IN THE SUPREME COURT OF NAURU
(FULL COURT)

MISCELLANOUS CAUSE NO. 4/98

IN THE MATTER of a Petition Under Article 36 of the Constitution by LAGUMOT HARRIS & ORS

Petitioners

A N D THE SECRETARY FOR JUSTICE

Respondent

CORAM: Donne C.J.
Dillon J.

Dates of Hearing: 31 August; 1 & 2 September 1998
In New Zealand: November-December 1998 (3 days)
Date of Decision: 6/5 May 1999

Tuckfield Q.C. with him Audoa for Petitioners
Hulme Q.C. with him Connell for Respondent

DECISION OF THE FULL COURT

There is before the Court a petition referred to it pursuant to Article 36 of the Constitution which reads:

> "36. Any question that arises concerning the right of a person to be or to remain a member of the Legislative Assembly shall be referred to and determined by the Supreme Court."

Also before us, is an application by the Respondent for an Order to strike out most of the paragraphs of the petition.

These matters were the subjects of a hearing in August/September 1998 which, for reasons stated in our interim decision of 23 December 1998, was adjourned to enable submissions to be made both on the application to strike out and on certain questions put by us to Counsel. We shall refer to these later in this decision.

At this stage, we have received submissions from the Respondent which we have considered. Apart from a personal submission by one of the Petitioners, which is not relevant for the purpose of this decision, we have received no pertinent submissions from the Petitioners.

For three months the Court has waited for the completion of submissions. A timetable was originally fixed for their filing. For reasons known to the parties, that timetable has had to be revised on many occasions and there now appears to be some obstacle, of which we are not aware, preventing the Petitioners from making submissions which, we were informed, would be presented by Senior Counsel; Junior Counsel having indicated he was not prepared further to assist us.

We can wait no further and have decided to proceed to a decision on this matter.

The Nature of the Petition

The Petition is properly founded as a constitutional reference under Article 36.

Briefly the facts leading to its presentation are:

The Petitioners on 22 January 1998 had their parliamentary seats vacated by Order of the Speaker of Parliament thus giving rise to this reference. For reasons which are traversed in this decision, the Petitioners allege such an Order was unlawfully made and they contend they are still members of the Parliament of Nauru.

The Secretary for Justice was joined as nominal Respondent by the Court since it was clear that the Republic is affected by the proceedings.

The Petitioners seek (*inter alia*) from the Court a declaration that their disqualification as members of Parliament is null and void. This proceeding, however, is not a declaratory judgment process. We perceive our jurisdiction to consider the petition is founded on Article 36 of the Constitution which, in effect, imposes a mandate on the Court to determine in accordance with law, the question posed in the petition. It is a special jurisdiction. Unlike a statement of claim in an action in which are pleaded causes of action requiring by way of

relief an enforceable judgment or decree, this petition does not plead any cause of action. We perceive it as a prayer to the Court requesting a determination by way of an opinion on whether, on the facts stated by the Petitioners, they have the right to remain Members of the Parliament of Nauru. Accordingly we consider that on receiving this request we are required by the Constitution to investigate, within the limits lawfully available to us, the alleged facts and opine thereon.

In our view, it is not open to the parties, or their Counsel, to decide the future course of these proceedings. We were advised in January that it was the intention of Counsel to meet to settle this matter. We do not approve of this.

As to the application to strike out, for the reasons given above, we do not propose to entertain it. At the hearing, we indicated that these proceedings are not and cannot be confrontational. The parties are entitled to put their case, but, in this constitutional reference, procedures such as the one in question are, in our view, not available to the Respondent. The petition does not plead causes of action, and from it does not flow any right to an enforceable judgment.

Locus Standi

Mr Hulme contends that three of the Petitioners have no *locus standi* in the proceedings. The petition, he says, is brought under Article 36 of the Constitution, empowering the Supreme Court to deal with "Any question that arises concerning the right of a person to be of or to remain a member of Parliament." The fact is that three of the petitioners are members of Parliament (having been re-elected in the by-elections complained of). No one asserts that they are not members, or that they should not remain as members. Nor is there the slightest evidence of any danger of that being asserted. In none of the three cases does any question arise as to the petitioner being or remaining a member of Parliament. None of them treated separately could be the subject of a valid petition under Article 36, and that position cannot be escaped by joining them in a petition relating to one or more other people.

With this argument we agree and accordingly we hold that Mr Botelanga, Mr Kun and Mr Audoa, for the reasons given, have no right to pursue this petition and accordingly we order that they be struck out as Petitioners with the question of costs of and incidental to this Order being reserved.

The Standing Orders of Parliament: S.O.47 and the Suspension Resolutions

At the initial hearing there was produced the "roll" or official record of Parliament which recorded the procedure relating to the question with which we are concerned. This prompted us to put to Counsel the following questions:

1. Has Standing Order 47 which requires sequential terms of suspension been complied with by the resolutions of suspension of Parliament?

2. Standing Order 47, on the face of it, makes provision for the suspension of a member during any period commencing on 1 January and ending on 31 December -

   (a) Is any suspension extending beyond 31 December lawful?

   (b) If the answer to (a) above is NO - in computing any period of absence without leave as specified in Article 32(1)(d) of the Constitution, should that period include the period of unlawful suspension?

It is with Question 1 only that we are concerned in this decision.

The conduct and procedure of Parliament are governed by its Standing Orders. These are self imposed rules which, so long as they are in force, must be obeyed by Parliament. They have the force of law. In Nauru, on independence, the Parliament adopted the Standing Orders of the House of Representatives of the Commonwealth of Australia with certain amendments to suit local conditions.

In 1973 new Standing Orders were drafted by the office of the Speaker. After consideration by the appropriate Standing Orders Committee of Parliament, they were presented to the House on 17 October 1983. They were adopted by it on that day. These are the present Standing Orders.

It is pertinent to note that as the existing Standing Orders then in force prevented the presentation of a motion to adopt the new Orders, it was necessary for the House first to suspend the relevant existing Standing Orders to enable legally the consideration of the motion to adopt the new Orders.

The Petitioners' disqualification was prompted by Parliament's suspension of them "from the service of the House" pursuant to resolutions passed by the House. Their suspension resulted in their being absent from sittings of the House for the period laid down by Article 32(1)(d) of the Constitution as a ground for the vacation of their parliamentary seats.

The Article reads:

> (1) A member of Parliament vacates his seat -
>
> (a) .....
> (b) .....
> (c) .....
> (d) if he is absent without leave of the Legislative Assembly on every day on which a meeting of the Legislative Assembly is held during a period of two months; ...."

The relevant resolutions were moved and passed by the House in the case of Petitioners Mr Audoa, Mr Kun and Mr Benjamin on 26 August 1997 and, in the case of Mr Harris and Mr Botelanga, on 20 November 1997.

The effect of these resolutions was to suspend the Petitioners from sitting in the House until they apologised to the Speaker. They did not do so and were in consequence absent from sittings in the House for a period in excess of two months. This prompted the Speaker to order the vacation of their seats on the grounds that the condition in Article 32(1)(d) had been satisfied.

What prompted the suspension resolutions cannot be the concern of the Court. The privilege of non-impeachment of Parliament prevents any inquiry into that aspect. *Edinburgh and Dalkeith Railway Co. v Wauchope* (1842) CL 710; Bell 252.

We can, however, take cognisance of the "roll" or official record of Parliament produced to us by the Respondent. This records the following:

> (a) The motion passed on 22 May 1997 recorded as follows:
>
> Motion
>
> His Excellency the President moved the following motion -

"That the House calls upon the following Honourable Members of Parliament who published the "Newsletter", Issue No. 1, dated 7 May 1997, that is to say the Honourable Anthony Audoa M.P., the Honourable Reuben Kun M.P., the Honourable Lagumot Harris M.P., the Honourable Clinton Benjamin M.P.; the Honourable Nimrod Botelanga M.P. and the Honourable Dogabe Jeremiah M.P. to take the floor and offer apology to the House."

The Hon. V. Detenamo (Minister for Internal Affairs) seconded.

(b) The 26 August 1997 - (naming by the Speaker of Petitioners Audoa, Kun and Benjamin and call to apologise).

Following up to a resolution passed earlier by Parliament calling upon certain Members to apologise to the House, the Speaker called firstly on Mr Audoa (Yaren) to tender his apology.

Mr Audoa refused to apologise.

The Speaker ordered Mr Audoa to withdraw from the Chamber.

The House was suspended until the bell rings.

RESUME

The Speaker called on Mr Kun (Buada) to tender his apology.

Mr Kun refused to apologise.

The Speaker ordered Mr Kun to withdraw from the Chamber.

The House was suspended until the bell rings.

RESUME

The Speaker called upon Mr Benjamin (Boe) to tender his apology.

Mr Benjamin refused to apologise.

The Speaker ordered Mr Benjamin to withdraw from the Chamber.

(c) The resolution of 26 August 1997 (SO 46) by the Speaker re Petitioners Audoa, Kun and Benjamin.

Motion (Standing Order 46)

The Speaker moved that Mr Audoa (Yaren) be suspended form the service of the House.

Question put and passed.

Motion (Standing Order 46)

The Speaker moved that Mr Benjamin (Boe) be suspended from the service of the House.

Question put and passed.

(d) 26 August 1997 Motion by the President re Petitioners Audoa, Kun and Benjamin

"Noting that in the interest of maintaining the dignity of the Chair, this House has passed a motion on 22 May 1997 calling upon the following Hon. Members of Parliament who published the Newsletter, Issue No. 1 dated 7 May 1997 -

Hon. Anthony D. Audoa
Hon. Reuben Kun
Hon. Clinton Benjamin

to take the floor and offer apology to the Chair.

Noting also that the House had determined subsequently on the day, i.e. 22 May 1997, that this motion of the House be effected at such time as the Speaker deems appropriate;

Noting further that Hon. Speaker, in accordance with the determination of the House, directed the abovementioned Honourable Members in the House today, 26 August 1997, to offer an apology in accordance with the aforesaid motion;

Noting with deep concern the intransigence of the abovementioned Honourable Members, to refuse to apology and thereby defy the authority of the Chair and the Order of the House;

Therefore this House resolves that in view of the contumacious and disrespectful conduct of these Hon. Members whose names are mentioned above and in order to preserve the dignity of the Chair and establish the authority of the House, these three Honourable Members may be suspended from the service of the House until such time as they, individually, take the Floor and offer an unconditional and unqualified apology to the House.

The Hon. V. Detenamo (Minister for Internal Affairs) seconded the motion."

(e) 20 November 1997 - Speaker naming Petitioners Harris and Botelanga and call to apologise.

"The Speaker - First of all I call upon Hon. Nimrod Botelanga to take the floor and offer an apology in deference to the resolution of the House.

Motion (S.O. 46)

The Speaker called on Mr Botelanga (Meneng) to tender his apology.

Mr Botelanga refused to apologise.

The Speaker ordered Mr Botelanga to withdraw from the Chamber.

Mr Botelanga withdrew from the Chamber.

Motion (S.O. 46)

The Speaker called on Mr L. Harris (Ubenide) to tender his apology.

Mr L. Harris refused to apologise.

The Speaker ordered Mr L. Harris to withdraw from the Chamber.

The House was suspended until the bell rings.

(f) 20 November 1997 - Motion of Suspension by the President.

"Noting that in the interest of maintaining the dignity of the Chair, this House has passed a motion on 22 May 1997 calling upon the following Members of Parliament who published the "Newsletter" Issue No. 1 dated 07 May 1997:

Hon. Anthony Audoa
Hon. Reuben Kun
Hon. Clinton Benjamin
Hon. Nimrod Botelanga
Hon. Lagumot Harris
Hon. Dogabe Jeremiah

to take the floor and offer apology to the Chair.

Noting also that the House had determined subsequently on the same day, i.e. 22 May 1997, that this motion of the House be effected at such time as the Speaker deems appropriate;

Noting further that for refusing to apologise to the Chair and for defying the resolution of the House, Hon. Members Anthony Audoa, Reuben Kun, and Clinton Benjamin were suspended from the service of the House on 26 August 1997;

Noting with deep concern the intransigence of Hon. Members Nimrod Botelanga and Lagumot Harris who refused to offer apology when called upon to do so by Hon. Speaker on 20 November 1997 in accordance with the determination of the House and thereby defied the authority of the Chair and the Order of the House.

> Therefore this House resolves that in view of the contumacious and disrespectful conduct of Hon. Members Nimrod Botelanga and Lagumot Harris and in order to preserve the dignity of the Chair and establish the authority of the House, these two Hon. Members may be suspended from the service of the House until such time as they, individually, take the floor and offer an unconditional and unqualified apology to the House.
>
> Hon. V. Detenamo (Minister for Internal Affairs) seconded.
>
> Question put and passed."

The procedures as recorded complied with the requirements of the Standing Orders. Each suspension resolution was preceded by the naming by the Speaker of the Petitioners. The resolutions are shown to have been made in accordance with Standing Order 46.

There can certainly be no question as to the right of the House and the Speaker to adopt these procedures. However, on considering Standing Order 47, we question its applicability to suspension resolutions made under its authority. A suspension made pursuant to Standing Order 47 must be:

> "(a) If it is the first occasion in the year of 1 January and 31 December that the Member is suspended - for the remainder of the day of the Sitting.
>
> (b) If it is on the second occasion in the same year - 7 consecutive days.
>
> (c) If it is on the third or more occasion - 28 consecutive days."

This Standing Order is the sole authority in the Standing Orders directed to the duration of any suspension imposed by Parliament.

Here the resolutions of suspension fix an indefinite duration. It follows, therefore, that, if Standing Order 47 applies in the procedure adopted, this indefinite suspension imposed is in contravention of it. No suspension by Parliament of the Standing Order preceded the moving and passing of the resolutions.

On this point, Mr Hulme argues that Standing Orders do not govern the procedure to be followed in the passing of these suspension resolutions. His argument is based upon two grounds. Firstly, he says that Standing Order 47 is contained in Chapter 8 of the Standing

Orders which, by its title, applies to "Maintenance and Order" in the House. He submits that the suspensions are not imposed to redress matters of maintenance or order. In consequence since the Order is limited to such a question, the limitations as to duration of suspension therein are not applicable to the resolutions. Secondly, his submission is that the suspensions are made by Parliament, not on the authority of Standing Orders, but, pursuant to a power possessed by the House of Commons which it inherited by Section 21 of the Powers and Immunities Act 1976. He cites *Erskine May Parliamentary Practice* (19 Edn) at pp. 131-132 which refers to a power of suspension quite separate from any Order in the Standing Orders of Nauru's Parliament.

As to Counsel's first point, it, in our opinion, is not correct to suggest that the conduct, the subject of the complaint which prompted the Petitioners' suspensions was not concerned with the maintenance and order of the House. The Petitioners were required by resolutions of the House to apologise to the Speaker (the reason for this is irrelevant) and, they refused so to do. The suspension resolutions follows (see items d and f of the extract of the Parliamentary record (supra)). A suggestion that such conduct does not constitute a breach of the rules of maintenance and order in the House is, we consider, not sustainable. The Parliamentary record speaks for itself. It is, in our view, incontrovertible that by the naming of each Petitioner and the following of the procedure prescribed by Order 46, the House acted in accordance with Chapter 8 of the Standing Orders and in doing so, clearly showed its intention to resolve in accordance with the requirements of the Chapter and Standing Order 47. We reject Counsel's argument to the contrary.

It is our opinion the suspensions imposed by the said resolutions were in contravention of Standing Order 47 which governed the duration of such suspensions and accordingly the resolutions violate the requirements of the Standing Orders of Parliament. Had Parliament wished to by-pass the Standing Order it could have done so by suspending it before the motions for the resolutions were put.

Counsel's second point in the circumstances does not require consideration.

It should be noted the Petitioners in their claim do not question the legality of the suspension resolutions on the above ground. The allegations in their petition are of little avail in their cause before this Court. They claim:

1. They were not given notice of certain Parliamentary sittings during the relevant period (paras 9 & 10).

2. That the resolution of 22 May 1997 was illegal because the matter was "*sub-judice*" (para 8).

3. That on 29 December 1997 and 19 January 1998 they were prevented from attending a sitting of the House (paras 12 & 13).

4. The resolution of 22 May 1997 was not legally passed and there was no quorum in the House (para 6).

5. That the resolution of 26 August 1997 was dealt with and passed without a quorum of Members present (para 7.)

6. That the suspension resolutions in fact granted them leave of absence from the House during their suspensions.

The question of quorum, whether a matter was "*sub judice*" and could be so considered, the prevention of the Petitioners from entering the House and whether the suspensions can be construed to be "absence without leave" were all matters which properly were for the direction and ruling of the Speaker as a part of his task of governing Parliament's internal procedure. The failure to give notice of a sitting is an omission by the Clerk of Parliament, which is also an "internal proceeding". The decision to declare their seats vacant was that of the Speaker. All these incidents occurred while the Petitioners were Members of Parliament. They clearly concern exclusively "proceedings in Parliament" and are matters for consideration by Parliament not the Courts - see *Bradlaugh v Gorseth* (1884) 12 Q.B.D. 371, which is quoted later in this decision.

The Vacancy of the Seats

There is no dispute that each Petitioner was absent without leave of Parliament on every day on which Parliament met during a period of two months. This absence, on the face of Article 32(1)(d) of the Constitution must result in each seat being declared vacant.

The Petitioners in their prayer claim they were not lawfully absent, but were by the resolutions of suspension granted leave of absence from the sittings. The Speaker obviously did not consider that to be the case and his decision is final. However we feel that we can properly give our opinion on the contention. The resolutions are clear and unequivocal; the

Petitioners were "suspended from the service of the House" until they apologised. That must mean that they are debarred from attending any sitting of the House so long as they are suspended. Leave of absence cannot be implied from that. In fact, had the Petitioners considered Standing Order 49, they would have been in no doubt about their position. The Order reads:

> "49. When a member has been suspended he shall not be permitted to enter the Chamber and Gallaries during the period of suspension."

Leave of absence can be granted from a sitting to which a member is entitled to attend. The Petitioners by Standing Order 49 are clearly not entitled to attend any sitting while suspended.

But what is challenged is the Order which declares vacant the Petitioner's seats in Parliament. That Order, as the Petitioners allege, is the ruling of the Speaker and not of Parliament. It could be made only by him after consideration of the facts he considered relevant to the issue as he interpreted them. This Court cannot go behind that ruling to examine the grounds upon which it was made. It is a final ruling which cannot be questioned by the Court. The position is clearly put in *Bradlaugh v Gossett* (1884) 12 Q.B.D. 371. Lord Coleridge at page 275 says:

> "What is said or done within the walls of Parliament cannot be enquired into in a Court of Law."

and Stephen J. at p. 286 says:

> "The House of Commons is not a Court of Justice; but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provision of Acts of Parliament. We must presume that it discharges this function properly and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a Judge whose decision is not subject to appeal."

Those very principles were affirmed in this Court's decision in the case of *In re Article 36 of the Constitution and in re Bobby Eoe* [1988] S.P.L.R. 229 where it is stated as follows:

> "It also provides in Section 26 as follows:

26. Neither the Speaker nor any officer of the parliament shall be subject to the jurisdiction of any Court in respect of the lawful exercise of any power conferred on or vested in the Speaker or the officer by or under this Act.

This effectively answers any argument that this Court has jurisdiction to correct any rulings of the Speaker of the Parliament of Nauru. There is no question that in this case the speaker was lawfully exercising his power in ruling on the motion for leave. He is the interpreter of the rules and procedures of the House (34 Halsbury (4th edn) paragraph 1143, page 455). It is contended he made an error in ruling. If he did there is no appeal in this Court against the ruling."

The Purpose and Effect of Article 36

Article 36 provides that any question as to whether a person is or remains a member of Parliament shall be determined by the Supreme Court.

It is our view that the extent of the Court's power under the Article is arguable. We considered asking for submissions from Counsel on the following questions:

Whether, in enacting the Constitution as the supreme law, and in particular Article 36:

(a) Parliament had abdicated certain of its privileges to the Supreme Court to the extent that, in any question arising as to the right of any person to become or remain one of its Members, it gave the Court the right of final determination thereon.

(b) The Speaker before ordering the vacation of any parliamentary seat, is required to refer the question to the Court for such determination under Article 36."

We decided, however, that it was not appropriate to seek submissions on the question in these proceedings. Firstly, the point was not raised by the Petitioners. Secondly, the Speaker had already made a ruling which is final and unquestionable. Thirdly, as will be seen in the decision on the election petition to be delivered herewith, the election is held to be a valid one and further the petition, in any event could not be entertained. Thus the candidates elected thereat are lawfully members of the Parliament.

The Determination

Article 36 requires that we **shall** determine the question before us according to law and, for the reasons stated, our determination is given by way of an opinion which we now record:

1. The resolutions of suspension of each of the Petitioners were made and intended to be made under the authority of Chapter 8 of the Standing Orders of the Parliament of Nauru.

2. Standing Order 47 prescribes the duration of any suspension to be ordered or imposed by resolutions thereon made pursuant to the said Chapter and, unless the Standing Order is suspended, and thereby rendered inapplicable, it has the force of law and governs the procedure of Parliament.

3. The resolutions in question as passed by Parliament were not prefaced by a motion to suspend Standing Order 47.

4. The period of suspension imposed by the said resolutions are imposed in contravention of Order 47 and violates the procedural law of Parliament.

5. The Order vacating the Parliamentary seats of each Petitioner was properly made on the ruling of the Speaker of Parliament. This ruling cannot be questioned by this Court. Parliament is the exclusive forum for such an exercise.

Costs

Apart from the initial hearing held on 31 August 1998 and the two following days, the Court was required to convene in New Zealand on three occasions to consider and deal with matters raised by Junior Counsel for the Petitioners. These have been the subject of our interim decision of 23 December 1998. The costs of and incidental to these proceedings are:

Issue of proceedings	40.00
Hearing Fees:	
Nauru	300.00
New Zealand	300.00
Secretarial fees: New Zealand hearings	253.50
TOTAL	**$893.50**

We reserve the question of party and party costs for further order of the Court and we require submissions on all costs to be made to the Registrar within 21 days of the date of this decision. Costs will be fixed.

By the Court.

Raven Donne
C.J.

DONNE C.J. **DILLON J.**

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REGISTRAR,
SUPREME COURT