

IN THE SUPREME COURT OF NAURU

MISC. CAUSE NO. 9/2002

IN THE MATTER of Article 36 and
32(1)(d) of the Constitution of Nauru

<u>BETWEEN</u>	:	PRES-NIMES EKWONA	<u>PLAINTIFF</u>
<u>AND</u>	:	SECRETARY FOR JUSTICE RETURNING OFFICER	<u>1ST DEFENDANT</u> <u>2ND DEFENDANT</u>

Date of Hearing : 27 June 2002
Date of Decision : 28 June 2002

B. Dowiyogo for the Plaintiff
Russell Kun for Secretary for Justice
Returning Officer

DECISION OF CONNELL, C.J.

1. An order was made by the Court on 20 June 2002 upon an ex parte application of the Plaintiff restraining the Second Defendant, the Returning Officer, from conducting a by-election for the constituency of Yaren listed for 13 July 2002 until the right of the Plaintiff to be or to

remain a member of Parliament was determined by the Court pursuant to a referral by the Plaintiff under Article 36 of the Constitution.

2. The action was treated as an urgent matter and was heard on 27 June 2002 in the Supreme Court. The decision was reserved with judgment delivered on 28 June 2002.

3. By letter dated 3 June 2002, the Speaker of Parliament informed the member for Yaren, Pres-Nimes Ekwona that, as a result of absence for more than two months from the meetings of Parliament without leave, he had vacated his seat and ceased to remain a member of Parliament in terms of Article 32(1)(d) of the Constitution as from the end of the sitting of Parliament held on 21 May 2002.

4. The Speaker stated that the days covering a period of more than two months were 18 December, 2001, 4 April 2002, and 21 May 2002. He further stated that the period of absence started from 18 December 2001 and ended on 21 May 2002 which also included one sitting day in-between, namely 4 April 2002.

5. Following the above notification, the Speaker issued a Writ for an election of a member of parliament to fill a vacancy created in Yaren. The Writ was dated 3 June 2002 but was gazetted on 12 June 2002.

6. The Plaintiff, Pres-Nimes Ekwona, then issued a Writ of Summons against the Speaker, represented by the Secretary for Justice, and the Returning Officer seeking a declaration that the action of the Speaker had preempted Article 36 of the Constitution, and an injunction against the Returning Officer to restrain him from conducting the by-election. The ex parte application for an interim injunction was made to me on 19 June and I granted the interim injunction on 20 June 2002.

7. On Wednesday, 26 June 2002, the Plaintiff filed with the Registrar an amended Statement of Claim and it was served on the Defendants late in the day. At the hearing on Thursday, 27 June 2002, the Court granted leave for the amendments which added three paragraphs dealing with the computation of the absent days, and some small amendments to the relief. Mr. Kun for the Defendants objected to leave being granted as it introduced new issues. The Court was prepared to grant him an adjournment until the afternoon but he declined the offer. In reality, the amendments, though important, were part of the transactional

facts intimately bound up with the material matters in issue and should not have caught the Defendants unaware.

8. As now raised by the Plaintiff, there were two main issues. First, was it incumbent upon the Speaker to refer the matter of the vacancy to the Court before acting? Secondly, in informing the member of the days he had been absent without leave was he correct in stating that the member had been in breach of Article 32(1)(d) and thus vacated his seat? The issues were not free from past precedent and had been ventilated in detail. See: In re Article 36 of the Constitution and In re Bobby Eoe [1988] S.P.L.R. 220.

9. In relation to the first issue whether there was a legal duty cast in the Speaker to seek a determination from the Court of the vacancy or otherwise before acting, the short answer is "No". I agree with the former Chief Justice that the seat of a Member becomes vacant immediately the disqualifying circumstances occur (In re Bobby Eoe op.cit. p. 224). The Constitution provides the basis upon which a member vacates his seat. What action is taken thereafter is really a matter for Parliament to determine the appropriate procedure and, in practice, this has fallen to the Speaker. The Court only is drawn in when a question arises as to the right

of a person to be or to remain a member of Parliament. Of course, if in the course of the matter a person interested objects to action taken by whomsoever then that interested person may seek by reference the determination of the Court. Indeed that is what has occurred in regard to this matter. There is, therefore, nothing procedurally wrong in the Speaker, if that is the will of Parliament, taking such procedural steps to inform a member of his position and issue a writ for a by-election.

10. The second issue brings to the forefront the letter of the Speaker to Mr. Pres-Nimes Ekwona dated 3 June 2002 (Exhibit 'C'). He there describes the manner by which he arrived at the conclusion that Mr. Ekwona was absent without leave in contravention of Art. 32(1)(d). Using what he believed to be the In re Bobby Eoe formula, he established that Mr. Ekwona had been absent without leave over a period of five months on the only meeting days of the Parliament. The time between the first meeting day of absence and the second was over three and a half months.

11. The provision in the Constitution reads as follows -

"32. - (1) A member of Parliament vacates his seat -

.....

(d) if he is absent without leave of Parliament ^o in every day on which a meeting of Parliament is held during a period of two months

.....

(2) In the event of the occurrence of a vacancy in the office of a member of Parliament, an election shall be held in the manner prescribed by law of a member to fill the vacant office."

12. The Speaker had acted in accordance with Article 32(2) once he had formed the belief that a vacancy had occurred.

13. The question is whether he had rightly construed Article 32(1)(d).

14. The evidence, as revealed in the Votes and Proceedings of the Parliament, recorded by the Clerk of Parliament, and were thus conclusive of the facts relating to non-attendance and absence without leave, established that Mr. Ekwona did not attend on sittings on 18 December 2001, 4 April 2002 and 21 May 2002 and that these were the only meetings of Parliament in the period commencing 18 December 2001 and concluding on 21 May 2002. The Votes and Proceedings also reveal that Mr. Ekwona was absent without leave on each of those occasions though on

18 December 2001, a motion for leave was moved by Mr. Gioura but was not granted by the Parliament.

15. Under Article 32(1)(d), what meaning should be given to the words 'during a period of two months'. If this matter was being raised for the first time and had not already been the subject of interpretation some fourteen years ago, I would have been inclined to say that the period is one of two successive calendar months which, for the sake of computation, begin with a meeting of Parliament. If you then commenced with the meeting of 18 December 2001, the period would end on 17 February 2002 irrespective whether on that day there was a meeting of Parliament or not. The words 'on every day' signify plurality so that there would have had to have been at least one other meeting day in the period of two months. This would have been a simple formula if, however, a little draconian. In the case of Mr. Ekwona it would have eliminated the 18 December 2001 two month period but he would have been caught by the 4 April 2002 and 21 May 2002, which period given the start date of 4 April 2002 would have ended on 3 June 2002. Mr. Dowiyogo for the Plaintiff objected to such a formula owing to the fact that it concluded on a day when there was no meeting. The other feature, however, of such a formula in the Nauruan

parliamentary context is that, as there is a tendency to have a paucity of meeting days of the Parliament, it may be rather more susceptible to political manipulation than is tolerable.

16. In a sense, this was shrewdly foreseen some years ago by the former Chief Justice where he said the period must start with a sitting (meeting) and finish with one, and also include one sitting day in between. The reason for this is that to be able to choose a start or a finish which is not a sitting day opens the way, so he stated, for arbitrary application of the article. (**In re Bobby Eoe** p226). Therefore, it was clear that in almost all cases the time between the start and finish both being meeting days would inevitably be greater than two months. Hence, he stated that the conclusion of the period must be two months or more from and including the first meeting day when the member was absent.

17. But with such a formula, some credence, in my view, has to be given to the period of two months. Otherwise, you may have developed, which may be called, the 'dangling leg' theory where you start with a day but the 'in-between' meeting could be eight or nine months later. Such would make a mockery of the words 'during a period of two months'.

However, I do not believe this was lost on the former Chief Justice. He stated three conditions to be satisfied, (In re Bobby Eoe pp 226-227),

- “1. the commencement date of the period of two months must be a day when Parliament met,
2. the conclusion of the period must be a day upon which there is a meeting of Parliament, and that day must be two months or more from and including the first meeting day when the member was absent; and
3. there must be at least one meeting day during the period of two months”.

18. In this formulation of the conditions, it is noted that he does not say in regard to condition three. ‘during the period of two months or more’ as he did in condition two. What must be attained is absence within the two calendar months of at least one meeting beyond the commencement date. If that is the correct computation, and I accept that as the appropriate formula, then Mr. Ekwona has not vacated his seat, as there has not been a sitting day within the two months at which he has been absent after the commencement date.

19. There is no doubt that such a formula is less draconian than

that outlined by me earlier (paragraph 15) but it fulfils the requirements of Article ~~21~~^{32(1)(d)} and, at the same time, has a more equitable and just result for members of Parliament. It also has the virtue of some certainty, and I trust clarity.

20. For ease of formulation in the future, I would simply make a slight change to better express condition 3 above (paragraph 17) in the following terms -

3. there must be at least one additional meeting day during the period of two months immediately following the commencement date of the period.

In that formulation, 'period of two months' means 'two consecutive calendar months'.

21. I, therefore, find that the Speaker has erroneously applied Article 32(1)(d) to the absences of Mr. Ekwona. He, therefore, remains a member of Parliament.

22. Having reached that conclusion, there are one or two matters that require comment. Presently Mr. Ekwona is recorded as being absent

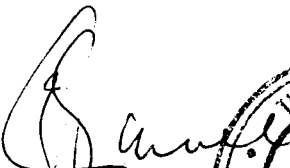
without leave on 4 April 2002, and 21 May 2002. I was informed during the argument that there was a meeting of Parliament on 18 June 2002 to which Mr. Ekwona did not attend as he was deemed by the Speaker at that time to have vacated his seat. A Court would not equitably list 18 June 2002 as a day of absence, and due to the Speaker's action, it would be unlikely that the Votes & Proceedings of that day would have recorded his absence as he was deemed not to be a member. He has, of course, for all purposes now, other than attendance on that day, to be regarded as a continuing member of Parliament. For that reason, Mr. Ekwona should note that using a commencement date of 4 April 2002 would place his seat in jeopardy with conditions one and three fulfilled unless he attends the next meeting of Parliament.

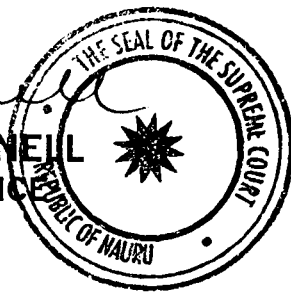
23. There is no doubt that Article 32(1)(d) is an onerous provision so far as members are concerned. This may call for Parliament to consider rules which provide some orderliness in the parliamentary time-table and notice arrangements that enable parliamentarians more room to attend. Alternatively, Parliament may give some attention to its motions for leave of absence. Where a parliamentarian, for one reason or another, finds himself geographically unable to attend a quickly called meeting, he or she

only has the protection of obtaining leave of absence. Naturally, these are matters essentially for Parliament in its wisdom to consider.

24. In argument, I noted that these constitutional provisions are mirrored more or less in the Australian constitution in both the House of Representatives and the Senate. They are placed there, as in the Nauruan constitution, to ensure that parliamentarians give their time and attention to Parliamentary duties. However, they are assisted in Australia through a parliamentary time-table that gives sufficient notice of meetings.

25. This decision of the Court will maintain consistency with the principles established in In re Bobby Eoe, but will also assist those who have to administer Article 32(1)(d) by explaining the proper interpretation of the Article that is to be applied.


BARRY CONNELL
CHIEF JUSTICE



THE SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU