IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M37 of 2011

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

KINZA CLODUMAR
Appellant

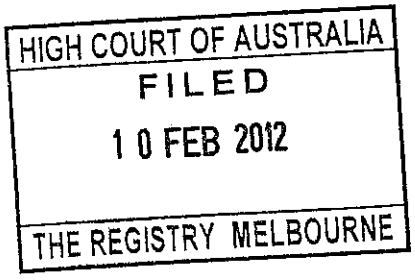
and

NAURU LANDS COMMITTEE
First Respondent

and

JANELLA ATSIME, ARAMWIT DEDUNA, BRODINE DEDUNA, JASON DEDUNA, JENA DEDUNA, DENEIY DEDEUNA, DORA DEPAUNE, DOREEN ADUMUR (EST), RABWIDO DEDUNA, RUBBER DEDUNA, BRIDELIA EDWARD, PAULINA HARRIS, JAYLEEN MENKE, JURAN SCOTTY, GEORGE TAGAMAOUN, DORIS CALEB, BELINDA TAGAMOUN, ANGELLA TAGAMOUN, JOHN TAGAMOUN, WAYNE TAGAMOUN, JAMIESON TAGAMOUN, VICTOR TAGAMOUN

Second Respondents



FURTHER SUBMISSIONS OF THE APPELLANT

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PART I: Publication of Submission

The appellant certifies that this submission is in a form suitable for publication on the internet.

PARTS II , III, IV and V: Issues presented; Judiciary Act certification; Citation of primary decision; Relevant findings of fact

These matters are addressed in the appellant's submissions filed 13 September 2011 ("**the Appellant's First Submissions**"), and do not require supplementation.

Notwithstanding that the first respondent has issued a notice pursuant to s.78B of the *Judiciary Act 1903* (Cth), the appellant contends that no question of the interpretation of the Constitution arises in this proceeding.

10 **PART VI: Argument**

1. Since the Appellant's First Submissions were filed, amongst other things:

   (a) The first respondent filed two affidavits made by its then solicitor, Mr David Lambourne, and filed written submissions dated 11 October 2011 ("**the Respondent's First Submissions**");

   (b) Orders were made by the Honourable Justice Gummow on 22 November 2011 providing for the addition of numerous persons collectively as the second respondents to the proceeding, and for the filing of further evidence and submissions by the parties;

   (c) The second respondents have indicated that they do not intend actively to
20 participate in the proceeding;

   (d) The appellant filed affidavits made by Remy Namaduk on 7 December 2011 and Peter MacSporran on 8 December 2011;

   (e) The first respondent has indicated that it does not propose to file any further evidence.

2. These further submissions are intended to supplement the Appellant's First Submissions, having regard to the evidence which has emerged since they were filed,

and so as to respond to the Respondent's First Submissions. The appellant otherwise continues to rely upon the Appellant's First Submissions.

Cogency and authenticity of the fresh evidence

3. The Namaduk affidavit puts to an end any concern about the authenticity and cogency of the new evidence sought to be adduced on appeal. He produces as exhibit RN-1 the original file relating to the land transfer, including the original of the document constituting the Presidential Approval bearing the signature of the late President Rene Harris. His evidence is persuasive. The First Respondent's decision not to file any evidence in response to the Namaduk affidavit is significant. It should be inferred for the purposes of this proceeding that his evidence is unquestioned.

Availability of evidence at trial with reasonable diligence

4. Mr Namaduk's evidence also makes it clear that there were no steps reasonably open to have been taken by the appellant which would have enabled him to place the Presidential Approval before the Court at trial. Mr Namaduk was instructed by President Harris to keep the file containing that document secret from the appellant, and did so.[1] Subsequently Mr Namaduk inadvertently took the file into his personal possession, where it remained until very recently.[2] It came to light only as a result of a chance enquiry made by the appellant's solicitor, Mr Keke, about another transfer referred to on the same approval document and which was connected to Mr Namduk's family.[3] Mr Keke's enquiry was prompted by the contents of the photocopy of the Presidential Approval document, which itself had come to light only in 2011.[4] It is not an enquiry which could reasonably have been expected to be made otherwise. There is accordingly no reason to believe that, at the time of the trial in 2002, reasonable diligence on the part of the appellant would have led him to discover that the Presidential Approval document was in Mr Namaduk's possession.

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[1] Namaduk affidavit at [7], [8]
[2] Namaduk affidavit at [10], [11].
[3] Namaduk affidavit at [12] to [15].
[4] Appellant's affidavit made 18 May 2011 at [8] to [14].

5. The Respondent's First Submissions suggest[5] that the appellant should have issued a subpoena:

   (a) to the President and/or the relevant Department to produce documents; and

   (b) to the President to give evidence at the trial.

6. It is clear from Mr Namaduk's evidence that the first of these suggested courses would have been to no avail, even if taken. Neither the President nor any Department had relevant documents. This is of course consistent with what enquiries made at the time had revealed.[6] We now know that this was because Mr Namaduk had the documents.

7. The second of these suggested courses, namely subpoena to "the President", was not a reasonable course for the appellant to have taken. First, there were at least two former Presidents who could conceivably have approved the transfer, namely Rene Harris (who as it happens was again the President at the time of the trial) and his predecessor Bernard Dowiyogo.[7] Secondly, the appellant had no reason to believe that either of them had done so, in view of the absence of gazettal of any transfer,[8] the fact that the first respondent had no record of approval,[9] and the absence of any other available documentary record of one. Finally, the evidence of the appellant's then lawyer, the highly experienced (in Nauru law and practice) Peter MacSporran,[10] is that on the information available at the time there was no proper basis to issue such a subpoena, and he doubts that the Court would have countenanced that course.[11]

No unfair prejudice in receiving the fresh evidence

8. The Respondent's First Submissions suggest[12] that the proposed fresh evidence should not be received because the first respondent would be unfairly prejudiced by the unavailability as witnesses of former President Rene Harris and former Chairman of the First Respondent, Mr Leslie Adam, both of whom are now deceased.

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[5] Respondent's Submissions filed 11 October 2011, at [52] sub-para (3)
[6] Appellant's affidavit at [14], MacSporran affidavit at [7] to [10]. See also exhibit DL-21 to the second Lambourne affidavit made on 12 October 2011
[7] MacSporran affidavit at [11].
[8] MacSporran affidavit at [7]
[9] MacSporran affidavit at [7].
[10] MacSporran affidavit at [3] to [5]
[11] MacSporan affidavit at [11].
[12] At [19] to [22]

9. As to former President Harris, his absence as a witness is no longer material (if it ever was) in view of Mr Namaduk's cogent evidence. The authenticity of President Harris's approval document, of which the original is now in evidence, should be accepted for the purposes of this proceeding. Of course, if this Honourable Court upholds the appeal and remits the matter to the Supreme Court of Nauru for re-hearing (as the appellant seeks), the first respondent will be free to contest that evidence on the re-hearing (albeit that its failure to contest it in this appeal suggests that no grounds for doing so are apparent to it).

10. As to Mr Adam, the evidence is that he died on 5 October 2011.[13] This appeal was filed on 18 May 2011, and the affidavit of the appellant was filed and served at the same time. No evidence is advanced by the first respondent as to any attempt to seek Mr Adam's response to that material in the succeeding several months before his passing. Any evidence which Mr Adam might have given should have been contained in an affidavit filed and served well before 5 October 2011. There is in the circumstances no reason to believe that Mr Adam may have contradicted the appellant's account of events. On the contrary, there is contemporaneous documentary evidence, in the form of a letter written by Mr Adam very close to the date of trial,[14] which tends to corroborate the appellant's account.

11. For the above reasons, there is no substance in the first respondent's objection to reception of the fresh evidence on the ground of unfair prejudice.

Nature of the appeal

12. The Respondent's First Submissions advance an argument that the appeal provided for by s.5 of the *Nauru (High Court Appeals) Act 1976* (Cth) ("**the Appeals Act**") is an appeal in the strictest sense, i.e limited to a consideration as to whether there was error below, and having regard only to the materials which were before the Court appealed from.

13. Some concessions are nonetheless properly made by the first respondent, and should be noted. The first respondent accepts that:

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[13] First Lambourne affidavit at [12]

[14] exhibit DL-21 to the second Lambourne affidavit; MacSporran affidavit at [9], [10]

(a) An "appeal" under s.5 of the Appeals Act is a proceeding in the original, not the appellate, jurisdiction of this Honourable Court;

(b) although the word "appeal", in its strictest sense, invokes no more than a search for error below having regard only to the material before the Court below, the word can have a variety of meanings depending upon the context in which it is used. Depending upon its context the word "appeal" may connote a wider inquiry with grater powers;

(c) there is no constitutional prohibition on this Court having jurisdiction conferred upon it to hear an appeal of a kind which does involve the reception of new evidence;

(d) the nature of the appeal provided for in s.5 is a matter of interpretation of the Appeals Act.

14. The interpretation of the Appeals Act must involve a consideration of the legislative purpose when that Act was enacted in 1972. The evident legislative purpose of the Appeals Act was to give effect to the treaty between Australia and the Republic of Nauru, the text of which is reproduced in the Act. Nauru, a small and newly independent (in 1968) Pacific neighbour, then had newly formed institutions, including a Parliament and a Supreme Court. It had enacted its own Constitution establishing its Supreme Court and conferring functions and powers upon it (capable of being supplemented by legislation), including providing for a domestic appeal process from a first instance decision of a Judge of the Supreme Court to a Full Court comprised of not less than two Judges, or to a Court of a foreign country.[15]

15. The possibility of legislative provision being made for appeal to a foreign Court (such as this Honourable Court) was thus envisaged at the moment of Nauru's independence. The reason for it is obvious; namely one of resources. In order for a domestic appeal process to operate, at least three Supreme Court Judges would be needed (not less than two Judges to hear the appeal, the third being the Judge whose decision was under appeal). However there was and is no real prospect of Nauru

[15] see Art. 57 of the *Constitution of Nauru*

having three or more Supreme Court Judges at any given time. It had not ever done so by 1972, and indeed it still has never done so.

16. What follows from the foregoing is that, at the time of the treaty being entered into, and the Appeals Act then being enacted, it was known to all concerned that the process provided for in s.5 of the Appeals Act would be in practice the only means by which the outcome of any matter presided over by a single Judge of the Supreme Court of Nauru could be reconsidered. It is unlikely therefore that either the states parties to the treaty, or the Parliament of the Commonwealth of Australia in enacting the Appeals Act to give effect to the treaty, intended to create only a restricted right of appeal.

17. There is no reason to conclude that the states parties to the treaty, or the Parliament of the Commonwealth of Australia in enacting the Appeals Act to give effect to the treaty, intended to replicate the appellate jurisdiction of this Honourable Court under s.73 of the Constitution. The circumstances described in paragraphs 14 to 16 above are remote from the circumstances which existed at the formation of the Australian federation, with each of the States maintaining and seeking jealously to preserve the jurisdiction of their respective appellate Courts.

18. The Respondent's First Submission also properly concedes that on an appeal to this Court under s.5 of the Appeals Act, the correctness of the determination of the Supreme Court is to be determined by reference to Nauruan law, which is picked up and applied as federal law.[16]

19. Nauruan statutory law does not explicitly identify the nature of an appeal, nor whether new evidence may be received on an appeal. Nor is there any decided authority on the question. In those circumstances, it is necessary to resort to the law of England as picked up and applied by Nauruan statutory law in cases where no local provision is made.

20. The Respondent's First Submissions respond[17] to paragraph [10] of the Appellant's First Submissions by pointing out that the modern English law permitting the

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[16] Respondent's Submissions filed 11 October 2011 at [24], acknowledging the authority on this point of *Ruhani v Director of Police (No 1)* (2005) 222 CLR 489

[17] at [39] to [41].

reception of new evidence on appeal is a creature of statute. That submission arises because paragraph [10] of the Appellant's First Submissions put the case too narrowly. That paragraph should also have made reference to s. 46 of the *Courts Act 1972 (Nauru)* as a relevant source of Nauruan law.

21. Section 46 of the *Courts Act 1972 (Nauru)* provides:

> **"PRACTICE AND PROCEDURE**
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> **46.** (1) The jurisdiction vested in the Supreme Court and the District Court shall, except where otherwise provided by any law for the time being in force, be exercised, so far as regards practice and procedure, in the manner provided by the Civil Procedure Act 1972 and any written law for the time being in force relating to the procedure in criminal causes and by such rules and orders of court as may be made pursuant thereto.
>
> (2) Where no provision is made by the Civil Procedure Act1972 or any written law for the time being in force relating to the procedure in criminal causes or by any rule or order of court made pursuant thereto,-
>
> (a) the jurisdiction of the Supreme Court shall be exercised in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice; and
>
> (b) the jurisdiction of the District Court shall be exercised in substantial conformity with the law and practice for the time being observed in England in the county courts."

22. Thus, Nauruan law picks up and incorporates not only English common law, but the whole of "the law and practice for the time being observed in England in the High Court of Justice". This includes applicable English statutory law.

23. Finally, the Respondent's First Submissions point out[18] that in those jurisdictions where fresh evidence is received on appeal, the protections in place are such that it will be permitted only in exceptional circumstances, involving "*some insistent demand of justice*".[19] So much is accepted. The fact that there might, albeit only in exceptional circumstances, be such an "*insistent demand of justice*" militates against concluding that the states parties to the treaty, and the Parliament of the

[18] At [46]
[19] *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444 per Dixon CJ

Commonwealth of Australia in enacting the Appeals Act to give effect to the treaty, intended to create a process which was incapable of responding to such a demand.

Dated: 10 February 2012

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