REPUBLIC OF NAURU

IN THE SUPREME COURT OF NAURU **Criminal Case No. 12 of 2017**
AT YAREN
CRIMINAL JURISDICTION

Between

THE REPUBLIC OF NAURU

Complainant

And

MATHEW BATSIUA & ORS

Defendants

Before: Judge Geoff Muecke

For the Complainant: Mr Rabuku, Director of Public Prosecutions
Ms S Puamau, of counsel

For the Defendants: Ms F Graham, of counsel
Mr M Higgins, of counsel
Mr C Hearn

For the Secretary for Justice and the Secretary for Finance: Mr J Udit, Solicitor-General
Ms M Lemaki, of counsel

Dates of Hearing: 28, 29 May 2018
Date of Order: 21 June 2018

DECISION AND ORDERS

Introduction

1 In or before 2014, five Members of the Parliament of Nauru were suspended from that Parliament, by the Parliament. These Members included Mathew Batsiua, Sprent Dabwido and Squire Jeremiah.

2 The five Parliamentarians filed legal actions in the Supreme Court of Nauru challenging their suspension from Parliament, arguing that their suspension was unlawful and in breach of the Constitution of Nauru ("the Constitution"). The action was heard before the Full Bench of the Supreme Court of Nauru on 30 October 2014. I do not know who appeared at this hearing. The action was decided on 11 December 2014, before 16 June 2015.

3 In the morning of Tuesday 16 June 2015, supporters of the suspended Members of Parliament which included Mathew Batsuia, Sprent Dabwido and Squire Jeremiah, set out to travel towards the Parliament building on Nauru to protest in support of the suspended Members. Police formed a line to stop the supporters moving towards or entering the grounds of the Parliament building. It was alleged that police also formed a barricade in front of the Parliament. It was alleged that three of the suspended Members of Parliament, Mathew Batsuia, Sprent Dabwido and Squire Jeremiah, were amongst the group of supporters.

4 From the next day, 17 June 2015, the Nauruan Director of Public Prosecutions ("the DPP") laid charges against these three suspended Members of Parliament and 17 others, all of whom were alleged to have been involved in the events at Parliament House on 16 June 2015, with various criminal offences.

5 On 16 March 2016, the DPP filed an Amended Charge Consolidation sheet in relation to 19 defendants, including the three above-named suspended Members of Parliament. Nineteen persons (including the above-named Members of Parliament) were charged with Unlawful Assembly, Riot and Disturbing the Legislature, offences alleged to be contrary to the Criminal Code, 1899 of Nauru. Some defendants were charged with other offences which were alleged to be contrary to the Civil Aviation Act, 2011 and the Criminal Code, 1899.

6 A further person (not charged on the Consolidated Charge) was charged by summons dated 12 May 2016. That person was charged with Serious Assault, alleged to be contrary to the Criminal Code, 1899, in that she, on 16 June 2015 at Yaren District, wilfully obstructed a Police officer while that officer was acting in the execution of her duty.

7 This means that, by 12 May 2016, 20 persons were charged with various offences arising out of the events that occurred before and outside the Parliament building at Yaren on Tuesday 16 June 2015.

8 On 2 July 2015, in the District Court of Nauru, the defendants then charged appeared for themselves with the assistance, presumably remotely, of a lawyer, Mr Jay Williams, in Australia. Magistrate Garo, of the District Court of Nauru, stated a case to the Supreme Court of Nauru, for determination, of questions relating to the defendants' Constitutional right to counsel of choice. That case was heard by Judge Khan, of the Supreme Court of Nauru, on 27 November 2015. The defendants appeared in person with Mr Vinci Clodumar, as a friend of the Court. Mr Jay Udit appeared for the Republic of Nauru. On 9 December 2015, Judge Khan held that the refusal of Mr Williams' application for a visa to allow him to enter Nauru did not infringe the Constitutional rights of the defendants as set out in Article 10(3)(d) and (e) of the Constitution. He remitted the case back to the District Court for it to continue with the hearing of the charges.

9 In December 2015, the Full Court of the Supreme Court of Nauru ruled that the suspensions of the five Members of Parliament were lawful, and that they were not entitled to attend the Parliament during their suspension. The Full Court ruled that the suspension of the Members of Parliament had not unlawfully deprived their constituents of representation in Parliament.

10 Following the refusal of Mr Williams' visa in mid-2015 to allow him to enter Nauru, the defendants, or some of them, sought other legal representation from lawyers in Australia.

11 At some time in early 2016, Mr Williams approached Mr Christian Hearn, a solicitor in Sydney, Australia, and a number of other legal practitioners in Australia to represent the defendants. Those others included Ms Felicity Graham and Mr Stephen Lawrence, both of counsel. Mr Hearn and a number of other legal practitioners agreed to commence the process of applying for admission in Nauru with a view to being able to be engaged by the defendants to represent them.

12 From April 2016 Mr Hearn, Ms Graham, of counsel, Mr Lawrence, of counsel, Mr Mark Higgins, of counsel, and Mr Neal Funnell, of counsel, made applications for petition for admission in Nauru.

13 By an affidavit of Christian Hearn, affirmed on 26 February 2018, Mr Hearn stated as follows:

> 5. I am instructed by a number of the Defendants that shortly after being charged, approaches were made on behalf of several of the Defendants to then Public Defender Mr John Rabuku requesting representation in these proceedings. I have spoken to a number of the Defendants, their family members and associates about this issue. I am instructed that the Public Defender's Office refused to provide any representation to the Defendants.
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> 6. Mr David Detageouwa has informed me that while his wife Mrs Grace Detageouwa (a defendant) was still on remand, he approached then Public Defender Mr Rabuku and requested that a Public Defender represent her. In answer to this inquiry, Mr Rabuku told him that he had received orders not to provide representation to any of the persons charged in relation to the riot outside Parliament.

> 7. Mr Sprent Dabwido (a defendant) has informed me that while still on remand he was present during a phone call between local pleader Mr Vinci Clodumar and Mr Rabuku in which Mr Clodumar asked Mr Rabuku if he could appear in bail applications for Mr Dabwido and Mr Squire Jeremiah (a defendant). Mr Rabuku responded by saying words to the effect of "*we are not allowed to represent anyone connected to the protests*".

14 Mr Hearn attested to the fact that it was shortly after the conversation referred to in paragraph [7] above that the defendants attempted to engage Mr Jay Williams from Australia to represent them in these proceedings.

15 In August 2016, Mr Hearn, Ms Graham and some other Australian-based legal practitioners initially communicated with some of the defendants by Skype from Australia. Mr Hearn was retained by the defendants to advise in relation to another case stated that was then before the Supreme Court. This case was stated by Magistrate Garo of the District Court of Nauru. It asked various questions of the Supreme Court in relation to the construction of the *Nauru Police Force (Amendment) Act, 2015*.

16 In June and July 2016, this case stated was before the Supreme Court. In June, the defendants appeared for themselves and in July, they appeared for themselves, assisted by counsel, remotely, in Australia.

17 In August 2016, the Supreme Court held that it did not have power to answer questions in relation to the construction of the Act the subject of the case stated and, again, remitted the matter to the District Court for it to hear the case.

18 In early August 2016, Mr Christian Hearn became solicitor on the record for the defendants in the trial proceedings.

19 On 31 August 2016, Magistrate Garo of the District Court, listed the matter for mention to fix a trial date. Mr Mathew Batsiua (one of the defendants) appeared as representative for all defendants. The DPP suggested a four week estimate for the prosecution case at the trial. Magistrate Garo suggested that it may take about eight weeks for the entire trial. She foreshadowed and indicated that she would block her court diary out from November to December 2016 for the trial.

20 On 6 September 2016, Mr Hearn communicated by email to the DPP that he could only arrange legal representatives to appear for a two week period. He had made enquiries with a number of legal practitioners in Australia about their availability to travel to Nauru and appear for the defendants at a trial on a *pro bono* basis.

21 Leading up to 31 August 2016, Mr Hearn made arrangements for another solicitor, Ms Penelope Purcell, and Ms Graham, of counsel, to travel to Nauru to obtain instructions from the defendants in relation to the substantive trial proceedings. On 22 September 2016, he, Ms Purcell and Ms Graham travelled to Nauru for the first time. That was just over 15 months after Mathew Batsiua had first been charged for offences alleged to have arisen out of the events at Parliament House on 16 June 2015.

22 In the lead up to this first trip to Nauru by the three Australian lawyers, it was (as later attested to by Mr Hearn) evident to him that a number of legal representatives would be required in order to provide adequate representation to the defendants. This was not only due to the number of defendants and the complexity of the case, but was also due to the apparent need to avoid, or minimise to the greatest extent possible, conflicts of interest between them.

23 It was on 6 September 2016, about two weeks before his first trip to Nauru on 22 September 2016, that Mr Hearn had emailed the DPP indicating that at that time he could only arrange legal representatives to appear for a two week trial period.

24 During their time in Nauru between 22 September 2016 and 25 September 2016, Mr Hearn, Ms Graham and Ms Purcell met with 19 of the then defendants. I now reproduce paragraphs [27] to [64] of Mr Hearn's affidavit of 26 February 2018.

> 27. During this trip a number of matters of concern became apparent:
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> - Many of the Defendants spoke very poor English and required the assistance of relatives or friends to interpret for them in Nauruan.
> - Many of the Defendants were functionally illiterate in English.
> - The brief of evidence that had been served on the Defendants had been produced in type written English text.
> - While Article 10(3)(b) of the Constitution requires that a Defendant be "informed promptly in a language that he understands and in detail of the nature of the offence with which he is charged" it was apparent that steps had not been taken to comply with this requirement.
> - Almost without exception this was the first time that the Defendants had received any advice regarding the nature of the allegations they were facing and the evidence put against them, and the first time they had received any legal advice about their circumstances.
> - The vast majority of the Defendants did not have even a rudimentary understanding of the number or nature of the charges that they faced nor the evidence put against them by the DPP.
> - No Crown Case Statement or summary of facts had been produced in either English or Nauruan which would have crystallised the allegations and could have assisted in making the allegations comprehensible to the Defendants.
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> 28. In the several days that we were on the island, given the number of Defendants and volume and complexity of the brief, it was not possible to obtain confirmed instructions as to a plea from more than a couple of Defendants during this time.
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> 29. I was alarmed that despite the gravity of the charges, and the fact that the Defendants were completely ill-equipped to answer the charges themselves, the Republic appeared to have made no efforts to give effect to the right to state-funded legal representation enshrined in the Constitution.
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> 30. I was further seriously troubled that in these circumstances the District Court and the Minister for Justice and Border Control, Mr David Adeang ("the Minister for

Justice") – through his employee the DPP – were pushing for the matter to be listed for a trial to be heard and finalised before the end of 2016.

31. It was clear to me at this point that huge resources were required in order to ensure the Defendants had access to a fair trial as guaranteed to them under the Constitution. At the same time it was clear to me, given the history of the matter, that the Republic had no interest in ensuring this right was afforded to them.

32. From talking to the Defendants, it was evident that neither individually nor collectively did they have anything close to sufficient financial means to fund overseas legal practitioners to defend them.

33. Ms Graham and Ms Purcell had to depart Nauru on 25 September 2016. I remained on the island for several more days.

34. On 27 September 2016, I appeared for the Defendants before Magistrate Garo in the District Court. This was the first time that the Defendants had been represented by a legal practitioner in court in these proceedings. The matter was adjourned to 31 October 2016 for the purpose of allowing any Defendants who wished to plead guilty to enter those pleas and be sentenced on the next occasion.

35. Following our first trip to Nauru Ms Graham and I continued efforts to engage further legal representatives from Australia to appear on an unfunded basis for the Defendants. This continued as a work in progress over a number of months.

36. On 30 October 2016, Ms Graham and I arrived in Nauru. Ms Graham and I had several conferences with each of the Defendants and gave them advice and received instructions in relation to how they wished to plead to the charges against them. Between 31 October 2016 and 3 November 2016 Ms Graham and I appeared on a number of occasions in the District Court. During that time, Ms Graham and I engaged in negotiations with the DPP on behalf of the Defendants, attempting in good faith to resolve various of the matters in an appropriate way. Repeatedly these attempts were frustrated when agreements reached with the DPP were broken by the DPP because he said he had been over-ruled by the office of the Minister for Justice.

37. During this trip, the Minister for Justice made remarks in Parliament to the effect that the Republic would not negotiate with those charged in relation to the protest, and that leniency ought not be extended to them. The Minister for Justice additionally made reference to the fact that the Magistrate's contract was shortly up for renewal.

38. Between 4 and 9 November 2016, the Defendants were variously arraigned and sentence proceedings commenced in relation to four of the Defendants: Mrs Grace Detageouwa, Mr John Jeremiah, Mr Job Cecil and Mr Josh Kepae.

39. On 24 November 2016, Magistrate Garo rejected pleas of guilty by Mr John Jeremiah and Mr Kepae in relation to a charge of entering a security restricted area (Count 2).

40. On 25 November 2016, the proceedings against Defendant Mrs Grace Detageouwa were finalised in sentence proceedings. On that day Magistrate Garo also sentenced Mr John Jeremiah, Mr Kepae and Mr Cecil. Those sentences are subject to appeal proceedings in the Supreme Court and the appellants are on bail pending determination of those proceedings.

41. In relation to the Defendants who entered pleas of not guilty, Magistrate Garo listed the matter for a trial to commence on 18 April 2017 with an estimate of 3 weeks.

Despite our requests, Magistrate Garo refused to allocate hearing time for pre-trial issues.

42. On 27 November 2016, Ms Graham and I departed Nauru.

43. Since late September 2016, I have been the sole solicitor representing the remaining 18 Defendants listed for trial, and representing the three appellants in relation to the sentence appeals.

44. Shortly after returning to Australia I was served with a notice of appeal filed by the DPP in which the Republic complained that the sentences imposed on Mr John Jeremiah, Mr Cecil and Mr Kepae were too lenient. Shortly thereafter I learnt that Magistrate Garo's contract was not renewed.

45. After some time, a team comprising myself and four barristers was assembled to represent the Defendants. The barristers were: Felicity Graham, Mark Higgins, Stephen Lawrence and Neal Funnell. The Defendants were divided up into groups and allocated to a representative in a way which best managed the potential conflicts. This allocation was set out in the Pre-Trial Conference Question and Answer form that was filed on behalf of the Defendants at the request of District Court Magistrate Lomaloma. I exhibit and mark "**Exhibit E**" a copy of the Defendants' amended Pre-Trial Conference Question and Answer form filed on 30 March 2017. (Exhibit not reproduced here.)

46. On 30 March 2017, Mr Funnell and I appeared in the District Court for a pre-trial conference before Magistrate Lomaloma.

47. In April 2017, I travelled with Mr Higgins, Mr Funnell, Mr Lawrence and Ms Graham to Nauru for the trial before Magistrate Lomaloma listed in the District Court to commence on 18 April 2017 and for the hearing of the sentence appeals in relation to three of the Defendants before Judge Khan in the Supreme Court listed on 24 and 25 April 2017. Between 18 April 2017 and 5 May 2017 I appeared with counsel for the Defendants in the trial and sentence appeal proceedings. I remained in Nauru until 6 May 2017 with Mr Higgins and Mr Lawrence; Mr Funnell and Ms Graham having had to return to Australia earlier as a result of other commitments there.

48. On 4 May 2017, the trial was adjourned to a date to be fixed.

49. On 10 May 2017, Magistrate Lomaloma listed the trial for 24 July 2017 to 4 August 2017. The hearing of pre-trial applications was subsequently listed for hearing on 12 July 2017.

50. In June 2016 (sic – 2017), I received correspondence from Ashurst Australia to indicate that they had been retained by the DPP to appear in the criminal proceedings against the Defendants, including the stay application brought by the Defendants, and the various constitutional matters that have arisen. Ashurst Australia indicated that they considered it "totally unrealistic to think that a trial can proceed on 24 July 2017." Ashurst Australia briefed several Australian barristers, including a senior counsel, to appear on behalf of the DPP.

51. In July 2017, I again travelled to Nauru with Ms Graham and Mr Lawrence. On 5 July 2017, I appeared with Ms Graham and Mr Lawrence for the Defendants in the Supreme Court in relation to an application for prerogative relief brought by the DPP.

52. On 11 July 2017, Magistrate Lomaloma transferred the proceedings from the District Court to the Supreme Court pursuant to s 162(1) *Criminal Procedure Act 1972* as amended by *Criminal Procedure (Amendment No 2) Act 2016*.

53. Between July 2017 and January 2018, the trial was adjourned for mention on several occasions as the new prosecutor, Ashurst Australia, prepared a new brief of evidence and attempts were made for an agreed timetable for the listing of the trial and pre-trial hearings.

54. On 24 November 2017, the Republic of Nauru terminated the retainer of Ashurst Australia and the Australian barristers engaged to act for the DPP.

55. On 15, 16 and 17 January 2018, I appeared with Ms Graham, Mr Lawrence and Mr Higgins in the Supreme Court in relation to case management hearings for the proceedings. On 17 January 2017, Chief Justice Jitoko listed the proceedings for trial for four weeks to commence on 6 August 2018 to 31 August 2018.

56. The brief of evidence is now (26 February 2018) in eight volumes plus electronic materials such as audio recordings of witness interviews and video evidence. In addition to that, there are now numerous judgments, large amounts of evidence and multiple sets of submissions of the parties in relation to the substantive and related litigation in the proceedings.

57. The case involves complex matters of the interpretation and effect of various parts of the Constitution, statutory interpretation of other legislation, admissibility of evidence and criminal liability.

58. On each of the trips to Nauru, I along with the other legal representatives for the Defendants have spent substantial periods of time taking instructions from and giving advice to each of the Defendants, conferencing witnesses, collecting and preparing evidence to be used in the proceedings.

…

59. On each occasion that our legal team travels to Nauru, it usually involves a return flight from Sydney to Brisbane, an overnight stay in Brisbane and a return flight from Brisbane to Nauru. Among other on-island expenses are accommodation and vehicle rental.

60. The costs of flights, accommodation and on-island expenses have been incurred by both the legal team and the Defendants. I exhibit and mark "**Exhibit F**" a schedule of expenses that have been incurred by the Defendants. I exhibit and mark "**Exhibit G**" a schedule of the expenses that have been incurred by the legal representatives. Neither list is exhaustive, and generally does not identify the costs incurred such as day-to-day living expenses whilst on-island or in transit that add significantly to the overall cost burden. The Defendants have substantially borne the costs of accommodating the legal team on each visit to Nauru, mostly by way of moving out of their family homes and allowing us to live in them for the duration of the trip. The considerable burden this places on the Defendants has not been reflected in the schedule Exhibit F. (Exhibits not reproduced here.)

61. Up until this point, the expenses incurred by the Defendants have been met by fundraising activities in Nauru, and individuals (both Defendants and others) contributing sums of money.

62. The expenses incurred by the legal team have been funded by the individual representatives. A portion, but not all of this has been covered by fundraising activities that we have carried out in Australia.

63. Fundraising sources are now practically exhausted both among the Defendants and the legal representatives.

64. In the next six to eight months (from 26 February 2018) the legal team will have to travel to Nauru at least three times and undertake a huge amount of preparation for the pre-trial applications and the trial proper. The legal team needs to sustain itself in Nauru for almost two months this year.

25 Reference is made above (para 55) to a hearing before the Chief Justice of the Supreme Court on 17 January 2018 when he listed the proceedings for trial from 6 August 2018 to 31 August 2018.

26 Also, on 17 January 2018, the Chief Justice foreshadowed that any *Dietrich* application by the defendants was to be filed by 16 February 2018 with any response by the DPP by 23 March 2018. He listed any *Dietrich* application for hearing on 7 and 8 May 2018. He directed that any pre-trial applications were to be filed by 25 May 2018. He indicated that the hearing of any pre-trial applications may be heard from 23 July 2018, although he did not fix any hearing dates other than for 6 August 2018 to 31 August 2018.

27 By Notice of Motion dated 26 February 2018, the defendants gave notice that they would move the Supreme Court on 7 May 2018, or as soon thereafter as counsel could be heard on the application, for **ORDERS** pursuant to clauses 10(2) and 10(3)(e) of the Constitution of Nauru as follows:

1. An order that the legal representatives Mark Higgins, Stephen Lawrence, Felicity Graham, Neal Funnell and Christian Hearn be assigned to represent the Defendants in the proceedings; and

2. An order that the assignment of the legal representatives in accordance with Order 1 be without payment by the Defendants; and

3. An order that the Republic of Nauru pay the reasonable fees and all disbursements of the legal representatives for the Defendants incurred to 7th May 2018; and

4. An order that the Republic of Nauru pay the reasonable fees and all disbursements of the legal representatives for the Defendants incurred from and including 7th of May 2018;

In the alternative to Orders 1 to 4:

5. An order staying the proceedings against the Defendants until arrangements are made for the legal representatives Mark Higgins, Stephen Lawrence, Felicity Graham, Neal Funnell and Christian Hearn to appear for each of the Defendants at the expense of the Republic of Nauru.

28 The affidavit of Christian Hearn dated 26 February 2018, from which I have reproduced extensive extracts, was filed in support of this Notice of Motion of the same date. This affidavit concluded with the following paragraphs:

65. When providing representation on a private basis, my fees are charged at a rate of AUD $400 per hour or AUD $3000 per day. When appearing in legally aided matters, I charge according to the Legal Aid New South Wales scale of fees. I exhibit and mark "**Exhibit H**" a copy of the scale of fees that relates to solicitors. (Exhibit not reproduced here)

66. When appearing on a private basis, each of the barristers have both an hourly rate and a day rate. As an hourly rate each of them charge AUD $400 per hour. As a day rate, all but Mr Higgins charge AUD $3000 per day. Mr Higgins charges AUD

$4000 per day. When appearing in legally aided matters, each of the barristers charge according to the Legal Aid New South Wales scale of fees. I exhibit and mark "**Exhibit I**" a copy of the scale of fees that relates to barristers. (Exhibit not reproduced here)

67. Over the next 6-8 months the professional fees of the legal team if charged at a private rate are estimated to be in the many hundreds of thousands of dollars, likely approaching $800,000 to $1,000,000. If charged at a legal aid rate, they are estimated to be no less than $250,000.

68. The Republic of Nauru has not provided any funding to the Defendants' legal team, or to the Defendants. In mid-late 2017 the legal team representing the DPP informed the Defendants' legal team that the Minister for Justice had rejected a suggestion that the Republic consider a $10,000 *ex gratia* payment toward the legal costs of the Defendants.

69. In terms of their financial means, and ability to cover legal costs, I have obtained instructions from each of the Defendants. I exhibit and mark "**Exhibit J**" a schedule of income, expenses, assets and other financial circumstances in relation to the Defendants. (Exhibit not reproduced here.)

70. I have been instructed that due to the system of land ownership in Nauru, none of the defendants independently owned land.

71. Each of the Defendants was asked whether they owned a house and whether they had any significant assets such as cars, motorbikes or boats. They were also asked whether they had any liquid assets such as savings or stocks and shares.

72. Each of the defendants was asked about income from all sources, and whether they were employed. Most of the Defendants responded that they were on "the blacklist". I was instructed that this is a list that was created to bar people involved in the protest from gaining employment on Nauru.

73. Many of the Defendants instructed me that because they cannot work or are only able to work casually, they fish. While some make money from this activity, for the most part this is a subsistence activity.

74. The Defendants were asked whether they had any debts, loans or mortgages. They were also asked about their outgoings, including utilities, rent and if they make money from a business, any costs associated with running that business.

75. The Defendants were also asked about dependents, that being any person who is dependent on them for financial support.

76. Exhibit J summarises each of the Defendants' responses in relation to the above matters. (Exhibit not reproduced here.)

The Supreme Court Judge to hear the case

29 By Instrument of the Republic of Nauru, I was, on 13 March 2018, appointed by the then Acting President of the Republic, the Honourable David Adeang, MP, as "A Judge of the Supreme Court of Nauru, to hear and dispose (of) Supreme Court Case No 12 of 2017 between Republic & Mathew Batsuia & Ors". At Government House at Yaren, Nauru, I, on 13 March 2018, swore "by Almighty God that I will be faithful and bear true allegiance to the Republic of Nauru in the office of Judge, and that I will do right to all manner of people according to law, without fear or favour, affection or ill-will".

30 My appointment followed a public statement released by the Minister for Justice, the Honourable David Adeang, MP, on or about 1 August 2017 that the Republic of Nauru would be appointing an independent retired Supreme Court or Federal Court judge from Australia to hear the trial of the defendants. As at that time, by a Notice of Motion filed by the defendants on 2 May 2017, the defendants had sought a stay of proceedings against them until a fair trial before a properly independent judge, both in fact and perception, was able to proceed on Nauru. There had also been hearings, in both the Supreme and District Courts, regarding the admission before the courts of affidavits sworn by Mr Geoffrey Eames QC and Mr Peter Law.

31 It was also around that time, on 6 July 2017 to be precise, that the then Acting Chief Justice of the Republic of the Supreme Court of Nauru was informed by the defendants' legal representatives that legal representation for their trial could not be assured and that some application may need to be or would be made regarding that matter and/or a stay of the trial until legal representation could be assured. I return to that later.

32 On 14 March 2018, I ordered that the hearing of the defendants' Notice of Motion, by way of oral submissions supplementing written submissions, would commence before me on 7 May 2018, with 8 May 2018 also available. I gave directions regarding the filing and service of any affidavit material and written submissions. I directed that any pre-trial applications by any party were to be filed and served by 25 May 2018.

33 Further, I directed that the defendants were to serve a copy of their Notice of Motion on the Secretary for Justice & Border Control and on the Secretary of the Treasury. I requested that those two Secretaries indicate their position as to the Notice of Motion dated 26 February 2018. I gave these directions as I considered it prudent to ensure that each of the two Secretaries were aware of the defendants' Notice of Motion, the first named because the alternative relief sought a stay of the trial and the second named because the relief sought in paragraph [1] to [4] sought that the Republic pay for the defendants' legal representation before and at trial.

34 I ordered that any pre-trial applications would be heard commencing on Monday 23 July 2018, with two weeks set aside, with any trial commencing on Monday 6 August 2018, with four weeks set aside. I directed that any trial would commence immediately after the hearing and determination of any pre-trial applications.

35 On 19 April 2018, I conducted a teleconference with the parties at which the Solicitor-General for the Republic of Nauru represented the two Secretaries. As the Solicitor-General was not available on 7 and 8 May 2018 I vacated the hearing of the defendants' Notice of Motion for that date and relisted it for 28 and 29 May 2018. I gave directions for the Solicitor-General to file and serve any affidavit material upon which he wished to rely and to file and serve his written submissions.

36 In a further telephone attendance with the parties on 15 May 2018, I varied the date by which the parties were to file and serve any pre-trial applications from 25 May 2018 to 26 June 2018.

The Hearing on 28 and 29 May 2018

37 The defendants' Notice of Motion dated 26 February 2018 came on for hearing and was heard before me on 28 and 29 May 2018.

38 Before that hearing, extensive affidavit material and written submissions had been filed on behalf of the defendants, the DPP, and the Solicitor-General.

39 The Solicitor-General had also filed, on 8 May 2018, a Summons which sought, on behalf of the Secretary for Justice and the Secretary for Finance, a hearing at which the following orders would be sought:

> (a) the directions and order of this Honourable Court that the Notice of Motion and Affidavit of Christian Hearn filed on the 27th of February 2018 be served in the absence of the Secretary for Justice and the Secretary for Finance, be set aside;
>
> (b) the application and orders sought in the Notice of Motion be summarily dismissed on the grounds that it is an abuse of process of the court and has no reasonable cause of action against the Republic of proceedings; and
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> (c) that the costs of and incidental to this application be paid by the accused persons or the legal representatives personally.

40 An affidavit of Graham Everett Leung, the Secretary for Justice & Border Control, was sworn and filed on 8 May 2018. That affidavit purported to respond to parts of Mr Hearn's affidavit of 26 February 2018. It also expressed the views of the Republic on the issue of a stay of these proceedings if no funds are available for the defendants to be legally represented at the trial.

41 The Solicitor-General had filed, on 22 May 2018, extensive written submissions on the Summons filed for and on behalf of the Secretary for Finance and the Secretary for Justice.

42 On 23 March 2018 the DPP had filed an Affidavit of Salote Tagivakatini, a Police Legal Advisor in the Office of the DPP, sworn on 23 March 2018. This was sworn and filed in respect of the defendants' Notice of Motion.

43 On 22 May 2018, the DPP had also filed a Notice of Motion indicating that he would be moving this Court on 28 May 2018 for the following Orders:

> 1. The Notice of Motion dated 26th day of February 2018; and in particular the first, second, third and fourth orders, and the order sought as an alternative to the first to fourth orders contained in the Notice of Motion filed on behalf of the Defendants be dismissed on the ground that it is brought in abuse of process; the criminal division of the Supreme Court of Nauru having no jurisdiction to determine the questions raised therein.
>
> 2. That each party to bear its own costs.

The DPP had also filed on 22 May 2018 an Affidavit of Kristian Aingimea, a Pleader employed at the Office of the DPP purporting to respond to the defendants' Notice of Motion.

44 The DPP had filed a further affidavit of Kristian Aingimea in support of his, the DPP's, Notice of Motion of 22 May 2018.

The position of the parties as at 28 May 2018 as to the trial

45 On 28 May 2018, I had before me an Affidavit of Mr Aingimea, a Pleader employed at the Office of the DPP, which states that "the Director of Public Prosecutor, as the Republic's representative in criminal matters, is desirous that the matter proceed to trial on (the 6th day of August 2018); and is prepared to take the matter to trial on that day".

46 On 28 May 2018, Mr Higgins, of counsel for the defendants, informed me that if the trial of the defendants was to proceed on 6 August 2018 without orders being made of the type sought in paragraphs [1] to [4] of the defendants' Notice of Motion dated 26 February 2018, it would be without legal representation by Ms Graham, Mr Higgins, Mr Lawrence and Mr Funnell, all of counsel, and by Mr Hearn as instructing solicitor to the above-named counsel.

47 I understood both parties to be indicating to me that those positions applied equally to the hearing of any pre-trial applications set to commence on 23 July 2018.

The Hearing of the Defendants' and the DPP's Notices of Motion

48 The hearing before me commenced in the Supreme Court at about 10 am on Monday 28 May 2018 and concluded at about 5 pm on Tuesday 29 May 2018. At that time I reserved my decision on the Notices and adjourned. I indicated that I hoped to deliver my decision on Thursday 14 June 2018. When, later that day, I was advised that the DPP would not be available on that day, I had the parties notified that I hoped to deliver my decision on Thursday 21 June 2018.

49 On Wednesday 30 May 2018 I returned to Australia. After I returned I commenced the writing of my decision on the two Notices of Motion.

50 I had got to about this stage of my decision when, at about 2.30 pm Nauruan time on Wednesday 6 June 2018, I was sent the *Criminal Procedure (Amendment) Act, 2018* by the Registrar of the Supreme Court. He sent it to me in the ordinary course of his advising the judiciary of Nauru of recent Parliamentary enactments.

51 The amending Act was certified on 6 June 2018, the same day I received it. It was an Act to amend the *Criminal Procedure Act, 1972*. It amended the provisions by which the *Criminal Procedure Act, 1972* had been amended on 12 May 2016 by the *Criminal Procedure (Amendment) Act, 2016*. This amending Act of 2016 had been referred to by the DPP in his written submissions on his Notice of Motion filed on 22 May 2018. In those written submissions (para 20), the DPP submitted that there was a clear legislative

intent in the Constitution to create three separate and distinct guarantees, the third of which was:

> The right to have a legal representative assigned to him or her in a case where the interests of justice so require and without payment by him or her in any such case if he does not, in the opinion of the court, have sufficient means to pay the costs incurred.

The DPP submitted (para 22) that "in order to give effect to this third right pursuant to its obligations under Article 10(3)(e) of the Constitution, the Republic created the Office of the Public Legal Defender on 12 May 2016 (see s. 6 of the *Criminal Procedure (Amendment) Act, 2016*)".(I note that this is not supported by the Second Reading Speech, see para 74 herein.)

52 The DPP submitted that s 8 of the above Amendment Act clearly sets out the functions of the Public Legal Defender as follows:

> **50C Functions of the Public Legal Defender**
>
> (1) The functions of the Public Legal Defender are to provide legal aid, advice and assistance to persons:
>
> (a) in need who may be charged or have been charged with a criminal offence; or
>
> (b) who need such aid, advice and assistance in respect of legal proceedings under any other Act; or
>
> (c) subject to the availability of resources and staffing, when requested to do so by the Supreme Court or the District Court.
>
> (2) The Director may, after consultation with the Secretary for Justice and Border Control, establish guidelines setting out eligibility criteria for receiving legal aid, advice or assistance.

53 I was informed at the hearing before me that no "eligibility criteria" have been established.

54 The *Criminal Procedure (Amendment) Act, 2018* amended s 50C by omitting s 50C(1)(c) and substituting it with the following:

> (c) where the Nauru Court of Appeal, Supreme Court or District Court request or is required under a written law to assign a legal representative to represent a person in a court proceeding where such person does not have sufficient means to retain the services of a legal representative.

55 The amendment passed by the Nauruan Parliament on Wednesday 6 June 2018 also inserted two new provisions in the *Criminal Procedure Act, 1972*. They are as follows:

> **50D Assignment of legal representative**
>
> For the purposes of section 50C(1)(c):
>
> (a) the Director of the Office of Public Legal Defender in so far as practicable shall provide legal representation; and

(b) subject to section 50E, where the Director of the Office of the Public Legal Defender is unable to provide legal representation or has a conflict of interest, he or she shall engage a legal representative duly admitted to practice law in the Republic to do so where the interest of justice so require.

50E Director of the Office of the Public Legal Defender is unable to provide legal representation

(1) Where the Director of the Office of the Public Legal Defender is required to engage a legal representative under section 50D(b), he or she shall pay the following professional fees:

(a) appearances for call overs or mentions at the rate of $50 for each such appearance; and

(b) appearances for trial at a rate not exceeding $300 per day.

(2) The maximum legal fee and disbursements to be charged for each case inclusive of mentions, call overs and trial shall not exceed $3,000.

(3) Where the Director of the Office of the Public Legal Defender is required to engage a legal representative under this section for the purposes of an appeal either in the Supreme Court or Nauru Court of Appeal, the legal fees and disbursements for such appeal shall not exceed $3,000.

(4) The legal fees and disbursements prescribed by this section shall apply to an assignment of legal representative by the Court or any other authority under a written law or inherent jurisdiction, where the Republic may be required to pay the legal fees and disbursements.

56 The only other provision in the amending Act passed on Wednesday 6 June 2018 was a savings section. It reads:

Saving

This Amendment shall not affect any judgment, decision or order of any court or any decision of the Director of the Office of the Public Legal Defender in respect of any assignment or engagement of a legal representative under a written law made prior to the certification of this Amendment to the Act.

57 I have been unable to discover when the Bill which became the *Criminal Procedure (Amendment) Act, 2018* was introduced into the Nauruan Parliament and read a first time. I have also been unable to discover the Second Reading Speech when the Bill was introduced into the Parliament by whomever introduced it. I considered that this information may be relevant to what I have to decide as it may be that I may need to construe the provisions of the amending legislation, including the Saving provision.

58 On Saturday 9 June 2018, I caused an email to be sent to the parties in this Criminal Case No 12 of 2017. That email indicated that the amending Act just referred to was passed by the Nauruan Parliament on Wednesday 6 June 2018 and that it seemed that it could be relevant to the decision reserved by me on Tuesday 29 May 2018 which I was then writing for delivery in Nauru on Thursday 21 June 2018.

59 The parties were advised that I would receive any written submissions on the amending Act that either party may wish to send to me by 12 noon Nauruan time on Friday 15 June 2018. The parties were advised that any written submissions would be forwarded to me. I would consider them and advise the parties. They were informed that I would be arriving in Nauru on Sunday 17 June 2018.

60 I had no notice of any intention of the Nauruan Parliament to consider any amendments to s 50C of the *Criminal Procedure Act, 1972* nor any additional provisions to be proposed to be inserted in that Act until the afternoon of Wednesday 6 June 2018. This was, of course, not eight days after I heard two days of submissions in Nauru on 28 and 29 May 2018 and had reserved this decision at the end of Tuesday 29 May 2018.

61 I proceeded to prepare and write my decision. I did so having no regard to the amending legislation which was passed by the Nauruan Parliament on 6 June 2018. This is because I had heard no submissions regarding the amending legislation. If there are to be submissions I consider that I will likely need to have a copy of the Second Reading Speech made when the Bill seeking to make the amendments was introduced into Parliament and a copy of the Parliamentary Debates in respect of it.

62 At the commencement of the hearing before me on 28 May 2018, Mr Higgins applied to cross-examine Kristian Aingimea, a Pleader employed at the Office of the DPP, on his affidavit sworn and filed on 22 May 2018. Mr Higgins wished to cross-examine the deponent on that paragraph of his affidavit in which he confirmed that, by his checking through the Roll of the Court on 1 May 2018, "there are at least eight duly admitted Pleaders who are entitled to appear before the District and Supreme Courts of Nauru sitting in its civil and criminal jurisdictions". The deponent named those eight persons.

63 In a further paragraph in his affidavit, the deponent swore that he had "confirmed by checking through the Roll of the Court on this 1st day of May 2018, there are at least two duly admitted barristers and solicitors enrolled and entitled to practice as such before the District and Supreme Courts of Nauru". He named those two persons.

64 The deponent had further sworn that he was aware that the Public Defender's Office was staffed by the Public Defender, Mr Sevuloni Valenitabua, an admitted barrister and solicitor, Mr Ravuanimasei Tagivakatini, an admitted barrister and solicitor, and Mr Knox Tolenoa, an admitted Pleader.

65 Mr Higgins wished to cross-examine the deponent as to which, if any, of the persons named were available to represent the defendants at and before their trial in July and August 2018, how long they had been available in the sense of having been admitted and whether any of them who might otherwise have been available had any conflicts of interest that may prevent them from representing any of the defendants. Mr Higgins referred to the two admitted barristers and solicitors named as possibly having a conflict or conflicts which may fall into this category of being unable to represent any of the defendants.

66 Mr Higgins also applied to cross-examine the Secretary for Justice and Border Control, Mr Graham Leung, on his affidavit sworn and filed on 8 May 2018.

67 I did not rule on these applications directly. I first heard Ms Graham's submissions on the applications before me.

68 In the afternoon of the first day of hearing, the Solicitor-General informed me that he sought leave to withdraw. He then told me that he sought to withdraw the Summons he had filed on behalf of the Secretary for Justice and the Secretary for Finance on 8 May 2018. He then told me that he sought to withdraw the affidavit of Graham Leung, the Secretary for Justice and Border Control, sworn and filed on 8 May 2018. He then told me that he sought to withdraw the written submissions he had filed on 22 May 2018. He told me that he no longer, on behalf of the Secretary for Justice and the Secretary for Finance, sought any of the orders sought in his Summons of 8 May 2018.

69 I granted leave for the Solicitor-General to do all of the above and he withdrew from the hearing.

70 The Solicitor-General's withdrawal, of course, resolved any issue as to whether Mr Higgins should or could cross-examine Mr Leung. This is because I would have no regard to his affidavit in this matter as it was withdrawn. When considering my decision I shall also have no regard to the Solicitor-General's extensive written submissions.

71 I did not hear cross-examination of Kristian Aingimea on his affidavit in which he referred to admitted practitioners and admitted Pleaders in Nauru. I had questioned Ms Puamau, of counsel for the DPP at the hearing, about whether she could provide any details about when the eight named Pleaders and the two named admitted barristers and solicitors became entitled to appear in court and to practice before the Supreme Court. Enquiries were also made of her as to whether any of them would be available to appear at and before the trial of the defendants in this matter because they were capable, in practical terms to start work immediately to prepare for any pre-trial applications, to appear on any pre-trial applications and to appear at the trial, where that period was at least three months. Enquiries were also made of her as to whether any of the persons named may have conflicts of interest which might prevent them from acting for the defendants or any of them. Ms Paumau informed me that she had no such detailed information.

72 Ultimately, it was accepted by both parties that I should proceed on the basis that the deponent would not be cross-examined but that I would receive his affidavit as to the matters referred to above on the basis that there were admitted barristers and solicitors on Nauru and admitted Pleaders on Nauru who were duly qualified to appear for defendants in criminal matters, but that I had no information regarding the availability of any of them to do so in this case.

73 I also had no information as to when it was that the current Public Legal Defender was appointed as Public Legal Defender, nor, for that matter, when any Public Legal Defender was appointed. I was informed, by the DPP's written submissions dated 22 May 2018, that the Office of the Public Legal Defender

was created on 12 May 2016. I have referred to the establishment of that Office by the Parliament earlier in this decision. That legislation also set out the functions of the Public Legal Defender (which have now recently been varied).

74 Section 26 of the amending legislation in 2016 which set up the Office of the Public Legal Defender enacted transitional and savings provisions. They provided that the "current office of the Public Legal Defender in operation before the commencement of this Act continues in operation" and "any appointment to the office of the Public Legal Defender made before the commencement of this Act continues until its expiration upon which the provisions of appointment in this Act will apply". In his Second Reading Speech, when introducing the *Criminal Procedure (Amendment) Bill, 2016*, the Honourable David Adeang, MP, informed the Parliament that the Bill sought to establish by legislation an office of the Public Legal Defender. He added:

> Till now, the Defender's office does not have a legal basis so the amendment will formalise what up until now has been an office which is a creature of public policy.

I do not know when the person who was the Public Legal Defender in the Office of the Public Legal Defender (when it was one of public policy) at the time the charges with which I am concerned arose, being 16 June 2015, ceased to be the Public Legal Defender, nor do I know who held that office after the then Public Legal Defender ceased to do so.

The Issues and Questions before me

75 The issues and questions before me on what became the two Notices of Motion, the first by the defendants and the second by the DPP, were and are:

1. **Whether, as a matter of law, I can make any of the first four orders sought by the defendants pursuant to Articles 10(2) and 10(3) of the Constitution of Nauru in the proceedings before me, being Criminal Case No 12 of 2017. (This is the DPP's issue of jurisdiction.)**

   Counsel for the defendants submitted that I can. They submitted that this Court has, to the exclusion of any other court, original jurisdiction to determine any question arising under or involving the interpretation or effect of any provisions of the Constitution. They rely on Article 54(1) of the Constitution.

   Further, counsel for the defendants contend that Article 10(3)(e) of the Constitution clearly envisages that a person charged with an offence "shall be permitted … to have a legal representative assigned to him in a case where the interests of justice so require and without payment by him in any case if he does not, in the opinion of the court, have sufficient means to pay the costs incurred". Counsel for the defendants submit that it is clear from this provision that the Constitution envisaged that this court could assign a legal representative to a person charged with an offence where the interests of justice requires. The power of a court to so assign a legal representative without payment by such a person charged with an

offence will arise if that person does not, in the opinion of the court, have sufficient means to pay the costs incurred.

The DPP submitted that this Court, in this case, has no power, pursuant to Article 10 of the Constitution, to assign a legal representative to any person charged with an offence in this case (being Criminal Case No 12 of 2017). He submitted that no court has such a power.

The DPP submitted that any assignment of a legal practitioner by the Court as referred to in Article 10 of the Constitution can only be done pursuant to Article 14 of the Constitution. That Article provides: "A right or freedom conferred by this Part (in which Article 10 appears) is enforceable by the Supreme Court at the suit of a person having an interest in the enforcement of that right or freedom". That Article further provides; "The Supreme Court may make all such orders and declarations as are necessary and appropriate for the purposes of" enforcing that right or freedom.

It was submitted by the DPP that what is envisaged by Article 10 of the Constitution can only be achieved when a civil action is instituted against the Republic of Nauru pursuant to the *Civil Procedure Act* (or against the Secretary for Justice pursuant to the *Civil Procedure Act, 1972*). It was submitted that the term "suit", although not defined in the Constitution, is defined under the *Civil Procedure Act, 1972* to mean "an original civil proceeding commenced in any matter prescribed and includes both a cause and a matter". It was submitted that the word "suit" in Article 14 of the Constitution should be construed as it is defined in the *Civil Procedure Act, 1972*.

2. If I can make an order pursuant to Article 10 of the Constitution "to have a legal representative assigned to (a person charged with an offence) in a case where the interests of justice so require and without payment by him in any such case", can I order that the legal fees of that representative be paid by the Republic of Nauru.

Counsel for the defendants submitted that it was implicit in Article 10 of the Constitution that an assignment of a legal representative without payment to the person charged must, by necessary implication, mean that the Republic will pay the fees of that legal representative, either through any legal aid scheme if one exists, or outside any such scheme established by public policy. At the time the Constitution of Nauru was adopted and enacted, there was no Public Legal Defender, and there was no legal aid scheme established in Nauru, so there was no reference to any legal aid scheme in the Constitution.

But, if legal representation was to be assigned to a person charged with an offence, without cost to him, who else but the Republic would pay to ensure that this protection of the law is accorded to the people of Nauru.

It was submitted that it was the Constitution of Nauru that provided in Article 10 "to secure protection of law" to persons charged with an offence

and that they "be afforded a fair hearing within a reasonable time by an independent and impartial court" (Article 10(2).)

The DPP's submission was that, assuming that I had power to assign a legal representative to a person charged with an offence as referred to in Article 10(3)(e) of the Constitution without payment by him, I have no power to order, direct or require the Republic to pay. It was submitted that I could only make an assignment pursuant to Article 10(3)(e) of the Constitution to a legal representative from the Office of the Public Legal Defender, or to a legal representative who was prepared to be assigned and appear for the defendants *pro bono*.

3. **Whether the defendants here have a legal right to have legal representatives of their own choice assigned to them pursuant to Article 10 of the Constitution and, if not, should I assign their current legal practitioners to appear for them at their trial and, if so, should I order the Republic to pay their reasonable legal expenses.**

Counsel for the defendants submitted that the defendants do not have a legal right to have legal representatives of their own choice assigned to them but, in light of the history of this matter (they have acted for them for nearly two years) and the fact that they have prepared for trial including for pre-trial applications and that there is no evidence before me to suggest that legal representatives other than them could be assigned at this time to be able to represent the defendants at a trial set to commence on 6 August 2018 (or 23 July 2018 when any pre-trial applications are set to commence), it makes common sense and is in the interests of justice that they be assigned to represent the defendants at and before their trial, assuming that I am satisfied as to the question of their having insufficient means to pay their legal costs.

The DPP submitted that the defendants have no legal right to have representatives of their own choice assigned to them and that their current legal representatives should not be assigned to them under Article 10 of the Constitution. The Director did not argue against the defendants' current legal representatives continuing to act for the defendants at their trial were they do so *pro bono* or were paid by the defendants or others, other than the Republic of Nauru.

4. **Whether, if I have power under Article 10 of the Constitution to assign the defendants' current legal representatives to represent them before and at their trial and I have power to order that the Republic pay their reasonable legal expenses, what expenses should I order, and should I order the Republic to pay that sum into Mr Hearn's trust account in Australia, or into Court, before I commence to hear any pre-trial applications on 23 July 2018.**

5. **Should I dismiss the defendants' Notice of Motion "on the ground that it is brought in abuse of process".**

The Director submitted that I should because it is.

Counsel for the defendants submitted that I should not as it is not.

6. If I cannot or will not make any assignment as referred to in Article 10(3)(e) of the Constitution, should I stay these proceedings against the defendants until arrangements are made for their current legal representatives to appear for each of them at the expense of the Republic of Nauru.

The first question – the DPP's Issue of Jurisdiction

76 The DPP's submission was that Article 14 of the Constitution provides that "a right or freedom" conferred by Part II of the Constitution "is enforceable by the Supreme Court at the suit of a person having an interest in the enforcement of that right or freedom". It was submitted that the word "suit" is defined under the *Civil Procedure Act, 1972* to mean "an original civil proceeding commenced in any matter prescribed and includes both a cause and a matter".

77 After setting out s 11(2) of the *Republic Proceedings Act, 1972* which provides that "Civil proceedings against the Republic shall be instituted against the Secretary for Justice", the DPP submitted that the defendants here "ought to name the Secretary for Finance as Head of Department for the department responsible for finance matters in Nauru as a party to their suit". It was submitted that the DPP "has no authority to act as Counsel for the Republic in a civil suit; and in particular, in respect of a suit in which a party is seeking an order compelling the Executive to expend public funds".

78 Part II of the Constitution is headed "PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS". By the various Articles in Part II, every person in Nauru is entitled to the fundamental rights and freedoms of the individual, namely freedoms of "life, liberty, security of the person, the enjoyment of property and the protection of the law; freedom of conscience, of expression and of peaceful assembly and association; and respect for his (or her) private and family life". The Constitution provides that provisions in Part II "have effect for the purpose of affording protection to those rights and freedoms".

79 The Constitution provides that every person in Nauru is provided with a right to life, protection of personal liberty, protection from forced labour, protection from inhumane treatment, protection from deprivation of property, protection of person and property and, in Article 10, protection of law.

80 Further, each person on Nauru is provided with freedom of conscience, freedom of expression, and freedom of assembly and association.

81 Article 14 provides that these rights and freedoms are enforceable by the Supreme Court "at the suit of a person having an interest in the enforcement of that right or freedom". "Suit" is not defined in the Constitution.

82 The rights and freedoms accorded to all Nauruans by the Constitution, which is the "supreme law of Nauru", take many different forms and are expressed in a

variety of different ways. Some are expressed as protections, others as rights, others as freedoms and others as a right to certain freedom. For example, Article 3 provides that every person in Nauru has the right to the freedom of the protection of the law.

83 Article 10 is the provision of the Constitution "to secure protection of the law" to every person in Nauru. Article 10(3) provides that a person charged with an offence shall, amongst other things, "be informed promptly in a language that he understands and in detail of the nature of the offence with which he is charged" and "shall be permitted to have without payment the assistance of an interpreter if he cannot understand or speak the language used at the trial of the charge".

84 Counsel for the defendants made what I considered to be telling submission that it cannot be that a proper construction of Article 14 of the Constitution would require someone, whether it be the defendant or an interpreter or the court, to commence a fresh cause of action in the civil jurisdiction of the Supreme Court naming the Secretary for Justice (or the Secretary for Finance) as the defendant in order to ensure the assistance of an interpreter at his or her criminal trial. Such a new action would potentially involve significant costs and would almost certainly, unless it was made several months before the trial, stall any trial. The defendant would also need to know months before the trial which language or languages were to be used at the trial of his or her charge.

85 The other "right or freedom conferred by" Part II is the right of a person charged to "be informed promptly in a language he understands and in detail of the nature of the offence with which he is charged". The Constitution is silent as to when that must be done and by whom, although it requires that it be done "promptly". It makes sense that the Constitution envisaged that this protection, right or freedom be accorded to a person at the time he is charged with an offence. It may mean that it is to be done at the time he is formally charged and when the written charge is laid and served. In the later case, it would strain common sense to suggest that if the written charge is in English and he does not understand English, he must bring a "suit" against the Secretary for Justice in the civil jurisdiction of the Supreme Court to enforce his right to be informed promptly in a language he understands and in detail of the nature of the offence with which he is charged. In the former case, it would be equally, if not more, bizarre.

86 Article 14 of the Constitution does not provide that a right or freedom conferred by Part II of the Constitution is *only* enforceable by the Supreme Court at the suit of a person having an interest in the enforcement of that right or freedom. In my view, Article 14 provides, appropriately, further protection of all Nauruans to their fundamental rights and freedoms by providing that each can go to the Supreme Court, if necessary, to enforce their rights and freedoms, which, it is to be noted, are enforceable by a suit of such a person or another person who has an interest in the enforcement of that right or freedom.

87 It is my view that if the various rights and freedoms are accorded to all Nauruans, there will be no need to "enforce" them by suit, and in many instances it will be too late to do so.

88 Insofar as a number of protections, rights and freedoms provided to all Nauruans under Part II of the Constitution are concerned, there is no need for the Supreme Court to make any declaration that all persons charged with an offence shall be permitted to defend himself before the Court in person. As provided in Article 10(3)(e), that declaration is made by that Article in the Constitution. That Article provides further that if a Court before whom the person charged comes does not have sufficient means to pay costs for legal representation, the Court can assign a legal representative to that person where the interests of justice so require it.

89 The construction contended for by the DPP would also mean that a person charged with an offence who is awaiting trial in the District Court would also have to apply in the Supreme Court to have a legal representative assigned to him where he could not pay the costs incurred and the interests of justice so required. I reject any such contention and I would construe the word "court", where it twice appears in Article 10(3)(e), to include all courts established by or envisaged as being established by the Constitution that have jurisdiction and powers in respect of the criminal law in Nauru. I note, without comment, that this seems to be accepted in the new section 50C(1)(c) of the *Criminal Procedure Act,* 1972.

90 The DPP submitted, in para [61] of his written submissions, that "what the authorities indicate is that if any of the Defendants were to find themselves without Counsel going forward, the Republic would be obligated to provide them with an advocate capable of ensuring that a defendant's defence is properly and adequately placed before the Court … the Public Legal Defender is just such an experienced advocate".

91 That submission of the DPP is, at least potentially, referrable to Article 10(3)(c) of the Constitution. I say "potentially" because the DPP does not use the terms used in that Article, being "to have a legal representative assigned to him".

92 I cannot see how the obligation referred to by the DPP in the above passage from his written submission could be drawn from the provisions in the *Criminal Procedure Act, 1972* which established the Office of the Public Legal Defender and the functions of the Public Legal Defender in 2016.

93 At the time these Notices of Motion were argued before me, s 50C of that Act provided that the functions of the Public Legal Defender were to provide legal aid, advice and assistance to persons in need, "subject to the availability of resources and staffing, when requested to do so by the Supreme Court or the District Court". That provision was varied by the Parliament after submissions on the two Notices had concluded and I had reserved this decision.

94 Before leaving this part of the DPP's submissions, I note that his submission was that if any of the defendants here were to find themselves without counsel going forward the Republic would be obligated to provide them with an

advocate capable of ensuring that a defendant's defence is properly and adequately placed before the Court. There are 16 defendants in the case before me. If all were to find themselves without counsel then there are insufficient advocates capable of ensuring that the defence of each is properly and adequately placed before the Court. I am not convinced that the Public Legal Defender, or anyone else, could appropriately represent all 16 defendants. I am satisfied that at least four legal representatives are required to represent these 16 defendants. Counsel for the DPP did not submit otherwise.

95 In any event, s 50C(2) of the *Criminal Procedure Act, 1972* provides that the Director may, after consultation with the Secretary for Justice and Border Control, establish guidelines setting out eligibility criteria for receiving legal aid, advice or assistance. No such guidelines have been established.

96 In light of these matters, I consider that I should consider the DPP's submission in para [61] of his written submissions to be referring to the provisions of Article 10(3)(e) of the Constitution.

97 For these reasons, I reject the Director's "jurisdiction" submission that an assignment of legal representatives to the defendants here can only be made pursuant to Article 14 of the Constitution. I consider that such an assignment can be made by me, or by any court, pursuant to Article 10(3)(e), without recourse to Article 14.

98 It is convenient for me now to consider the *Criminal Procedure (Amendment) Act, 2018* ("the Act") to which I referred earlier (paras 50-60 above).

99 I received and have considered written submissions from both parties regarding the Act.

100 Counsel for the defendants submitted that the Act " is an impermissible limitation of Article 10 of the Constitution and therefore void." It was submitted that it is inconsistent with the Constitution in one, and possibly two, respects.

101 Firstly, "it arguably purports to limit the power of this Court to assign a legal representative, providing in sections 50C (I) (c) and 50D that the Public Legal Defender 'shall 'provide representation upon a referral or assignment ." It was submitted that another construction , that these provisions be" read as only applying when the Court has assigned the matter to the Public Legal Defender" is the preferable construction and is consistent with the fact that section 50E (4) "seems to envisage referrals other than to the Public Legal Defender ."

102 Secondly, "in purporting in section 50E (4) to limit the fees payable to the legal representative to whom an assignment is made, it is inconsistent with the fair trial protection in the Constitution" .It was submitted that, although rights can be subject to express and sometimes implied permissible limitation or limitations,

there was “no arguable basis to suggest that (the) Act is a permissible limitation on Article 10 “of the Constitution. It is “not a proportionate limitation, in fact it is patently disproportimate.” It was submitted that it is” not aimed at achieving a legitimate objective, rather the Court would infer it is directly aimed at frustrating the Defendants vindicating their rights, without regard to any reasonable policy objective.”

103 Counsel for the defendants cited and relied on a passage by Oliver De Schutter in International Human Rights Law: Cases, Material, Commentary (2nd edition) page 339, in which he wrote that limitation may be imposed on human rights provided that there was a ’condition of legality’, a ‘condition of legitimacy’ and a “ condition of proportionality “. Counsel referred to the “Siracusa Principles “which state the general principles relating to the justification of limitations on rights. Counsel also referred to a statement of permissible limitations by the Human Rights Committee in General Comment No. 27.

104 Counsel also referred to the fact that the consistency of legal aid schemes with human rights guarantees has been considered in jurisdictions with like constitutional protections as here. The sufficiency of legal aid payments and whether a fair trial was affected was considered in *McLean v Buchanan (2001) 1 WLR 2445*. Lord Clyde, in this case, referred to where “no allowance is made for any unusual or exceptional circumstances”. He stated: “The requirements of fairness in juridical proceedings are rarely, if ever, met by blanket measures of universal application. Universal policies which make no allowance for exceptional cases will not readily meet the standards required for fairness and justice “. Counsel referred to what Haddon-Cave J. said in *R v Furniss*, *Hall and Stacey* of Article 6 of the European Convention of Human Rights that “inadequate remuneration within a legal aid scheme may be in breach of a defendant’s right to a fair trial “under that Article.

105 Counsel for the DPP, in the written submission filed on 15 June 2018, did not address the above submissions of the defendants. If the defendants’ written submission was not received by the DPP’s office before 15 June 2018 that is understandable.

106 In his submission, the DPP stated that “in a democratic nation constitutionally based on the Westminster System, Parliament is sovereign and it retains the power to repeal or amend law (*R v Warren* (2012) PNSC 1 at para 181).Further, what Lovell- Smith J said in *R v Warren* was emphasised by the DPP. That Judge had approved the following principle in the House of Commons Standard Notes:

> It is sometimes mistakenly believed that the Bill of Rights cannot be amended. This is not the case. It is a fundamental principle of British constitutional law that no parliament can bind its successors and that any statute can be repealed ….The principle of parliamentary sovereignty means that the UK Parliament can enact any law

whatsoever on any subject whatsoever...Furthermore, changes in rules of UK constitutional law can be effected by ordinary legislation.

The submission concluded: "It is clear that in the Republic of Nauru, Parliament is the supreme law making body".

107 The submission then contended that there was no issue here that the amendments did not act retrospectively.

108 On 29 January 1968, the people of Nauru adopted, enacted and gave to themselves their Constitution. Their Constitution "is the supreme Law of Nauru. A law inconsistent with this Constitution is, to the extent of the inconsistency, void "(Article 2).

109 Article 3, in Part II of the Constitution, has been refered to earlier in these reasons (paras 78-82) in a different context and for a different purpose. I reproduce Article 3 here :

3. Whereas every person in Nauru is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following freedoms, namely:-

(a) life, liberty, security of person, the enjoyment of property and the protection of the law;

(b) freedom of conscience, of expression and of peaceful assembly and association, and

(c) respect for his private and private life,

the subsequent provisions of this Part have effect for the purpose of affording protection to those rights and freedoms**, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by a person does not prejudice the rights and freedoms of other persons (my emphasis) or the public interest.**

The emphasised part of the Article is important. It recognizes that even fundamental rights and freedoms may, legitimately, be subject to limitations, when they are designed to ensure that they do not prejudice their enjoyment by others or when they are the general public interest.

110 Further, it is to be noted that the Constitution envisages, indeed prescribes, that any limitations in the protection of rights and freedoms are to be contained in the Constitutional provisions relating to them.

111 There are some limitations in Article 10 of the Constitution to secure protection of law to all Nauruans. Articles 10(10) and 10 (II) contain some. There is no express limitation in Article 10 (3).

112 I have no doubt that the Act contains limitations, and significant limitations, on the Constitutional protection enjoyed by all Nauruans for the protection of law given to them by Article 10(3).

113 It is not clear to me whether the Act meant that, in assigning a legal representative to a person charged with an offence who does not have sufficient means to pay under Article 10 of the Constitution, the court must assign the Public Legal Defender; or whether it means that it only applies if the court chooses to assign the Public Legal Defender.

Section 50C (I) of the Act seems to suggest the former construction whilst section 54E (4) seems to suggest the later. In that regard there is possible conflict here.

Access to any Explanatory Memorandum, the Second Reading Speech and the Parliamentary Debates might have assisted in resolving this.

114 The DPP submitted that "the Constitution is the only written law in Nauru that makes provision for the assignment of counsel "(para 26 of written submissions of 15 June 2018.) The following was also submitted by the DPP:

> 28. On both a plain and purposive reading of section 50C (1) of the Criminal Procedure Act 1972 taken together with Article 10(3) (e) of the Constitution, when the Nauru Court of Appeal, Supreme Court or District Court is of the considered view that legal representation is desirable, it may invite the Director of the Office of the Public Legal Defender to provide a legal representative to represent an indigent person in court proceedings, both criminal and civil.
>
> 29. Further, on both a plain and purposive reading of section 50C(1) (c) taken together with Article 10(3) (e) of the Constitution, where the Nauru Court of Appeal, Supreme Court or District Court is invited to assign legal representation to an indigent person in court proceedings (criminal), and the Nauru Court of Appeal, Supreme Court or District Court determines that the defendant does not have sufficient means to pay the cost incurred; the Public Legal Defender is to provide legal aid, advice and assistance to that indigent accused person.
>
> 38. In the Nauruan context, Parliament has enacted law that clearly provides that it is for the Court to determine the *lack of means* question; but it is for the statutory office holder in the form of the Director of the Office of the Public Legal Defender to make a determination on the *interest of justice* question whenever the assignment of legal representation to an indigent person charged with an offence is implicated. It is not for the judicature to usurp the clearly delineated role of the legislature.

115 I assume that in para 29 reproduced above, the DPP intended this submission to apply where the court is invited, *and does* assign legal representation to an indigent person. That is the import of new section 50C (I) (c) and is consistent with para 26 of the DPP's submission, although inconsistent with para 38 reproduced above in my para 114.

116 The case which I have been appointed to hear and dispose of as a Judge of this Supreme Court is, in my view, an classic example of the Act providing a "blanket measure of universal application and of making no allowance … for unusual or exceptional circumstances", and in so doing not meeting, or even, on its face, attempting to meet, such circumstances.

117 The Act also, in my view, offends each of the conditions of legality, legitimacy and proportionality refered to by Oliver De Schutter. It also offends the "Siracusa Principles".

118 The Act provides that where the Director of the Office of the Public Legal Defender is unable to provide legal representation or has a conflict of interest "he shall engage a legal representative duly admitted… to do so where the interest of justice so require". Where that happens the maximum legal fees and disbursements to be charged for each case, inclusive of mentions, call overs and trial, shall not exceed $3000.

119 There are 16 defendants in this case. I am satisfied and find that they can only be represented fairly by no less than four counsel. Between August 2016 and January 2018 the defendants incurred expenses of nearly $40,000.Between September 2016 and February 2018 their Australian Lawyers incurred (by way of disbursements) just over $20,000. Further significant expenditure has occurred since the early months of this year. This case has been in and out of the courts in Nauru (and in the High Court of Australia) since July 2015. That is nearly three years ago.

120 It is true that the only figures for counsel fees are from the defendants' current legal team from Australia, including legal aid rates, including for counsel, in New South Wales. The Australian legal team are not contending for even Australian legal aid rates. I have not been provided with any figures relating to fees charged by the legal profession in Nauru. I thought at one stage the DPP was going to give me some figures as to this during oral submissions. In his recent written submissions it is said that he had asked at the hearing "to be heard on the issue of quantum should matters progress to that point."

121 Whatever that may be, in the present context I am satisfied and find that a statutory limit of $3000 for all legal fees and disbursements in this case, which has been before the court numerous times in the past nearly 3 years, where any pre-trial applications (and there has been notice of some) are set to be heard for two weeks from 23 July 2018 followed by a trial which is set for 4 weeks, is

so absurd that it invites a conclusion that the Act was passed after 29 May 2018, not with the legitimate objective of invoking a reasonable policy for legal aid in Nauru consistent with limited funding here and balancing the interests of all Nauruans, but to frustrate the defendants' Notice of Motion that I am deciding.

122 This conclusion would apply with equal force to a not insignificant number of cases in the courts of this country where local legal practitioners are engaged by the Director of the Office of Public Legal Defender. Certainly no legal practitioners from outside this country could be engaged at a limit of $3000, including disbursement and the trial. Travel costs alone would prohibit this.

123 I have earlier reproduced para 38 of the DPP's recent submission in which it is submitted that the Act provides that it is for the Court to determine "the lack of means question", but it is for a statutory office holder to determine "the interest of justice question". "It is not for the judicature to usurp the clearly delineated role of the legislature."

124 This submission suggests that the court, under Article 10(3) (e), can only decide the lack of means question, and that it is someone else who determines the interests of justice question under Article 10(3) (e).

125 If this is to be accepted by me, which it is not, it means that the Parliament has "rewritten" this Article of the Constitution so that it provides for other than what it plainly states.

126 There is no doubt that the Nauruan Parliament is the sovereign law-making body in this country, subject to the Separation of Powers, and, vitally, subject to the Constitution. That is the "supreme law of Nauru" and a law inconsistent with it is, to the extent of the inconsistency, void.

127 My conclusion is that, for the above reasons, the Act is inconsistent with the Constitution. I am of the view that the whole of the Act is inconsistent with those provisions of the Constitution by which all Nauruans are secured with the protection of the law, including in particular Article 10(3) (e). No provisions of the Act can, in my view, be excised to remove their inconsistency with the Constitution.

128 I would declare the Act wholly void.

129 Before leaving this issue, I have reproduced part of the DPP's submission that "it is not for the judicature to usurp the clearly delineated role of the legislature." I have also reproduced an extract from the House of Commons Standard Notes that "the UK Parliament can enact any law whatsoever on any subject whatsoever". I do not know what the UK Bills of Rights says as to how amendments to it can be made.

But I am not dealing with an amendment to the Nauruan Constitution, nor am I dealing with the rules of Nauruan constitutional law. The Nauruan Constitution expressly provides that a law (presumably of the Parliament of Nauru), is void if inconsistent with it. This court has the Constitutional power to declare a law void. I consider that I should do so here.

130 In para 45 of the DPP's recent submission, this was stated:

> 45. In Ahnee v Director of Public Prosecutions (1999) 2AC 294, the Board had considered the question whether under the Constitution of Mauritius the Supreme Court had an inherent power to punish for contempt of court. Lord Steyn at p. 302 stressed the importance of the structure of the Constitution of Mauritius and stated that it was based on the Westminster model. At p. 303, Lord Steyn observed in respect of the structure:
>
> "First, Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave each arm of government such powers as were deemed to be necessary in order to enable the judiciary to discharge its primary duty to maintain a fair and effective administration of justice, it follows that the judiciary must be an integral part of its constitutional function to have the power and the duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it."
>
> 46. The underlined principles hold true for the Republic of Nauru.

131 Nauru is a democratic state constitutionally based on the rule of law. The Rule of Law identifies, defines and protects our freedoms, our rights, our responsibilities and the way we interact with others with whom we live in our community.

At the heart of the Rule of Law in the legal system here lie four core principles. First, that a civilised community must be governed by general rules that are laid down in advance. Secondly, these rules (and no other rules) must by applied and enforced. Thirdly, disputes about the rules must be resolved effectively, independently, and fairly. And fourthly, that the government itself is bound by the same rules as citizens and that disputes involving governments are resolved in the same way as those involving private parties.

Judicial independence is vital to the upholding and the preservation of the Rule of Law in this society. An impartial and independent judiciary keeps the Executive and the Parliament within the bounds of law. The effectiveness in securing the Rule of Law depends on both the fact, and the perception, of judicial independence.

The independence and impartiality of the Judges of the courts in Nauru are not rights, or worse privileges, that we each have. They are rights that every Nauruan has, and the oath I took before the Acting President, the Honorable David Adeang MP, on 13 March 2018, was an oath I swore to all the people of Nauru.

132 Nothing that Lord Steyn said in *Ahnee* in 1999 suggested that the judiciary could play no role in keeping the Parliament within the bounds of law, including upholding the Nauruan Constitution when the Court considers that the Parliament has enacted a law inconsistent with it.

The second question - Can I order the Republic to pay the costs of assigned legal representatives?

133 This question is whether, if I have power to order a legal representative or legal representatives to be assigned to the defendants, do I have power to order that the Republic pay the reasonable legal costs of any legal representative I order be assigned to the defendants, or can I only order legal representatives to be assigned on a *pro bono* basis.

134 I note in regard to this question that the DPP's submission in para (61) of his written submissions was that the Public Legal Defender was an advocate capable of ensuring that the defendants' defence is properly and adequately placed before the Court. It was not submitted by the DPP that I had power to assign the Public Legal Defender, or his Office, as the defendants' legal representatives. He was, in my view, correct in not so submitting as s 50C of the Criminal Procedure Act, 1972 provided, at the time of the submissions before me, that the Public Legal Defender's functions included the provision of legal aid and advice to persons when requested to do so by the Supreme Court, but subject to the availability of resources and staffing.

135 The DPP referred me to Article 14(2) (d) of the Constitution of the Republic of Fiji 2013 which provided similarly to Article 10 of the Constitution of Nauru. The Constitution of Fiji provides that a person who is charged with an offence has the right, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so required, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission and to be informed promptly of this right. It was submitted that this Article amended the Constitution of the Republic of Fiji of 1997 which provided every person charged with an offence with a right, if the interests of justice so required, to be given the services of a legal practitioner under a scheme of legal aid.

136 The Director submitted that these provisions in the Constitution of Fiji "does not permit every accused person to call upon the State to provide defence counsel at the State's expense. All factors relating to legal aid must be taken into account, including the accused's monetary circumstances and need for legal assistance in the particular circumstances" (Attorney General of *Fiji v Silatolu*

(2003) FJCA12). In a decision in 2008, the Supreme Court of Fiji held that that provision " of the Constitution does not give an absolute right in every case, to be given the services of a legal practitioner, paid for by the state nor an absolute right to a lawyer of one's own choosing*". (Ledua v State (2008) FJSC31*). The DPP also cited *Clark v Register* of the *Manukau District Court* (2012) NZCA 193, para 94, where the New Zealand Court of Appeal said:

> [94] In contrast, the state assumes a positive obligation under s 24 (f) to fund legal assistance for those charged with an offence if the interests of justice so require and the person does not have sufficient means to provide that assistance. It is for the state to determine the means by which it will meet that obligation. The court will be reluctant to interfere with the policy adopted in the absence of clear evidence that the purpose of the right is not being fulfilled.

137 In paragraph 13 of this decision I reproduced paragraphs 5 to 7 of Mr Hearn's affidavit of 26 February 2018. The affidavit of Salote Tagivakatini of 23 March 2018 refers to these three paragraphs in this way:

> 4. I am unaware of the veracity of the paragraphs 5, 6 and 7 and cannot comment on the same.

The deponent was a Police Legal Advisor in the Office of the DPP.

The current DPP was the Public Legal Defender as at 16 June 2015 and at the time charges against most of the defendants were laid. I was not informed when he ceased to be the Pulbic Legal Defender and whether that was before or after 12 May 2016, the date that the Office of the Public Legal Defender was "formalize(d) what up until (then) has been an office which is a creature of public policy" (see paragraph 74 herein).

138 On a number of occasion during the hearing on 28 and 29 May 2018, I raised with counsel for the DPP that I may accept paragraphs 5 to 7 of Mr Hearn's affidavit in the absence of anything to the contrary. I received, and have received, nothing to the contrary.

139 I am satisfied and find that the facts stated in these 3 paragraphs are true and correct. I am satisfied and find that the then Public Legal Defender had received orders not to provide representation to any of the persons charged in relation to the events outside Parliament on 16 June 2015.

140 I received no clear and unambiguous assurance by anyone who was involved in the hearing before me in late May 2018 that the position I have found to exist in June 2015 has changed.

141 I also note that there are currently two admitted barristers and solicitors in the Office of the Public Legal Defender (including the Public Legal Defender) and two admitted Pleaders. I have concluded that 4 lawyers are required for the defendants here to receive fair trial. If the Office of the Public Legal Defender

was assigned to this trial, all of the lawyers there would be engaged solely in these proceedings for the next over 2 months, leaving no one in that office to appear for anyone else.

142 Further, although Kristian Aingimea, a Pleader employed at the Office of the DPP, met with the Public Legal Defender on 1 May 2018 (see his affidavit, para 7) he did not, apparently, discuss with him whether his Office would, or could, appear and act for all the defendants in this matter in the coming months, or at all. It is one thing for the Public Legal Defender to act for one of the defendants (which may have been after that person had pleaded guilty), it is quite another for his Office to act for all remaining defendants at and before their trial.

143 There is also nothing before me to indicate that the Office of the Legal Public Defender has received no instruction or direction from anyone regarding acting for the defendants, as I have found to have occurred in the case of the current DPP when he was the Public Legal Defender.

144 This brings me back to the authorities cited by the DPP to which I have referred in paragraph 136 above.

Counsel for the defendants referred me to a Samoan case in 1988 where the Supreme Court of Samoa answered two questions relating to the Constitution of Samoa which is in very similar terms to Article 10 (3) of the Nauruan Constitution. The first question: "Does the Constitution require the State to furnish every person charged with an offence with free legal assistance if he has insufficient means to pay for legal assistance and the interest of justice so require?" was answered "Yes" by the Court. The second question, whether the Constitution requires the State to furnish any such person with legal assistance of his own choosing was answered "No", "once a defendant embarks under a state funded scheme". If he does that counsel will be assigned to him and he has no choice in the selection of that counsel.

145 I consider that the authorities referred to in paragraphs 136 and 144 above (and other authorities cited to me during the hearing) indicate the following:

(1) that the Nauruan Constitution does not give an absolute right to the defendants before me to have the services of a legal practitioner or of legal practitioners of their own choosing paid for by the State of Nauru.

(2) that the defendants are not precluded by the Constitution in having legal practitioners of their own choosing assigned to them, and paid for by the State of Nauru, if the circumstances and the interests of justice so require.

(3) that the circumstances and the interests of justice will include whether there are available on Nauru lawyers who are willing, qualified and available to be assigned to them. They will include when the trial is due to commence and the preparation required for it. They will include

whether there are already lawyers who are willing, qualified and available to be assigned to them and the work already done by those lawyers in preparation for trial. They will include a consideration as to the extent of any lawyer/client confidence that has already been established. They will include whether the defendants have confidence in any lawyers on Nauru that may be willing, qualified and available to act for them. They will include a consideration of the money already spent on lawyers already engaged. They will include the seriousness of the charges faced by the defendants, the complexity of the issues in the case and the volume of the brief of evidence.

(4) that the right to a fair trial according to law, as guaranteed to these defendants by the Constitution, is paramount.

146 Relevant to the matters referred to in paragraph 145 above are the following:

(1) My finding that the defendants were denied legal representation by the Public Legal Defender on Nauru in the aftermath of the events at the Parliament on 16 June 2015.

(2) I find that as a result of (1) the defendants were forced to seek legal representation off Nauru. They, I find reasonably, chose to seek it in Australia. Mr Graham Hearn was the second lawyer they sought after the first was denied a visa to enter Nauru.

(3) Mr Graham Hearn has been the Solicitor on the record in this Court as acting for the defendants since August 2016. This includes the four defendants who pleaded guilty.

(4) The four Australian counsel have also acted for the defendants since August 2016.

(5) There has developed a strong mutual confidence between the defendants and their five Australian lawyers in the last nearly 2 years.

(6) Numerous hearings have occurred here with their Australian legal team representing the defendants.

(7) The defendants and their Australian legal team have expended very significant sums of money up to this time, and there are no monies left.

(8) My not being satisfied that there are sufficient lawyers (including Pleaders) on Nauru who are willing, sufficiently qualified and available to give legal representation to the defendants before and at their trial commencing in about 4 weeks, such that that trial is a fair one according to the Constitution of Nauru.

(9) The lack of any indication from anyone that the Office of the Public Legal Defender has received no instruction or direction from anyone

regarding that Office acting for the defendants, and that no such instruction or direction will be given to anyone from that Office.

(10) My finding, which I now make, and of which I am satisfied beyond any doubt, that the defendants will only receive a fair trial, guaranteed to them by the Constitution, over the next several months, if their current Australian legal team is assigned to them by me, under Article 10 (3) of the Constitution.

147 I conclude that I can, by law, order the Republic of Nauru to pay the costs of legal representation that I assign to the defendants in this case.

I reject the submission of the DPP that I can only order legal representation to the defendants by assigning legal representatives who are prepared to act *pro bono*. I consider that that is not only wrong as a matter of law, and in principle, but it is unworkable in practice. How would a court find such legal representation?

The Public Legal Defender does not work *pro bono,* nor would, I imagine, any Pleader on Nauru. The Court would have to look elsewhere and the same problem that has arised in this case may likely arise again. I refer to this when I deal with Question 3.

The third question – Do the defendants have a legal right to have lawyers they choose assigned to them? If not, should I assign their current lawyers to them for the trial? I so, should I order the Republic to pay their reasonable legal expenses?

148 The first question posed above is answered. “No.” The defendants here have no legal right to have lawyers they choose assigned to them. That is clear on the authorities. It is also clear that there is nothing in the Constitution, or at Law, that would preclude lawyers they choose being assigned to them by the Court.

149 I have, when considering Question 2 above, already refered to circumstances and facts I consider to be relevant to a consideration of assigning the defendants’ Australia legal team to them for their trial.

150 I now refer to an aspect of the case that formed a large part of the DPP’s submissions before me. I am in no way critical of him in doing so. This was that the defendants’ Australian legal team informed the Court, and led the DPP to believe, at least in the early stages, that they were and would be representing the defendants’ *pro bono*. There were fundraising activities here and in Australia to raise funds for their legal expenses and the defendants and others paid for some of those expenses.

151 As indicated above, I have found that their seeking legal assistance outside of Nauru was the result of their being denied legal assistance here.

152 The position regarding their Australian legal team described in para 150 above continued for some time. In September 2016 Mr Hearn informed the DPP he could only then arrange legal representation for a two week trial period. On 6

July 2017 this Court, and the DPP, were informed that legal representation for the trial could not be assured and that some application may need to be made as to that matter and/or for a stay until legal representation could be assured.

The defendants' Notice of Motion dated 26 February 2018 is that application.

In August 2017 it was announced publicly in Nauru that a retired judge from Australia would be appointed to hear this case.

In November 2017 the Republic terminated the retainer of Ashurst Australia, solicitors in Australia, and the Australia barristers who had been briefed to act for the DPP and had so acted in this case since June 2017.

The fact that these Australian lawyers were so briefed had caused the trial that had commenced in the District Court of Nauru, with the defendants being represented by their Australian legal team, and had been adjourned to resume on 24 July 2017, to be abandoned at the instigation of Ashurst Australia.

The briefing of Ashurst Australia and the Australian barristers led to the compilation of a "new brief of evidence (expanded from one volume, to eight volumes plus electronic material such as audio recordings of interviews with witnesses and video evidence "(see defendants' written submissions para 35).

I accept the defendants' submission (in para 37) that " it (was) in this context of a fundamental change of circumstances that the (defendants') legal representatives properly indicated they could no longer commit to appearing without payment and flagged the making of (the) application (before me) and pursued it, in a timely fashion."

I am satisfied that any delay since flagging it, if it could be considered a delay, resulted from the announcement that a retired judge from Australia would be appointed to hear this case.

There is no evidence before me as to whether anyone on Nauru, apart from the defendants, explored alternative legal representation for the defendants for the trial with the Office of the Legal Public Defender, between July 2017 and February 2018.

As indicated earlier in these reasons I have no information before me as to whether there is any lawyer on Nauru who is willing, qualified and able to represent the defendants at their trial.

153 I was informed on 28 May 2018 by Counsel for the defendants that if the trial was to proceed on 6 August 2018 in the absence of any orders of the type sought in paragraphs (1) to (4) of their Notice of Motion of 28 February 2018, it would proceed without the defendants' Australian legal team.

154 The only conclusion I can come to is that, in that event, it would proceed where the defendants are unrepresented.

155 I have no doubt that, in that event, the defendants would not get a fair trial. In coming to this conclusion, I take into account the history of the case, the size and complexity of the case, the number of defendants, and some of the matters referred to in paragraphs (27) to (64) of Mr Hearn's affidavit that I reproduced in para 24 of this decision, in particular, but not limited to, paras 27, 29, 56, 57, and 58.

156 Further, I consider that this state of affairs has occurred through no fault of the defendants or any of them. I consider that they did all they could in seeking legal representation from off Nauru when they were denied it on Nauru, and the fact that money and resources for legal representation is now exhausted is not to be attributed to anything any of them have done, or failed to do. This is partly, but significantly, due to the matters to which I refer in para 152 of these reasons.

157 For these reasons I shall order that the defendants' Australian legal team be assigned to them forthwith upon the making of this order.

158 I consider that I may also order that the Republic pay the reasonable legal expenses of the defendants' Australian legal team. Subject to the paras that immediately follow, I consider that I can and should so order. In addition to what I have earlier referred to, I agree with and adopt paras 15 to 24 of Counsel for defendants' written submissions (reproduced in an attachment hereto). The authorities there cited are wholly persuasive in this case.

159 The costs orders to which I have referred in paragraphs 157 and 158 above must be subject to my being satisfied that the defendants have insufficient means to pay the costs incurred. This is linked, at least partly, to the next question as to what are those costs.

160 In addressing this question, should I consider whether the defendants have the means to pay what would, on my findings, be the hypothetical legal representatives on Nauru charging local rates, or should I consider whether they have the means to pay what I consider to be the reasonable legal expenses of their Australian legal team.

Further, should I consider the 16 defendants separately, or together. That is, must they each have insufficient means or must they together have insufficient means.

161 In my view I do not have to decide either of these issues. Firstly, having local lawyers on local rates is hypothetical, because I have not been able to find that is practical in this case. And second, I am satisfied and find on the evidence before me that together the defendants have insufficient means to pay the legal costs of either their Australian legal team, or of a team of local lawyers at local rates.

162 The evidence before me as to the defendants' means is in Mr Hearn's two affidavits. There is a further affidavit of a defendant Mathew Batsiua that was affirmed on 14 June 2018, and filed at court. I receive and read that affidavit. It discloses that Mr Batsiua no longer receives rental income from his home. His tenant "abandoned" the lease on 15 June 2018. Mr Batsiua states in his affidavit that his tenant (a business associate with the Ministry of Health) had told him that she had been directed by the Government to abandon the lease immediately and vacate the premises. The rental income on his house had been $5000 a month. That was easily his greatest income. Without that, his pension income is less than one-fifth of his monthly outgoings, with a wife and 4 children to support. Otherwise, his house has a modest value and he has minimal amounts in assets in this country and overseas.

The evidence is that Mr Batsiua is unemployed, and Exihibit J to the Hearn affidavit of 16 February 2018 refers to him being on the "blacklist".

163 The exhibits indicate that Mr Batsiua is one of the few defendants with a house. Of those who have houses their value is modest. The income of those who had an income is also modest. The majority were unemployed and those who had so indicated had added the word "blacklist" to the exhibits.

164 It is not necessary, or appropriate, to refer here in detail to these Exhibits. It suffices for me to say that they indicate that most of the defendants are in a poor, if not dire, financial state.

The exhibits disclose to me that neither individually nor together do the defendants have sufficient means to pay the costs already incurred or that will be incurred should either their Australian legal team or any Nauruan legal team, if one could be assembled which I am satisfied could not happen, be assigned to them.

165 I so find.

The fourth question- What legal expenses should I order? And how should I do so?

166 The defendants' Australian legal team sought that the Republic of Nauru pay their reasonable legal fees incurred prior to and after 7 May 2018 (being the date originally set to hear their Notice of Motion).

At the hearing on 28 and 29 May 2018 it was indicated that they sought their legal fees from 6 July 2017 onwards. This was the date when they informed the Court and the DPP that they could not assure the Court of their continued representation of the defendants and that an application of the type made on 26 February 2018 may need to be made.

The defendants' legal team sought solicitor and counsel fees at a daily rate of $750. This is the same as legal aid rates in New South Wales for an instructing

solicitor, if one ignores the $210 per day for each co-accused represented by the solicitor.

The rate of $750 per day for each counsel is significantly less than legal aid rates in New South Wales of $1140 per day plus $220 per day for each co-accused represented by each counsel.

The above rates are for the trial and do not take account of a higher scale for those on a specialist barristers panel for complex criminal matters.

Me Hearn would be appearing for all defendants and the 4 counsel would each be appearing for multiple defendants.

167 Allowing 10 days for preparation from 9 July 2018, 10 days for pre-trial hearings from 23 July 2018 and 20 days estimated for the trial from 6 August 2018, that produces a total sum of $150,000 for the 5 lawyers from Australia who have constituted the defendants' Australia legal team thus far. This is for 40 days at $750 per day for 5 lawyers.

Disbursements for the Australia legal team is projected to be $51,240 from July 2018.

168 Counsel and solicitor fees between 26 February 2018 and 30 May 2018 are submitted to have been $14,250.Disbursements in this period were $8531.90.

169 I have only refered to sums since the filing of the defendants' Notice of Motion of 26 February 2018 as I am not prepared to go back to 6 July 2017, notwithstanding that a trial that was then part heard was abandoned through no fault of the defendants or their legal representatives.

170 The sums in paras 167 and 168 above total $224,021.90.

171 I refered earlier to the DPP's recent submission that stated that he had, during the hearing on 28 and 29 May 2016, asked to be heard on the issue of quantum " should matters progress to that point". No submissions were made in his written submissions of 15 June 2018.

It was and is not clear to me when it is the DPP wants to be heard on quantum. Counsel for the defendants submitted in their written submission dated 21 May 2018 that "a day rate of $750, for each legal practitioner would be appropriate, plus travel-related expenses. These are matters that can be the subject of negotiation between the parties in the event an assignment is made requiring payment of fees or a stay until such payment is made".

172 The problem I have with this is that preparation work by the defendants' Australian legal team must start on 9 July 2018. That is only 2 weeks away.

Further, the defendants' Australia legal team have requested that funds for their legal expenses be deposited in Mr Hearn's trust account in Sydney before they commence work in preparation for the trial.

173 I do not know whether the Nauruan Government will deposit any funds in Mr Hearn's trust account, or indeed pay any funds into this Court so that such funds can be distributed to the Australian legal team under certificates issued by me as and when I am satisfied, from the time to time, that certain fees and expenses have been incurred.

174 I shall order that the Republic of Nauru pay into this Court the sum of $224,021.90 by Friday 29 June 2018, unless some lesser sum is agreed between the DPP and the defendants' Australian legal team and such lesser sum is paid into Court by that date.

175 I shall, from time to time, certify payments to the defendants' Australian legal team to be made out of court upon my being satisfied that the fees and disbursements the subject of such payments has been incurred or expended.

The fifth question – Should I dismiss the defendants Notice of Motion as an abuse of process?

176 My answer is "No", for reasons that will be obvious.

The sixth question – If I do not make an assignment under Article 10(3)(e) of the Constitution should I stay these proceedings until arrangements are made for the defendants' Australian legal team to appear for them at the expense of the Republic of Nauru?

177 In light of the orders I shall make this question does not arise. It will arise if the trial, set to commence on 23 July 2018, does not proceed. In this regard I note para (49) o*f Ledua v The State* (2008) FJSC 31.

178 I conclude by noting that some elements of the Rule of Law are legally enforceable, like the right to a fair trial according to law. Other elements explain and justify enforceable rules, like the fact that our community must respect all individuals comprising it and it is therefore appropriately respectful to assume that a member of our society is good and law-abiding, unless the contrary is proved, and proved to a high standard.

179 If there is a "blacklist" in Nauru relating to the defendants in this case, a matter upon which I make no finding, it should, in my view, consistent with the above, be "shreded", in fact and at law.

I declare and order as follows:

1. I declare the whole of the *Criminal Procedure (Amendment) Act 2018* to be void and of no effect.

2. I assign the defendants' Australian legal team (as described in this decision) to represent the defendants at their trial, without payment by the defendants.

3. I order that the Republic of Nauru pay into the Supreme Court of Nauru the sum of $224,021.90, or such other sum as may be agreed between the DPP and the defendants' Australian legal team, by 5pm Friday 29 June 2018, for and on behalf of the legal fees and disbursements of the defendants' Australian legal team for the trial in this matter, and for some fees and disbursements already incurred.

4. Failing compliance with Order 3, I shall consider ordering a stay of the defendants' trial until Order 3 has been complied with.

I indicate, in respect of Orders 3 and 4, that I am and shall be ready and willing to carry out my Commission dated 13 March 2018 to hear and dispose of Supreme Court case No.12 of 2017 between the Republic of Nauru & Mathew Batsiua and others.

If the trial does not proceed on 23 July 2018, I shall hear any application regarding the bail agreements of the defendants.

I shall place the affidavits of Geoffrey Eames QC and Peter Law in a sealed envelope marked "Not to be opened other than by order or direction of a Judge of this Supreme Court of Nauru, which shall include me.

I publish my reasons.

Attachment

15. The international case law concerned with Article 14 of the ICCPR is clear. The State is obliged to fund the defence of an accused person in a criminal trial where the interests of justice have led to assignment.

16. In *Evans v. Trinidad and Tobago* 21 March 2003, UNHRC, 908/20002 the Human Rights Committee stated at 6.6:

> "*As to the claim that he was denied access to the courts in not being provided with legal aid to make a constitutional challenge on the issue of the length of the sentence imposed upon commutation, the Committee recalls its prior jurisprudence **(12)** that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in all cases but only in the determination of a criminal charge where the interest of justice so require. The Committee is therefore of the view that the State party is not expressly required to provide legal aid outside the context of a criminal trial. As the author's claim relates to the commutation of his sentence rather than the fairness of the trial itself, the Committee cannot find that there has been a violation of article 14, paragraph 1, of the Covenant, in this respect."*

17. Ample other authority exists as to the obligation on the State to fund the trial (including pre-trial phases) of the indigent defendant pursuant to Article 14:

> *Levy v. Jamaica* 3 November 1998, UNHRC, 719/1996
>
> *Johnson v. Jamaica* 25 November 1998, UNHRC, 592/199
>
> *Krasnova v. Kyrgyzstan* 29 March 2011, UNHRC, 1402/2005

18. The situation is similar pursuant to Article 6(3)(c) of the European Convention on Human Rights.

19. The following commentary is useful:

> "*One of the fundamental procedural rights of all people accused or suspected of crimes is the right to legal assistance at all stages of the criminal process. But it is not enough to merely allow a theoretical or illusory right to legal assistance. The right must be practical and effective in the way in which it is applied. Accordingly, people charged with crimes should be able to request free legal assistance from the outset of the investigation if they cannot afford to pay for that assistance themselves. This ensures that indigent suspects and defendants are able to defend their cases effectively before the court and are not denied their right to a fair trial because of their financial circumstances. 8. Legal aid also has broader benefits for the system as a whole. A functioning legal aid system, as part 8 of a functioning criminal justice system, can reduce the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison*

overcrowding and congestion in the courts.1 9. The United Nations General Assembly recently adopted the world's first international instrument dedicated to the provision of legal aid. The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems2 ("the UN Principles and Guidelines") were approved on 20 December 2012. They enact global standards for legal aid, and invite States to adopt and strengthen measures to ensure that effective legal aid is provided across the world:

"Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution".3 10. The right to legal aid is established explicitly in Article 6(3)(c) of the European Convention on Human Rights ("ECHR") and in Article 14(3)(d) of the International Covenant on Civil and Political Rights ("ICCPR"). The European Court of Human Rights ("ECtHR") has developed detailed rules about how legal aid should be provided, many of which have been affirmed by the UN Human Rights Committee applying the ICCPR".

20. The DPP's suggestion that Article 10(3)(e) could be interpreted to only apply when pro bono representation is available is not based on any legal foundation whatsoever. It should be rejected by the Court.

21. The fact that the constitutional regime in Fiji refers specifically to "*the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission*" does not support a conclusion that a defendant in a criminal trial in Nauru is not entitled to legal representation funded by the State. It rather reflects that in Fiji the Legal Aid Commission is a creature of the Constitution.

22. Various jurisdictions throughout the Pacific have given effect to Article 14 of the ICCPR by, amongst other constitutional provisions, the creation of a legal aid service in the structure of the constitution. For example, the provision of a Public Solicitor in Solomon Islands: Article 92 *Constitution of Solomon Islands*; the provision of a Legal Aid Commission: Article 118 *Constitution of the Republic of Fiji*; the provision of a Public Solicitor: Article 56 *Constitution of the Republic of Vanuatu.*

23. The Public Defenders Office in Nauru is not created by the Constitution, contrary to the position in many of its Pacific neighbours. This is why such an office is not referred to in the terms of Article 10.

24. The Constitution of Samoa is in similar terms to the Constitution of Nauru in respect of the right to legal representation, with Article 9(4)(c) stating:

(4) Every person charged with an offence has the following minimum rights:
(a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) To have adequate time and facilities for the preparation of his defence;
(c) To defend himself in person or through legal assistance of his own choosing and, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

Footnotes omitted.