

BETWEEN

Junior Dowiyogo

Plaintiff

AND

Secretary for Justice
Paul Aingimea

First Defendant
Second Defendant

Application for a Declaration

For Plaintiff:
First Defendant:
Second Defendant in Person

Mr. Pres Nimes Ekwona
Mr. W. Togamae

DECISION

1. On 18 July 2003, the Plaintiff in Chambers made an interlocutory application for a declaration, which, after hearing the parties, I refused. Under the ensuing Order, I, however, ordered a speedy trial which I directed was to proceed by written submissions of the parties, as the determinants of the issues at stake were legal. If indeed following the closing of the process of submissions it was my opinion that further matters need to be ventilated then I would make an order for further written submissions or an oral hearing. Having considered the submissions, I do not require further submissions on the substantive matters.

2. The following submissions have been filed subsequently with the Court.
 - i. An outline of the Plaintiff's case filed 22 July 2003
 - ii. Statement of Defence of First and Second Defendants filed 23 Jul 2003
 - iii. Written submission of First Defendant filed 31 July 2003
 - iv. Written submission of Second Defendant with annexure filed 31 July 2003
 - v. Written submissions in reply by Defendants filed 5 August 2003
 - vi. Written submissions in reply by Plaintiff with annexures filed 5 August 2003

3. The factual situation arising from which this Court has been asked to make a Declaration is simple enough. It was common ground that the Plaintiff had been appointed Director of Police by the Chief Secretary in the year 2000. In mid-June 2003 there was correspondence from the Minister of Justice and the Acting Chief Secretary to the Plaintiff, by the Acting Chief Secretary to the Second Defendant and a Gazette Notice dated 25 June 2003. Did this correspondence effectively remove the Plaintiff from his previously held office of Director of Police, appoint the Second Defendant as Director of Police, and place the Plaintiff in the position of Superintendent of Police? The Plaintiff seeks under his amended Statement of Claim a Declaration *inter alia* that the manner of the removal from Office of Director of Police of the Plaintiff was void *ab initio* and similarly so with the latter appointment of the Second Defendant to the position of Director.

Republic Proceedings Act

4. A preliminary point was taken by the First Defendant that these proceedings are not justiciable as being in contravention of Section 3 of the Republic Proceedings Act 1972, and, further, that no application has been made by the Plaintiff to Cabinet for leave for such proceedings to be taken. Section 3, however, permits, under the first proviso, a claimant to enforce a contract validly entered into by, or on behalf of the Republic, without the leave of the Cabinet. In this case, the Chief Secretary, on behalf of the Republic, and the Plaintiff entered into a contractual arrangement upon the Plaintiff's appointment as Director of Police, and this is given statutory support by the provisions of the Nauru Police Force Act 1972 where there are clear regulatory provisions with respect to the office of Director of Police. Section 3 of the Republic Proceedings Act 1972 does not prevent action being undertaken by the Plaintiff to preserve his office.
5. Does seeking a declaration constitute an appropriate remedy? In the situation faced by the Plaintiff, it may have been thought that an injunction or, perhaps, specific performance would have been more adequate remedies. But there are evident difficulties with each of these.
6. Much of the procedural legislation drafted in the nineteen seventies for Nauru was based on English law. The opportunities to injunct or order specific performance against the Republic were specifically excluded under Section 14(1)(a) of the Republic Proceedings Act 1972, where provision was made, in the alternative, for an order declaratory of the rights of the parties. In consequence, where procedural fault regarding the office is found, then the Court may make a declaration accordingly. But this all depends, of course, upon the course of action taken by the First Defendant, and, particularly so, with

reference to the various statutory arrangements that govern the office of Director of Police.

Correspondence and Gazette Notice

7. Before considering the statutory provisions governing the office of Director of Police, I advert, first of all, to the correspondence between the parties. There were, as I stated above in paragraph 3, three letters.

8. The first, dated 16 June 2003, was from the Minister of Justice to the Plaintiff, it read -

“Mr. Junior Dowiyogo
Baitsi District
Republic of Nauru

Dear Mr. Dowiyogo,

I would like to hereby advise of your position reassignment as Superintendent of Police, as per Cabinet resolution 102/2003 conducted at a formal meeting of Cabinet on 13 June 2003 at 10.00 a.m.

Under this restructure, however, your wages will still be the same.

I forward this for your information and further course of action.

Yours sincerely,

Hon. Russell Kun, LLB, MP
Minister for Justice

Cc: HE the President
Ministers
A/Secretary to Cabinet”

9. The Second letter dated 17 June 2003 is addressed to the Plaintiff from the Acting Chief Secretary, to Angie Itsimaera, it read -

“Mr. Junior Dowiyogo
Baitsi District
Nauru

Dear Mr. Dowiyogo,

I wish to advise you that the Cabinet at its formal meeting, Friday 13th June 2003, has approved the restructuring of the Executive positions in the Nauru Police Force.

Therefore with effect from Monday 16 June 2003, Mr. Paul Aingimea will assume the position of Director of Police and you will assume the position of Superintendent of Police.

Yours sincerely,

Angie Itsimaera
Acting Chief Secretary

Cc: HE the President
Cabinet Ministers
Secretary for Justice
Director of Police”

10. The third letter, dated 17 June 2003, is addressed to the Second Defendant from the Acting Chief Secretary, it read -

“Mr. Paul Aingimea
Meneng District
Nauru

Dear Mr. Aingimea,

I have pleasure to inform you that Cabinet at its formal meeting, Friday 13th June 2003 at 10.30 a.m. has approved your appointment as Director of Police.

Your commencement of duties is effective Monday 16 June 2003.

On behalf of the Government and on my own behalf, I extend our congratulations on your appointment.

Yours sincerely,

Angie Itsimaera
Acting Chief Secretary

Cc: HE the President
Cabinet Ministers
Secretary for Justice
Police Superintendent
Acting Director of Police”

11. Apart from the above correspondence, Gazette Notice No. 167/2003 was inserted in the Government Gazette published on 25 June 2003. It was in the following terms -

Appointment of Acting Director of Police

Pursuant to Clause 3 of Article 68 of the Constitution of Nauru, Cabinet at its meeting held on 13 June 2003 approved the following administrative arrangements: -

1. The appointment of Mr. Paul Aingimea to the position of Director of Police with effect from 13 June 2003.
2. The appointment of Mr. Bernard Junior Dowiyogo to the position of Superintendent of Police with effect from 13 June 2003.

Dated this 20th day of June 2003.

Angie Itsimaera
Acting Chief Secretary

Statutory Provisions - Nauru Police Force Act 1972 ('the Act')

Appointment of Director of Police

12. Section 6(1) of the Act makes provision for the appointment by the Chief Secretary provided that the Chief Secretary shall not appoint any person to be Director of Police unless the Chief Secretary has obtained the consent of the Cabinet to his appointment.
13. Section 6(1) and the following sub-sections are consistent with Articles 68 and 69 of the Constitution. Given the alternatives offered under Article 69(1), the parliamentary process in Nauru proceeded in accordance with Article 69(1)(b) of the Constitution with the result that appointments to the Police Force other than that of the Director are made by the Director of Police, but in the case of the Inspectorate with the consent of the Public Service Board.

Period of Appointment

14. Pursuant to Section 8(2), the Director, when a Nauruan citizen, which is the case of the Plaintiff, is appointed to serve until he obtains the age of fifty-five years or where authorised by the Chief Secretary until sixty years. The Director also, once he has attained the age of fifty years, may also be authorised by the Chief Secretary to continue to serve for any specified period (Section 8(2)(b)). It should be noted that, subject to the reasons recorded in writing, this post fifty-five years of age period is in the discretion of the Chief Secretary.

Disciplining of Director

15. Section 35 of the Act reads: -

“The Director shall be subject to all written laws relating generally to the maintenance of discipline in the public service, the punishment of inefficiency and of breaches of discipline and the suspension of public officers pending the completion of disciplinary proceedings.”

16. Where a Director is alleged to have committed a disciplinary offence then he is subject to a disciplinary charge laid by the Chief Secretary under the Public Service Act and the procedures therein. The Director would be entitled to an appeal to the Public Service Appeals Board. Section 35 of the Act is quite consistent with the terms of Articles 68, 69 and 70(6) of the Constitution. Other than the Director, a member of the Police Force is subject to the disciplinary procedures under the Act and Regulations.

for signature
Registration of Director

17. Under Section 11 of the Act, the Director may resign from the Police Force by giving to the Chief Secretary four months notice in writing which the Chief Secretary shall accept with a proviso that the Chief Secretary may, with the written approval of the Minister, waive the requirement of notice or abbreviate the period of the notice.

Termination of Service of an Officer in the Public Interest

18. There is a provision in the Act, Section 9, under which any officer in the police force may have his services terminated by the Cabinet on the ground that having regard to the conditions of the Force, the usefulness of the officer to the Force and all other circumstances of the case it is desirable in the public interest to terminate. However, where such action is to be taken by the Cabinet, the officer must first be suspended and the Minister then gives notice to Parliament of such suspension whereupon, if it thinks fit, Parliament may within fourteen days of receiving such notice appoint a committee of members to review such termination and if the committee considers that the services should not have been terminated, Parliament may direct that the suspension shall cease to have effect, and any termination of services is void. Again, after receiving the committee report, the Parliament may reach the conclusion not to direct the suspension to cease to have effect and the termination is then effective.

Establishment of the Nauru Police Force

19. Section 3 of the Act reads as follows: -

“3. (1) There shall be in Nauru a police force to be called the Nauru Police Force.

(2) The force shall consist of the Director of Police, inspectors and officers of such other ranks as the Minister may from time to time by notice in the Gazette direct.”

20. Once there is an establishment, it is a duty of the Director to appoint Inspectors from among serving officers of the Force but requiring the consent of the Police Service Board to such an appointment. The Director also appoints non-commissioned officers from the ranks of constables, and he has the further duty to appoint constables.
21. Under Section 22A, Sub-section 1, the salaries of police officers are to be paid out of the Treasury Fund from moneys appropriated for that purpose by Parliament on scales prescribed in regulations made by the Cabinet on the advice of the Minister.

What action was taken involving the Plaintiff

22. Reliance must be placed on the evidence of the correspondence. On 16 June, the Minister by letter informed the Plaintiff of a 'position re-assignment' as 'Superintendent of Police'. Described in the next paragraph as a 'restructure', the Plaintiff was informed 'your wages will still be the same'. The purported power for such position re-assignment was a Cabinet Resolution No. 102/2003 reached at a Cabinet meeting on 13 June 2003.
23. Presumably in support of the Minister's letter, the Acting Chief Secretary wrote to the Plaintiff on 17 June to inform him that on Friday 13 June, Cabinet 'has approved the restructuring of the Executive positions in the Nauru Police force'. As a consequence the Acting Chief Secretary stated 'with effect from Monday 16 June 2003, Mr Paul Aingimea will assume the position of Director of Police and you will assume the position of Superintendent of Police.'
24. The third letter was addressed to the Second Defendant from the Acting Chief Secretary and dated 17 June 2003. It stated, 'I have the pleasure to inform you that Cabinet at its formal meeting Friday 13 June 2003 at 10.30 a.m. has approved your appointment as Director of Police. Your commencement of duties is effective Monday 16 June 2003.'
25. Finally, the Gazette Notice No. 167/2003 stated that the Cabinet had 'approved the following administrative arrangements.
 1. The appointment of Mr. Paul Aingimea to the position of Director of Police with effect from 13 June 2003.
 2. The appointment of Mr. Bernard Junior Dowiyogo to the position of Superintendent of Police with effect from 13 June 2003.'

The Acting Chief Secretary signed the notice.

The position of Director of Police and its tenure

26. The Chief Secretary must appoint the Director of Police after obtaining the consent of Cabinet to the proposed appointment. The Plaintiff was so appointed in 2000.
27. Once appointed, a Director of Police, who is a Nauruan citizen, has tenure of office under Section 8 of the Act until he is 55 years of age or to a later age where the Chief Secretary authorises it.
28. The Director, upon giving notice, may resign at any time (Section 11).
29. The Director, however, may not otherwise be removed from office other than by the process outlined under Section 9 of the Act, or for disciplinary reasons by the Chief Secretary under Section 35 of the Act. A Director of Police, as with other officers of the Public Service, is entitled, when disciplined, to an appeal to the Public Service Appeals Board pursuant to Section 35 of the Act and Article 70(6) of the Constitution. In that, he differs from other members of the force who may appeal from a Director's decision to the Police Service Board.

Restructuring of the Force - Administrative Arrangements

30. In the letters and Gazette Notice there has been some loose use of words such as 'restructure' or 'administrative arrangement', as if these could justify whatever action may be taken. The Nauru Police Force Act 1972 is a carefully drafted Act that has now been in operation for over thirty years. Parliament in this period has not so far seen fit further to amend it after 1972.
31. Once appointed, the Director of Police has considerable general power. He may appoint inspectors, non-commissioned officers and constables in accordance with the establishment of the Force as notified by the Minister in the Gazette. The Director's power of appointment is only curtailed by requiring consent of the Police Service Board upon the appointment of an inspector. The Director commands, administers, exercises disciplinary control over, makes orders for and directs the Force. On discipline, there is an appeal available to members of the Force to the Police Service Board from his decision. Other than that, the Minister may, subject to Section 3, provide by Gazette Notice the establishment of the Force, and the Director is in terms of Section 22 subject to the lawful directions, if any, of the Cabinet. But that latter power of the Cabinet is heavily circumscribed by the Act and the Constitution. Further the Minister may make 'Police Regulations' but not inconsistent with the Act and in terms of Section 50 of the

Act. Finally, the salaries of police officers are to be paid out of the Treasury Fund on scales prescribed in regulations made by the Cabinet on the advice of the Minister.

32. If by the simple use of the terms 'restructure' or 'administrative arrangement', it is contemplated that a Director may be removed from office and placed in a subordinate position, then the action taken was clearly wrong. These are not terms of art and such action as was made in their names would not be in accord with the prevailing law.

Removal or revocation of Appointment

33. The First Defendant places some emphasis in his submissions upon the power of the Chief Secretary, using Section 38 of the Interpretation Act 1971, to remove. Indeed, one does not have to move to the general provision in the Interpretation Act 1971 to assert this, for the Chief Secretary is given specifically such a power under Section 68(1)(c) of the Constitution. But this is not a power granted to the Chief Secretary to be exercised by mere whim. It may only be exercised in accordance with law, which in this case is the Constitution, the Nauru Police Force Act and the Public Service Act. These statutes with their regulations and orders provide the framework within which the administrative system operates. The Chief Secretary exercises her powers within that system as does the Cabinet and the specific Minister.
34. There was a removal of the Plaintiff from office. Until that had been done lawfully, the position had not been vacated by the Plaintiff so that any purported appointment could not be substantiated and was void.
35. Removal of the Plaintiff from office could only be achieved by exercising of the disciplinary provision by the Chief Secretary and no charge was even laid and there was no assumption to be made from the pleadings or statements of the First Defendant that anything was awry. Otherwise, Section 9 process could have been undertaken. This was not attempted.

Other Matter

36. In the letter of the Minister to the Plaintiff, it was stated that the Plaintiff had been reassigned to a position of Superintendent and at the same salary as the Director of Police. In terms of the Nauru Police Force Act, there is no provision for the position of superintendent. It may be that such a post has been created though it is difficult to imagine at this stage without any further evidence when and how this was established. Nor was any evidence given to the court regarding the salary ranges of this position to be

paid to the Plaintiff. These too are settled under Section 22A(1) of the Act, and would have been prescribed in regulations. These were not provided to the Court. But this matter was only ancillary to the main question and the proceedings need not be held up, as I have reached a conclusion on the ultimate issue.

Conclusion

37. The basic foundation to good administration is to work within the confines of the applicable statutes and regulations. In the event that these are unsatisfactory for whatever reason then it is up to governments to persuade the legislators to make the requisite amendments. With this in mind, neither Cabinets, Ministers, nor public servants are at large to institute changes that may simply be attractive to them. Administratively, each must operate within the relevant constitutional and legislative provisions. Parliamentary government demands that.
38. The ultimate issue here was whether the Plaintiff was properly removed from the office of Director of Police.
39. It was quite clear to me on the evidence that he was not. The Plaintiff was merely informed that he was no longer Director and relegated to a subordinate post. It was not open for either the Minister, whether or not at the behest of Cabinet, or the Chief Secretary to do this given the existing statutory provisions contained within the Nauru Police Force Act and, further, the appellate safeguards accorded the Plaintiff under the Constitution. He had not been properly removed by any process open to the Cabinet or Chief Secretary under the Act. The Plaintiff had not resigned and it is clear that he had not reached the retirement age. The position of Director of Police was not therefore vacant and no appointment could be made to it.
40. In this matter, the Plaintiff has standing to seek a declaration and I refer in this regard to paragraphs 4, 5 and 6 of this decision. Furthermore, the Plaintiff meets the rules outlined by Lockhart J. in Aussie Airlines Pty Ltd v Australian Airlines Ltd (1996) 139 ALR 663 at 670-671. Whilst there may be limitations to judicial review of certain exercise of statutory discretions, this is not one of them. The Plaintiff had been appointed to a statutory post whose conditions were spelt out in the Act. It was always open for the administration to operate within the Act. The administration chose not to do so in contravention of the Act. As Viscount Simonds stated in Pyx Granite Co. Ltd v Ministry of Housing and Local Government [1960] AC 260 at 286 -

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