

IN THE HIGH COURT OF KIRIBATI )  
CIVIL JURISDICTION )  
HELD AT BETIO )  
REPUBLIC OF KIRIBATI )

HIGH COURT CIVIL CASE No. 54 OF 2005

**BETWEEN:**                    **DR HARRY TONG**  
   **LEADER FOR THE OPPOSITION**                    **APPLICANT**

**AND:**                            **ATTORNEY GENERAL IN RESPECT OF**  
   **THE COMMISSIONER OF POLICE**                    **RESPONDENT**

**FOR THE PLAINTIFF:**        **MR GLENN BOSWELL**  
**FOR THE RESPONDENT:**    **MR DAVID LAMBOURNE, SOLICITOR GENERAL**

**DATE OF HEARING:**        **11 & 12 OCTOBER 2005**

### **JUDGMENT**

The decision in 2003 by the Government to recognise the Republic of China (Taiwan) has caused controversy in Kiribati.

On 3 May 2005 the President of the Republic of China (Taiwan) was due to arrive at Bonriki Airport for a State Visit. Following a telephone conversation the Applicant in these proceedings, Dr Harry Tong, Leader of the Opposition in the Maneaba ni Maungatabu, on 22 April 2005, wrote to the Commissioner of Police:

**Re: Political Rally**

I refer to our telephone conversation of this morning's date in respect of the above matter. Please consider this letter as a formal application for a permit to hold this rally.

The purpose of this rally-demonstration will be to register our disapproval at Kiribati continued diplomatic recognition of the Taiwan as we believe that in view of the current tension between China and Taiwan, Kiribati support for Taiwan puts our National Security at risk.

We also believe that Taiwan dominates both our foreign affairs and our domestic affairs. We propose to hold the rally in the parking area of the airport. We expect to have between 1500 and 2000 protestors present.

After the President of Taiwan and his party depart from the airport the protestors would board their vehicles and depart for Betio where the Betio protestors would disperse. The convoy would then turn back toward Bonriki with other protestors dispersing at their respective villages on the way. The demonstration would be of a peaceful nature and well controlled by our own marshals.

I look forward to hearing from you at your earliest convenience.

The rally/demonstration date will be the arrival date of the President of Taiwan which is proposed for the 3<sup>rd</sup> May but we believe this has not yet been confirmed.

On 26 April the Commissioner replied to the Leader:-

Re: POLITICAL RALLY

Thank you for the notice of your intention to hold a public gathering during the forthcoming visit of the President of the Republic of China/Taiwan. You may be aware that we have also received an application from another group wishing to gather at the same time.

As you will appreciate, the logistics of the State visit mean that all available Police officers will be fully engaged with security arrangements for the visit. Unfortunately, we cannot spare the officers that would be needed to properly police the two gatherings for which applications have been received. I consider that the potential for a breach of the peace during one or both of the planned gatherings is unacceptably high.

Therefore, in exercise of my powers under section 17(1) of the Public Order Ordinance (Cap 82), hereby prohibit the holding of your proposed public gathering for the duration of the Taiwanese President's visit to Kiribati. For your information, I have similarly refused the other application referred to above.

On or soon after 25 April Mr Ata Burerua wrote to the Commissioner:

Dear Sir

Request for march

This is our letter in regards our telephone conversation on Monday 25<sup>th</sup> April 2005 in regards the inclusion of our march with some of our friends from Tarawa Teinainano and Betio, upon the arrival of the Taiwanese President on Tarawa on the 2<sup>nd</sup> May 2005. The purpose of the march is to show support for our Kiribati Government for its' diplomatic ties with the Taiwanese Government. The march will also be our means of saying thank you to the Taiwanese President and His Government for the many help and support they have given to our people and country.

It is with hope that this request be approved in light of the authority vested in you by law. We are most willing to fulfill decisions and follow them accordingly as expected. We request that you let us know at your most convenient time.

We have planned to gather at the Airport with some of our colleagues who will be holding up banners to welcome the President, and then proceed from the airport on trucks and cars. It has been decided that there will be Trucks available to pick up our friends from Betio as well as those from TUC. Approximately there will be about 15 or 16 trucks during that time, there could be more or less.

Thank you and we await your reply.

Signed

Ata Burerua  
For supporters of Boutokaan te koaua BTC and TUC

The Commissioner refused permission for the march.

The Originating Application for Redress in respect of breach of sections 12 and 13 of the Constitution is for this order:-

1. A declaration that the Applicant's rights under sections 12 and 13 of the Constitution have been contravened by the Commissioner of Police's decision refusing a permit to hold a peaceful rally;

The grounds relied on:-

- (a) **The Commissioner of Police's decision refusing a permit for a rally and prohibiting a rally contravened sections 12 and 13 of the Constitution;**
- (b) **The Commissioner of Police's decision refusing a permit for a rally and prohibiting a rally on the grounds that there was a potential for a breach of the peace was not reasonably justifiable in a democratic society.**

In a supporting affidavit Dr Tong averred that previous demonstrations in Kiribati had always been peaceful and that Kiribati people are generally of a peaceful nature.

Sections 12 and 13 of the Constitution protect respectively freedom of expression and freedom of assembly and association. Each section ends by providing that any law which may be made as an exception to the section must "be reasonably justifiable in a democratic society" (the positive sense of the negative construction in the sections).

Section 17 of the Constitution pursuant to which the Application is brought allows persons aggrieved by contravention of sections 3 to 13 to apply to the High Court for redress.

The Commissioner in refusing permission for the gatherings acted under section 17(1) of the Public Order Ordinance:-

- 17(1) The Commissioner of Police or an officer in charge of police may, if it appears to him to be necessary or expedient in the interests of public order, prohibit the holding or the continuance of a particular public gathering in any area, premises or place or on any particular day.**

Section 17(1) gives the Commissioner a discretion: he "may" prohibit.

The Court does not interfere with the exercise of a discretion unless it is shewn that the particular discretion has miscarried. The Court of Appeal, using the phrase "a statutory power of decision" rather than "discretion" most helpfully set out the principle in civil appeal No. 5/2003 *Etera Teangana, The Speaker of the Maneaba ni Maungatabu and Anote Tong, Te Beretitenti of the Republic of Kiribati*:

The Courts will ensure that there was no procedural unfairness, that the decision was not unlawful, and that it was reasonable. ----- As to the reasonableness of the decision the leading case is *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, although there have since been numerous refinements and elaboration of the principle established by that decision. It is enough to mention *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, in which Laws LJ, with whose judgment May LJ concurred, said (at p.847):

“On this model the court makes no judgment of its own as to the relative weight to be attached to this or that factor taken into account in the decision-making process; it is concerned only to see that everything relevant and nothing irrelevant has been considered, and that a rational mind has been brought to bear by the [decision maker] in reaching the decision”.

The Applicant has suggested neither procedural unfairness nor that the decision was not lawful. He complains of the reasonableness of the Commissioner’s decision. It is necessary therefore to consider the facts. They are not in dispute.

The preamble to the Deployment Instructions issued for a “*State Visit of HE Chen, Shuibian President of Taiwan*”:-

Kiribati Police Service will provide security and protection for the safety of President Chen, Shui-bien and entourage during State Visit on 3-4 May 2005. The visit is expected to attract huge crowd at airport upon arrival as well as other places subsequently visited by the President.

It is anticipated that some groups of people might caused disturbance or provoked breach of the peace during the occasion. Foreign interference is considered as possible external threats. The visit is a big challenge to the organisation for obvious reasons and we must in turn exercised high standard of performance in the execution of our mission.

The visit was a big event in Kiribati to be carefully planned and safely conducted: “a big challenge”.

Evidence was given by Dr Tong and by Mr Ata Burerua and the Commissioner of Police Ioeru Tokantetaake.

Dr Tong asserted that the risk of trouble was not unacceptably high. Mr Burerua said the two political parties, each supporting one of the proposed rallies, "sometimes get on, sometimes clash".

What could the situation at Bonriki airport have been on the arrival of President Chen? There would have been those taking part in the ceremony of arrival and no doubt many spectators there out of interest to watch: away from the airport school children lining the road. Had the two rallies been held up to 2,000 (Dr Tong's estimate) in one and getting on for 1,000 (my estimate based on Mr Burerua's 15 to 16 trucks) in the other. The car parking area of the airport is large but if there were up to 3,000 milling about there and two groups expressing differing, controversial opinions, it could have been chaos! How the Taiwanese party would have felt, what they would have thought, may be imagined.

Mr Boswell submitted that the Commissioner was obliged to take some risk to safeguard rights under the Constitution. Mr Boswell did not draw a line between some risk and an unacceptably high risk. In his cross examination of the Commissioner he attempted to shew that the Commissioner had at his disposal plenty of police at the same time to provide security for the visit and to control two separate gatherings in the same area. In his address Mr Boswell was critical of the Commissioner for not being able to give the precise disposition of each one of his officers. I do not accept the criticism: the Commissioner could not be expected to carry in his head such detail. The effect of the Commissioner's evidence which I accept was that the Police were already fully committed providing security for the visit without having to cope as well with rallies or demonstrations.

The Commissioner cannot be blamed for not being prepared to take the risk of trouble if he gave permission for the two gatherings. The Applicant has failed to shew that the Commissioner's prohibition was "not ---- reasonably justifiable in a democratic society".

The Commissioner came to his decision after seeking advice from the Attorney General and after discussion with his Senior Executive Group of four police officers.

*Mahmood v Secretary of State* requires "that everything relevant and nothing irrelevant has been considered, and that a rational mind has been brought to bear by the [decision maker] in reaching the decision". I am satisfied the Commissioner did consider "everything relevant and nothing irrelevant" and did bring "a rational mind" to bear on Dr Tong's request.

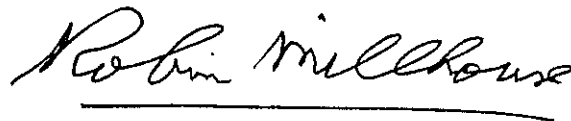
The Commissioner made "a decision which a reasonable person might reasonably reach" (per Lord Denning MR in *Secretary of State for Education*

*and Science v Tameside Metropolitan Borough Council* [1977 AC 1014 @ 1025E].

His discretion did not miscarry.

The application for the declaration sought is dismissed.

Dated the 14<sup>th</sup> day of October 2005

A handwritten signature in black ink, reading "Robin Millhouse". The signature is written in a cursive style with a horizontal line underneath it.

THE HON ROBIN MILLHOUSE QC  
Chief Justice