

SUPREME COURT OF NAURU

Constitutional Reference No. 2/2003

In the matter of Article 55 of the
Constitution

In the matter of Article 34(1), 35(4) and
16(5) of the Constitution

In the matter of the election of the
Speaker and President at the
commencement of the Fifteenth
Parliament

OPINION

Reference and Public Hearings

1. A constitutional reference was referred pursuant to Article 55 of the Constitution by the President with the approval of Cabinet and filed on 21 May 2003. The terms of the Reference are as follows:-

Whereas Article 34(1) Provides

“Parliament shall before it proceeds to the dispatch 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 its members to fill that office”,

And Whereas the 15th Parliament at its first meeting on 6th May 2003 elected a Speaker and Deputy Speaker,

And Whereas immediately thereafter when nominations for President were called, the then Speaker resigned on 7th May 2003,

And Whereas the Parliament has been sitting several times to resolve the election of the President,

And Whereas on the several adjournments Parliament has been sitting without electing a Speaker to date presided by, the Deputy

Speaker.

Now the Cabinet of Nauru has resolved pursuant to article 55 of the Constitution of Nauru to refer to the Supreme Court for its opinion the following questions on the interpretation and effect of particularly referred provisions of the Constitution that caused several parliamentary adjournments.

- A. Article 34 states that a Speaker must be elected before the parliament dispatch any other business.
- B. If the answer to "A" is "Yes" what is the position when the office of the Speaker becomes vacant after the elected Speaker resigns or otherwise becomes vacant.
- C. If no Speaker is elected under any circumstances, can the Deputy Speaker act under Article 35(4).
- D. If the answer to "C" is "Yes", can the Parliament then proceed to elect a President under Article 16(5)(b).
- E. What is the interpretation of the "first sitting of Parliament after dissolution" under Article 16(5)(b) and Article 81(1)

Dated this 20th day of May 2003.

Derog Gioura
President and Chairman of Cabinet.

2. In accordance with the usual practice, the Registrar wrote to members of Parliament, members of the legal profession, published in the gazette, and arranged public notice on radio and television of a hearing date of Thursday 22 May 2003 at 2p.m. to receive from interested parties written submissions and any oral submissions in support of the written submissions.

3. At the hearing, there was some complaint that the time allowed for submissions was too short. The Reference had emphasized the urgency of the matter. After consultation with the executive government who were responsible for the Reference, the Court extended time to a further hearing date on Friday 23 May 2003 at 2p.m., and the reception of written submissions filed with the Registrar until 12 noon on Monday 26 May 2003.

4. I was further pressed in one oral submission that I should refrain from giving an opinion on the Reference until the present proceedings in Parliament involving the election of a Speaker and President had been finally concluded. It was urged on me that the Reference had had the effect of temporarily halting the political process and that the Court should therefore stand back for the time being. There is substance in this argument. Nevertheless, the Court is under a duty to comply in reasonable manner to a Reference given pursuant to Article 55 of the Constitution. An Opinion of the Court is simply a considered statement of the Court as to the interpretation and effect of particular Constitutional provisions. Because it is the Opinion of the Supreme Court, it will carry weight but it is not designed to restrict any on-going parliamentary process and certainly cannot have that effect. In the present circumstances, I have proceeded to undertake the Reference with due urgency and deliver the Opinion as required in open court without having any curtailing effect upon the continuing parliamentary process.

5. The list of submissions received is attached to this Opinion. Any Reference in this Opinion to Mehra is a reference to Mehra - The Practice and Procedure of the Parliament of Nauru (1990).

Preliminary

6. In giving this Opinion, I have exercised some care to answer as clearly as possible the questions asked within the confines of the Reference. Some of the written submissions have canvassed other questions based on hypothetical consequences. It is not the task of an Opinion under Article 55 to wander outside of the terms of the Reference itself. Further, it is not the task of a Reference either to give policy solutions to a perceived problem or, outside of stating the interpretation and effect of a constitutional provision, to provide answers, as in this case, how Parliament might handle the situation. That is clearly for Parliament itself to determine using its own wisdom and with such outside advice that it cares to take. It is certainly not a function of the Court which, after all, may be called upon to adjudicate any justiciable inter partes dispute that may arise.

7. Before answering the questions, I shall make some introductory remarks on the Constitution itself. The Constitution is a living instrument that was prepared by a Constitutional Convention of the people of Nauru. It is a remarkable and carefully developed document that covers both the transition from the pre-independence Government and the operation of the present State. The fact that it has remained unaltered since May 1968 is a clear indication that the people of Nauru through successive Parliaments have been satisfied both with its structure and operation. Above all, one readily perceives in the

community a justifiable pride in a document which was democratically constructed by Nauruans and not imposed from outside.

8. Fundamentally, it is the base upon which the State is built. By Article 2, the Constitution is the supreme law of Nauru and any law inconsistent with the Constitution is to the extent of the inconsistency void.

9. The Constitution sets out in detail the arrangements for The President and Executive Part III, the Legislature Part IV and the Judicature Part V. Each one of these branches of government are designed to provide ease of operation both within that branch of government and between each. All, in the end however, are confined by the powers conferred by the Constitution itself, for example, Article 27.

10. However, the Constitution in the end is a document. It is the supreme law and requires adherence to make the State work in accordance with its dictates. It goes, I hope without saying, that it requires those controlling the branches of government, the human element, to work both within the requirements of the Constitution but also within its spirit. As a living instrument, it is designed to enable the State to operate and indeed it does just that. But it may require, from time to time, as we are all but imperfect humans, something of a selfless will to ensure its proper operation. That is what I mean by working within its spirit.

11. The matters that have been referred to this Court relate to the commencement of the Fifteenth Parliament. The institution of Parliament (Article 26) naturally survives a dissolution but the members do not (Article 32(1)(a)). The executive government continues but under constitutional convention in a limited caretaker capacity, that is, until the election of the President consequent upon the following Parliament sitting after a general election with its new members. Indeed, between dissolution and the election of a new President in the following Parliament there is an inevitable hiatus. What the Constitution does is to confine this hiatus to as short a period as reasonably possible in order to ensure that the wheels of government are enabled to roll again with an active Parliament.

12. After a dissolution, a general election is to be held within two months (Article 39). A session of Parliament is to be held within 21 days after the last day on which a candidate at a general election is declared elected following a dissolution (Article 40(1)). The Speaker, Deputy Speaker, and President are then elected on the first sitting of Parliament following the election. (Articles 34(1), 35(1) and 16(5)(b)). In other words,

the Constitution, makes it clear that within those time-limits, Parliament and the new President are to be in place.

13. In that way, the hiatus period is taken care of by the Constitution, so that an elected government and Parliament can commence to operate. I have carefully considered the various submissions put to me. I have not, however, found the questions asked in the Reference difficult to answer, as I am of the opinion that the Constitutional provisions are clear. I proceed to answer the questions asked in the Reference.

Question A.

'Article 34 states that a Speaker must be elected before the Parliament dispatches any other business.'

14. This is curious as it is a statement rather than a question, though Question B clearly wants it dealt with as a question. I have treated it as a question by reading 'does' before 'Article 34' in the question.

15. Article 34 (1) reads:-

'Parliament shall, before it proceeds to the dispatch 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.'

16. That article not only emphasizes the preeminent role in Parliament accorded to the Speaker, but states unambiguously and in plain meaning that the first task of Parliament before any other business is undertaken is to elect a Speaker. Furthermore, it also adds that whenever the office of Speaker is vacant, no other business is transacted until a member is elected to that office. Under the Constitution, it is fundamental to the operation of Parliament that there is a Speaker in office before business can be transacted.

17. The wide-ranging duties and powers of the Speaker are surveyed in Mehra pp.48-51 and, symptomatic of and in accord with those powers, Nauru protocol accords the Speaker, in rank, second only to the President.

Question B.

'If the answer to 'A' is 'Yes' what is the position when the office of the Speaker becomes vacant after the elected Speaker resigns or otherwise becomes vacant.'

6.

18. The answer to this question has already been dealt with under Question A. Under Article 34(3), there are various ways spelt out by which the position of Speaker becomes vacant, one of which is by resignation.

Article 34(1), I reiterate, provides that Parliament shall not transact any other business, upon the vacancy of the Speaker occurring, until a member is elected to that office.

Question C.

If no Speaker is elected, under any circumstances, can the Deputy Speaker act under Article 35(4)?

19. The wording of this question is unusual as to what is meant by 'under any circumstances.' That situation is hard to contemplate as it is the duty of elected members under Article 34(1) to proceed to an election of a Speaker in order for them to fulfill their role as members of Parliament. True, members may have difficulty in deciding who is the most appropriate member to undertake the task but it is clear that Parliament cannot proceed to transact business until that is done.

20. Without the filling of the vacancy in the Speaker, it is possible for a deputy Speaker to act under Article 35(4)?

Article 35(4) reads:-

The powers and functions conferred by this Constitution upon the Speaker shall, if there is no person holding the office of Speaker or if the Speaker is absent from a sitting of Parliament or is otherwise unable to exercise those powers and perform those functions, be exercised and performed by the Deputy Speaker and, if he is also absent or unable to exercise those powers and perform those functions, Parliament may elect one of its members to exercise those powers and perform those functions.'

21. This article allows the Parliament to operate where, for some reason, the Speaker is absent and the Deputy Speaker carries out the Speaker's powers and functions.

22. If, for example, a Speaker becomes a member of Cabinet the office of Speaker is then vacant. Where Parliament is in recess or not meeting at the time, the Deputy Speaker exercises and performs for that limited time the powers and functions of the Speaker. But Article 34(1) is the controlling element. Whenever Parliament meets and there is a vacancy in the Speakership, the Deputy Speaker initially has no other role than immediately to preside over Parliament for the election of a member to fill the office of Speaker. In other words, the only action open to the Deputy Speaker under the Constitution in the current situation, as described in

the preamble to the reference, is to preside over the election of a Speaker. No other business can be transacted until that occurs.

23. One or two of the submissions put to the Court have raised the question whether the words contained within Article 35(4), ostensibly giving to the Deputy Speaker, when there is no person holding the office of Speaker, the powers of the Speaker to then proceed to elect a President without first electing a Speaker. This may appear superficially attractive but has no statutorily satisfactory base.

24. In Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436 at 461 and 463 Viscount Simonds stated -

‘Words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context’.

25. One cannot read Article 35(4) in isolation. It must be read with Article 34(1) which, in the context of the Constitution, is a mandatory provision that the Deputy Speaker must follow. The absurdity of the other course is demonstrated where there has been a resignation of the Deputy Speaker, also, thus creating a vacancy. Is it being suggested then that one of the members may exercise those powers to proceed to an election of a President using Article 35(4) in advance of the election of a Speaker? This is not in contemplation within Article 35(4) nor in the context of the Constitution. Article 34(1) is the controlling Article.

26. In fact, I am given to understand, though this is not material to the issue, that where both posts, Speaker and Deputy Speaker, are vacant, it is the parliamentary practice for the Clerk to Chair a sitting for the election of a Speaker. That simply re-emphasises that the election of a Speaker first is paramount.

Question D.

‘If the answer to ‘C’ is ‘Yes’, can the Parliament then proceed to elect a President under Article 16(5)(b)?’

27. Such a question predicates that the Deputy Speaker can preside over the Parliament for the purpose of electing a President without the Parliament filling the vacancy of the Speaker. So long as the position of Speaker is vacant, as I have stated above, the Deputy Speaker must preside for the election of a Speaker before any other business is transacted.

Question E.

'What is the interpretation of the "first sitting of Parliament after dissolution" under Article 16(5)(b) and Article 81 (1)?'

28. Following a general election, pursuant to Article 40(1), a session of Parliament shall be held within twenty one days after the last day on which a candidate at the election is declared elected.

29. The day when Parliament resumes following a dissolution constitutes the beginning of the first sitting.

30. 'Sitting' is defined within the Constitution under Article 81(1) to mean 'a period during which Parliament is sitting without adjournment' Mehra (104) states, 'A sitting of Parliament means the daily meeting of Parliament from the ringing of the bells at the appointed time until the adjournment of Parliament for the day.' I am not satisfied that the emphasis should be on 'the daily meeting' for the Constitution mentions a 'period' rather than a 'day'. A period may be more than a day. The important word is adjournment. Adjournment is covered by Chapter 7 of the standing orders: Once there has been an adjournment of the House the sitting is at an end. In most cases it is the more likely to be simply a day but it could be a longer period depending on the adjournment. The Votes and Proceedings of the Parliament would record this.

Conclusion

31. The plan of the Constitution is quite clear. At the first sitting of the Parliament following a dissolution, the Parliament must elect a Speaker, a Deputy Speaker, and then a President. In fact, the Parliament, itself, has acknowledged this is in its own Standing Orders, Standing Order 3. The reason for this is sound. At the earliest reasonable opportunity following a general election the Parliament meets to elect a new President and government consistent with the result of the election. Such meeting ends the caretaker, sometimes described as hold-over, role of the old Government which has been in place as a caretaker since the dissolution. Once the various elections have been undertaken at the first sitting as prescribed, the wheels of government roll under the new Parliament and other parts of the Constitution immediately operate.

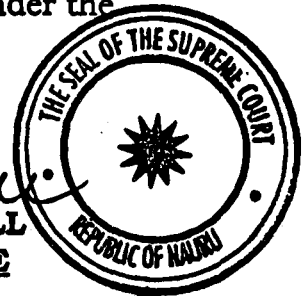
32. In the hearings, one or two submitted that there be some flexibility. You cannot, however, amend the Constitution by parliamentary practice, however attractive it might appear, but Parliament, within its constitutional confines, remains master of its own procedures. First, it has twenty one days within which it must sit, and it may be, in the

future, useful that the first sitting is set later than two or three days after the final declaration which would provide time to sort out, if needed, political affiliations. Secondly, the first sitting could be extended by house procedures at least to cover a period longer than one day so long as the purpose of the constitutional provisions are not lost sight of.

33. By way of summary, the short answers to the questions asked are:-

- A. Article 34(1) unambiguously and plainly requires that Parliament elect a Speaker before the dispatch of any other business.
- B. Article 34(1) also requires that, upon the position of the Speaker being vacant which word includes resignation, Parliament shall not transact other business until the election of a member to fill the office of Speaker.
- C. The Deputy Speaker, when the office of Speaker is vacant, must preside in Parliament, before any other business is transacted, for the purpose of the election of a Speaker. Parliament cannot proceed to other business without an elected Speaker.
- D. It is clear from the answer to Question C above that Parliament cannot proceed to elect a President until there is a Speaker elected and in office.
- E. A sitting is a period during which Parliament is sitting without adjournment. First sitting is the first such period and in the case of Article 16(5)(b) is the first period Parliament sits next following its dissolution. A sitting comes to an end with the adjournment of the Parliament as provided under the Standing Orders.


BARRY CONNELL
CHIEF JUSTICE



ATTACHMENT

Written Submissions

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| Mr. Leo Keke, | Barrister and Solicitor |
| Mr. Anthony Audoa, | Barrister and Solicitor |
| The Hon. Kieren Keke M.P., | Deputy Speaker |
| Mr. Robert Kaierua, | Pleader |
| The Hon. Kinza Clodumar M.P. | |
| The Hon. Russell Kun M.P. | |
| Mr. Knox Herman Tulenoa | |
| Mr. Paul Aingimea, . | Pleader |

The following made oral submissions in support of their written submissions:-

Mr. Leo Keke, Mr. Anthony Audoa, The Hon. Kinza Clodumar M.P.,
Mr. Robert Kaierua.