

In the Supreme

Court of Nauru

CONSTITUTIONAL REFERENCE NO. 2/2010

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 John Von Doussa

Mr. David Lambourne Secretary for Justice and Border Control – **Representing the President**

Mr. Leo Keke for the Nauru Law Society Nauru; **Intervenor**

Date of Hearing : Monday 11th October, 2010

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| REASONS FOR ORDER |
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This Constitutional Reference was included in the call-over of matters for hearing in the present sittings of the Supreme Court which is scheduled to run from 11th to 20th October, 2010. The Reference is made pursuant to Article 55 of the Constitution of Nauru which provides:

Article 55

“The President or a Minister may, in accordance with the approval of the Cabinet, refer to the Supreme Court for its opinion any question concerning the interpretation or effect of any provision of this Constitution which has arisen or appears to the Cabinet likely to arise, and the Supreme Court shall pronounce in open Court its opinion on the question.”

The Reference is made by His Excellency the President acting in accordance with the approval of the Cabinet. By its terms the Reference refers to the Supreme Court for its opinion a question relating to Article 53 of the Constitution namely:

“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 02 April 2010; and
- b. the subsequent exercise of the President's discretion not to renew Justice Millhouse's appointment under Article 53."

Obviously an opinion of the Supreme Court will concern the status of Justice Millhouse as a holder or former holder of judicial office in the Republic. However no appearance was made by him or on his behalf at the call-over. The Secretary for Justice and Border Control (the Secretary) stresses the urgency of this matter as the government is anxious not to have the office of Chief Justice vacant but nevertheless for reasons which I now give consideration of the Reference is stood over until next week. It will be listed for hearing at 10:00 a.m. on Monday next 18th October, 2010.

Justice Millhouse has conveyed to the Court through the Secretary that he is unable to be present during these sittings of the Court. However, it is clear that he has received Notice of the Reference and its terms. The Court was informed from the bar table by the Secretary that Justice Millhouse had been given Notice of the Reference in mid-September 2010, and a copy of the supporting Affidavit was delivered to him on 27th September, 2010. Communication about the matter then followed between Justice Millhouse and the Secretary. The Secretary has been asked to place this information, on the Court file in affidavit form as soon as possible.

In the communications between Justice Millhouse and the Secretary, Justice Millhouse raised a question about service out of the jurisdiction of the proceedings on him as if the Reference was an initiating proceeding in an inter-parties controversy governed by the ordinary court rules relating to civil actions.

A Reference under Article 55 is not a proceeding of this kind. Article 55 is a Constitutional right given to the executive government to seek an advisory opinion from the Supreme Court on any question concerning the interpretation or effect of any provision of the Constitution. The advisory opinion of the court is similar to an opinion of the kind normally provided to the Executive government by the law officers of the government. As such the opinion of the court does not affect or determine the rights of an individual. The opinion is not given in exercise of the judicial function of the court. Rather it is in the nature of an executive function.

The Supreme Court of Canada has power to give an advisory opinion to the executive government. The nature of such a power was considered by the Privy Council in Attorney General for the Province of Ontario V Attorney General for the Dominion of Canada [1912] AC 571. In reference to that case, a leading text on the Canadian Constitution Hogg "Constitutional Law of Canada" 4th edition 1977 in section 8.6 (d), pages 227, says:

"In the Reference Appeal (1912) ... (Ontario-v- Canada)....., the Privy Council held that the Court's answer to a question posed on a reference was 'advisory' only

and of 'no more effect than the opinions of the law officers'. It follows that the court's answer is not binding even on the parties to the reference, and is not of the same precedential weight as an opinion in an actual case".

In my opinion the nature of the Reference does not attract the Civil Procedure Rules about service of proceedings outside the jurisdiction.

Article 55 requires that the court "shall pronounce in open court its opinion on the question" This requires the court to give its reasons for whatever it decides in open court but the Article does not, in my opinion, remove from the court a discretion not to give an opinion where there is good reason not to do so. In Canada the relevant legislation provides that "it is the duty of the court to hear and consider it and to answer each question so referred but the "Supreme Court has held that it has a discretion not to answer a question, for example if the question is vague, not yet ripe to be answered, has become moot, or is not a legal question. See Hogg section 8.6 (a) and (d). I shall return to the relevance of this discretion shortly but first it is necessary to mention the facts which give rise to this reference.

The Minister of Justice and Border Control has in a supporting Affidavit deposed to those facts. His affidavit exhibits correspondence which has passed with Justice Millhouse. As the evidence presently stands this correspondence shows that there is no significant dispute about the facts.

In brief summary, the Minister deposes that on 3rd April 2006 Justice Millhouse was appointed by the President to act as Chief Justice for a period of 4 years. The relevant provisions of the Constitution (Articles 49 (2) and 53) empower the President to appoint the Judges of the Supreme Court including a judge who is to act as Chief Justice. The Constitutional provisions are clear in stating that the power of appointment resides solely in the President.

The appointment of Chief Justice Millhouse was supported by a written contract between him and the government of Nauru which dealt with his duties in the office of Chief Justice, his remuneration and other entitlements of office.

During a session of the Supreme Court in March and April of 2009 the Minister of Justice and Border Control met with Justice Millhouse to discuss a possible extension of his contract. It seems that neither party had the existing contract at hand, and were not clear at the time about the duration of the 2006 appointment. The terms and conditions of an extension were discussed both then and in subsequent correspondences. On about 6th August, 2009 Justice Millhouse, as he had not heard further from the government, sent to the Minister a draft contract for a further period of service in the office of Chief Justice which he had drawn up and signed. His letter said:-

"I enclosed two copies of a settled draft of my Contract as Chief Justice. You will see that I have made the Contract run from 1 August, 2009 for three years. My recollection had been that the original contract ran until some time in March, 2010 but looking at an early draft of it, I think it may have already expired in March this year.

I have ventured to sign both copies which unless you wish to discuss further the terms, may serve as the Contract itself once it has been duly signed and dated by the President. If the government is satisfied with the contract as I have drawn it, please return one completed copy to me."

Neither the Minister nor anyone on the government's behalf responded to the letter. However when Justice Millhouse sat in Nauru in March 2010 and again in May 2010 he was paid per diem allowances at the rate stated in the draft contract, which exceeded the rate previously paid.

The Minister deposes that it was not until July 2010 that he was made aware that Justice Millhouse's 2006 appointment expired on 2nd April, 2010. The matter of his re-appointment was then discussed in Cabinet after which the President resolved not to renew Justice Millhouse's appointment. The President telephoned the judge to inform him of his decision.

Justice Millhouse thereafter informed the government that he believed that he remained the Chief Justice of Nauru, and he continues to so assert. His correspondence says that he believed his offer contained in the draft contract was accepted by the government as the government did not question the draft and as he subsequently received the increase in his per diem allowance.

The government does not agree that the draft Contract was accepted, although it acknowledges that a higher per diem allowance was paid. Moreover the government asserts that even if the contract had been accepted by the government, there has been no formal appointment to judicial office beyond 2nd April, 2010 made by the President.

The government relies heavily on the decision of the Right Honourable Sir Harry Gibbs sitting in the High Court of Kiribati: Faqir Muhammad-v- Attorney General & Ors High Court of Kiribati HSSC Nos3/95 and 4-95, judgment 01st February, 1995. That decision concerned a dispute between Justice Muhammad and the government of Kiribati over his status as Chief Justice of Kiribati. The High Court held that even though Justice Muhammad had a binding contract with the government to serve as Chief Justice for a period beyond the expiry of his formal appointment as Chief Justice, he ceased to be Chief Justice when the formal appointment expired. The contract at best was no more than an agreement to make another appointment but did not bind the President to make the appointment. Whilst the office of Chief Justice had come to an end, the Court held that the contract, in so far as it provided for the payment of remuneration, holiday leave and other payments was binding on the Government and that Justice

Muhammad was entitled to payments provided for in the contract, or damages in lieu if these payments were not made.

In the present case, if the court accepts a similar analysis of the events which are deposed to by the Minister, and if Justice Millhouse is correct in his belief that the circumstances indicate an acceptance of his draft contract, Justice Millhouse may have a claim for damages for breach of contract even if his term as Chief Justice has expired.

The correspondences exhibited by the Minister indicate an intention by Justice Millhouse to pursue contractual rights. If that remains the position, separate proceedings in the ordinary civil jurisdiction of the Court will be necessary. The fact of such a claim is a matter which the Court would be required to consider in deciding whether in the exercise of the discretion which I consider exists under Article 55, it should give an advisory opinion on the Reference, or whether notwithstanding the urgency of the need to resolve the uncertainty about the office of Chief Justice, the resolution of that question should occur in inter-parties proceedings between the President, the Government and Justice Millhouse.

It is important therefore to know what if any further action Justice Millhouse proposes.

For this reason consideration of the reference has been stood over until Monday next at 10:00 a.m. to give Justice Millhouse an opportunity to issue proceedings and the further opportunity to indicate to the government and the court his position generally, should he wish to do so. He may, of course, make submissions either in writing or by counsel next Monday on the Reference. His responses will be important considerations in the exercise of the discretion whether to answer the question posed by the Reference.

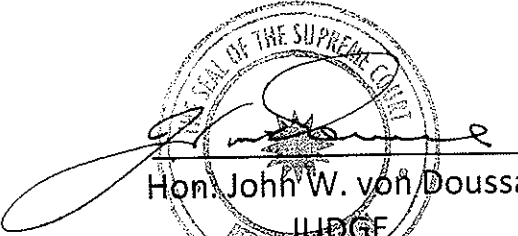
I record at this stage that when the Reference was called on 11th October, 2010 the Law Society of Nauru, by its counsel Mr. Keke, sought leave to intervene. Certain of the reasons for seeking leave concern the Law society's interest in the appointment of judges. Those concerns are not relevant to the Reference. However, the Secretary did not oppose the application, and leave to intervene was granted. The matter is an important one and the Law Society has indicated its desires to make submissions and if necessary to adopt the role of contradictor if appropriate to do so.

In passing, counsel for the Law Society raised a question about the status of Justice Millhouse, and the business of the Supreme Court during the session of the court conducted in May 2010.

Even if justice Millhouse's term as a judge had expired before that session, the business of the court would not for that reason be invalidated. The general law principles governing the exercise of public functions by a de facto officer will preserve the validity of that business. As to those principles see Baldock-v- Webster

And others, [2005] EWCA Civ 1869 (UK Court of Appeal): Leymang-v-Ombudsman [1997]VUCA 10 [Court of Appeal of the Republic of Vanuatu]; "Jesting Pilot", Papers and addresses by the Right Honourables Sir Owen Dixon 2nd edition, 1997 in the Chapter entitled "De facto Officers" at p229.

The reference will be considered at 10:00 a.m. on 18th October, 2010. In the Meantime these reasons are to be provided as soon as possible to Justice Millhouse.


Hon. John W. von Doussa
JUDGE

The image shows a circular seal of the Supreme Court of the Republic of Vanuatu. The seal contains the text "SEAL OF THE SUPREME COURT" at the top and "REPUBLIC OF VANUATU" at the bottom. In the center of the seal is a sunburst emblem. A handwritten signature in black ink is written across the seal. Below the seal, the name "Hon. John W. von Doussa" and the title "JUDGE" are printed in a standard font.