

**IN THE MATTER** OF His Excellency of the Republic of Nauru

**AND**

**IN THE MATTER** of Article 53 and 55 of the Constitution of Nauru

**Coram:** Justice Hon. John von Doussa AO

Mr. David Lambourne, Secretary for Justice and Border Control: Representing the President

Mr. Leo Keke for the Nauru Law Society: Intervener

Date of Hearing: 11, 13, 18 and 20 October 2010.

OPINION
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Pursuant to Article 55 of Constitution of Nauru, His Excellency Marcus Stephen MP, President of the Republic of Nauru, acting in accordance with the approval of Cabinet has referred to the Supreme Court for its Opinion the following question:

If, as is asserted by Justice Millhouse, a valid and binding contract exists between Justice Millhouse and Minister Batsiua, does Justice Millhouse continue in office as Acting Chief Justice under Article 53 of the Constitution for the duration of the contract, notwithstanding:

- a. The expiration of Justice Millhouse's commission 2 April 2010, and
- b. The subsequent exercise of the President's discretion not to renew Justice Millhouse's appointment under Article 53.

These Reasons are to be read with the Reasons for standing over the consideration of the Reference which were published in this matter on the 13<sup>th</sup> October, 2010. The nature of a Reference under Article 55 is discussed in those Reasons. The function of this Court is limited to answering the specific question referred for the opinion of the Court: see Reference re: dual nationality and other questions, Opinion delivered 24<sup>th</sup> September, 2004 by Chief Justice Connell in Constitutional Reference No. 1/2004.

In the Reasons previously published, I expressed the view that the Court has a discretion to decline to answer a question referred under Article 55. As the present Reference concerns the status of the Honourable Justice Millhouse I considered the Court must consider whether it should decline to answer the question referred by His Excellency, the President in favour of resolving the status of Justice Millhouse in inter-partes proceedings between him, the President and the government. On 11<sup>th</sup> October 2010, for the Reasons previously published, I declined to consider the Reference until Justice Millhouse had been given a further opportunity to inform the

court of his position generally, and to institute proceedings should he wish before the Reference was re-listed on Monday 18<sup>th</sup> of October, 2010.

The reasons published on 13<sup>th</sup> October 2010 were transmitted to Justice Millhouse.

In my opinion, facts highly relevant to the exercise of the discretion whether the Question should be answered include:

- The urgency for the government to clarify whether the Office of Chief Justice is presently vacant and the need for the President to fill the vacancy if there is no Chief Justice;
- Whether inter-partes proceedings are on foot which could provide a procedural vehicle for the speedy determination of the status, rights and interests of Justice Millhouse; and
- The likely merits of the claim by Justice Millhouse that he holds, or is entitled to hold, the office of Chief Justice. The Court should as far as reasonably possible avoid prejudicing civil rights of individuals which could be pursued with success through the courts.

There is now on file an affidavit from both Minister Batsiua, Minister for Justice and Border Control, and Mr. David Lambourne, Secretary for Justice and Border Control. These disclose that Justice Millhouse first raised the issue of him bringing inter-partes proceedings to enforce his claim to the office of Chief Justice on 25<sup>th</sup> August 2010; that he was notified by the Minister of the government's intention to seek the opinion of the Supreme Court under Article 55 on 10<sup>th</sup> of September 2010; that he was given a draft of the Reference on 25<sup>th</sup> September 2010; and a copy of the Reference after it was issued on 27<sup>th</sup> September, 2010. The Secretary also deposes to a communication he received from Justice Millhouse following the delivery to him of the reasons published on 13<sup>th</sup> October 2010. The communication reads in part,

*"My position remains the same as I set out in my e-mail on 2<sup>nd</sup> October. Even if at this stage it were practicable for me to come to Nauru for a hearing next Monday, which I doubt, I have a full list of cases for hearing here in Kiribati, both this week and next. I am neither able to be in Nauru next Monday nor to instruct counsel to represent me. Nor would it be practicable between now and then to have civil proceedings issued on my behalf. In the past I have always had to set the dates for a sitting of the Supreme Court many weeks ahead so that all arrangement in Nauru and here could be made.*

.....

*Even if my appointment has expired – which I do not concede – the Government is estopped from denying I have a contract to serve as Chief Justice until 2012. Even if Justice von Doussa should decide I no longer hold office as Chief Justice I contend I am entitled, pursuant to the contract, to be reappointed in that position and ask that he make a declaration to that effect. Alternatively he may consider exercising his discretion not to make any Order, merely to express an opinion (subject to argument) as to my entitlement (or otherwise) to be appointed for the balance of the term of the contract. That may be sufficient to bring this unhappy matter to a close."*

The Court accepts that there is an urgent need for the President and Cabinet to clarify whether the office of Chief Justice is vacant so that steps can be taken to identify and appoint a new Chief Justice as soon as possible should no-one presently hold that office.

Presently, a proclamation of a state of emergency is in force in the Republic of Nauru made under Article 77 of the Constitution. A declared state of emergency has existed since 11<sup>th</sup> June 2010. Article 79 of the

Constitution envisages that there will be an Advisory Committee in place when a state of emergency exists. Article 79 provides:

**Restriction on detention**

*79. (1.) For the purposes of this Article there shall be an advisory board consisting of the Chief Justice, one person nominated by the Chief Justice and one person nominated by the Cabinet.*

*(2.) A person detained under an order under Article 78 shall, as soon as practicable, be informed the reasons for his detention and be brought before the advisory board and permitted to make representatives against his detention.*

*(3.) No person shall be detained under an order under Article 78 for a period exceeding three months unless that person has been brought before the advisory board and any representations made by him have been considered by it and it has within that period determined that there is sufficient cause for the detention.*

Since a state of emergency was first proclaimed 21 emergency orders have been made under Article 78. So far no order provides for detention. Nevertheless, Article 79 envisages that throughout a state of emergency there will be in place an advisory board. This is important as its functions might conceivably arise at short notice. If the office of Chief Justice is vacant there can be no advisory board in place.

Moreover, the Chief Justice holds office as the Chairperson of the Police Services Board and the Public Service Appeals Board. Presently, neither of those bodies is able to sit and each has matters awaiting a hearing.

There is still no proceeding in this Court brought by Justice Millhouse against the President and the Government to have his claim to the office of Chief Justice determined, nor has Justice Millhouse given any indication if and when he might issue proceedings. If the Court were to decline to give its Opinion now on the Reference, there could be significant delay, perhaps long delay before inter partes proceedings are commenced and thereafter heard by the Court.

Justice Millhouse has invited the Court on the present Reference to make a declaration as to his rights.

The Reasons published on 13<sup>th</sup> October, 2010 explain that this Court has no jurisdiction on a Reference to determine rights. Moreover, there is a dispute between the government and the Judge whether the draft contract proffered to the Minister on 6<sup>th</sup> April 2009 is, or evidences, a binding contract. That is an issue that must be resolved in inter partes proceedings before a declaration could be made even if the Court on a Reference otherwise had jurisdiction to do so.

Although there is a dispute about the contract, that dispute is put to one side by the terms of the referred question. That question is formulated on the assumption that the contract is binding, and the Court can only give its opinion on that basis.

As I explained in the Reasons previously published, the power to appoint a Supreme Court Judge and the further power to designate a Judge to act as Chief Justice under Article 53 (1) is a power given solely to the President. The exercise of that power is of the highest public importance and the appointment is in the complete discretion of the President. The exercise of that discretion cannot be fettered by contract or by notions of estoppel.

In *Attorney General (NSW)-v- Quin* [1990] 93 ALR 1 the High Court of Australia considered the nature of the power of the Executive to appoint a Magistrate. Mason CJ at 11 said:

*“The Executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of power: see Watson’s Bay and South Shore Ferry Co Ltd-v-Whitfield (1919) 27 CLR 268 at 227; Ansett Transport Industries (Operations) Pty Ltd –v Commonwealth - (1977) 139 CLR 54 at 74-6; 17 ALR 513; Malvaso-v-R (1989) 64 ALJR 44 at 47; 89 ALR 34 at 37; Birkdale District Electric Supply Co-v-Southport Corporation [1926] AC 355 364; Cudgen Rutile (No. 2) Pty Ltd-v-Chalk[1975] AC 520 at 533-4; Southend-on-Sea Corporation-v-Hodgson (Wickford) Ltd[1962] 1QB 416 at 423-5; Western Fish Products Ltd-v-Penwith District Council [1981] 2 ALL ER 204. Accordingly, it has been said that ‘a public authority.....cannot be estopped from doing its public duty’, to use the words of Lord Denning MR in Lever Finance Ltd-v-Westminster (City) London Borough Council [1971] 1 QB 222 at 230. See also Rootkin-v-Ken County Council [1981] 1 WLR 1186; [1981] 2 ALL ER 227. As Gummow J observed in Minister for Immigration-v-Kurtovic (1990) 92 ALR 93 at 111, the principle has been explained on the footing that:*

*“.....in a case of a discretion, there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised (any more than a contract might be relied upon) to prevent or hinder the exercise of the discretion; the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the statute, and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding.”*

A like conclusion in relation to a claim that the President is bound to appoint a claimant to the office of Chief Justice because the claimant has a binding contract with the Government to serve in that office was rejected by the Right Honourable Sir Harry Gibbs in the High Court of Kiribati in the *Muhammad-v-Attorney General*, HSSC Nos 3/95 and 4/95 Judgment 1 February 1995.

In my Opinion, on the information before the Court, there appears to be no basis for the claim to the Office of the Chief Justice by a Justice Millhouse which is maintainable against the President.

For these reasons I am of opinion that the Court should not decline to answer the Question referred, but should do so and answer the Question in the negative.

The Court has been assisted on the Reference by the intervention of the Nauru Law Society which supports the Presidents contention that an answer to the Question is one urgently required and that the answer should be in the negative.

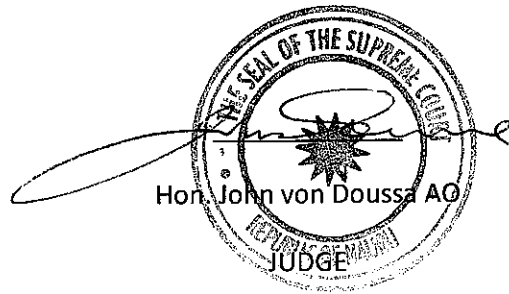
#### Conclusion:

The opinion of the Supreme Court is as follows:

**Question :** If, as is asserted by Justice Millhouse, a valid and binding contract exists between Justice Millhouse and Minister Batsiua, does Justice Millhouse continue in office as Acting Chief Justice under Article 53 of the Constitution for the duration of the contract, notwithstanding;

- a. The expiration of Justice Millhouse’s Commission on 2 April 2010; and
- b. The subsequent exercise of the President’s discretion not to renew Justice Millhouse’s appointment under Article 53.

Answer : No



20 October 2010