "in no way limit the Governor's absolute discretion with regard to commutation decisions"). Instead, the Act merely requires that the president follow certain procedures to ensure that his decision to grant or deny a pardon is a properly informed one.

Legislative history supports the conclusion that the Act imposes only procedural requirements and does not infringe upon the president's substantive pardon power. The first procedural rules governing the exercise of executive clemency were created by the executive himself, former President Haruo I. Remeliik, in Executive Order No. 27. The Senate bill that would eventually become the Executive Clemency Act was modeled on that Executive Order. *See* Stand. Com. Rep. No. 3-19 (Apr. 11, 1989) (noting that "[t]his bill is very similar in substance and form to Executive Order No. 27"). The Senate Committee on Judiciary and Government Affairs (Committee) recommended that "the procedures set forth in this Executive Order should be statutory, so as to ensure consistency in the application of the pardon authority." *Id.* Accordingly, the Committee translated the basic requirements established by the Executive Order into a legislative act. In doing so, the Committee observed that "this bill does not restrict the authority of the President to grant pardons." *Id.* Instead, "[t]hese established procedures will ensure that the President is properly informed regarding any proposed clemency action." Stand. Com. Rep. No. 21 (Jul. 25, 1989). The legislative history thus confirms that the Olbiil Era Kelulau intended to codify preexisting procedures governing executive clemency and did not intend to substantively restrict the president's pardon power.

Republic of Palau v. Diaz, et al., Civil Action No. 13-008, slip op. at 8-10 (Trial Div. Nov. 29, 2013). We agree with the Trial Division's rationale.

We note that Appellants Diaz and Llecholch have refined their argument on appeal and more specifically argue that the Ministerial review prescribed by § 3204 is a substantive or impermissible limitation because it infringes upon the President's right to exercise his Executive Clemency powers "*at any given time.*" (Diaz and Llecholch Opening Br. 7) (emphasis added). Appellant Tadao similarly asserts that the Act restricts the President's power to exercise Executive Clemency "*at any time*." (Tadao Reply Br. 3) (emphasis added). However, nothing in the Constitution suggests that the President may exercise his Executive Clemency powers *at any given time*; nor do Appellants cite any authority in support of this assertion other than to baldly suggest that the Constitution so empowers him. To the contrary, the Constitution explicitly calls for the imposition

of procedural limitations on the President's ability to grant pardons. *See* ROP Const. art. VIII § 7 (providing that the President shall have the power "to grant pardons, commutations and reprieves *subject to procedures prescribed by law*.") (emphasis added). The limiting procedures referenced in the Constitution are codified in §3204 and, as discussed above, we agree with the Trial Division's analysis and determine that those procedures are not unconstitutional.

[4][5] Appellants also pose hypothetical scenarios which purportedly demonstrate that the Act operates unconstitutionally. Appellants Diaz and Llecholch argue that the limitations prescribed by the Act would prevent the President from granting Executive Clemency to individuals who were serving less than 60 day sentences. (Diaz and Llecholch Opening Br. 7). Appellant Tadao suggests that the President may have to issue a pardon on short notice for national security reasons and that the Act, as it stands, would impermissibly restrict his ability to do so. (Tadao Opening Br. 8). The Court will not entertain these theoretical situations. The fact remains that these scenarios do not exist in this case and Appellants simply cannot challenge the Act's constitutionality on the ground that it might injure some hypothetical individual. *See* 16 Am. Jur. 2d *Constitutional Law* § 137 (2009) ("As a general rule, no one can obtain a decision as to the invalidity of a law on the ground that it impairs the rights of others."). Furthermore, Appellants do not challenge the constitutionality of the Act on its face, which would require a showing that "the law, by its own terms, always operates unconstitutionally." Am. Jur. 2d *Constitutional Law* § 137 (2009). As the Trial Division noted, "[i]t is enough that [Appellants] have failed to show either that the Act always operates unconstitutionally or that it operates unconstitutionally as applied to them." *Republic of Palau v. Diaz, et al.*, Civil Action No. 13-008, slip op. at 11 (Trial Div. Nov. 29, 2013). Accordingly, we conclude that the Act is neither unconstitutional on its face nor unconstitutional as it applies to Appellants.

III. Equal Protection

Appellant Tadao asserts that the Trial Division erred as a matter of law in granting summary judgment because there exists a genuine issue of material fact with respect to her equal protection claim. Although her argument is undeveloped at best, essentially Tadao complains that the Republic has chosen to prosecute a claim against her while failing to pursue claims against other persons to whom executive clemency was also granted in less than 60 days. In her most concise articulation of why a genuine issue of fact remains, Tadao states, "there was a clear case of uneven treatment granted to Senator Baules and [Tadao], and for no clearly articulated reason." (Tadao Reply Br. 6) This simply is not the standard for an equal protection argument. For the reasons set forth below, we conclude that there exists no issue of fact and Tadao's argument fails.

First, Tadao has failed to establish that she and the other individuals she claims were granted executive clemency in less than 60 days—specifically, that she, Ibedul Gibbons and Senator Baules—are similarly situated. Such a showing is a necessary prerequisite to an equal protection claim. *Ngerur v. Supreme Court of the Republic of Palau*, 4 ROP Intrm. 134, 137 (1994) ("[E]qual protection does not require identical treatment of persons who are not similarly situated."). Instead, Tadao seems to establish that the circumstances of her pardon and that

of Senator Baules, on whom she focuses in her Reply Brief, are actually quite dissimilar. Tadao ultimately concedes the fact that Senator Baules, though he was granted a temporary reprieve from his jail sentence, was granted a commutation only *after* the President received recommendations from the required entities. (Tadao Reply Br. 5) Thus, it appears as though the procedure prescribed by § 3204 was followed in Senator Baules' case.

[6] Regardless, even assuming that Tadao, Senator Baules, and Ibedul Gibbons are similarly situated, Tadao still fails to set forth a comprehensive equal protection argument. Specifically, she offers no evidence that the government discriminated against her on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation. *See* Const. Art. IV, § 5, cl. 1 (listing impermissible bases for discrimination). The Trial Division, citing *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995), addressed this deficiency in her argument:

> Even assuming that [Appellants] have raised a question as to whether they have been treated differently from similarly situated persons, they have failed to offer any evidence whatsoever sufficient to raise a genuine issue of fact as to the second prong of the test. *See Zahra*, 48 F.3d at 684 ("The flaw in Zahra's equal protection claim is that Zahra assumes that to prevail he need only prove that he was treated differently from others."); *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) ("Mere failure to prosecute other offenders is not a basis for a finding of denial of equal protection."). [Appellants] have neither alleged nor provided any evidence that the Republic decided to enforce the Executive Clemency Act in this case because it wishes to discriminate against them on the basis of an impermissible consideration, such as race, social status, gender, or religion. *See* Palau Const. art. IV, § 5, cl. 1 (listing impermissible bases for discrimination). Nor have [Appellants] alleged that the Republic intended to punish or inhibit their exercise of constitutional rights. Finally, the record is entirely lacking in any evidence that the Republic has acted with malice or a bad faith intent to injure [Appellants]. *See Zahra*, 48 F.3d at 684 (holding that evidence suggesting an individual "was 'treated differently' from others does not, in itself, show malice"); *LeClair v. Saunders*, 627 F.2d at 608 ("[E]qual protection does not require that all evils of the same genus be eradicated or none at all."). Accordingly, [Appellants] have not demonstrated the existence of a genuine dispute of material fact as to whether their equal protection rights have been violated.

Republic of Palau v. Diaz, et al., Civil Action No. 13-008, slip op. at 16 (Trial Div. Nov. 29, 2013). We agree with the Trial Division's analysis and determine that Tadao has failed to offer sufficient evidence to raise a genuine dispute of material fact as to whether she was treated differently than others similarly situated on an impermissible basis. As a result, her equal protection argument fails.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the Trial Division's ruling.

ARTHUR NGIRAKLSONG, Chief Justice, concurring:

The simple issue in this case is whether the Executive Clemency Act, (17 PNC § 3201), an enabling legislation for the constitutional provision on President's power to grant pardons, commutations or reprieves, is unconstitutional. Does the Act usurp the President's powers to grant pardons, commutations or reprieves in Article III, section 7 of the Palau Constitution?

The Act is constitutional. It is also a prerequisite to the President's exercise of the power to grant pardons, commutations or reprieves. Former President Toribiong failed to follow the constitutionally mandated procedures before granting executive clemency to appellants. I affirm.

There is an important difference between the Palau Constitution's executive clemency provision from the corresponding provision in the United States' Constitution. The Palau Constitution requires an enabling legislation before the President can exercise his power to pardon, commute or reprieve.

"The President shall have all the inherent powers and duties of a national chief executive, including, but not limited to the following:

1) . . .

2) . . .

3) . . .

4) . . .

5) to grant pardons, commutations and reprieves subject to procedures

prescribed by law… [emphasis added].

6) . . .

7) . . .

8) . . . "

Palau Const., art. VIII, § 7. Contrast with the US Const., art. II, § 2 which states, "he [the President] shall have power to Grant Reprieves and Pardons against the United States, except in cases of impeachment." This constitutional provision of the US Constitution is self-executing.

The Palau Constitution on the power of the President to grant pardons, commutations and reprieves is not self-executing. *See Gibbons v. Etpison*, 4 ROP 1, 4 (1993). This means this constitutional provision does not become operative until an enabling legislation is in place. The Palau Constitution specifically says the power of the President "to grant pardons, commutations and reprieves [is] subject to procedures prescribed by law…" The Executive Clemency Act, 17 PNC §3201, et seq., is the enabling legislation.

Appellants have not shown that the Act has diminished the constitutional powers of the President to pardon, commute or reprieve nor has it imposed cumbersome procedures that tantamount to infringements on the President's constitutional powers.

Since Appellants have failed to show that the Executive Clemency Act is constitutionally infirm and former President Johnson Toribiong failed to follow the procedures required by the enabling legislation and the Constitution, I affirm.