IN THE SUPREME COURT OF NAURU

MISCELLANEOUS CAUSE NO. 8/2000

BETWEEN : **DEROG GIOURA, VINSON DETENAMO, LUDWIG SCOTTY, VASSAL GADOENGIN, ALOYSIUS AMWANO, KENNAN ADEANG, ANTHONY AUDOA & BERNARD DOWIYOGO**

PLAINTIFFS

AND : **RENE HARRIS & SECRETARY FOR JUSTICE**

DEFENDANTS

Date of Decision :

Gioura for Plaintiffs
Ramatlap for Defendants

INTERIM DECISION OF DONNE C.J.

Proceedings have been presented by the Plaintiffs by way of originating summons seeking a declaration that "the

appointment of Reuben Kun by the President H.E. Rene Harris as Minister for Justice on the 19th March, 2000 is unconstitutional".

The Defendants have filed an application to have the Plaintiffs' proceedings struck out which application is the subject of this decision.

There appears to be uncertainty by the said parties as to the true nature and effect of the Plaintiffs' proceedings which are rarely launched in this jurisdiction. The procedure followed is that of obtaining a declaratory judgment – one which plays a large part in private law. It is particularly valuable for settling of disputes in cases which involve the wrong exercise of the law before the point is reached where a right is infringed thereby. The essence of a declaratory judgment is that it states the legal

position in question as it stands without changing it in any way. Such a judgment by itself merely creates some existing legal situation. It requires no one to do anything and to disregard it does not constitute a contempt of court. It cannot be used to litigate matters. It is not a civil claim.

Although in section 14 of the Republic Proceedings Act, 1972 the procedure has been recognised, Nauru has not any statutory provision for the declaratory judgment process. This Court acquires jurisdiction to make declaratory judgments under the provisions of the Customs and Adopted Laws Act, 1971. Section 4(1) of the Act reads:

> "(1) Subject to the provisions of sections 3, 5 and 7 of this Act, the common law and the statutes of general application, including all rules, regulations and orders of general application made thereunder, which were in force in England on the thirty-first

day of January, 1968, are hereby adopted as laws of Nauru."

The Rules of the Supreme Court (U.K.) 1965, in particular Order 15 Rule 16 reads:

"No action or proceedings shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not."

The declaration is a discretionary remedy. The Court has inherent power to refuse relief to speculators and busybodies, those who asks hypothetical questions or those who have not sufficient interest. The procedure was already put by Lord Dunedin in ***Russia Commercial and Industrial Bank v British Bank for Foreign Trade*** (1921) A.C. 438 at page 448 wherein he says:

> "The question must be real and not theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought."

Declaratory judgment procedure is frequently invoked against the State. It is a particularly suitable way to settle disputes with government since it involves no immediate threat of compulsion. A landmark in the use of the declaration is the case of ***Dyson v Attorney-General*** (1911) 1 K.B. 410; (1912) 1 Ch 158. The applicant Dyson, a taxpayer, sought a declaration that the Inland Revenue Department was unlawfully issuing tax demands. The Attorney-General argued that the applicant was not entitled to seek the declaration but should wait until he had received a tax demand and then dispute it. The Court rejected this submission. Fletcher Moulton L.J. (1912) Ch. 158 at page 168 said:

> "So far from thinking that this action is open to objection on that score, I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty."

As the quotation shows, the Court considered that a question as to the legality of administrative action was in itself a good reason for asking for judicial intervention at the earliest possible moment.

Parties to the Application.

This application is a joint one instituted by eight Plaintiffs. It seeks one declaration. This procedure would allow all eight

Plaintiffs with identical interests to be heard. If, in fact,they each have a different basis to justify the declaration, each Plaintiff should proceed separately. If, however, all rely upon the same basis, in proceedings of this nature, there can be no justification for a joint approach unless it can be shown that in the interest of justice all Plaintiffs should be heard. The question of severance would then have to be considered. However this may be a matter to be pursued at the final hearing of the application.

There is also a question as to whether the Defendants are properly joined, in particular the President.

The President, in appointing Mr. Kun as Minister was acting in pursuance of the Constitution. The act of appointment is not in question – it was a proper act of appointment which

cannot be challenged. It is an executive act and there can flow from it no personal liability of Mr. Harris. The responsibility for it must be borne by the Republic.

I am, therefore, of the view that Mr. Harris is wrongly joined as a defendant and he is discharged from the suit.

Consequently, the Republic must be the defendant represented by the Secretary for Justice. He is joined as a defendant pursuant to section 11(2) of the Republic Proceedings Act, 1972 as the nominee of the Republic.

THE DEFENDANT'S APPLICATION.

The Defendant seeks an order striking out the Plaintiffs' application on the following grounds:

1. The proceedings laid are an abuse of process.

2. There is no reasonable cause of action shown therein.

3. The Plaintiffs have no "locus standi".

ABUSE OF PROCESS.

In support, the Defendant submits (inter-alia) the Plaintiffs have abused the Rules of procedure laid down for the commencement of proceedings of the nature initiated.

He points out that on the 20th March 2000 there was filed a purported application seeking a declaration in the same terms as are prayed for in the present originating summons which was filed on the 22nd March without first withdrawing their prior process.

The reason for this course being taken need not be sought, but, the blatant fact is that the first process filed was not and

could not, in law, be deemed an initiating process commencing proceedings in compliance with the Civil Procedure Rules. It is not a proceeding that could be entertained by the Court. Although I gave consideration to an application for its withdrawal, the matter was not properly before me. There is, and has been, only one lawful process before the Court which is the present originating summons. There is certainly no legal requirement for the Defendant to accord the first process recognition by filing an appearance or any other proceeding in respect thereof.

Furthermore, I am satisfied the Defendant has suffered no injustice by this irregular procedure.

Finally, on the point of abuse, it is the contention of the Defendant that the Plaintiffs in launching these proceedings are

involved in a "fishing expedition".

I can find no substance in that submission. I have considered the affidavit of Mr. Gioura in support of the summons. The facts to which he deposes, I consider, would indicate the Plaintiffs have already "fished" and obtained a "catch" the particulars of which are succinctly set out in the document. The affidavit appears to state fully the facts upon which the prayer sought is based. Unless they can be contradicted these facts establish that Mr. Amwano's dismissal by the President from the Office of the Minister was followed by the appointment of Mr. Kun, a former Member of Parliament. By virtue of his appointment Mr. Kun became a Member of the Cabinet which on Mr. Amwano's dismissal comprised the President and four Ministers. Since these facts are clearly the only ones the Plaintiffs aver they need to establish Mr. Kun's

appointment to be unlawful, it could scarcely be suggested that they were in need of a further "fishing expedition"..

THE CAUSE OF ACTION.

The Defendant submits the proceedings disclose no "cause of action". He finds it difficult to answer the Plaintiffs' who he contends have not disclosed sufficiently their interests either individually or as a group. In my view the gravamen of the claim is what is important. What is the complaint raised by the Plaintiffs? Upon what basis do they allege there is an infraction of the Constitution? Is there a cause for concern? Particularly, the Court must first look at what is alleged to be wrong and then if there is wrong, whether the Plaintiffs are entitled to concern themselves with it in the way they have. That, I consider, is the correct approach in a proceeding of this nature which has been called "a mere declaration" with no means of enforcement.

The nature of a declaratory judgment has been considered above.

As I see it, from the papers before me, the Defendant should have no difficulty in ascertaining the relevant "cause of action". The Plaintiffs clearly put it in this way:

1. Mr. Kun was appointed to replace Mr. Amwano as a Minister under Article 18 of the Constitution.
2. As a Minister, Mr. Kun must be a member of Cabinet.
3. At the time of his appointment, Mr. Kun was no longer a Member of Parliament.
4. A Minister need not be a Member of Parliament if, on his appointment, the conditions set out in Article 19(2) apply.

5. The condition of appointment in Article 19(2) did not apply.
6. The claim therefore is that Mr. Kun is not lawfully qualified to be a Minister or a member of the Cabinet.
7. Declaration sought is, they claim, to confirm that unlawfulness.

This is the case to be met by the Defendant by way of reply.

LOCUS STANDI.

The Defendant submits the Plaintiffs have not established "locus standi" entitling them to be heard – they have no legal rights or interests to be heard. Furthermore he draws attention on Article 55 of the Constitution which gives Cabinet the right to refer to this Court for an opinion on or an interpretation of, such

a matter as the one herein referred. His words appear to suggest that as the appointment in question is an executive act, and only the Cabinet would have the standing to seek an opinion on it. He submits that for the Plaintiffs to have any standing to be heard, there must be shown by them a loss financial or otherwise, resulting from the appointment.

However, insofar as the executive act of appointment is concerned, there is no challenge by the Plaintiffs of the President's right under the Constitution to make the appointment. The question posed is whether Mr. Kun is lawfully qualified to hold the post to which he has been appointed – is he lawfully able to be a Minister and/or a Member of the Cabinet?

Moreover, I consider untenable the argument that if it were the executive act of appointment that was challenged, the only

"person" with the "locus standi" to challenge it in this Court would be, by virtue of Article 55, the Cabinet. Article 55 does not give Cabinet an exclusive right to apply for an opinion or interpretation. It, in my view, confers "per se" on the President or Minister who, with Cabinet's approval, seeks a constitutional opinion or interpretation, the "locus standi" to be heard by the Court irrespective of the nature of the act or matter the subject of the referral.

The Courts on question of standing have until recently expounded different rules for different remedies. In an application for a declaration there is no need for any applicant to have a subsisting cause of action or right to some relief. In the English Courts on the introduction of the application for judicial review, the Supreme Court Rules were amended to provide in Order 53 Rule 6(5) the following:

> "The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

That test of standing has seen the relaxation in recent years of rules about standing – see ***R v Greater London Council Ex Parte Blackburn*** (1976) 1 W.L.R. 550; ***R v Inland Revenue Commissioners,Ex Parte National Federation of Self-Employed Small Businesses Ltd*** (1982) A.C. 617. On the point of raising the question it is the view of the House of Lords in the ***Inland Revenue Commissioners'*** case (supra) that it is wrong to treat standing as a preliminary view for determination independently of the merits of the complaint – see Lord Wilberforce at page 630.

I consider, nevertheless, it would be proper, on a preliminary application, to turn away a hopeless or meddlesome application which this application certainly is not. Here in any case, the argument which has been presented on the point is brief and inadequate. It requires more research. I am not satisfied with it. Consequently, standing will be dealt with at the hearing. This should take place at the next Sessions if practicable, since if a finding of unlawfulness is made, while this would not affect greatly the appointee's position which ends in a few days from now, there may be decisions and acts affected thereby which need review.

This application is declined with the question of costs reserved.

CHIEF JUSTICE

5/4/2000

ATTESTED TRUE COPY:

G. N. SARSENA
REGISTRAR, SUPREME COURT

ADDENDUM:

Since writing this decision, I have received a further submission from the Defendant on the question of standing. For the reasons I have given I shall not consider further the argument thereon until final hearing.

Mr. Registrar - Please deliver this decision.