

IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Suit No.5 of 2013

Kieran Keke MP, Roland Kun MP, Landon Deireregea MP, Godfrey Thoma MP, Marcus Stephen MP, Mathew Batsiua MP, and Frederick Pitcher MP.

Plaintiffs

V

Defendant

The Hon Ludwig Scotty MP

JUDGE: Eames, C.J.
DATE OF HEARING: 5 March 2013
DATE OF JUDGMENT: 6 March 2013
CASE MAY BE CITED AS: Kieran Keke MP and Others v The Hon Ludwig Scotty MP
MEDIUM NEUTRAL CITATION: [2013] NRSC 1

CATCHWORDS:

Constitution - Dissolution of Parliament - Under Article 41(2) Speaker refers to House the advice of the President to dissolve Parliament - Speaker refers advice but then adjourns the House without allowing time for debate by members - Whether Speaker obliged by Art 41(4) to provide an opportunity for the Members to debate the advice and to consider whether to resolve to remove President and Ministers from office.

Declaration - Proceedings seeking interpretation of Constitution pursuant to Supreme Court's powers under Art 54 - Declaration sought as to legal effect of Article 41 - Declaration granted.

APPEARANCES:

For the Plaintiffs Mr R Kun (Pleader)
For the Defendant Ms K Le Roy
Amicus curiae, by leave Mr S Bliim

CHIEF JUSTICE:

- 1 The plaintiffs are seven members of the Parliament of Nauru. They bring proceedings by way of judicial review pursuant to leave granted by the Registrar under Order 38 of the Civil Procedure Rules 1972. The plaintiffs initially sought orders by way of mandamus and prohibition in addition to relief by way of a declaration directed against the actions of the Speaker of the Parliament, the Hon Ludwig Scotty MP. At the outset of the hearing, however, I was informed by counsel for the plaintiffs that they no longer sought orders by way of mandamus or prohibition. The only relief sought is by way of a declaration as to the proper interpretation of Article 41 of the Constitution.
- 2 The plaintiffs contend that the Speaker unlawfully adjourned proceedings in the House thereby denying the plaintiffs the opportunity to advance a no confidence vote against the President and Cabinet. The plaintiffs contend that with two other members they had nine votes, a majority for that purpose.
- 3 By confining their claim for relief to the remedy of a declaration as to proper interpretation in law of Article 41, and by virtue of agreement between the parties as to the facts relevant for identifying the competing interpretations as to the meaning of Art 41, the issues before me were significantly narrowed. Furthermore, counsel for the Speaker informed me that should I conclude that he adopted an incorrect interpretation of Art 41 then the Speaker would reconsider his decision accordingly.
- 4 In view of those concessions it becomes unnecessary for me to address issues concerning the justiciability of the conduct of the Speaker having regard to the issue of parliamentary privilege. Nor do I need to explore the ambit of administrative law remedies when they are sought to be applied to questions arising out of parliamentary proceedings. The plaintiff's action now constitutes a request for interpretation of a provision of the Constitution pursuant to Art 54(2), that being a function exclusively the province of the Supreme Court, by virtue of Art 54(1).
- 5 I am indebted to Mr Kun, counsel for the Plaintiffs, Ms Le Roy, counsel for the Speaker, and Mr Bliim, who appeared by leave as amicus curiae, on behalf of the

Minister for Justice. Their careful submissions, produced at short notice, were very helpful.

6 The agreed facts may be briefly set out.

7 On 11 February 2013 the nine Members had sent the speaker a petition under Article 42(1) requesting that the Speaker appoint a time for holding a session of Parliament. Pursuant to Article 42(2)(c) they advised that the business proposed to be dealt with was a no confidence motion directed against the President and Cabinet.

8 On 12 February 2013 the Speaker wrote to those nine Members refusing their request''.

9 On 28 February 2013, acting on advice of the President under Art 40(1), the Speaker notified all Members that a sitting of Parliament would be held on Friday 1st March 2013.

10 On 1 March Parliament commenced at 10am with opening prayers. The Speaker then referred to Parliament the advice that he had received from the President, pursuant to Art 40(2), that he should dissolve Parliament. Then, at approximately 10.05am, the Speaker announced that the House was adjourned "*sine die*" (i.e. to a date to be fixed), and departed the Chamber. It is accepted that no time was given to the Members to debate the President's advice or to move any motions before the House adjourned.

11 The Speaker has advised the Members and the public, that he proposes to hold a session of the House on Friday 8 March 2013 whereupon, pursuant to Art 41(4), he will dissolve Parliament. By virtue of Art 39, that would mean that within two months of that date a general election must be held.

12 The plaintiffs contend that the Speaker's action on 1 March in adjourning the session denied all Members of Parliament the opportunity to then consider and debate the advice proffered by the President, a right they say was given to them by Art 40(4). Specifically, they say they were denied their right to move a resolution calling for the

removal of the President and Ministers as provided for by Art 40(4).

- 13 In response, counsel for the Speaker submitted that the Speaker's actions were consistent with the terms of Art 41 of the Constitution.
- 14 In order to understand the competing arguments, I will set out the relevant provisions of the Constitution.

General Elections for Parliament

39. A general election of members of Parliament shall be held at such time within two months after a dissolution of Parliament as the Speaker in accordance with the advice of the President appoints.

Sessions of Parliament

40.-(1.) Each session of Parliament shall be held at such place and shall begin at such time, not being later than twelve months after the end of the preceding session if Parliament has been prorogued, or twenty-one days after the last day on which a candidate at a general election is declared elected if Parliament has been dissolved, as the Speaker in accordance with the advice of the President appoints.

(2.) Subject to the provisions of clause (1.) of this Article, the sittings of Parliament shall be held at such times and places as it, by its rules of procedure or otherwise, determines.

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.

(3.) For the purposes of clause (2.) of this Article, and notwithstanding Article 40, the Speaker shall, if necessary, appoint a time for the beginning of a session, or for a sitting, of Parliament.

(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 Ministers 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.

(5.) The President may withdraw his advice at any time before the Speaker has dissolved Parliament and where the President so withdraws his advice, the Speaker shall not dissolve Parliament.

(6.) Notwithstanding the preceding provisions of this Article, where a resolution for the removal from office of the President and Ministers is approved under Article 24, the Speaker shall not-

(a) prorogue Parliament; or

(b) dissolve Parliament,

during the period of seven days after the day on which the resolution is approved.

(7.) Parliament shall, unless sooner dissolved, continue for a period of three years from and including the date of the first sitting of Parliament after any dissolution and shall then stand dissolved.

Sessions of Parliament at request of one-third of members

42.-(1.) Where-

(a) Parliament is not in session; and

(b) there is delivered to the Speaker a request that complies with clause (2.) of this Article for the holding of a session,⁹

the Speaker shall appoint a time for the holding of a session of Parliament, being a time before the expiration of fourteen days after the request is delivered.

(2.) A request referred to in clause (1.) of this Article¹⁰-

(a) shall be in writing;

(b) shall be signed by a member of Parliament for each of at least three constituencies and by a number of members of Parliament which is at least one-third of the total number of members of Parliament; and

(c) shall set out particulars of the business proposed to be dealt with at the session of Parliament.

Speaker to preside

44. The Speaker shall preside at a sitting of Parliament.

15 The critical provision is Art 41.

- 16 Mr Kun, counsel for the plaintiffs, submitted that the actions of the Speaker were contrary to the plain language, the intended purpose, and scheme of Article 41. Taken together, he submitted, the multiple subsections of Art 41 were intended to ensure that a decision to dissolve Parliament could not be taken by the President without the Speaker being informed and without the Members of Parliament being given the opportunity, in that session, to consider the President's advice, either accepting it or moving a motion of no confidence in the President and Cabinet. Instead of being interpreted in a way consistent with an approach to parliamentary democracy whereby the Members had to be given the right to reject the President's advice, Mr Kun submitted that the actions of the Speaker gave the President absolute power to dissolve Parliament, without debate.
- 17 Ms Le Roy, counsel for the Speaker, submitted that the Speaker's action in adjourning the House sine die was consistent with the literal words of Art 41(4). All he was required to do under Art 41(2) was to "refer the advice" to Parliament. The language of Art 41(4) did not require him to permit a debate on the question. There having been no resolution carried for removal of the President and Ministers the Speaker was required by Art 41(4) to dissolve Parliament on the seventh day after the 1 March. The mere fact that no resolution could have been carried - because no time was allowed to even consider the matter - was not to point, Ms Le Roy submitted. The literal words of Art 41(4) did not require that the Speaker provide the Members with that opportunity.
- 18 Ms Le Roy submitted that the Speaker's power to avoid debate, by adjourning the House immediately upon advising the members of the President's advice, was an appropriate recognition of the reserve power of the Speaker. There being no equivalent position in Nauru to that of the Governor General under the Australian Constitution, then, Ms Le Roy submitted, it is the Speaker in Nauru who holds reserve powers, one of which would be to adjourn the House in circumstances where unruly conduct was anticipated. A literal reading of Art 41 would allow the Speaker to take that action even if it prevented debate concerning the advice of the President

to dissolve Parliament, Ms Le Roy submitted. That would be an appropriate reserve power attaching to the role of Speaker, so as to ensure orderly proceedings in the House.

19 Ms Le Roy submitted that the interpretation of Art 41(4) which the plaintiffs advanced required reading into that provision words that do not appear, namely words such as "*and after allowing time to consider the advice no resolution for the removal from office of the President and Ministers under Article 24 is approved . . .*" The Constitution should be read literally, she submitted, not by implying terms that the founders did not insert.

20 In my opinion, however, there is no question of having to read words into the Constitution in order to give the provision the meaning advanced by Mr Kun and supported by Mr Bliin, as amicus curiae. In my view, the interpretation advanced by the Plaintiffs is entirely consistent, and only consistent, with the combined language of Article 41. Indeed, without importing any words into Art 41(4) a literalist approach would lead to the conclusion that "referring" the advice to the House must, in the context of the scheme created by Art 41, require that members be given the opportunity to consider and debate the advice. To read the provision in any other way would deny to members - at the option of the Speaker - the right to debate an issue of fundamental importance to all Members and their constituents.

21 There are a number of additional factors that point to the correctness of the interpretation favoured by the plaintiffs.

22 In the first place, Art 41(2) requires the Speaker to "refer the advice" to Parliament. It does not say, merely, "to advise", or to "inform" the Parliament. This language used is entirely consistent with advice being delivered in order that it might be considered, and acted upon, by the Members. Ms Le Roy, I understood, did not deny that the plaintiffs' interpretation of "refer the advice" was open, but she contended that even so it did not in terms deny the right of the Speaker to merely inform the House, but then deny to Members the opportunity to debate the advice.

23 Secondly, the process created by Articles 41(2) and (4) requires that the Members be informed of the President's advice in a session of Parliament. Art 41(3) directs the Speaker to appoint a time for the beginning of a session or for a sitting in which the Members can be informed of the advice. If all that was required was that Members be informed of the President's decision to have Parliament dissolved, that might be achieved by way of a letter or a notice in the gazette. It would be excessive to require that the elaborate and costly process of convening Parliament would be undertaken merely to achieve the result that Members were so advised. It is much more logical to accept that the advice was to be conveyed in Parliament because that is the place for debate of such important issues.

24 Thirdly, the mere fact that Art 41(4) allows for a resolution to remove the President and Ministers from office, clearly indicates the expectation and intention that the opportunity for debate on the advice will be given. The language of Art 41(4) assumes that Members, upon consideration, will by a majority either vote the President and Ministers out of office or not approve such a motion. In the former case, Art 24(1) would require members to vote on an election of the President. If a President was not elected then Parliament would be dissolved, under Art 24(2). If there was no resolution adopted to remove the president and Ministers then Art 41(4) required the Speaker to dissolve Parliament seven days after delivery of the advice to Parliament, with an election to follow within two months. Thus, the fundamental assumption behind these provisions is that Art 41(2) and Art 41(4) will ensure that Members will be able to debate the future of the government.

25 Fourthly, the interpretation of Art 41 advanced by Ms Le Roy would deny the opportunity provided to the President by Art 41(5) to withdraw his advice to dissolve Parliament on the occasion when the Speaker first informed the Members of his advice to dissolve Parliament. As Ms Le Roy observed, it is true that upon adjournment of the House on 1 March the President could over the next seven days have withdrawn his advice to the Speaker to dissolve Parliament. That is so, because Art 41(5) allowed him to withdraw his advice at any time before the Speaker

dissolved Parliament, as he would do on 8 March. The President, therefore, could withdraw his advice at a time when Parliament was not sitting. But the interpretation advanced by Ms Le Roy would mean that the Speaker could deny the President the opportunity to withdraw his advice during the course of the very session at which the Speaker referred the advice to the House. In my view, once again, this points to the intended operation of Art 41(4) being in the context of members having an opportunity to debate the issue in the House.

26 As I have noted, Ms Le Roy submitted that the Speaker must have had reserve powers to do what he did, because the Speaker had the responsibility for the orderly conduct of the Parliament, and where disorder was threatened, he must have power to prevent it, even if it meant abruptly adjourning the House. The short answer is that Art 41 is not concerned with the control of behaviour of members, but with the involvement of Members - and not just the Executive - in the process of proroguing or dissolving the House. There are ample powers held by the Speaker under Standing Orders to address unruly conduct. Additional power to that end should not be read into Art 41 when the effect would be to impair the process of parliamentary democracy that the Article so carefully constructs.

27 The plaintiff's interpretation of the requirement imposed on the Speaker by Art 41 is supported by the former parliamentary counsel N.N.Mehra in his book "Practice and Procedure of the Parliament of Nauru"¹. The learned author plainly saw Art 41 as involving a process where the Members were given an opportunity to consider and respond to the President's advice. He did not contemplate any entitlement of the Speaker to prevent the Members of Parliament from so doing. Mehra described the process as follows:

"A Parliament lasts for a period of three years from and including the date of the first sitting of Parliament after any dissolution, and then stands dissolved. The President may, however, have Parliament dissolved earlier by advising the Speaker to dissolve Parliament. When so advised, the Speaker has first to place the advice of the President before Parliament as soon as practicable, and in any case before the expiration of fourteen days after the receipt of the

¹ "Practice and Procedure of the Parliament of Nauru", N.N. Mehra, 1990

advice. For this purpose he must appoint a time and date for the beginning of a session, if Parliament has been prorogued, or for a meeting of Parliament if it is not already sitting. *When the Speaker has placed the advice of the President before Parliament, it is open to Members to bring a Motion for removal of the President and the Ministers from office within seven days from the day on which the President's advice is placed before Parliament.* If such a resolution is passed by Parliament with at least nine Members voting in favour, the President and Ministers are removed from office and the advice for dissolution stands rejected."²(My emphasis).

28 Later, the learned author says:

"When a notice for dissolution of Parliament is given to the Speaker and if no resolution for the removal from office of the President and Ministers is approved by Parliament, the Speaker shall dissolve the Parliament on the seventh day after the advice of the President for dissolution has been received. Where a resolution for the removal from office of the President and Ministers is approved by Parliament, the Speaker may neither prorogue Parliament nor dissolve it for a period of seven days after the day on which the resolution is approved. The immediate business before Parliament at this stage is to elect a new President. No other business can be considered until a President is elected. However, if a President is not elected by Parliament before the expiration of the seven days, Parliament stands dissolved."³

29 Likewise, Peter MacSporran, in his book "Nauru: The Constitution" contemplates no entitlement on the part of the Speaker to prevent debate on the President's advice, nor does he suggest that the Speaker could deny members the opportunity to pass a no confidence vote, thereby forcing removal of the President and Ministers. That is consistent with what the learned author said was the general scheme of the Constitution, namely, that "the Nauruan Constitution establishes a parliamentary democracy in which the powers of the Parliament (and the Executive) are limited by the Constitution but the responsibilities of Parliament are paramount – the Executive is answerable to the Parliament"⁴.

30 Mr Mac Sporran succinctly and clearly highlights what Art 41 is all about, and at the same time demonstrates why the interpretation adopted by the Speaker would not advance that purpose, in the following observation:

"The role of the House is to either accept the advice given by the Speaker or, if it does not like it, dismiss the President and appoint one who will follow the

² At page 26

³ At page 27.

⁴ "Nauru: The Constitution", Peter H Mac Sporran, 2007, at 104.

wish of the House.⁵

31 The Speaker has long and distinguished parliamentary experience, much of it as Speaker, and twice as President. The approach he adopted was no doubt thought to be necessary and appropriate to avoid unruly behaviour, but I am satisfied that notwithstanding the Speaker's best intentions, the interpretation of Art 41 (4) adopted by him was in error. I will therefore make a declaration in the terms sought by the plaintiffs.

32 The Speaker, as he has advised the Court, will abide by my ruling as to the interpretation of these provisions of the Constitution. What course he might then adopt is a matter for him to decide, in the exercise of his important responsibilities as Speaker.

Conclusion and Declaration

33 I uphold the Plaintiffs' contentions as to the meaning of Article 41 of the Constitution.

34 I declare that by his action on 1st March 2013 in adjourning the Parliament sine die, the Speaker acted in contravention of Article 41(4) of the Constitution of Nauru, which requires that Members of Parliament on being referred by the Speaker the advice from the President to dissolve the Parliament, must be given the opportunity to consider that advice, to decide whether to adopt courses of action provided for by Articles 24 and 41, and to vote on any such proposed course of action.

35 I will hear counsel as to any other orders that may be sought.

Geoffrey M Eames AM QC

Chief Justice

6 March 2013

⁵ At 101-2.