

IN THE SUPREME COURT OF NAURU

Petition for Constitutional Reference No. 1 /2010

IN THE MATTER OF THE CONSTITUTION

AND

IN THE MATTER OF THE DISSOLUTION OF THE EIGHTEENTH PARLIAMENT

AND

IN THE MATTER OF THE DECLARATION OF A STATE OF EMERGENCY ON 11 JUNE 2010

AND

IN THE MATTER OF PRESIDENTIAL ORDERS MADE THEREUNDER

AND

IN THE MATTER OF THE DISSOLUTION OF THE NINETEENTH PARLIAMENT

AND

IN THE MATTER OF THE DECLARATION OF A STATE OF EMERGENCY ON 09 JULY 2010

PETITION BY THE FOLLOWING MEMBERS OF PARLIAMENT

David Adeang MP, Milton Dube MP, Baron D Waqa MP, Valdon Dowiyogo MP, Aloysius Amwano MP, Godfrey Thoma MP, Ludwig D Scotty MP, Rykers Solomon MP, and Shadlog Bernicke MP

Petitioners

Coram : Justice John W. von Doussa

Date : 11, 12, 20 October, 2010

Counsel : Mr. K.C. Flemming QC for the Petitioners

Counsel : Mr. R.M. Niall for His Excellency the President Mr. Marcus Stephen MP

JUDGMENT

This Constitutional Petition is brought pursuant to Article 36 of the Constitution of Nauru by the nine Petitioners who are each members of the Twentieth Parliament of Nauru; the election for which was held on 19th June 2010. The petitioners described themselves in their supporting affidavits as aligned to the Opposition.

The Parliament of Nauru consists of 18 members (Art 28 (1)), and the remaining nine members of the Twentieth Parliament are aligned with His Excellency Mr. Marcus Stephen MP, the President of Nauru (the President), and are described as the Government.

The equal division of members between the two camps has created a political deadlock which has existed since early March 2001 notwithstanding many events recorded later in this judgment. At that time the Eighteenth Parliament was still in session. The President had been elected at the start of that Parliament.

The deadlock has continued even though in the meantime there have been two further elections. On 11th June, 2010 the President declared a State of Emergency under Art 77 of the Constitution. Other Declarations have followed in succession, the last which is presently still in operation. During the periods of State of Emergency, the President has exercised Emergency Powers under Art 78 by making a number of Emergency Orders.

Questions for Consideration

Article 36 provides:-

"Any question that arises concerning the right of the person to be of or to remain a Member of Parliament shall be referred to and determined by the Supreme Court."

The nine petitioners seek the determination by the Court of the following questions-

1. Was each of the declarations by the President of a State of Emergency on 11 June, 2 July, 9 July, 20 August, 10 September and 1 October 2010 valid and binding, that is, in accordance with the Constitution?
2. Was the Eighteenth Parliament properly dissolved, that is, in accordance with the Constitution?
3. Were Presidential Orders 1, 2, 4, 5, and 6 valid and binding Orders, in accordance with the Constitution?
4. Was the election for the Nineteenth Parliament properly conducted, that is, in accordance with the Constitution?
5. Was the Nineteenth Parliament properly dissolved, that is, in accordance with the Constitution?
6. Was the Twentieth Parliament properly adjourned by Presidential Order 14?
7. Was the Speaker of the Twentieth Parliament legally removed by Presidential Order 13?

The Application has been opposed by the President. Counsel for the President points out that there is no question about the right of each of the Petitioners to be and to remain a member of the Twentieth Parliament. However the President does not seek to have the Petition struck out on that ground, and in the interest of addressing the substantive arguments of the Petitioners requests the Court to deal with the substance of the questions posed in the petition. In these circumstances there is no need to consider arguments advanced on the Petitioner's behalf as to the appropriateness of their proceeding under Art 36.

Constitutional Provision

The narrative of relevant events since the election of the 18th Parliament is a long one. To aid in understanding it, the following Articles of the Constitution are important. It will be necessary to refer to other Articles later in these reasons.

The President

16. (1.) There shall be a President of Nauru, who shall be elected by Parliament.
-
- (4.) The President holds office until the election of another person as President.
- (5.) Parliament shall elect a President-.....
- (b).....at the first sitting of Parliament next following its dissolution; and;

Speaker of Parliament

34. (1.) Parliament shall, before it proceeds to the despatch of any other business, elect one of its members to be Speaker and, whenever the office of Speaker is vacant, shall not transact any business other than the election of one of its members to fill that office.
- (2.) A member of the Cabinet is not qualified to be elected Speaker
- (3.) The Speaker ceases to hold office –
- (a) when Parliament first meets after dissolution;
- (b) upon ceasing to be a Member of Parliament otherwise than by reason only of its Dissolutions;
- (c) upon becoming a member of the Cabinet;
- (d) upon being removed from office by a resolution of Parliament; or
- (e) upon resigning his office by writing under his hand delivered to the Clerk of Parliament

Prorogation and dissolution of Parliament

41. (1.) The Speaker, in accordance with the advice of the President, may at any time prorogue Parliament.
- (2.) The Speaker shall, if he is advised by the President to dissolve Parliament, refer the advice of the President to Parliament as soon as practicable and in any case before the expiration of fourteen days after his receipt of the advice.
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- (4.) Where the Speaker has, under clause (2) of this Article, referred the advice of the President to Parliament, and no resolution for the removal from office of the President and Minister under Article 24 is approved after the date on which the advice was so referred, he shall dissolve Parliament on the seventh day after that date.

Voting

46. (1.) Except as otherwise provided by this Constitution, a question before Parliament shall be decided by a majority of the votes of its members present and voting;

(2. The Speaker or other member presiding in Parliament shall not vote unless on a question the votes are equally divided in which case he has and shall exercise a casting vote.

Declaration of Emergency

77. (1.) If the President is satisfied that a grave emergency exists whereby the security or economy of Nauru is threatened he may, by public proclamation, declare that a state of emergency exists
- (2.) A declaration of emergency lapses-
- (a) If the declaration is made when Parliament is sitting, at the expiration of seven days after the date of publication of the declaration; or
- (b) In any other case, at the expiration of twenty-one days after the publication of the declaration, unless it has in the meantime been approved by a resolution of Parliament approved by majority of the members of Parliament present and voting.
- (3.) The President may at any time revoke a declaration of emergency by public proclamation.
- (4.) A declaration of emergency that has been approved by a resolution of Parliament under clause (2.) of this Article remains, subject to the provisions of clause (3.) of this Article, in force for twelve months or such shorter period as is specified in the resolution.
- (5.) A provision of this Article that a declaration of emergency lapses or ceases to be in force at a particular time does not prevent the making of a further such declaration whether before or after that time.

Emergency Powers

78. (1.) During the period during which a declaration of emergency is in force, the President may make such 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.
- (2.) 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 a Parliament present and voting.
- (3.) The revocation or lapsing of an order made by the President under clause (1) of this Article does not affect the previous operation of that order, the validity of anything, done or omitted to be done under it or any offence committed or penalty or punishment incurred.

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 of the reasons for his detention and be brought before the advisory board and permitted to make representations 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.

Factual Background

I take the following account of events from the affidavit of the petitioner David Adeang MP which I have in places shortened, and in others supplemented by inter-posing text from a Declaration of Emergency or further detail about an Emergency Order. Reading from Mr. Adeang's affidavit:

4. I am presently aligned with the Opposition

5. On 17 February 2010, in the Eighteenth Parliament, the Opposition moved a vote of no confidence in the President but failed in a vote of 8 – 9. Since that day Opposition numbers have grown to nine votes, out of an eighteen Member House. The Government has nine votes as well.

6. On Tuesday 9 March 2010 all nine Members of the Opposition signed a petition to then Speaker Riddell Akua to convene a sitting of Parliament in order to put a vote of no confidence in the Government. The Speaker advised all members of Parliament on Friday 12 March that Parliament would meet on Saturday 13 March 2010 at 2pm, which it did.

7. At that 13 March sitting, the Speaker read an advice from President Marcus Stephen advising the Speaker to dissolve the House. The Speaker did not deal with the Petition. After laying the said advice on the table of the House, the Speaker resigned his office and stood down from the Chair. The Opposition nominated Riddell Akua to again take the Chair, but he declined. The Opposition then nominated the deputy Speaker Dominic Tabuna to take the Chair, but he declined. Parliament could not consider the vote of no confidence because of the resignation of the Speaker.

8. With no Speaker, the House adjourned to Tuesday March 2010 at 10am. On that day there was no quorum and the sitting was adjourned to Thursday 18 March 2010 at 10am.

9. On Thursday 18 March 2010, the Opposition nominated the Minister for Transport to assume the Speakership but he declined. The Opposition then nominated Opposition member Shadlog Bernicke who accepted the nomination to the position of Speaker. He was elected by the House without contest.

10. The President immediately moved to adjourn the House and the motion was carried. An adjournment debate ensued. While the fourth Speaker, Aloysius Amwano, was speaking the PA system encountered severe problems and the House was adjourned by the Speaker to Friday 19th March at 2pm.

11. On Friday 19 March 2010 at 2pm when the sitting resumed, there was no quorum as all nine Government members were absent.

12. The Speaker dissolved Parliament.

13. On Saturday 20 March 2010, the Speaker issued writs for an election to be held on Saturday 24 April 2010.

14. Elections were held on 24 April 2010 and all members of the Eighteenth Parliament returned. There were no changes in the structure of parliament.

15. The first sitting of the Nineteenth Parliament was held on Tuesday 27 April at 10am. After the swearing-in of Members, various nominations for Speakership were declined. The House was at a stalemate. The House was adjourned to Thursday 29 April at 10am.

Parliament met again on 29 April, 4 May, 6 May, and 11 May but was unable to elect a Speaker and remained in stalemate. Obviously neither side has prepared to lose the vote of a person appointed Speaker.

20. Parliament met on 13 May at 10am. Our group, the Opposition, nominated Godfrey Thoma to the Speakership and he accepted. He was subsequently elected as Speaker without dissent. The House was adjourned to Tuesday 18 May 2010 at 10am.

21.

22. Parliament met on 18 May 2010 at 10am. The Speaker delivered a statement, and, finding there to be no resolution to the political impasse, he resigned with no nominations to the Speakership the House was adjourned to Thursday 20 May 2010 at 10am.

Parliament met again on 20 May, 25 May and, 27 May but the stalemate continued.

27. Parliament met on 1 June at 10am. The Opposition nominated Ludwig Scotty to the Speakership. The Government nominated Dominic Tabuna to the Speakership. Dominic Tabuna was elected Speaker. The Speaker recessed the House until 2pm.

28. The House resumed at 2pm. The Speaker delivered a statement expressing confidence that a President should be elected soon and adjourned the House to Thursday 3 June 2010 at 10am.

29. Parliament met on 3 June at 10am. The President suggested the Speaker recess the House to Friday 4 June 2010 at 10am. The Speaker agreed.

30. Parliament met on 4 June 2010. The Speaker delivered a statement and resigned. The House was again in stalemate and subsequently recessed to Tuesday 8 June 2010 at 10am.

31. Parliament met on 8 June 2010 at 10 am. The House failed to elect a Speaker.

32. Parliament adjourned to Thursday 10 June at 10am. Parliament met on 10 June 2010 at 10am. The House failed to elect a Speaker. Parliament adjourned to Tuesday 15 June at 10am [This was the fourteenth sitting of the Nineteenth Parliament]

33. on Friday 11 June 2010 at 1 pm, the President Marcus Stephen issued a Declaration of State of Emergency under Article 77 of the Constitution..... and Presidential Orders 1 to 7 were also issued that day, ordering a dissolution of Parliament, closure of the electoral rolls at 1:30pm and restrictions on Supreme Court actions.

The 11 June Declaration reads:

CONSTITUTION OF NAURU

ARTICLE 77

DECLARATION OF A STATE OF EMERGENCY

WHEREAS

- A. *Despite 6 weeks and 14 sittings of Parliament since General Elections were held for Members of the 19th Parliament on the 24th of April, 2010, the 19th Parliament has remained unable to progress to the election of the President due to an ongoing political stalemate. This has also resulted in the inability of the Parliament to entertain any other business, including any Appropriation or financial Bills.*
- B. *Despite all the efforts that have been made to find a political resolution to enable the 19th Parliament to progress, I am now convinced that whilst a political resolution would be desirable, unfortunately the political stalemate cannot be broken and would otherwise persist.*
- C. *I have received advice that Appropriation limits have been reached across a number of sectors and therefore Government no longer has the legal authority to effect payment to maintain all of government's functions. Nauru cannot function without the legal authority for Government to fund these essential needs. The consequences for the economy of Nauru, the welfare of our people, Nauru's social stability and its international standing will be severe.*
- D. *As a consequence of the ongoing political deadlock and Parliament's inability to consider and vote on any appropriation bills, the only feasible option available to government to ensure the functions of government, the welfare of our people and social stability, is to exercise the authority available to me under Constitutional Emergency Powers.*
- E. *The situation has been reviewed by the President in Cabinet and having been satisfied, on the advice that I have received, that there now exists a grave threat to the economy of the Republic;*

NOW THEREFORE, in accordance with Article 77 of the Constitution of Nauru, I, **MARCUS STEPHEN**, President of the Republic of Nauru, publicly **PROCLAIM** as follows:

1. *A State of Emergency exists in Nauru.*
2. *That the Constitution of the Republic of Nauru shall remain in place, except for those Articles of the Constitution specifically excluded from application and operation by Presidential Order made under Part IX of the Constitution.*
3. *This Proclamation shall come in to force at once and will lapse upon the election by Parliament of a President, or after 21 days, whichever occurs sooner.*
4. *This proclamation may be extended by further proclamations.*

DECLARED at NAURU this Eleventh day of June, 2010 at one o'clock in the afternoon.

H.E. Marcus Stephen, MP

PRESIDENT

The Emergency Orders (sometimes referred to as Presidential Orders) numbered 1, 2, 4, 5 and 6 which are the subject of Question 2 in the Petition were directed to issues necessary to bring about an early election. Order 1 dissolved the Nineteenth Parliament and closed the rolls; Order 2 appointed the Returning Officer; Order 4 was a writ for a General Election; Order 5 set election dates and deadlines; and Order 6 appointed necessary Officers and Registrar to conduct the election.

Orders 4 and 7 are not subject to specific challenge but would be affected if the main argument of the Petitioners about the construction and operation of Articles 77 and 78 are upheld. Order 3 prohibited any person instituting proceedings in the Supreme Court under any provision of the Constitution, or for judicial review of administrative action. Order 7 provided for supply, in the nature of a supplementary appropriation to meet government expenses to 30 June 2010.

Mr. Adeang's narrative continues:

34. As a consequence of the purported dissolution and Presidential Orders, elections were held on Saturday 19th June 2010.

One Opposition member was not re-elected but his replacement aligned himself with the remaining Opposition members

35. The first meeting of the Twentieth Parliament was held on Tuesday 22 June 2010 at 2pm. The House failed to elect a Speaker. Parliament was adjourned to Wednesday 23 June 2010 at 10am.....

Parliament met again on 23 June, 24 June, and 29 June and on each occasion failed to elect a Speaker.

39. The Bells were rung on Wednesday 30 June 2010 and Parliament met at or about 1:30pm. The caretaker President Marcus Stephen nominated Aloysius Amwano to take up the Speakership. Godfrey Thoma seconded the nomination. Aloysius Amwano accepted and was subsequently elected to the Speakership without dissent. The House was adjourned to Friday 2 July 2010 at 10am.

40. The President issued a further Declaration of a State of Emergency on 2 July 2010, together with Presidential orders 10 and 11.

The Preamble to the 2 July 2010 Declaration recited that the Declaration of 11 June 2010 was to lapse at the end of 2 July 2010, and that the political stalemate continued notwithstanding extensive negotiations and attempts to reach and compromise. The Preamble continued:

F. Due to ongoing political stalemate and the inability of Parliament to consider a Supply Bill, I issued on 30 June 2010 in exercise of my emergency powers a Presidential Order (Presidential Order No.9) for the purpose of meeting expenditure necessary to carry on the services of the Republic of Nauru after the commencement of the new financial year until Parliament is able to approve an appropriate law.

G. In order for Presidential Order No. 9 to remain in force, which is essential as a consequence of the ongoing political deadlock and Parliament's inability to consider and vote on any appropriation bills, the only feasible option available to govern to ensure the functions of government, the welfare of our people and social stability is to exercise the authority available to me under Article 77 (1) and 77 (5) of the Constitution to make a further declaration of a State of Emergency.

On 16 June 2010, the President had issued Emergency Order 8 authorising the Clerk to appoint a time and date for the first sitting of the Twentieth Parliament. Order 9 was made on 30 June 2010. It made provision for supply for the period 1 July 2010 to 30 September 2010. Because of the stalemate Parliament had not

undertaken the usual budget process or approved an appropriation bill for the 2010 -2011 year. Details of the heads of expenditure authorised were attached to the Order and appear consistent with the orderly and proper administration of government functions. The contrary is not suggested by the Petitioners Order 10, made on 2 July 2010 continued in force Order 3 and Order 9. Order 11 also made on 2 July 2010 fixed a custom duty for tobacco products.

I leave the affidavit of Mr. Adeang at this point. The Parliament met again on 2nd July 2010. A Deputy Speaker and a Deputy Chairman of Committees were elected without dissent. The Speaker delivered a statement and then Parliament was adjourned to Thursday 6 July 2010.

Parliament met on 6 July. Apparently some rowdy behaviour occurred in the House. The Speaker recessed the House after delivering a statement. Legal objection is taken to some of the evidence filed about that event which occurred in Parliament on 6 and 8 July 2010, and in any event there is a measure of disagreement about the events. What happened between members in that period is not important to the outcome of the petitions. It is sufficient to note, as Dr. Kieren Keke does in his affidavit, that from the date when Mr. Amwano MP was elected Speaker, until 8 July 2010 the Speaker refused to allow the House to progress to the election of a President (that being the necessary first item of business of the new Parliament: Art. 16(5(b))). No other Parliamentary business was able to proceed for that reasons.

On 8th July Emergency Orders 12 and 13 were issued by the President. Order 12 directed that no officer of the Nauru Police Force was to accept any directive from the Speaker. Preamble to the Order says that it was made as the Speaker had suspended a Memorandum of Understanding reached in February 2010 between the Speaker and the Commissioner of Police about the manner in which Police were to operate in the precinct of Parliament. Order 13, which is the subject of question 6 in the Petition, reads:

CONSTITUTION OF NAURU

PART IX

EMERGENCY POWERS

PRESIDENTIAL ORDER 13

ARTICLE 78

WHEREAS –

- (a) a State of Emergency has been declared under Article 77(1) of the Constitution of Nauru; and*
- (b) the Speaker of Parliament, in breach of Article 16(5) of the Constitution and Standing Order 3(g) is refusing to allow Parliament to progress to the election of President; and*
- (c) the second sitting of the 20th Parliament (which commenced on Friday 2 July 2010) has twice, in contravention of the applicable parliamentary procedure, been suspended by the Speaker without the consent of the House; and*
- (d) I am satisfied that this Order is reasonably required to safeguard the interests of the community and to prevent the Speaker from contravening the Constitution and the Standing Orders with impunity and from needlessly prolonging the political stalemate,*

By virtue of the powers vested in me under Article 78(1) of the Constitution of Nauru, I MARCUS STEPHEN, President of the Republic of Nauru hereby order -

1. *The office of Speaker is vacant. The sitting of Parliament (which commenced on Friday 2 July and which has twice in contravention of the applicable parliamentary procedure been suspended by the Speaker without the consent of the House) will resume when the bells ring.*
2. *The Clerk will ring the bells when requested to do so by me.*

Given under my hand this Eighth day of July, 2010.

HON. MARCUS STEPHEN MP

PRESIDENT

The Bells were rung on 9th July 2010. A quorum of members was not present. The Deputy Speaker adjourned the House sine die for want of a quorum.

Later on 9th July 2010 a further Declaration of a State of Emergency was issued as the 2nd July 2010 Declaration was due to expire that day. Emergency Order 14 was also issued by the President. That order is the subject of question 7 in the petition. The Preamble to the Declaration in part recites that the grave threat to the economy of Nauru exists. Emergency Order 14 extended Emergency Orders 3 and 9 relating to supply, and further Ordered:

2. *The office of Speaker remains vacant until a Speaker is elected by Parliament.*
3. *Parliament remains adjourned and will not sit until directed by the President.*
4. *The President, through the Clerk of Parliament, will notify Members of the time and date of the next sitting of Parliament.*
5. *Each roll of electors kept under section 6 of the Electoral Act shall remain closed until the lapse of the State of Emergency declared by me on 9 July 2010 or until further order.*

Parliament has not sat since 9th July 2010 but it is still formally in session, though adjourned. Since then further Declarations of States of Emergency based on a continuing threat to the economy of Nauru caused by the political stalemate have been issued by the President on 30th July, 20th August, 10th September and 1st October, 2010. The last one will lapse at midnight on 22nd October 2010 unless revoked in the meantime.

A further seven Emergency Orders have also been issued, some continuing early Orders, one revoking Order 3 which had limited access to the Supreme Court and one for providing additional supply to run to 31st December 2010. These Emergency Orders are not the subject specific questions in the petition.

Arguments of the Parties

The common position of counsel for each party is that the answers to the Questions posed in the petition, other than Questions 2, turn essentially on the interpretation and effect of Art 77 and 78 of the Constitution: Were the Emergency Powers in those Articles enlivened in the events which happened, and if so did the powers enable the President to make Emergency Orders that are inconsistent with the provisions of Articles 34, 39, and 41?

Question 2 asks whether the Eighteenth Parliament was dissolved in accordance with the Constitution. The petitioners, relying on paragraphs 11 and 12 of Mr. Adeang's affidavit, intended to challenge the lawfulness of the dissolution of the Eighteenth Parliament on the ground that the Speaker purported to dissolve Parliament

six days, not seven days, after the President advised the Speaker to dissolve it. However, counsel for the petitioners' sighted a document showing that Parliament was dissolved on 20th March not 19th March as Mr. Adeang recollected and the point is no longer pressed. The answer to question 2 will therefore be: "Yes".

In so far as the challenge to the lawfulness of the Nineteenth and Twentieth Parliaments rested on the premise that the Eighteenth Parliament had never been dissolved in accordance with the Constitution that challenge must also fail.

By the terms of Art 78 orders can only be made by the President in exercise of Emergency Powers during a period when a Declaration of Emergency proclaimed under Article 77 is in force. The petitioners contend, correctly in my view, that this must mean that the Declaration is one validly made in accordance with the requirements of Article 77.

Article 77 requires that: "the President is satisfied that a grave emergency exists whereby the security or economy of Nauru is threatened....." The petitioners argue that a grave emergency is an objective fact and the facts in this case fail to establish that a grave emergency has existed at any relevant time. They argue that a threatened possibility of emergency is not enough. The grave emergency must actually exist at the time the Declaration is made. The petitioners contend that there was no grave emergency as there was no possible threat to the security of Nauru or any threat to its economy. In support of the last point, the petitioners argue that the political deadlock in no way restricted the receipt of income by Nauru, and revenue continued to flow into the coffers of government. For these reasons they contend that each of the Declarations of the Emergency should be set aside.

Should the validity of the Declarations be up-held, the petitioners then argue that the Emergency Orders made under Art. 78 are not valid, and should be set aside, first on the ground that the subject matter of the Orders is inconsistent with the requirements of the Constitution, and secondly that in any event in their practical operation the Orders were a disproportionate means of dealing with a political deadlock, and were so unreasonable that no reasonable president acting in good faith could consider them to be "reasonably required for securing public safety, maintaining public order or safe-guarding the interests of or maintaining the welfare of the community" as required by Article 78 (1). The Petitioners contend that Art. 78 does not permit the making of Emergency Orders that are inconsistent with express requirements of the Constitution. For example, Emergency Order 1 dissolved Parliament in a way inconsistent with the provisions of Article 41 and Emergency Orders 2, 4, 5, and 6 were inconsistent with Art. 39 as the President, in effect, usurped the role given by the Constitution to the Speaker. Emergency Order 13 removed the Speaker from office in a way that is inconsistent with Art. 34(3) and Order 14 in its operation was inconsistent with Constitutional provisions regarding the role and office of Speaker.

Although Emergency Orders 7, 9, and 20 which deal with supply are not the subject to specific Questions in the petition, the petitioners argument also questioned the lawfulness of them under the Constitution as they achieve supply (i.e. authorised expenditure from the Treasury Fund) in a manner inconsistent with the Finance provisions of the Constitution (Arts 59 and 61 in particular).

Of central importance to the success of their arguments concerning Article 78 is the meaning of Article 78 (2). The petitioners contend that Art. 78 (2) (a) should be understood to mean that only the fundamental rights provisions in Part II of the Constitution maybe transgressed by an Emergency Order, and because Art. 78 (2) (a) expressly recognises that an Emergency Order may have affect notwithstanding Part II, by necessary implication all other provisions of the Constitution must be followed. That argument leads directly into the meaning of Art. 78 (2) (b) which says that an Emergency Order is not invalid only because it provides for

"any matter for which provision is made under any law or because of a consistency with any law"

The petitioners argue that "law" does not include the Constitution. If it were otherwise, the petitioners contend, Emergency Orders could be used to overthrow the very foundations of the representative democracy in Nauru which the Constitution is intended to achieve.

A difficulty for the petitioner's arguments is the decision of this Court in *Kun -v-Secretary of Justice and Others* [2004] NRSC 2. That case concerned the validity of two Emergency Orders made by the President under Art. 78 during a State of Emergency declared under Art. 77. One Order dissolved Parliament and the other limited access to the Supreme Court so as to prohibit a question being raised under Art. 36. In substance the Orders under challenge there were similar to Emergency Orders 1 and 3 in the present case which respectively dissolved parliament and restricted access to the Court.

Connell CJ upheld the validity of both Emergency Orders. In the course of doing so he held at [14] that the court cannot investigate the satisfaction of the President in declaring an emergency. His Lordship said

"The President is not on such a matter subject to the Court. The court cannot substitute its view to that of the President."

Connell CJ also held that "law" in Art. 78 (b) included the Constitution. He said at [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 may be finance articles such as Article 61. Article 2 of the Constitution states clearly that 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.)"

Counsel for the petitioners, whilst supporting other passages in *Kun*, contended that the judgment was wrong in both these respects and should not be followed, as to give such an interpretation to Arts 77 and 78 would encourage indefinite executive rule by the President and open a door to a state of autocracy.

Counsel for the petitioners addressed the Court at length of the principles of interpretation that should be applied in construing a Constitution, stressing that the ordinary rules of construction applied to a statute passed by Parliament do not provide a complete guide to understanding a Constitution such as that of Nauru which developed out of a Constitutional Convention and lengthy debate within the Nauruan community. Rather, the Constitution should be understood as a special law and interpreted in a way that achieves the aims and purpose of the people of Nauru when they entered into the compact, which is the Constitution. Because the Constitution is a special law with a function and character which differs from an ordinary statute, Counsel argued that it was legitimate to have regard to the history of the Constitution and to secondary materials available in the transcript of the Constitutional Convention.

Generally speaking, I think there is merit in these submissions as to the way a Constitution should be interpreted, and I agree that the ritualistic adherence to established rules for construing an ordinary statute of Parliament may be too limiting to ensure that a Constitution is properly understood and applied. However in the present case I do not think it is helpful or necessary to go beyond an analysis of the text of the Constitution itself. In any event, the limited discussion of the Emergency Powers in Part IX of the Constitution during the Constitutional Convention on 20th January, 1968, which has been provided to the Court, does not usefully add to the understanding of the intended scope of the Emergency Powers, particularly as the text of the Draft Convention under discussion that day is not before the court.

The President, on the other hand, contends that this court should follow *Kun*, first because it is right and secondly because of the importance of adhering to an interpretation of the Constitution that has been acted on to order the affairs of State in ways that cannot now be reversed without disturbing the established order. He contends a decision of the court on a Constitutional matter should not be re-opened without grave reason and only if the decision turns on a matter of vital importance and is manifestly wrong.

It follows, so the argument runs, that the satisfaction of the President that a grave emergency exists existed cannot be reviewed by the court, and the Article 77 Declarations must be held to be valid in accordance with the Constitution. The President contends in any event that on the facts it was open and reasonable for him to conclude that a grave emergency existed so that even if the President's state of satisfaction is reviewable, the Declarations must be upheld.

Accepting the validity of the Declarations, the President contends that the Emergency Orders were reasonably required in the circumstances for the purposes or some of them specified in Art. 78 (1), and none of the orders were invalidated by the provisions of Article 78 (2). Further, the application of *Kun's* case directly supports Emergency Order 1 which dissolves the Nineteenth Parliament, and pursuant to Art.78 (2) (b) none of the other Emergency Orders under attack are invalid on the grounds argued by the Petitioners because the Constitution is one of the laws of Nauru, and it is specifically provided that an Emergency Order may be inconsistent with any law.

The Constitution must be read as a whole. Whilst it provides for representative government through the functions of Parliament comprising members elected by the citizens of Nauru with power to make laws for the peace order of good government of Nauru, the Constitution itself expressly recognises that in times of grave emergencies the normal organs of governments and constitutional processes laid down in the Constitution may be insufficient for the preservation of the Republic and the Constitution itself. It is the Constitution itself which provides for the exercise of the Emergency Powers and they form part of the Constitutional compact.

The President contends that the exercise of these Powers does not represent a departure from the Constitution's requirements because they are expressly authorised by it.

On the petitioners' case, all the Declarations of Emergency and Emergency Orders should be set aside so that Parliament can sit and arrive at a political solution to the parliamentary stalemate. The risk of this is that of the stalemate will continue and the business of government will descend quickly into chaos with great harm to the welfare of the Community, to the economy and even to public order as essential services of government are deprived of operating funds.

On the President's case, the Declarations and Orders will remain in place so that the Republic is governed under Emergency Powers until such time as the Members of Parliament compromise their positions sufficiently to enable parliament to resume and elect a Speaker and President. In the meantime, the business of government can continue in an orderly manner under the Emergency Powers. The risk of this is that absent a compromise the Republic may descend into an autocracy.

Neither scenario offers a quick magical solution that is likely to satisfy both camps. The Court however must decide the petitions according to law and thereafter the members of parliament and the community at large, will have to find a workable political outcome. So much seems to be common ground amongst the parties.

Reasoning

In understanding the scope and function of the Emergency Powers, the starting point must be recognition that those Constitutional provisions are themselves part of the Constitution. It is the Constitution that provides for

the President as the head of government elected by Parliament to exercise extra-ordinary Executive powers independent of the normal Parliamentary process in abnormal times.

The Constitution includes these extraordinary powers to enable the protection of the Republic in times of "grave emergency". The expressions "emergency" and "grave emergency" are very broad and incapable of precise definition. See Ninagan-v-Government of Malaysia [1970] AC 379 at 390. The wide scope of matters that may be comprehended is important to ensure the Constitution can deal with the unforeseen as well as with predictable possibilities.

War, flood, famine and civil unrest are often cited as causes for an emergency, but more recently the world has experienced physical devastations through tsunamis, earthquakes and volcanic eruptions of magnitudes not expected, and economic disaster precipitated in some parts of the world by the world financial crisis. The emergency powers, to serve their purpose, must be wide. Moreover it must be recognised that events may arise which render impossible the ordinary functions of the separate arms of government recognised by the Constitution – the Legislature, the Judicature, and the central functions of Executive Government such as the police force and fire and health services which are critical to the maintenance of law and order and public safety.

To serve their intended purpose the emergency powers must be construed widely enough to allow the President to respond to situations of this kind.

Article 77 is in broad terms to ensure the effectiveness of the emergency power. The repository of the power is the President who is the elected head of government, and as such is likely to be well suited, if not best suited, to understand, evaluate and judge the gravity of the events, and to form an opinion whether a grave emergency exists.

Whether the President's Declaration in a particularly case that a grave emergency exists is reviewable in the Supreme Court is an issue raised by this case. Connell CJ in Kun said that it is was not, but the petitioners' argument that the existence of a grave emergency is an objective fact implies that the court is entitled to judge whether or not the objective fact is established, presumably on the balance of probabilities, and if not, to set aside the Declaration. The petitioner's argument also places weight on the word "exists" in the requirement that the President be satisfied that a grave emergency exists.

In my opinion, a grave emergency can exist even if the harm anticipated from the emergency is only threatened harm from events which have not yet happened. The very essence of good government and management generally is foresight on the part of those in control so that measures are taken ahead to limit or prevent the potential of events which threaten. An assertion that emergency powers could only be exercised once threatened harm had eventuated was rejected by the Privy Council as unacceptable reasoning in King Emperor -v- Benoari Lal Sarma [1945] AC 14 at 23. I respectfully agree with that view.

Recognising that an assessment whether a grave emergency exists includes assessing the future potential of emerging and often fluid events serves to demonstrate why the state of satisfaction of the President cannot be amenable to the fact finding processes of a court. In King Emperor-v- Benoari Lal Sarma the Governor-General of India made an ordinance under legislation that empowered him to do so "in cases of emergency". The Privy Council said at 21:

"it is to be observed that the section does not require the Governor-General to state that there is an emergency, or what the emergency is either in the text of the ordinance or at all, and assuming that he acts bona fide and in accordance with the statutory powers, in cannot rest with the court to challenge his view that the emergency exists."

The language of Article 77, in expressly stating that it is the President who is to be satisfied that a grave emergency exists makes it even clearer than the legislation considered by the Privy Council that the decision is a matter for the President alone, not for the court to ultimately judge.

It will be noted however that the Privy Council qualified its pronouncement by requiring that the exercise of the power be bona fide and in accordance with legislation.

Here there is no basis at all in the evidence to doubt that the President exercised the Power under Article 77 bona fide and in accordance with the Constitution, save for the argument that a grave emergency did not exist. That argument I have rejected because it is for the President alone to judge.

Even if it were open to the court to consider whether there was an adequate factual basis for a finding that a grave emergency exists, I consider it was open to the President to be so satisfied on each of the occasions a Declaration was made. Each Declaration was based on the threat to the economy of Nauru arising from the failure of parliament to consider and approve supply. Even if income abounds, the economy and welfare of community will suffer if nothing can be expended from the Treasury fund. The practical result is the same as if the Treasury fund was empty.

In my opinion the conclusion of Connell CJ in *Kun* at [14] that the court cannot investigate the satisfaction of the President in deciding that a grave emergency exists is correct and should be followed. The qualifications by the Privy Council that the power must be exercised bona fide should be noted, but I do not think it was relevant for Connell CJ to expressly state that reservation in *Kun*.

It follows in my view that each of the declarations that a state of emergency existed was validly made in accordance with the Constitution. The petitioner's submissions to the contrary fail. The answer to Question 1 will be 'Yes'

I turn now to the emergency orders made under Art 78.

Once the powers of the President are enlivened by a proclamation declaring a State of Emergency the exercise of power by the President in making an order under Article 78 is administrative in nature. As such the body of law concerning the exercise of administrative powers comes into play, including the principles which in appropriate cases allow judicial review of executive action. The submissions made for the petitioners assume these principles apply to the emergency orders under challenge, and counsel for the President concedes that the President's exercise of power under S.78 can be reviewed.

The lawful and valid exercise of administrative powers requires that the powers be exercised according to all legal conditions attaching to their exercise and reasonably for the purpose intended by the head of power.

The purpose of judicial review is to determine the lawfulness of the exercise of power. It is not the function of the reviewing court to evaluate the merits of the exercise. The court has no power to pass judgment on the wisdom or fairness of the exercise, and no power to exercise it in a different way. If the review succeeds, at most the exercise under challenge is set aside and the matter returned to the repository of power to re-exercise it according to law.

Generally speaking, a party seeking to challenge an exercise of power conditioned on the state of satisfaction as to reasonableness by the repository of power necessarily carries a heavy and difficult onus to establish that the exercise exceeds the limits of the wide grant of power. Under the Constitution of Nauru, the President's power under Art. 78 (1) is very broad, and the grant of power should be construed with all the generality it permits: see *Grain Pool-v- The Commonwealth* [2000] 202 CLR 479 at 492. On such a challenge to an order of

the kind envisaged by Article 78 (1) the court will look to the practical operation and the effect of the order: see *Ha-v-N.S.W.* [1997] HCA34; 167 ALR 355 at 367.

Should the court find that the order is wholly disproportionate to the gravity of the risk or threat sought to be regulated, so as to be beyond any reasonable and rational mode of regulation, the order will be in excess of power, and on that ground unlawful and invalid.

As a general rule of statutory interpretation these principles will be assumed to operate unless the statute in clear and unambiguous terms indicates that they do not apply in a particular situation, or apply only to a limited extent.

The question here is how these principles operate in the case of an order made under the Constitutional powers in Art. 78, and what direction does the Constitution give about the requirements for a valid exercise with power?

Critical to the answer are the provisions of Art. 78(2). In my opinion each of paragraphs (a), (b), and (c) of that sub-Article operates together. The paragraphs are conjoined in the text by 'and'. Paragraph (a) provides that an order has effect notwithstanding anything in Part II of the Constitution. To this extent paragraph (a) is a saving provision. Paragraph (b) contains another saving provision which is cumulative on paragraph (a). Finally, paragraph (c) specifies the point in time when the validity of an order comes to an end.

Essential to understanding Article 78(2) is the meaning of the word 'law' appearing in paragraph (b). Does it include the Constitution as Connell CJ decided in *Kun*, or does it mean all laws except the Constitution which, because of its importance, stands above ordinary laws as the petitioners contend? I consider the conclusion of Connell CJ in *Kun* is correct. I respectfully agree with his reasoning in the passage from [21] earlier set out in these reasons. That construction is indicated by Art. 2 of the Constitution which says: "*This Constitution is the supreme law of Nauru*" and the definition of 'Law' in Article 81 lends further support to this conclusion. As Connell CJ observed, if emergency powers were unable to operate in ways inconsistent with particular Constitutional provisions, the effectiveness of the emergency powers would be curtailed. Indeed they could be useless in dealing with disasters that prevent Parliament or the Courts going about their usual business, or with prolonged and civil unrest.

Paragraph (a) of Article 78(2) addresses the question of possible conflict between an emergency order and fundamental human rights conferred by Part II of the Constitution on every person in Nauru. There are a number of provisions in Part II qualifying those human rights which provide that:

"Nothing contained in or done under the authority of any Law shall be held to be inconsistent with or in contravention of the provisions of this Article to the extent that the law makes provision which is reasonably required...."

and then go on to specify limited circumstances where inconsistency is permissible: see Arts. 8(2), 9(2), 10(12), 11(4), and 12(3).

Accepting that 'law' in the Constitution includes the Constitution, if it were not for paragraph (a) of Art. 78(2) there would be great difficulty in determining the lawfulness of an emergency order which did not fall within one of the permitted inconsistencies with fundamental rights. I consider paragraph (a) is to put the primacy of emergency orders beyond doubt, not to indicate that only the fundamental rights provisions of the Constitution may be derogated from, as the petitioners contend.

Paragraph (b) puts beyond doubt that an emergency order can be inconsistent with a requirement of the Constitution as Connell CJ held in *Kun*.

However, the terms of paragraph (b) indicate that an emergency order may be invalid for other reasons. This is an important Constitutional statement. The recognition of invalidity necessarily implies that the authority appointed by the Constitution to determine rights, the Judicature, is empowered in all circumstances to judge the validity of an emergency order. As Marshall CJ in *Marbury v. Madison* [1803] 5 US 87 at 111 said in a famous passage frequently cited in administrative law cases:

"It is, emphatically, the province and duty of the judicial department to say what the law is".

On review of an Emergency Order, the question and the only question for the Court would be a question of law: 'Was the Order lawful and therefore valid?'

In *Kun* notwithstanding that the terms of the order there in question purported to prevent any reference to the Supreme Court of a question regarding any article of the Constitution, Connell CJ reviewed the constitutional validity of the order. Although Emergency Order 3 made by the President in the present case, until it was revoked, purported to prohibit applications for judicial review of administrative action, in my opinion such an application could nonetheless have been made to, and entertained by, the Supreme Court to determine the validity of the order itself.

In the present case, I hold that the emergency orders under challenge were not invalid on the ground that they were inconsistent with provisions of the Constitution.

In so far as the petitioners argue that the emergency orders under challenge were not a reasonable and proportionate exercise of power, the evidence is strongly against that proposition. Emergency Orders 1, 2, 4, 5, and 6 were an appropriate response to the political stalemate to enable an early election to be held.

Emergency Order 13 was again an appropriate response to the failure of the Speaker to facilitate the House proceeding to the election of a President. The provisions of Order 14 are generally reflective of the requirements of Article 40 of the Constitution in the circumstance that the office of Speaker is vacant.

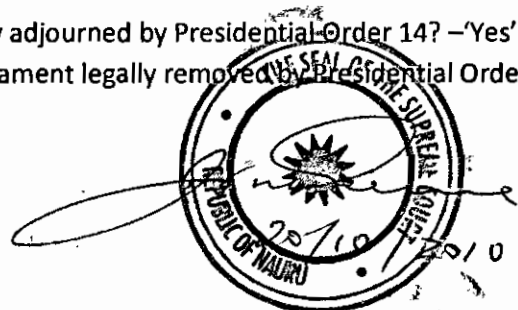
The answer to Questions 3 to 7 is therefore 'Yes'.

For the reasons now given, the answer to each of the questions asked in the petition is 'yes'.

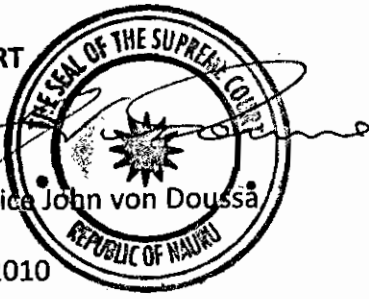
Orders:

The Court answers the Question in the Constitutional petition as follows:

1. Was each of the declarations by the President of a State of Emergency on 11 June, 2 July, 9 July, 20 August, 10 September and 1 October 2010 valid and binding, that is, in accordance with the Constitution? – 'Yes'
2. Was the Eighteenth Parliament properly dissolved, that is, in accordance with the Constitution? – 'Yes'
3. Were Presidential Orders 1, 2, 4, 5, and 6 valid and binding Orders, in accordance with the Constitution? – 'Yes'
4. Was the election for the Nineteenth Parliament properly conducted, that is, in accordance with the Constitution? – 'Yes'
5. Was the Nineteenth Parliament properly dissolved, that is, in accordance with the Constitution? – 'Yes'
6. Was the Twentieth Parliament properly adjourned by Presidential Order 14? – 'Yes'
7. Was the Speaker of the Twentieth Parliament legally removed by Presidential Order 13? – 'Yes'



BY THE COURT



The Hon Justice John von Doussa

20 October 2010