

IN THE SUPREME COURT

Civil Action No. 11/2004

BETWEEN: RUSSELL KUN PLAINTIFF
AND: SECRETARY FOR JUSTICE 1ST DEFENDANT
RETURNING OFFICER 2ND DEFENDANT

Civil Action No. 12/2004

BETWEEN: KINZA CLODUMAR & ORS PLAINTIFFS
AND: PRESIDENT LUDWIG SCOTTY DEFENDANT

Hearing dates 5 and 7 October 2004
Date of Decision 11th October 2004

Pres Nimes Ekwona for Plaintiffs in both actions
Acting Secretary of Justice Lionel Aingimea for defendant in both actions.

DECISION

1. Both actions arose from the Public Proclamation on 30 September 2004 by the President of Nauru that a state of emergency exists with the result that he invoked emergency powers under Part IX of the Constitution of Nauru. By Presidential Order 2, he dissolved the fifteenth Parliament and by subsequent Presidential Orders 3,4 and 5 and the issuing of a Writ for a general election, he put in train the necessary electoral procedures for a general election on October 23, 2004.

2. The plaintiffs in civil actions 11/2004 and 12/2004, both issued on 4 October 2004, were respectively the Speaker of the fifteenth Parliament and a number of members of that Parliament. In civil action 11/2004, the Plaintiff as the Speaker of the fifteenth Parliament sought declaratory relief that the dissolving of Parliament was unconstitutional and an injunction against the Returning Officer restraining her from further conducting the election until the Supreme Court further orders. Civil Action 12/2004 sought similar declaratory relief and, in the course of the statement of claim, drew attention to Article 36.

3. When the matters were called on 5 October 2004 in an inter-parties hearing for an injunction, the A/Secretary for Justice, acting for the defendant in both actions, tabled in the Supreme Court, Presidential Order 9, dated 4 October 2004, which was declared to have effect from the date of the commencement of the declaration of emergency powers, namely, 30 September 2004. He then submitted to the Court

that the plaintiffs were denied any locus standi for these matters before the Supreme Court.

4. Presidential Order 9 reads as follows:-

By virtue of the powers in that behalf vested in me under Part IX of the Constitution of Nauru, and all other powers enabling me, I, LUDWIG SCOTTY, President of the Republic of Nauru do hereby order and declare that all rights and obligations conferred upon the citizens of Nauru under the Constitution or any other law on Nauru, to refer to the Supreme Court any question regarding any Articles of the Constitution is hereby revoke(d), unless ordered by hand.

This order has effect from the date of commencement of the Declaration of State of Emergency 30th September Two Thousand and Four.

GIVEN under my hand this Fourth day of October, 2004.

HONOURABLE LUDWIG SCOTTY, M.P.,
PRESIDENT OF THE
REPUBLIC OF NAURU

5. As the effect and constitutional legality of this Order was the crucial element for the continuation of the cases, I set a date for a resumed hearing on 7 October 2004. For that hearing, I stated that the argument would be confined to the questions whether Presidential Order No. 9 was an attempt to prohibit a question raised pursuant to Article 36, and, if so, was it considered to fall under the terms allowed by Part IX of the Constitution. Parliament having been dissolved by Presidential Order, the members thereby vacated their seats under Article 32(1). Such a situation could in the ordinary course be raised by a member under Article 36, if he so desired, and have the matter determined by the Supreme Court.

6. At the resumed hearing on 7 October 2004, the Court received two written submissions from the pleader for the plaintiffs, and the Acting Secretary for Justice respectively. Both counsel also addressed the Court.

7. It was the contention of the Acting Secretary for Justice that the Plaintiffs do not have, on account of the Presidential Order No. 9, locus standi and that, therefore, both actions should be struck out.

8. His argument was advanced on the following basis -

A. All rights conferred on citizens of Nauru to refer any question on any articles of the Constitution are revoked and as Article 36 confers such a right that right is revoked, and Presidential Order No. 9, therefore, prohibits a question raised pursuant to Article 36.

- B. Under Article 78, there are conferred wide powers on the President to make orders to secure public safety, public order or safeguarding the interests or maintaining the welfare of the community.
- C. In making such Orders under Article 78, the President cannot be fettered either by Part II, or even other Articles of the Constitution other than those contained within Part IX, namely, the Emergency Powers themselves. As the issuance of an Order was in the sole discretion of the President, such Orders through Article 78 might also override, for example, Article 17(1) where the executive authority is vested in the Cabinet.
- D. In terms of Article 78(2)(b), any Order that provides for any matter for which provision is made under any law or is inconsistent with such law is not invalid. Any law includes the Constitution pursuant to Article 81(1) where the definition of 'Law' reads 'includes an instrument having the force of law and an unwritten rule of law'.
- E. It was also submitted that pursuant to Article 77(5) there could be a continual use of emergency powers which could override rights under the Constitution and all other legal obligations.

9. The submission of the Plaintiffs was to the effect that Article 36 conferred a right on members of Parliament rather than citizens as such that could not be abrogated by Presidential Order acting under emergency powers. Article 36 was in Part IV and not Part II of the Constitution. The Constitution as the Supreme law of the Republic was not a law within the meaning of Article 78(2)(b) or as defined within Article 81(1). Therefore, under the emergency powers the President could not disturb rights of members of Parliament, outside of Part II, and could not dissolve Parliament which had a function itself within the Emergency Powers (Article 77(2)).

10. The Court realizes that these matters must be decided with some urgency. It regrets that the situation has so developed in the Republic that the President to preserve the security and economy of Nauru has found it necessary to declare a state of emergency. This Court, of course, cannot question the decision of the President, whose task and responsibility it is, to preserve the State. The powers, however, asserted by the Secretary for Justice are far-reaching and taken to their ultimate under Article 77(5) could result, as he was bold enough to submit to the Court, in a continual state of emergency in which situation the Constitution, apart from Part IX, depending on the orders made would be virtually suspended and to all intents and purposes then rendered moribund. The Court faces the less than envious task of establishing some semblance of legal and constitutional order in this situation.

11. This is the first occasion that a declaration of emergency has been proclaimed. There was an earlier occasion which has some resemblances to the present one in that the then President Kennan Adeang was unable to get a Supply Bill passed on 30 September 1986. He had advised the Speaker to dissolve the Parliament, but as there was no moneys for expenditure on the services of the

Republic, he was declaring a state of emergency for seven days. At which point, the President moved that at its rising Parliament do adjourn until 7 October 1986. He was defeated on that motion and was removed from office on a vote of the Parliament. (Mehra – Practice & Procedure of the Parliament of Nauru p.192) The obvious resemblance to the present case is that the factual situation concerned a late attempt by the Government to submit a Budget, but the present government was faced with the added problems of the sanctions now imposed by the Treasury Fund Protection Act 2004, and of a divided Parliament brought about by a separate dispute surrounding the Speaker's decision that a member had vacated his seat pursuant to Article 32 of the Constitution. Eventually, as this latter dispute was not resolved the Speaker adjourned the house sine die. It is not entirely clear to the Court why he did this other than possibly acting under Order 50 of Standing Orders. The effect of such an adjournment is to end the sitting so that the time of the next sitting is appointed by the Speaker in accordance with the advice of the President. (Mehra, op. cit. p. 104). Such an adjournment enabled the President to make the Proclamation declaring the emergency for 21 days, as the Parliament was not sitting (Article 77(2)(b)).

12. Emergency powers, of course, are not unknown under other written constitutions of states or granted under specific laws of states. They have been used in various states around the world, and within the South Pacific. But, in the end, this Court must confine itself to the meaning of powers granted within Part IX of the Constitution. The Court is mindful that the Constitution was a people's document drawn up through an elected Constitutional Convention which clearly declared the Constitution to be the supreme law and that whatever law was inconsistent with it was void in law. The Constitution protected people's rights and freedoms and separated out the executive, the legislature and the judicature. It established, beyond doubt, through the Constitution a parliamentary democracy. It also stated however, that if the President is satisfied that there is a grave emergency whereby the security or economy of this Republic of Nauru was threatened he may declare a state of emergency with the object of securing public safety and public order. The whole intention of these emergency powers is for a limited period until there is a restoration of the normality of activity associated with a parliamentary democratic government. It is not expected to be continuous, and even with Parliamentary approval by resolution would not last beyond twelve months (Article 77(4)). The Court states that to put forward the submission of an ongoing state of emergency without some finite limit and without parliamentary sanction leads unswervingly towards a state of autocracy. Happily, this Court does not have to deal at this point with such a problem as the Public Proclamation has under Article 77(2)(b) a lapse date of 21 days from 30 September 2004, namely 21 October 2004.

13. In fact, the President may before the lapse date revoke a declaration of emergency. If indeed, it was his view that the state of emergency still existed then he may make a further such declaration. The basis for the present emergency is contained within the first paragraph of the Proclamation dated 30 September 2004,

namely, the inability of Cabinet 'to pass its budget due to the problems occurring in Parliament'. The actions taken by the President, since the Proclamation of 30 September 2004, are to dissolve the Parliament and call a general election (Presidential Order 2), suspend the operation of the Treasury Fund Protection Act 2004 (Presidential Order 10), and prevent access to the Supreme Court of citizens of Nauru on any questions regarding Articles of the Constitution. (Presidential Order 9). It would appear to be the aim of the invoking of emergency powers to allow a general election to take place without hindrance and to instal a government through the Parliament that is able to govern. One would expect in these circumstances that the emergency would then terminate and permit a normal functioning government.

14. The particular issue at stake is, first, the extent and legality or otherwise of the Presidential Order No. 9. At the outset, the Court cannot investigate the satisfaction of the President in declaring an emergency. The President is not on such a matter subject to the Court. The Court cannot substitute its view to that of the President.

15. Secondly, the President may make Orders as 'appear to him to be reasonably required for securing public safety, maintaining public order or safeguarding the interests or maintaining the welfare of the community'. The question arises whether such an order as No. 9 is 'reasonably required' for any one of those purposes.

16. In his initial proclamation he has anticipated the matter by asserting the emergency occurred due to the stalemate position reached in the Parliament. Instead of a procedure for dissolution provided in Article 41, he used his own emergency powers under Article 78(1) to dissolve and through Presidential Order 9 prevent any citizen, member or otherwise, challenging the action in the Court. Although the Plaintiffs submitted otherwise, the general term 'citizens' in the aforesaid Order encompasses the lesser, members of Parliament, who are required themselves to be Nauruan citizens. Article 36 in any event is not confined to members of Parliament.

17. The ability of a court to review administrative discretion on grounds of reasonableness has a broad range of applications in varying circumstances. However, as de Smith states in Judicial Review of Administrative Action 4th Edit p. 349,

'In time of grave emergency the courts may decline to undertake any inquiry into the reasonableness of the grounds on which a responsible Minister, entrusted with the maintenance of national security, chooses to exercise powers vested in him, notwithstanding that he is required by statute to have reasonable cause before exercising those powers'.

The case of Liversidge v Anderson[1942] AC 206 limited such Court review to a case where it could be shown that the Minister had not honestly believed that he had had reasonable cause for his belief. There is no suggestion here that that is the situation.

18. Article 78(2) reads as follows -

An order made by the President under clause (1) of this Article -

- (a) has effect notwithstanding anything in Part II of this Constitution or in Article 94;
- (b) is not invalid in whole or in part by reason only that it provides for any matter for which provision is made under any law or because of inconsistency with any law; and
- (c) lapses when the declaration of emergency lapses unless in the meantime the order is revoked by a resolution of Parliament approved by a majority of the members of Parliament present and voting.

19. In Article 78(2) under sub-paragraph (a) the President may make an Order contravening Part II of the Constitution. In emergency situations fundamental rights of citizens are often suspended during the course of the emergency. Most emergencies have come about through external aggression or invasion, or internal strikes or catastrophes where either lawlessness has to be overcome or property protected. Often due to the circumstances of the emergency, powers are limited to geographical locations. But in most situations limits are placed on individual rights in the interest of the security of the wider community. It is an expected and common provision. But the notion of fundamental rights of association, free speech, property and protection of law are so strong and jealously guarded in democratic communities that the revocation at the earliest opportunity of emergency powers curtailing them is usually sought.

20. In sub-paragraph (b) of Article 78(2), an issue of importance arises whether 'law' encompasses the 'Constitution'. The sub-paragraph grants to the President wide-ranging powers to make Orders even though present laws may already make provision. Where such Orders are inconsistent with such laws, the Orders are not invalid and, of course, override the laws during the emergency.

21. Law is defined in the Constitution under Article 81(1) to include 'an instrument having the force of law and an unwritten rule of law'. The Secretary for Justice submits this includes the Constitution, common law and equity but the Plaintiffs state that it does not include the Constitution which, unlike other laws, is the supreme law of the land and falls outside the definition. Of course, if that were the case it would curtail the effectiveness of emergency powers not just in regard to Article 36 but also maybe finance articles such as Article 61. Article 2 of the Constitution states clearly the pre-eminence of the Constitution in the panoply of laws of Nauru but it is still a law and in the view of the Court falls within the definition of Article 81(1) and, therefore, a law within Article 78(2)(b).

22. The Court is fortified in its view of the definition in comparing equivalent provisions in the Constitution of Western Samoa which was drafted and entered into force in 1962. Western Samoa has in recent times been renamed Samoa. Comparative constitutional law has its limitations and there are between the

constitutions of Nauru and Samoa, as it is now called obvious differences. But the pattern is much the same. Interestingly Professor James Davidson, an Australian political scientist, was the adviser both to the Samoan and Nauruan people at the time of the formulation of the Constitution. Nauru was six years later in obtaining its independence than Samoa. On a purely historical note, Samoan and Nauruan political history was comparable, too, in that both were former German colonies, and both were C Class Mandates under the League of Nations and then Trust territories under UN Trusteeship.

23. The Constitutional similarity, however, is striking in that, inter alia,
- (a) Article 2 in both constitutions are identical in effect, in that the Constitution is the supreme law and where another law is inconsistent it is void to the extent of the inconsistency.
 - (b) Part II of both Constitutions set out the fundamental rights in similar terms.
 - (c) Article 36 of the Nauruan and Article 47 of the Samoan are in identical terms.
 - (d) The referral provision in Article 55 of the Nauruan Constitution finds a similar provision in Article 73(3) of the Samoan.
 - (e) Part X of the Samoan and Part IX of the Nauruan constitutions with respect to emergency powers are in similar terms but for one significant point which is considered below in paragraph 26.

24. Under the Samoan constitution Article 106(4) is in similar terms to that of Article 78(2)(b). However the definition of law in Article III(1) of the Constitution is stated as follows -

'Law' means any law for the time being in force in Western Samoa; and includes this Constitution, any Act of Parliament and any proclamation regulation, order, by-law, or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Western Samoa, and any custom or usage which has acquired the force of law in Western Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction.

25. That definition in Article III provides in a sense the clothes to the shorthand of the Nauru definition of including 'an instrument having the force of law and an unwritten rule of law'. The Nauruan definition would embrace all law including the Constitution, all Acts, Ordinances applicable, regulations, common law and equity so far as they apply, and custom and usages that have acquired the force of law. What the Samoan constitution does is to explain in detail what is included within the Nauru concept. It would have been better, perhaps, had this been expressed in detail but it is clear to the Court that the Samoan definition is really the detailed meaning embraced by the sparse Nauruan phraseology

26. What, perhaps, is distinctive between the two Constitutions is the absence in the Nauruan Constitution of the need to recall Parliament if it is not sitting. Under the Samoan constitution if the Legislative Assembly is sitting at the time of the Proclamation then the Proclamation must forthwith be laid before the Legislative Assembly. However if the Legislative Assembly is not sitting then the Head of State will appoint a time to sit, as soon as conditions make it practicable, and the Proclamation shall then be laid before the Legislative Assembly (Article 105(3) and (4)).

27. What does stem from this, however, is the clear indication that, whilst the Samoan Constitution may be affected by the Emergency powers, the Legislative Assembly will not be prevented from sitting. The Constitution appears to be predicated upon the principle that the Legislative Assembly may still act on the Proclamation even if not sitting at the time. It may be, of course, that the dissolution provisions based on discretions of an independent Head of State (Article 63) overcomes the problem faced at various times by the Nauruan Parliament.

28. It would be unfortunate in the extreme if the precedent were set that a deadlocked or stalemated Parliament would have to be unlocked by Presidents declaring emergency powers. That is not a normal use of such powers, particularly where there is some indication from the earlier Convention debates that the Parliament would play its role when an emergency was declared. (Record of Proceedings of the Constitutional Convention 20 January 1968 p. 27). However, that indication subsequently was not translated into Article 77 thus permitting an order such as Presidential Order No. 2 to remain in force without being subject to the Parliamentary process, as, for example, required under the Samoan process, when the Parliament is not sitting. In another context, the Supreme Court has been informed that a Select Committee on Constitutional Review has been constituted to examine and review the Constitution of Nauru. Perhaps, it might first give consideration to Part IX and the Emergency Powers, together with the manner of dissolving Parliament.

29. As the Court has found that Presidential Orders 2 and 9 are within power, constitutional legitimacy can be given to the ensuing general election. In the course of the hearing, however, I asked the Acting Secretary for Justice whether, under the general election process, Presidential Order No. 9 would disentitle citizens having an interest taking action to bring a matter to the Supreme Court under Article 36. He said they would so be prevented. I then said that an election held under emergency powers must run some risks that the electoral process would be compromised. The Court would assume that if a declared purpose of the emergency powers is to order a general election then it will be conducted in such a way as to satisfy observers in its conduct and that Electoral Act provisions such as are contained in Part VI of that Act establishing the Court of Disputed Elections are permitted to operate in the normal way, and further that care is taken to ensure a free and untrammelled election subject, of course, to the normal requirements of law and order.

CONCLUSION –

30. The Court has concluded that the Constitution comes within the ambit of the powers granted the President under Part IX of the Constitution. This does not of itself require that the Constitution will cease to operate but only such parts of the Constitution or any other law of Nauru, written or unwritten, that may be inconsistent with a Presidential Order made within the scope of the Emergency Powers. Such Presidential Order must be reasonably required for securing public safety, maintaining public order or safeguarding the interests or maintaining the welfare of the community. The President must have honestly believed that he had reasonable cause for his belief (see para. 17 above). Until affected by Presidential Order, all the laws of Nauru continue to operate and may be enforced under the normal court processes of the Court system. The Court adds that once the emergency powers are revoked, the operation of the Laws of Nauru, including the Constitution, will resume as they existed before the emergency and will not be affected by anything contained in the Presidential Orders made during the emergency.

31. At the same time, the Court has stated that an emergency that arises from a Parliament in stalemate is not a precedent that would be supported as a useful governing tool. It would appear clear then, that attention will have to be paid to the ambit of emergency powers under the Constitution and the means for dissolution of Parliament. Such changes may effect an improvement in government processes to the benefit of Nauru, and retain emergency powers essentially for their more usual purpose of dealing with external threats or internal civil strife or catastrophe.

32. On account of the fact that this is the first occasion in the history of Nauru, it is important for public knowledge that the Supreme Court states shortly the effect of emergency powers.


- (i) Emergency powers (that is Part IX of the Constitution) do not operate until the President in office is satisfied that a grave emergency exists and by public proclamation makes a declaration.
- (ii) If Parliament is sitting, that is, sitting without adjournment, the state of emergency lapses after seven days unless Parliament has approved it by resolution. If Parliament is not sitting, then the state of emergency lapses after 21 days, unless approved by resolution. If approved by resolution of Parliament, the declaration may remain in force for up to twelve months. Where there is no resolution by Parliament, a further declaration may be made before or after the declaration lapses provided that the grave emergency in the view of the President still exists or that other events creating a grave emergency have occurred.

- (iii) During this period of the emergency, the laws of the land including the Constitution continue to operate unless for reasons of public safety, maintaining public order or safeguarding the interests or maintaining the welfare of the community it is reasonably required to make orders that affect such laws.
- (iv) The jurisdiction of the Courts are only curtailed under an emergency when Presidential Orders so curtail such jurisdiction, such as in Presidential Order 9 where citizens of Nauru are limited from taking action under Articles of the Constitution.
- (v) Apart from Part II of the Constitution relating to fundamental rights, laws continue to operate as before the emergency, for example, the Lands Act 1976, the Nauru Rehabilitation Corporation Act 1997. Whilst under Presidential Order No. 10, the Treasury Fund Protection Act 2004 has been suspended, such other financial measures as Articles 59, 61, 67, of the Constitution, The Government Loans Act 1972, Public Finance (Control & Management) Act 1997 would remain in place and be administered accordingly. In other words, the stability of existing legislation and procedures remain operative until otherwise varied by Presidential Order.
- (vi) Upon the revocation of the declaration of emergency, in one blow the existing Orders cease to have force and the full ambit of legislation existing immediately prior to the emergency is restored.
- (vii) By Article 78(3), following the revocation of the declaration of emergency, the previous operation of an Order is not affected nor is the validity of anything done or omitted to be done under the order, and any offences committed or penalties sustained are not affected.
- (viii) It is important, therefore, not only for the Courts but for the citizens of Nauru that full publication is given to Presidential Orders, many of which may have an effect in one way or another upon the lives of citizens.

33. The Court finds as follows -

- (i) The Court is satisfied that Presidential Order No. 9 is an Order made under Part IX of the Constitution and is within power.
- (ii) Members of Parliament of the Fifteenth Parliament fall within the term 'citizens of Nauru' in Presidential Order No. 9
- (iii) Under Article 78(2) (a) and (b), and Article 81(1), the Constitution is a law, and arising therefrom Presidential Order No. 9 prevents citizens of Nauru having legitimate interest from accessing Article 36 until revocation of the Order
- (iv) It also follows that Presidential Order 2 is within power.

34. The Plaintiffs on account of the above findings, in civil action 11/2004 and 12/2004 have no locus standi to maintain their actions. The actions are dismissed with no order as to costs.


BARRY CONNELL
CHIEF JUSTICE

