



**Judge's Chambers
Supreme Court of Nauru**

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Geoffrey Eames resigns as Chief Justice of Nauru

Negotiations with the Nauru government conducted by the Australian and New Zealand foreign ministers have failed to produce a public acknowledgment by the Nauru government that the arrest and deportation of the Resident Magistrate on 19 January 2014 constituted an abuse of the rule of law and a denial of the independence of the judiciary. Nor has the Nauru government withdrawn false allegations made by ministers against myself and the Resident Magistrate in its belated attempts to justify its unlawful actions. My own discussions with President Waqa failed to achieve any better outcome.

Following his meeting with Nauru's Justice Minister, the Hon David Adeang, and the Nauru Home Affairs Minister, the Hon Charmaine Scotty, the New Zealand Foreign Minister, the Hon Murray McCully, announced on 12 February 2014 that:

“Nauru’s ministers gave him assurances about the integrity and transparency of future judicial appointments and processes, and New Zealand maintains the right to suspend funding should this not happen” .

I welcome those assurances about the future, vague as they are, and hope that they are put into effect by government in choosing my successor. I note, however, that notwithstanding those assurances Minister Scotty later repeated her earlier false allegations that the judicial decisions in this case have been motivated by “cronyism”, an attack likely to undermine public confidence in the judiciary.

Given the government’s failure to concede that its actions against the Resident Magistrate and myself constituted breaches of the rule of law, it is clear that my relationship with government is such that I could no longer perform the duties of Chief Justice even if my visa was restored. I could not be assured that the separation of powers and the independence of the judiciary would be respected. This would greatly inhibit the role I could play as a judge of the Supreme Court.

Whilst I accept that it would not be appropriate for me to sit on many of the proceedings that have been brought or foreshadowed against the Nauru government arising out of recent events - because my own orders would be in issue - it would also be difficult for me to sit on any of the very many other cases in the court list in which the government is a party without attracting submissions that I should disqualify myself because of my criticisms of the conduct of the government.

Whatever may be the future intentions of the Nauru government concerning judicial independence it remains the situation that the Government has declined to reverse its decision to cancel my visa. I must now accept that it is impossible for me to perform the duties of Chief Justice from Melbourne.

I have therefore tendered my resignation to the President pursuant to Article 51(2) of the Nauru Constitution. The resignation will take effect immediately.

In announcing my resignation I think it important to place on the public record some of the background factors that have motivated my decision.

Judicial independence

It is to be kept in mind that, for reasons which had been comprehensively set out in his judgments on 9, 14 and 17 January 2014, the Resident Magistrate, Mr Peter Law (acting in his additional role as Registrar of the Supreme Court) found that there was a prima facie case that the deportation orders signed against two Nauru residents, Rod Henshaw and Hareef Mohammed, on 8 January 2014 by the Minister for Justice and Border Control were unlawful.

The deportation orders were made pursuant to December 2013 amendments to the Immigration Act 1999. The Resident Magistrate found significant deficiencies in the drafting of the amending legislation. He granted interim injunction orders staying the deportations and permitting the residents to apply for an order for judicial review by a Supreme Court judge.

The Minister for Justice sent an SMS text message demanding an explanation from the Resident Magistrate for his actions in staying a deportation order that had been “endorsed” by and “so-ordered” by Cabinet. As the Resident Magistrate pointed out, these were interim orders only, and if the government did not wish to wait for the judicial review hearings to commence in the Supreme Court, it had a right to review or appeal the Court’s interim orders.

In this case, however, rather than have its counsel attend the hearing which had been set down before the Registrar on Monday 20 January 2014 - so as to argue that the deportations were lawful - the government had Mr Law arrested and forcibly deported on Sunday 19 January, in defiance of injunctions granted by me from Melbourne and served in Nauru.

The government has never attempted to explain why the Registrar was wrong in interpreting and applying Nauru law as he did. Nor has the government sought to make a case in open court as to the invalidity of the Court’s orders.

As Mr Law noted on 9 January 2014, in his reasons for granting an interim injunction, the apparent problems with the 2013 legislation had been acknowledged in open court by the Solicitor General, Mr Steven Bliim, who had appeared for the government on that occasion. Mr Bliim subsequently resigned in protest at the treatment of Mr Law and myself, as did Ms Janine Hebiton, the Senior Government Lawyer with the Department of Justice.

Rather than debate the issues in open court the government sacked and replaced the Registrar/Resident Magistrate and later introduced a new Immigration Act that, unusually, was to operate retrospectively.

The Immigration Act 2014

The new immigration legislation allows for the arbitrary deportation of non-citizens without them being given notice or grounds for their deportation and it purports to deny the courts the right to review the decision.

The new Act is deemed to have commenced on 31 December 2013, 10 days before Mr Law made his first order. Furthermore, s.35 provides that:

“Any orders or legal proceedings commenced in any court or tribunal made under the repealed Act is (sic) no longer taken to be a valid proceeding and hence must be discontinued”.

The legislation specifies that that prohibition includes any proceedings by way of prerogative writ and judicial review. The new legislation has been made retrospective, so as to override rights that had previously existed under Nauru law.

Mr Henshaw was deported notwithstanding outstanding injunctions that had been issued by the Supreme Court. The new legislation has decreed that such proceedings and orders are no longer valid.

There is a serious question whether the new legislation is consistent with the Nauru Constitution.

The Constitution protects fundamental rights and freedoms, and provides in Article 10(9) that it is for “an independent and impartial court or other authority” to rule on the existence or extent of those civil rights. That determination shall be “fairly heard” within a reasonable time. Article 10(10) provides that proceedings to determine the extent or existence of any civil right “shall be held in public”. Article 8 provides that a person may not be deprived compulsorily of his property except for a public purpose and on just terms for compensation. Mr Henshaw and Mr Mohammed had operated separate businesses that were affected by the deportation orders.

All of those issues will need to be determined by a justice of the Supreme Court, but I could not myself sit on those cases.

Nor could the High Court of Australia deal directly with these or any other constitutional issues. Although it is the final appellate court under Nauru law for many disputes, the High Court does not have appellate jurisdiction to determine the interpretation or effect of the provisions of the Nauru Constitution. As an independent sovereign nation, that right resides exclusively with the Supreme Court of Nauru, but I am currently the only judge holding a commission.

For present purposes what is significant about the introduction of the Immigration Act 2014 is that by rewriting the legislation and making it retrospective the government has made a tacit admission that the government’s deportation orders under the 2013 legislation - which led to the crisis in Nauru - were indeed legally defective.

Sovereignty and the Rule of Law

In response to critics of its actions in deporting the Resident Magistrate in defiance of court orders, and in cancelling my own visa, the government declared that the criticism amounted to an attack on the sovereignty of the nation of Nauru.

That is not the case. The President has the constitutional right to appoint judges to the Supreme Court and - after consultation with the Chief Justice - to appoint magistrates. That does not mean, however, that the government has the right to arbitrarily dismiss judges or magistrates.

The government's conduct has attracted world-wide condemnation by organisations concerned with promoting the rule of law. The Commonwealth Magistrates' and Judges Association, for example, noted that as a member of the Commonwealth of Nations Nauru has committed itself to the fundamental values known as "*the Latimer House principles*" of 2003. Those principles have been stated and applied in numerous international instruments, such as the *Basic Principles on the Independence of the Judiciary*, endorsed by the General Assembly of the United Nations (of which the Republic of Nauru is a Member State) and the *LAWASIA Beijing Statement of Principles of the Independence of the Judiciary*, which was an agreed position of 32 Chief Justices of the Asia Pacific region, signed in 1997 by the then Chief Justice of Nauru and Tuvalu.

These principles require that in order to ensure judicial independence a judicial officer should not be removed from office except for proven serious misbehaviour and provided that he or she was first fully informed of the charges against him or her, had been given the opportunity to make a defence,

and been judged by an independent and impartial tribunal. None of those rights was granted to the Resident Magistrate. Instead, false and untested allegations of misbehaviour which the President himself had dismissed as baseless on 26 November 2013 , were adopted by the government in an unattributed media release after Mr Law had been deported.

The Nauru Law Society, stating that its members worked closely day by day with the Resident Magistrate, subsequently praised his performance and integrity and declared “We have lost another good man”.

Having regard to the failure to comply with the Latimer House principles, Chief Justices and a deputy Chief Justice of eleven Pacific Island nations who were meeting in Auckland last week expressed their deep concern about the state of judicial independence and the Rule of Law in Nauru.

The reality is that the government removed and replaced the Resident Magistrate in response to his decisions in the Henshaw and Mohammed cases. Its actions would have constituted a breach of the rule of law even if the Resident Magistrate’s decisions had been wrong in law. Rather than sacking a judicial officer with whose ruling it disagreed, a government which respected the rule of law would have appealed the decisions and/or had parliament alter or clarify the legislation so as to lawfully produce a different outcome.

In this case, however, the breach of the rule of law was exacerbated by the fact that the humiliating treatment of the Resident Magistrate, who was arrested, forcibly manhandled through a crowded airport terminal and deported under police guard, was a response to decisions by him that the

government now tacitly admits had correctly interpreted and applied Nauruan law as it then stood.

The allegations of “cronyism” and judicial corruption

The Nauru Constitution provides that a judge of the Supreme Court cannot be removed from office except on the ground of proved incapacity or misconduct and upon a vote of two thirds of the members of parliament. That protection from arbitrary dismissal ensures that judges cannot be successfully pressured by the threat of removal from office if they do not make decisions that favour the government. That safeguard provides fundamental support for judicial independence which, in turn, is an essential bastion of democracy. The independent and impartial role of the courts is not always accepted by politicians, however.

Minister for Home Affairs, Mrs Charmaine Scotty MP, complained about court rulings that had gone against the Executive, asserting that “in previous events we have had the Chief Justice overrule our parliament in regards our state of emergencies.” It is true that from time to time judges, including me, have ruled that governments had acted in breach of the Constitution or otherwise had exceeded their powers. In all such cases the decisions were supported by comprehensive written reasons. An independent judiciary must be willing to make conscientious decisions with which government may disagree.

The government did not move a motion in parliament for my dismissal. No allegations of misconduct have ever been made to me but reports suggest that I was accused by the government of “cronyism”, a vague charge for which no details were ever provided. Minister Scotty, said in a media interview that, “Sadly, the Chief Justice is part of this network of cronyism. They constantly

set plans in action that are detrimental to the well-being of our people and our country". She also said that I had an affinity with the opposition.

In a government media release on 24 February 2014, President Waqa said of the government's actions:

"Cleaning up cronyism and corruption was the first priority, because a level playing field was important for all Nauruans to prosper and have equal opportunity. We made the tough call to replace – and in some extreme cases, deport - high profile people who put their own interests above the interest of the nation, and we have brought credibility back to our legal system".

The President added that the government would decide who held key positions and that "people appointed from overseas" had engaged in unacceptable conduct that compromised their roles and had engaged in "clear conflicts of interest and disregard for the laws of our nation".

Those generalised complaints were obviously intended to embrace both myself and the Resident Magistrate. No evidence was presented to support those claims, which amount to allegations of corruption and abuse of our oaths of office. The claims of cronyism were first made only after the arrest and deportation of the Resident Magistrate (and the withdrawal of my visa) had attracted international criticism.

Any suggestion that the injunctions issued against the government were the product of "cronyism" is unjustified. The small number of graduate Nauruan lawyers has meant that since independence senior legal positions have usually been filled by expatriate Australian or New Zealand lawyers and

judicial officers. Indeed, in this case the government immediately replaced Resident Magistrate Law with an Australian lawyer who had been flown to Nauru.

Mr Law and I both knew Mr Rod Henshaw, who was one of the two people whose deportation was prevented by interim injunction orders. Neither of us knew Mr Hareef Mohammed.

In a small community it is inevitable that the judiciary will sometimes know people who come before the court as parties or witnesses. That is a situation which is addressed by well recognised legal principles. I followed those principles scrupulously in these cases.

The orders made by the Court were interim orders, that is, holding orders which preserved the status quo while allowing the parties an opportunity to later make more substantial submissions in a full hearing. Those orders had been made in circumstances of great urgency, at a time when no other judge or magistrate was available to deal with the matters. The principle of necessity is recognised to apply in such circumstances.

Of course, at no time did I consider sitting personally as the judge hearing the judicial review cases in the Supreme Court. That would clearly have been inappropriate. Both the Secretary for Justice and the Minister for Justice, as well as the other parties, had been informed a week before the unlawful deportation of Mr Law took place that I had arranged for Justice John von Doussa to sit on the cases. I had advised the government that I would seek a new short-term commission for him to do so, as his term as a Supreme Court Justice had ended in October 2013. Justice von Doussa did not know either of the two men who had been served with deportation orders.

The legal principles that were employed by the judiciary when making these decisions about the unlawful deportations were available to and protect all citizens and residents from the abuse of power by government.

At all times I have acted according to Nauruan law and with respect to my oath of office, which requires that “I will do right to all manner of people according to law, without fear or favour, affection or ill-will”. A similar oath was taken and honoured by the Resident Magistrate.

Until these recent events, I had enjoyed a good working relationship with all governments in office over the last three years. I was not a crony to any politician. I respected the separation of powers and kept a distance from members of parliament, except for formal occasions.

Without seeking or obtaining a two thirds vote in Parliament, as required by the Constitution on grounds of proved misconduct, the government effectively achieved my removal from the office of Chief Justice by the simple expedient of cancelling my visa.

Rather than bringing credibility to the Nauru legal system, the government’s actions against myself and the Resident Magistrate have undermined it.

The Future

Minister Scotty announced in the media that the Government wishes to “enhance and better” the legal system, and she proposed that the contract of the Chief Justice be no longer than “maybe two years”, and that there be six

monthly reviews of all judges' contracts. Such proposals are designed to interfere with judicial independence.

I am proud of the judgments that my colleague Justice John von Doussa and I have delivered in the Supreme Court over the last three years. I also acknowledge the dedication and conscientiousness of the Resident Magistrate and Registrar, Mr Peter Law. I have been pleased to be party to the many reforms and training programs that were initiated by Mr Law and myself.

Far from the judiciary being resistant to scrutiny or to modernising, Mr Law and I were the authors of many reform proposals, including the separation of the positions of Registrar and Resident Magistrate, the appointment of additional Supreme Court judges, the creation of a Court of Appeal and the introduction of a probation and parole service, among many other initiatives.

The government seems to be unaware that Mr Law and I have been strong supporters of the Pacific Judicial Development Programme (PJDP) , which is funded by the New Zealand government and administered by the Federal Court of Australia. It is specifically designed to enhance the judicial systems of Pacific nations. Nauru has benefitted from many PJDP programmes which we have helped design and deliver.

Ironically, the government's actions against Mr Law and myself meant the cancellation of the "Enabling Rights Project", which was to have been conducted in Nauru between 3 and 8 February 2014. That was to have been a wide-ranging consultation with stakeholders (including Minister for Justice Adeang) by Dr Livingston Armytage, Team Leader of PJDP, designed to identify unmet needs and access to justice issues.

Government should not interfere with the independence of the judiciary under the guise of “enhancement”. The Nauru judiciary has been committed to reform, guided by the International Framework of Court Excellence, which is promoted by the Australasian Institute of Judicial Administration (AIJA) and supported by the PJDP. The Framework seeks to ensure quality in the administration of justice. As a life member of the AIJA, I fully support its balanced initiatives in securing excellence in the administration of justice and transparent judicial reform.

In departing, I record my appreciation to the legal practitioners of Nauru, whose courage and dedication will provide the best safeguard of the rule of law in future.

I also thank the court staff who have put up with very cramped and unsatisfactory working conditions in providing valuable support to the judiciary, and have done so with loyalty and good humour.

As Chief Justice it has been both my duty and a privilege to defend the rule of law in Nauru, on behalf of all residents, both citizens and non-citizens.

I bid a reluctant farewell to the people of Nauru. I wish the nation well, as it faces many great challenges.



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