REPUBLIC OF NAURU

IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 12 of 2017

Between

THE REPUBLIC OF NAURU

Complainant

And

MATHEW BATSIUA & ORS

Defendants

Before:	Justice Geoff Muecke
For the Complainant:	Mr J 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
Dates of Hearing:	30, 31 July 2018 and 1, 2 August 2018
Date of Judgment and Orders:	13 September 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. The action was decided on 11 December 2014.

> On 16 June 2015, the abovenamed three suspended Members of Parliament joined several of their supporters for a protest to be staged at the Parliament Complex concerning their ongoing suspension. The Parliament was debating the national budget that day. The suspended Members of Parliament wanted to enter Parliament to participate in the important budget debate.
>
> The defendants in this criminal prosecution (or some of them) and others approached the police roadblock at Yaren District near the Catholic Church and some of them spoke to police. Police told the group that they needed to present a permit from the Commissioner of Police, and that they would not be allowed to proceed without it.
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> The defendants (or some of them) and others asserted that they had a constitutional right to protest peacefully, but police continued to block their passage. Doneke Kepae (now deceased) was one of the persons who spoke to police at the roadblock and asserted the constitutional right to protest peacefully.
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> A police officer said to Doneke Kepae words to the effect of "You can go back home and listen to the radio. I ask you to go back home and listen to it [Parliament] on the radio. There are other ways to air your grievances but this is not the way".
>
> Doneke Kepae said to the police words to the effect of "Well, it's peaceful. If it's peaceful we can … We believe that we have a constitutional right. Are you overriding our constitutional right?"
>
> A police officer responded with words to the effect of "We are not talking about overriding constitutional rights. The thing is we are just stopping you."
>
> Doneke Kepae said words to the effect of "What I am trying to tell you is that in the Constitution, we can do a peaceful protest."
>
> A police officer responded with words to the effect of "Yes, but you need to have a permit. You need to show us a permit. It's in the Act."
>
> Doneke Kepae said words to the effect of "And what happens to the Constitution? Do we throw it out? Let's just rip up the Constitution?"
>
> A police officer responded with words to the effect of "What we are doing is we have been given orders. We don't want to debate the argument."
>
> Doneke Kepae then said words to the effect of "Well, we can't bring our grievances."
>
> After some time spent trying to convince police to let them past and proceed down the road to Parliament, a number of defendants drove their vehicles over the aerodrome fence and

proceeded to drive along the inside of the fence until they came alongside Parliament House. (Exhibit D10)

3 From the next day, 17 June 2015, the Nauruan Director of Public Prosecutions ("the DPP") laid criminal 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 the day before.

4 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*.

5 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.

6 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.

7 The defendants first appeared in court in Nauru on 2 July 2015. They appeared before Magistrate Garo, of the District Court of Nauru. They appeared without legal representation.

8 On 17 January 2018, over two years and six months later, the parties appeared before the Chief Justice of the Supreme Court of Nauru when he listed a trial for the defendants to commence on 6 August 2018. His Honour further directed that any pre-trial applications were to be filed by 25 May 2018 which would likely be heard from 23 July 2018. He directed further that any other application the defendants might be advised to make must be filed by 16 February 2018. The directions to which I have just referred were made by the Chief Justice after it had been announced publicly on Nauru on or about 1 August 2017 that a Judge from Australia would be appointed a Judge of the Supreme Court of Nauru to hear and dispose of this case. On 13 March 2018, I was appointed as a Judge of the Supreme Court to do that and on that day I swore my oath as a Judge of the Supreme Court of Nauru.

9 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.

An affidavit of Christian Hearn dated 26 February 2018 was filed in support of this Notice of Motion.

10 Although it was anticipated that this Notice of Motion would be heard by me on 7 May 2018, it was ultimately heard on 28 and 29 May 2018 as I had been informed by the Solicitor-General of Nauru on 19 April 2018 that 7 May 2018 was not convenient for him to argue it.

11 On 8 May 2018, the Solicitor-General filed a Summons on behalf of the Secretary for Justice of Nauru and the Secretary for Finance of Nauru seeking, *inter alia*, that the defendants' application and orders sought in their 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". The Summons also sought "that the costs of and incidental to this application be paid by the accused persons or the legal representatives personally". The Summons did not say to whom any such costs were to be paid.

12 By 28 May 2018, the DPP had also filed a Notice of Motion (on 22 May 2018) indicating that he would be moving this Court on 28 May 2018 for an order that all orders sought by the defendants in their Notice of Motion dated 26 February 2018 "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".

13 I commenced hearing the two Notices of Motion and the Summons on Monday 28 May 2018. During the afternoon of that day, the Solicitor-General informed me that he sought to withdraw from the hearing as he no longer, on behalf of the Secretary for Justice and the Secretary for Finance, sought any of the orders that he had sought in his Summons of 8 May 2018. I gave leave to the Solicitor-General to withdraw from the hearing, to withdraw his Summons, to withdraw the supporting affidavit of Graham Leung, the Secretary for Justice and Border Control, and to withdraw his written submissions on the matters before me.

14 In the evening of Tuesday 29 May 2018, I reserved my decision on the two Notices of Motion that were then before me, filed on behalf of the defendants and filed by the DPP.

15 On Wednesday 6 June 2018, the Registrar of the Supreme Court of Nauru sent to me by email an Act of the Parliament of Nauru certified to have been passed on 6 June 2018, the day that I received it. He sent it to me in the normal course of his advising the judiciary of Nauru of recent Parliamentary enactments. What he sent to me was the *Criminal Procedure (Amendment) Act 2018*. It was a short Act that purported to deal with what must happen where any court on Nauru assigns "a legal representative to represent a person in a court proceeding (in Nauru) where such person does not have sufficient means to retain the services of a legal representative" (s 4). The Act purported to provide that the Director of the Office of the Public Legal Defender must provide that legal representation, subject to where the Director is unable to do so or has a conflict of interest. In that case, "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" (s 5). The Act purported to provide further that: "The maximum legal fee and disbursements to be charged for each case inclusive of mentions, call overs and trial shall not exceed $3,000" (s 6).

16 This Act, then, purported to provide specifically for the circumstances that had been argued for two days before me in the Supreme Court of Nauru just the week before the Parliament of Nauru purported to pass this Act. That is, the Parliament of Nauru purported to pass legislation after I had reserved my decision which involved the proper construction of the then existing laws of the Republic of Nauru, including its Constitution. That is, the amending Act purported to address exactly the same subject matter on which I had reserved my decision the week before.

17 Before delivering my judgment, I received and took account of written submissions by the parties as to the *Criminal Procedure (Amendment) Act 2018*.

18 I gave judgment on these matters on 21 June 2018.

19 In my reasons for my decisions which I published that day, I referred to some of the history of these proceedings through the courts of Nauru. I referred to attempts by the defendants to obtain legal representation for them to meet the charges laid against them by the Republic of Nauru.

20 In my decision, I rejected the DPP's submission that I had no jurisdiction to determine the questions raised on the defendants' Notice of Motion dated 26 February 2018. That submission was one to the effect that where a person charged with a criminal offence in Nauru does not have sufficient means to pay the costs of legal representation incurred, such a person can only have a legal representative assigned to him without payment by him but with payment of those costs by the Republic where such person brings a civil suit against the Secretary for Justice (or possibly the Secretary for Finance) pursuant to the *Civil Procedure Act 1972* and the Court grants such an application. It was submitted that such a person charged must do that on the proper construction of Article 14 of the Constitution which provides:

> A right or freedom conferred by this Part is enforceable by the Supreme Court at the suit of a person having an interest in the enforcement of that right or freedom.

21 The DPP submitted that orders assigning legal representatives to a person charged with a criminal offence could not be made by any Court of Nauru pursuant to Article 10 of the Constitution which contained provisions "to secure protection of

law" to every Nauruan. The DPP submitted that I could only make such an order in civil proceedings commenced pursuant to the *Civil Procedure Act 1972* and the *Republic Proceedings Act 1972*.

22 Further, in my decision of 21 June 2018, I considered and decided whether the *Criminal Procedure (Amendment) Act 2018*, which the Parliament of Nauru purported to pass between my reserving my decision on 29 May 2018 and my giving it on 21 June 2018, was inconsistent with the Constitution of Nauru and thereby void.

23 On 21 June 2018, I declared and ordered 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.
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> 4. Failing compliance with Order 3, I shall consider ordering a stay of the defendants' trial until Order 3 has been complied with.

24 I indicated in my reasons 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".

25 I indicated that if the trial of the defendants did not proceed on 23 July 2018 (for the hearing of any pre-trial applications) and on 6 August 2018 (for the trial proper), "I shall hear any application regarding the bail agreements of the defendants".

26 The Republic of Nauru did not pay into the Supreme Court of Nauru the sum of $224,021.90 for and on behalf of the legal fees and disbursements of the defendants' Australian legal team for the trial in this matter by 5pm Friday 29 June 2018.

27 The failure by the Republic of Nauru to comply with my Order 3 of 21 June 2018 continues. That failure by the Republic of Nauru continues, notwithstanding the lack of any application to stay any of my orders, including Order 3, let alone any order staying any of them.

28 Further, no explanation has been given before me for these failures by the Republic of Nauru.

29 By Notice of Motion dated 3 July 2018, the defendants filed a Notice of Motion in this Court with a supporting affidavit of Christian Hearn dated 3 July 2018. That Notice indicated that this Court would be moved by the defendants:

> On the 30th day of July 2018 at 10:00 o'clock in the forenoon or as soon thereafter as Counsel may be heard on the hearing of an application by the Defendants for the following **ORDERS**:

1. The criminal proceedings against each of the Defendants be permanently stayed.

2. Costs.

30 The grounds relied on by the defendants included that my Order 3 made on 21 June 2018 requiring the Republic of Nauru to make payment of funds into Court for the legal fees and disbursements of the defendants' Australian legal team for the trial in this matter had not been complied with. No other sum had been agreed between the DPP and the defendants' legal representatives. In the absence of payment of funds by the Republic of Nauru into Court in accordance with Order 3 of this Court, the defendants cannot receive a fair trial. For this, the defendants relied on paragraph [146(10)] of my decision of 21 June 2018 in which I found "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". I had said that "I was satisfied (of this) beyond any doubt".

31 The defendants asserted in their Notice of Motion of 3 July 2018 that the delay in this case is such that the right guaranteed to each of them by Article 10(2) of the Constitution of Nauru has been infringed in that the defendants have not had(nor will not have) a hearing within a reasonable time.

32 Finally, the defendants relied in their Notice of Motion on the ground that "continuation of the proceedings against the Defendants will bring the administration of justice into disrepute in circumstances of the non-payment of funds by the Republic of Nauru and of the inordinate length of delay involved before the Defendants may face trial".

33 In his affidavit of 3 July 2018, Mr Hearn affirmed that:

> Given the non-payment of funds by the Republic of Nauru in accordance with Order 3, the Defendants' legal representatives are unable to prepare for and appear on behalf of the Defendants in the other pre-trial applications foreshadowed by way of Notices of Motion filed electronically on 26 June 2018 (and in the Supreme Court Registry on 27 June 2018) and in the trial.

34 I note here that pursuant to directions I had previously given to the parties on 15 May 2018, any pre-trial applications had to be filed and served by 26 June 2018.

35 The hearing of any pre-trial applications was to commence on 23 July 2018 and the trial was to commence on 6 August 2018, or at such other time as any pre-trial applications had been heard and determined. A total estimate of six weeks had been fixed for the pre-trial matters and the trial.

36 In my reasons of 21 June 2018, I wrote the following in paras [150] to [157]:

> 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.

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

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.
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.

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

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.

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.

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

37 Because of the filing by the defendants of their Notice of Motion dated 3 July 2018, the failure by the Republic of Nauru to comply with my Order 3 by 29 June 2018, or at all, and the indication by Mr Hearn in his affidavit that most of the defendants' legal representatives were in a position to appear on their Notice of Motion dated 3 July 2018 if it were listed on Monday 30 July 2018 (with an estimate of two to three days), I vacated any sitting of the Court in the week commencing 23 July 2018 and I listed the defendants' Notice of Motion of 3 July 2018 for Monday 30 July 2018, with three days set aside. I did not, before 30 July 2018, vacate the trial that was listed to commence on 6 August 2018 as the DPP had asked me not to do so as it was his wish to proceed to trial on that day and in the four weeks following. That would have been where the defendants were unrepresented.

38 Before Monday 30 July 2018, I directed, through the Registrar of the Supreme Court, that the defendants were to file and serve any additional evidence upon which they would seek to rely on the hearing of the Notice of Motion dated 3 July 2018 by Friday 20 July 2018, with the DPP to give, file and serve notice of any order or orders he may seek from me on 30 July 2018 and any evidence upon which he would seek to rely on the hearing of the defendants' Notice of Motion of 3 July 2018 by Wednesday 25 July 2018.

The Hearing on 30 July 2018 of the Notice of Motion dated 3 July 2018

39 The hearing of this Notice of Motion commenced in the morning of Monday 30 July 2018. It was heard for four days. I reserved my decision at about 4.00pm on Thursday 2 August 2018.

40 Ms Felicity Graham and Mr Mark Higgins, both of counsel, appeared for the defendants with Mr Christian Hearn.

41 The DPP, Mr John Rabuku, and Ms Seini Puamau of counsel, appeared for the Complainant, the Republic of Nauru.

42 I heard extensive submissions over four days and received evidence from both sides.

43 Before I deal in detail with those submissions and evidence, I refer to the first Annexure to the Affidavit of **LAISANI NAIQATO TABUAKURO DEAMER**, sworn and filed on 25 July 2018. The deponent to this affidavit, to whom I shall now refer as Ms Tabuakuro, is a Barrister and Solicitor employed by the Government of Nauru to serve as an appointed Public Prosecutor at the Office of the Director of Public Prosecutions. She swore that she deposed her affidavit "in my official capacity as an employee of the Office of the Director of Public Prosecutions and depose this, my affidavit, from knowledge obtained in my official capacity unless otherwise stated, and the contents of which are true to the best of my knowledge, information and belief". It was clarified when Ms Tabuakuro gave evidence before me that her employment is with the Chief Secretary's Office of the Government of Nauru. She is an employee of that Office.

44 In paragraph 6 of her affidavit, Ms Tabuakuro swore this:

> **THAT** it is apparent that the Government of Nauru has no intention of paying the amount ordered [by me on 21 June 2018] until their grievances about the legality and correctness of

Muecke's J decision, declaration and orders have been litigated and adjudicated by the Nauru Court of Appeal.

Ms Tabuakuro then refers to annexing to her affidavit a "Press Release issued by the Nauru Government Information Office on 3 July 2018".

45 The press release annexed was as follows:

REPUBLIC OF NAURU

Government Information Office

MEDIA RELEASE

For Immediate Release

3 July, 2018

Government to appeal court ruling to pay for Australian lawyers

The Government will appeal the ruling of the Nauru Supreme Court that recent legislation is unconstitutional, and that they must pay huge legal fees for a group of 19 defendants charged over the 2015 riots at Parliament House.

Justice Minister David Adeang said the ruling was surprising, given that the legislation committed to provide all defendants with legal representation in a similar way to many other democratic nations.

"The legislation passed by Parliament recognises the importance of due process and provides for every person charged with a criminal offence to have representation by way of a public defender, at no expense to them.

"Over the past few years we have introduced new laws that protect and promote the welfare of citizens in the current digital age, and this recent legislation also guaranteed people due process in court."

He said the legislation to provide defendants with a public defender was reasonable, just and in line with other nations.

"The ruling by His Honour means that we must pay hundreds of thousands of dollars to provide expensive international lawyers to defendants charged with criminal acts. This is not only unprecedented but excessive.

"While funds allocated for the recruitment of lawyers under legal aid are comparatively modest, this has to be seen in the context of Nauru's economy which is small," Mr Adeang explained, adding, "Nauru is not a rich country and the court's directions as to legal aid in this case has far reaching implications for the country's budget."

The minister said he wasn't aware of any other nation that would provide this level of legal assistance to defendants, "and in fact this sets an unfortunate precedent".

He said defendants wanting private representation should pay for it themselves.

"Those who cannot should, in line with a fair and just legal system, be provided with a public defender, which is what the Government ensured in the recent legislation."

ENDS

I return to this later, although I note here that it is not clear to me what standing "the Government" of Nauru has to appeal my orders of 21 June 2018. Nor is it clear when it is proposed that the Government of Nauru will do so.

46 On 30 July 2018, the DPP informed me that he had not yet decided positively whether or not he would be lodging an appeal in respect of my judgment of 21 June 2018. He first indicated that he had decided to appeal my decision even before I had made it. However, it was clarified later in the hearing before me that this statement was intended to be made solely in relation to the so-called "jurisdiction issue" or "jurisdictional issue" he argued before me in late May 2018, and that it did not apply generally.

47 The DPP further informed me that any decision he made ultimately as to this would depend on the decision I made in the defendants' Notice of Motion then being argued before me that had commenced that day. As I understood his submission, he would await the outcome of this decision of mine before he decided finally whether or not to lodge any appeal against any decision of mine.

48 In the last half an hour or so of the hearing before me on Thursday 2 August 2018, a question was raised as to whether or not the DPP had a right of appeal in criminal proceedings in the new *Nauru Court of Appeal Act 2018* (passed by Parliament on 10 May 2018) other than in quite limited circumstances, which circumstances did not, arguably, include the subject matter of my judgment of 21 June 2018 and any decision I made on the defendants' Notice of Motion of 3 July 2018.

A history of these proceedings

49 In order for me to decide the defendants' application for a permanent stay of these proceedings it is necessary for me to refer to and consider a history of these proceedings both in court and otherwise. The authorities on dealing with a permanent stay of proceedings seem to require a consideration of the history of the proceedings, as well as other important matters.

50 I shall deal with those authorities after I have set out some of the history of this matter both in the courts of Nauru and elsewhere.

51 Mathew Batsiua was the first defendant charged arising out of the events of 16 June 2015. He was charged on 17 June 2015 and on that day he was produced in the District Court of Nauru for the first time, *ex custody*, in respect of the charges filed against him. He was granted bail on, or soon after, 18 June 2015.

52 On 18 June 2015, Sprent Dabwido and Squire Jeremiah were charged and were produced in court for the first time, *ex custody*, in respect of the charges filed against them. They were both refused bail. These two defendants appeared again in the District Court on 23 June 2015 when bail was refused to both of them.

53 On 26 June 2015, 15 other defendants were charged and they were produced in the District Court of Nauru for the first time on that day in respect of the charges against them. I do not know which of them were produced *ex custody* and which were granted bail on that day.

54 I find that between 17 June 2015 and 2 July 2015, a number of the defendants approached the then Public Legal Defender, Mr John Rabuku, requesting legal representation in these proceedings. This finding relates to three paragraphs in the Affidavit of Christian Hearn dated 26 February 2018 to which I referred in my judgment of 21 June 2018. These paragraphs were as follows:

> **Refusal of representation by Public Defender**
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> 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.
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> 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*".

55 In my judgment of 21 June 2018, I indicated that I was satisfied and found that the facts stated in these three paragraphs were true and correct. I was satisfied and found 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. I further indicated that I had "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". I indicated that there was "also nothing before me to indicate that the Office of Legal Public Defender has received no instructions or directions 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". I indicated further that although "a Pleader employed at the Office of the DPP met with the Public Legal Defender on 1 May 2018 … 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".

56 I indicate here that, in light of later events, I have no doubt that the orders received by Mr Rabuku when he was the Public Legal Defender in June 2015 "not to provide representation to any of the persons charged in relation to the riot outside Parliament" were received from the Minister for Justice, the Honourable David Adeang MP.

57 This finding is important in the events that followed and, in particular, to my ultimate conclusion that the Republic of Nauru was anxious, following the so-called riot at Parliament House on 16 June 2015, to commit considerable resources, including significant financial resources, in prosecuting the 20 citizens of Nauru charged with various offences alleged to have occurred on that day, but the

Republic, through its Executive Government, were not prepared to commit any resources, including financial resources, to ensure that any of them received a fair trial and hearing according to law, as is guaranteed to them by the Constitution of Nauru.

58 When denied legal representation by the Public Legal Defender of Nauru, the defendants attempted to engage counsel from Australia. They first approached Mr Jay Williams to represent them in these proceedings. I am satisfied and find that the Secretary for Justice and Border Control refused Mr Williams a visa to allow him to enter Nauru, effectively preventing him from representing the defendants in these proceedings (the uncontested assertion in paragraph [8] of Christian Hearn's affidavit of 26 February 2018).

59 On 2 July 2015, Squire Jeremiah and Sprent Dabwido were again before Magistrate Garo of the District Court of Nauru. Both appeared in person *ex custody*. The DPP sought a further remand for 14 days, arguing that following the refusal of bail by the Court on 23 June 2015, "the onus is now on the two defendants to satisfy this Court that the circumstances have changed and that they should be granted bail. (Counsel for the DPP) further insisted on the two defendants file in the proper application and documents to allow the prosecution time to rebut the application".

60 Magistrate Garo pointed out that the two defendants were not represented and were in custody and asked counsel for the DPP, "How could they be expected to prepare the documents as requested by the prosecution?". Counsel for the DPP suggested that they could have members of their families who visited them to assist with the preparation of the court documents and file them on their behalf. Magistrate Garo rejected such a suggestion and found that it was "not only flawed but is made in ignorance of the real situation that not all persons are well versed with the processes of the law".

61 Squire Jeremiah informed the Court that "they were not able to get assistance from the Director Legal Aid". He, on behalf of both himself and Mr Dabwido, asked the Magistrate to stay the proceedings before her to "allow them to bring before the Supreme Court two issues. The first issue relates to the constitutionality of the charges that are on foot against them, in terms of the circumstances giving rise to their arrest, charge and detention. The second issue relates to the issue of their right, at their own expense, to have a legal representative of their own choice under Article 10(3)(e) of the Constitution".

62 Mr Jeremiah, on his own behalf and on behalf of Mr Dabwido, informed the Court that the lawyer of their choice, Mr Jay Williams, had been denied a visa to enter the country and that resulted in them being denied legal representation by counsel of their choice.

63 Magistrate Garo was of the view that both matters raised by Mr Jeremiah invoked the jurisdiction of the Supreme Court to the exclusion of the District Court. Her Honour stated a case to the Supreme Court for that Court to determine the constitutionality of the charges and the issue of the right of the two defendants before her to have, at their own cost, legal representation of their own choice. She listed the matter for mention before the Supreme Court on Friday 10 July 2015. She listed a bail application for the two men before her for 10 July 2015.

64 On 8 July 2015, Mathew Batsiua appeared before Magistrate Garo and asked that she state a case to the Supreme Court in respect of himself on the same questions that related to Squire Jeremiah and Sprent Dabwido. Magistrate Garo did so by case stated 9 July 2015.

65 On 9 July 2015, the remaining defendants came before Magistrate Garo and they were joined in the Case Stated.

66 On 10 July 2015, the three cases stated were called on before the then Chief Justice Madraiwiwi in the Supreme Court of Nauru. The former Chief Justice ordered on that day, 10 July 2015, that the "Appearance of Mr Jay Williams in these proceedings is not an option. Mr Williams is the subject of proceedings which directly relate to this matter and the Court has yet to rule on the issue surrounding his position in other proceedings. There is a clear conflict of interest which precludes any possibility of Mr Williams appearing as counsel. The Court will adjourn this application (made in respect of the case stated for Mathew Batsiua MP) to Monday 13 July 2015 for the Applicant to consider his position and to agree on a timetable for submissions and argument".

67 On 13 July 2015, Chief Justice Madraiwiwi adjourned the case stated in respect of the Hon Sprent Dabwido MP and the Hon Squire Jeremiah MP to 17 August 2015 "for mention to allow the Applicants time to seek alternative representation". At that hearing, it appears that the then Chief Justice thought that perhaps the Court needs to consider reframing one question to remove Mr Jay Williams' name "for the simple reason that the choice of Mr Jay Williams is really not open to them at this time for the purpose that that issue is being decided in another matter and is yet to be determined so it really is not an option for both the two Honourable MP's in this case and the Honourable Batsiua's case as you would understand given that you are involved in the other proceedings".

68 Later in court that same day, Pleader Mr Vince Clodumar (who had described himself as appearing for his former clients, Squire Jeremiah and Sprent Dabwido, as their friend) said that he had consulted three Honourable Members of Parliament who were defendants and they had asked him to inform the Court that time be granted to them to consult Mr Williams regarding alternative persons that may be able to represent them as to the case stated. They had asked Mr Clodumar to ask the Court to give them not less than a one month adjournment for them to find alternative representation. Mr Clodumar indicated that "They take the view that this matter is very serious in terms of its impact if they fail to defend themselves at the highest level, the impact will affect them being a Member of Parliament and their family life and social life in terms of representing the people from the two Districts. And therefore they are concerned in that regard and they continue to seek that their representation should be at equal level or a level that is in par with Government representation".

69 The then Chief Justice informed Mr Clodumar and the defendants that in the defendants' correspondence with the Registrar of the Supreme Court, "the Honourable Members had both put forward the names of Mr Jay Williams and Mr Lambourne. Mr Lambourne has filed his papers which is in the process and even if approved the issue of his entry (into Nauru) is not a matter that the Court can determine. It lies in another place and I'm just responding to that because they have

raised the issue of both Mr Jay Williams and Mr Lambourne in the correspondence. I just make that as an aside before I hear from the Solicitor-General". Mr Lambourne was a former Secretary for Justice and Border Control in Nauru. The then Solicitor-General was Mr Graham Leung, the current Secretary for Justice and Border Control in Nauru.

70 The Solicitor-General for Nauru, who appears to have been appearing for the Respondent Republic of Nauru in the three cases stated and who appears to have taken over from counsel from the DPP's office, then informed the Court:

> I readily accept the underlying gravity of this matter for his clients (referring to Mr Clodumar) and I have absolutely no difficulty with his request for a 1 month's adjournment for them to sort out the domestics of finding a suitably experienced counsel to argue this matter on behalf of the Members of Parliament that he represents.

The then Chief Justice adjourned the matter to 17 August 2015 for mention.

71 On or about 17 July 2015, Sprent Dabwido and Squire Jeremiah were granted bail by the Supreme Court of Nauru.

72 A directions hearing came on before Chief Justice Madraiwiwi on 17 August 2015. The orders he made on that day were in the proceedings between The Republic and Hon Mathew Batsiua MP. Counsel for the Republic was Mr J Udit, later to become the Solicitor-General for the Republic of Nauru.

73 Mr Batsiua made a statement to the Court on his own behalf and on behalf of Sprent Dabwido and Squire Jeremiah and the other people charged with the events of 16 June 2015 who remained without legal representation. Mr Batsiua stated that the cases stated were not ready to proceed for a number of reasons. He stated that Magistrate Garo had no power to state a case for the determination of the Supreme Court on any question she had stated. The determination of some issues were matters entirely for the Supreme Court of Nauru and not for the District Court. The last assertion was true insofar as Mr Batsiua stated that it was entirely for the Supreme Court and not the District Court, although his suggestion that the matter be by way of a case stated by the Supreme Court was not accurate. Mr Batsiua stated that the defendants, having engaged their constitutional rights for legal representation, that matter must be removed to the Supreme Court and a preliminary enquiry must be conducted by the District Court.

74 Mr Batsiua informed the Court that the DPP had not served the police brief of evidence and that the defendants cannot answer the case against them until they have been formally served with the police brief of evidence and know the case against them. He indicated that the matters could not proceed until the issue of legal representation for the defendants is resolved.

75 Mr Batsiua stated that since 13 July 2015 they had engaged Mr Lambourne and Arthur Moses SC in addition to Mr Williams. Mr Lambourne had filed a petition for admission on 9 July 2015. The Minister for Justice had raised objections to the admission of Mr Lambourne in respect of which Mr Lambourne was never given an opportunity to respond. Mr Batsiua stated that his Honour the Chief Justice was considering Mr Lambourne's application for admission (which was ultimately ruled upon on 13 November 2015). Mr Batsiua stated that Mr Lambourne would

immediately apply for a visa if his application for admission was granted. Mr Batsiua stated:

> What this reveals are the desperate lengths the Nauru government will go to block the legal representatives of the defendants and deny them a fair hearing.

76 Mr Batsiua also stated that on 13 August 2015 "the Minister for Justice stood up in Parliament and stated in words to the effect that Williams is a criminal and Lambourne has offended the Chief Justice and both will never be granted a visa to enter Nauru".

77 Mr Batsiua went on:

> 27. The Chief Justice of this Court is well aware that the charges were withdrawn against Williams for want of evidence and the Chief Justice found Williams to be of good character and admitted Williams to practice generally in Nauru.
>
> 28. Regrettably, the Minister has openly questioned the judgment of the Chief Justice and has scandalized the office of the Chief Justice in contempt of court.
>
> 29. Moreover, the Chief Justice is also well aware that Williams is representing Henshaw in a matter, which presses contempt of court charges against the President and the Minister for breaching injunctions and the termination of the former Chief Justice and Registrar of the Supreme Court. This may be the reason for the scurrilous and baseless attacks on Williams and the refusal to grant him a visa.
>
> 30. Now, the defendants have attempted to engage Lambourne and we find that the Minister also wishes to block his admission and visa. When will this farce end.
>
> 31. Put bluntly, the ongoing refusal by the Minister of Justice to grant visas to the legal representatives of the defendant's is a manifest abuse of process and it should not be tolerated by this Court.

78 Mr Batsiua informed the Court that Arthur Moses SC had been engaged by the defendants. He was an experienced senior barrister and was the Vice President of the New South Wales Bar Association and the Australian Bar Association. He was in the process of filing his petition for admission and visa applications and expected to do so that week. Mr Batsiua sought on behalf of the defendants "a formal undertaking from (the) Minister for Justice and Secretary of Justice to the Court that Moses SC will be granted a visa once the visa fee is paid". He stated that "it may be several months before admission and visas are resolved given the stalling tactics of the Nauru government. This has to be put to an end". Mr Batsiua concluded in this way:

> 37. Finally your Honour, over the last two years, this Court has witness the President, Minister for Justice and Secretary of Justice on behalf of the Nauru government commit contempt of court, abuse of process and interfere in the independence of the judiciary.
>
> 38. The former Resident Magistrate was terminated and deported for granting injunctions against the Nauru government.
>
> 39. The former Chief Justice has visa cancelled when he issued injunctions against the Nauru government.
>
> 40. The MPs were suspended from Parliament for raising these issues in the media.

41. Williams, the barrister of the NSW Bar Association and a practitioner of the High Court of Australia, had phony charges brought against him by the Minister, only to be withdrawn, to then find that his visa was denied two weeks before hearing. Williams is admitted and available however, the Minister refuses to grant a visa.

42. Lambourne, a former Solicitor-General of Nauru, now has his admission and visa effectively blocked.

43. The defendants in this matter face serious charges and cannot access their legal representatives of choice. The defendants have been denied their legal right to representation of choice at every stage of this process.

44. This constitutes a manifest and serious abuse of process.

79 Mr Batsiua sought orders directing the Minister for Justice or the Secretary for Justice to give undertakings to the Court that visas will be issued to the legal representatives of the defendants upon admission to practice and payment of the visa fee. Alternatively, a temporary stay should be granted until the visas are issued to the legal representatives of the defendants upon admission to practice and payment of the visa fees. Failing these orders, the Court should make an order for "a permanent stay for abuse of process".

80 By orders dated 18 August 2015, Chief Justice Madraiwiwi ordered as follows:

1. In relation to the matters traversed by Hon Mathew Batsiua for the defendants, the Court will disregard the submissions as not being properly instituted by way of appropriate application before the Court. They are merely made from the bar table without any supporting documentation and make serious allegations against officers of the Republic.

2. These issues may be revisited by the defendants when they have acquired the services of Counsel.

3. The Court could be in some position to advise about the situation relating to Mr Lambourne then.

4. Matter is adjourned to Thursday 20th August 2015 at 10am for Mention.

81 On 20 August 2015, Hon. Sprent Dabwido MP and Hon. Squire Jeremiah MP were before Chief Justice Madraiwiwi in person. Mr J Udit appeared for the Republic of Nauru. Mr Udit informed the Court that he had "taken the time to see what the issues are". He said that he was able to get particulars from the Supreme Court Registry and after going through the documents he considered the issues to be "Right of legal representation under the Constitution; Rights to have been illegally breached; timely right to a fair hearing; right to a proper defence; freedom of assembly and association". Mr Udit informed the Court that: "We will file a cross-summons to state the issues so that for the future of Nauru, the issues are settled". He stated three issues: "One would be the rights under the Constitution against the State's responsibility to prosecute illegal offenders; The reference of matters under the Constitution put to the Supreme Court under s 38 alleging constitutional issues; (and) Right to legal representation and the case of the present applicants".

82 Mr Udit informed the Court that he would be filing a Summons by Monday of the following week "to narrow the issues, then we will comply with the Court's

directions". He added: "I am new to Nauru and am told that the Constitutional issues are heard by a Full Court. I will be guided by the Court".

83 Mr Batsiua stated that the defendants remain unrepresented and they sought a formal undertaking that visas will be granted to their legal representatives upon request for a visa for processing.

84 The Chief Justice then advised the parties as to the progress of the application for admission to practice of Mr David Lambourne. He stated that the Secretary for Justice's objections had been put to Mr Lambourne and the Court was waiting for his response. He said that the Secretary for Justice's objections and Mr Lambourne's response will need to be considered. Mr Lambourne did not need to be present when that occurred as he was "only applying to appear in a limited matter and not seeking a general appearance".

85 The Chief Justice then gave the following directions on 20 August 2015:

1. Secretary for Justice to file cross summons clarifying the issues by Monday 24 August 2015.

2. Matter adjourned to 21 September 2015 for mention and the issues raised by the applicants in relation to undertakings can be dealt with when the objection (and response) are considered.

86 The Secretary for Justice did not file a cross summons clarifying the issues by 24 August 2015 as he was directed by Chief Justice Madraiwiwi to do on 20 August 2015. Instead he filed a Summons, or a Summons was filed on behalf of the Republic of Nauru, on 8 September 2015 seeking orders that the cases stated to the Supreme Court of Nauru were an abuse of process, "as the criminal trial would become fragmented and the case stated should be struck out". I come to that shortly.

87 On 6 November 2015, Chief Justice Madraiwiwi heard an application by David Lambourne, by way of a petition for temporary admission dated 3 July 2015, for him to practice as a barrister and solicitor in Nauru. The application was made pursuant to the *Legal Practitioners Act 1973* and the *Legal Practitioners (Admission) Rules*. It appears that Mr Clodumar appeared for Mr Lambourne "on limited instructions". Mr Graham Leung appeared for the Secretary for Justice as "Respondent". Mr Lambourne's application for admission was opposed by the Respondent.

88 Chief Justice Madraiwiwi published his decision on 13 November 2015. He stated that the Secretary for Justice opposed the application on "a plethora of grounds" which, he wrote "can be related most closely to the issue of the 'suitability' for admission of the Petitioner to practice in the courts of Nauru … connoting more generally the question of 'character'". The Chief Justice wrote that the Respondent took exception to the alleged failure of "the Petitioner to conclusively substantiate his qualifications and experience as required by the Act". The Chief Justice stated that these criteria may be characterised as the technical aspects of the application and said that he would "shortly" deal with them by observing that the Respondent was being "unduly pedantic" in this regard.

89 The Chief Justice observed that the Respondent had referred to the Petitioner's propensity for public comment on the events occurring in Nauru over the recent past. The Chief Justice stated that the Petitioner's "observations may be characterised as an amalgam of fair comment, intemperate and patronising asides with others bordering on the egregious in the context of a small, proud island nation with a poignant and at times tragic history that often feels hostage to external forces. While no doubt causing offense in some quarters, the Court will err on the side of circumspection and focus on what is the essence of the Respondent's objection: the Petitioner's suitability and character".

90 The Chief Justice then went on to consider the Petitioner's suitability and character.

91 A number of testimonials submitted by the Petitioner were before Chief Justice Madraiwiwi. One was a letter to the Registrar of the Court from "Chief Justice Geoffrey Eames" dated 6 September 2015. The Solicitor-General, Mr Graham Leung, for the Respondent, submitted that no weight should be given to that correspondence "as it was not properly before the Court". The Chief Justice overruled that objection and indicated that he would give due consideration to it.

92 Next, the Respondent contended that Article 15 of the Constitution of Nauru required that petitions seeking temporary admissions for specific cases are to include visas and that without a visa the Petition could not be validly presented. Chief Justice Madraiwiwi held that "this is a novel proposition which the Court finds difficult to accept". He held that the matter before him for determination was about an exercise of discretionary power conferred by the Act and the procedures prescribed under it. "The decision about visas lies properly elsewhere and is not within the purview of the Court presently".

93 Chief Justice Madraiwiwi then referred to the Respondent's affidavit in opposition to the Petitioner which he describes as purporting "to traverse in great detail the reasons why the Petitioner's contract as Secretary for Justice was terminated. They centre on issues of character and integrity about the Petitioner's dealings with both the former Resident Magistrate Peter Law and Eames CJ as well as seeking to undermine the independence of the judiciary. They are all serious charges and each sufficient on its own to damn the application of the Petitioner if made out". The Chief Justice concluded that they had not been made out, and he concluded that the Respondent's case had a "fatal flaw" which related to "a chain of causation" between the facts and circumstances of the Petitioner's particular situation and the termination of his contract as Secretary for Justice.

94 Chief Justice Madraiwiwi concluded that he was satisfied both "as to the qualification and suitability of the Petitioner to be admitted for practice on a temporary basis" for "matters arising out of the alleged unlawfully assembly and subsequent events at Parliament House on 16 June 2015", and some other matters.

95 The hearing of the Cases Stated by Magistrate Garo came before Justice Khan of the Supreme Court of Nauru on 27 November 2015. The three Members of Parliament, the Hon. Mathew Batsiua, the Hon. Sprent Dabwido and the Hon. Squire Jeremiah, appeared in person with Mr Clodumar as friend of the Court. Mr J Udit appeared for the Respondent, the Republic of Nauru.

96 Khan J also had before him a Summons filed on behalf of the Republic "seeking orders that the case stated to (the Supreme) Court is an abuse of process, as the criminal trial would become fragmented and the case stated should be struck out".

97 Khan J delivered his judgment on 9 December 2015. After setting out the provisions of s 38 of the *Courts Act 1972* and Articles 54(1) and (2) of the Constitution, his Honour observed that the Magistrate "did not make any findings of facts in relation to the issue number 2, as she was required to do". Issue 2 was whether or not the circumstances giving rise to or surrounding the arrest of the three defendants, their detention, and their being charged with the offences with which they were charged, "infringes their right to protection of freedom of expression" under Article 12(1) and their "freedom of assembly" under Article 13 of the Constitution. His Honour held that "since no finding of facts were made by the Magistrate with regards to (the defendants') arrest, detention and being charged, I am therefore unable to give an opinion on that issue".

98 Khan J went on, however, to state that as "issue number 1 is purely a question of law and the facts are that Mr Jay Williams has been admitted as a barrister and solicitor of this court and he has been denied a visa by the respondent to enter Nauru to represent the applicants as their counsel of choice" he could answer the question as to whether the denial of the visa by the Respondent infringes the applicants' constitutional rights under Article 10.

99 Khan J then referred to the fact that it was the contention of the three defendants "that the case was transferred to this Court in its entirety". Justice Khan stated that "That contention is flawed, as the Magistrate only stated a case pursuant to s 38 of the *Courts Act* seeking interpretation of Articles 10, 12 and 13 of the Constitution".

100 Khan J then dealt with two sets of affidavits Mr J Williams had prepared for Mr Batsiua that were filed on 20 and 21 October 2015, without leave of the Court. He referred to the fact that Mr Udit objected to the filing of those affidavits and that he would "be making submissions in due course" as to those affidavits. His Honour struck out the affidavits on the basis that the Court had no power to receive additional evidence and that their contents had no relevance to the case. He had noted that this was "not the first time Mr Williams had raised" issues regarding Mr Rodney Henshaw, Mr Peter Law and former Chief Justice Geoffrey Eames AO QC, the suspension of three Opposition MPs and contempt of court and abuse of process proceedings against the President and the Minister for Justice. His Honour noted that despite the former Chief Justice Madraiwiwi's "disapproval and a finding of abuse of process against Mr Williams, he has done the same thing all over again. In doing so he has shown great disrespect to the Chief Justice and to this Court … He was clearly under a duty to observe the Court's processes and not abuse it. A finding of abuse of process against Mr Williams is a very serious indictment on his professional standing".

101 Khan J then went on to deal with the Summons dated 8 September 2015 filed by the Respondent Republic. He stated that a Summons of that kind should be discouraged "as it could act as an inhibition on the part of Magistrates to state cases".

102 Khan J then dealt with Article 10(3) of the Constitution. He set out that a "legal representative" is defined in Article 15 of the Constitution as follows:

> *"legal representative"* means a person entitled to be in or to enter Nauru and entitled by law to appear in proceedings before a court on behalf of a party to those proceedings.

103 Khan J noted that it was the Respondent's contention that there are two sets of requirements in this definition. Firstly, admission as a barrister and solicitor under the *Legal Practitioners' Act 1973* and secondly, upon admission the practitioner shall be entitled to enter Nauru after obtaining the necessary visa under the *Immigration Act 2014*. His Honour noted that the applicants' counsel agreed with that contention and his Honour indicated that it was "indeed the correct interpretation".

104 His Honour then noted:

> So if a practitioner's visa is refused then for the purposes of Article 10 he cannot represent the defendant in court, although he may continue to advise the defendant from abroad.

105 Khan J then dealt with a person's right to counsel of choice. He stated the following:

> 25. Although an accused person may appoint a counsel, there is no guarantee that counsel will eventually become his counsel of choice. That is the matter which will ultimately be decided by the trial court when it hears the application. In making that determination the court will *inter alia* take the following matters into consideration:

106 Khan J then set out a number of considerations which he indicated were by no means exhaustive, and "in determining whether to allow a counsel chosen by the accused the court must always ensure that an accused is '*afforded a fair trial within a reasonable time*'".

107 Khan J then concluded his judgment as follows:

> 27. **Issues for determination**
>
> As I mentioned earlier that I am unable to answer the *issue number* 2 but with respect to *issue number* 1 I am of the opinion that the refusal of Mr J William's visa to allow him to enter Nauru for the Secretary of Justice does not infringe on the Constitutional rights of the applicants as set out in Article 10(3)(d) and (e) of the Constitution.
>
> 28. So, the answer to *issue number* 1 is "*no*".

108 The matter next came on before Magistrate Garo on 16 December 2015. The parties before me indicated to me that I should "Rely on the Court's Record" as to what happened on this day. No "Court's Record" for this day could be located.

109 The matter came on again before Magistrate Garo on 18 December 2015. All the defendants were present. Mathew Batsiua informed the Court that Mr Moses SC was not granted admission for the defendants' criminal matters and, in any event, he could not represent every defendant as that might cause a conflict of interest. Mr Batsiua also informed Magistrate Garo that the parties were examining whether to apply for special leave to appeal to the High Court of Australia in respect of the decision of Khan J on 9 December 2015 and his decision on other matters. He informed the Magistrate that each defendant would need to have individual legal

representation of one solicitor and one barrister at the public expense for those could not afford such legal representation, so as to prevent a conflict of interest and a miscarriage of justice. He informed the Magistrate that those who could afford legal representation were actively seeking out criminal law firms from Australia who would need to apply for admission to practice and for visas, and unless strict requirements were waived this would slow down proceedings. With regard to the visa applications for Mr Williams and Mr Lambourne, the Minister for Justice had not responded to their applications.

110 Mr Batsiua noted that the brief of evidence had not yet been served and it was over six months since the events at Parliament House. He asked for the matters to be adjourned for further directions so that the matters he had raised could be resolved.

111 What was described as the First Phase of Disclosure was given to Mathew Batsiua on the same day as this hearing, 18 December 2015. Seventy witness statements were served on Mr Batsiua on that day. A further 39 statements, being predominantly Police Statements, were served on Mathew Batsiua on 16 March 2016.

112 The matter came on next before Magistrate Garo on 27 January 2016. Mathew Batsiua spoke on behalf of the defendants and informed the Court of a number of legal representatives they had endeavoured to engage. They included barristers Stephen Lawrence and Felicity Graham from Sir Owen Dixon Chambers in Sydney. Mr Batsiua informed the Court that as to Mr Williams and Mr Lambourne, they will be challenging the decision by the Minister for Justice "to unilaterally reject their visas when no application was made". Mr Batsiua informed the Court that the defendants were also awaiting legal advice as to whether the judgments of Khan J would be challenged in the High Court of Australia. Mr Batsiua sought an adjournment so that their legal representatives could file petitions for admission at Court and their visa applications to the Minister. He noted that that might take some time but that it was within the power of the Minister for Justice to expedite these matters.

113 The matter was next before Magistrate Garo on 16 March 2016. On this day, the DPP filed an amended charge consolidation sheet in relation to all defendants containing ten counts. Mathew Batsiua informed the Court that Arthur Moses had been granted a visa and that other lawyers' applications for admission were pending.

114 On 20 April 2016, the matter was back before Magistrate Garo. Mathew Batsiua made a statement on behalf of the defendants. He indicated that the matters were not ready to proceed for a number of reasons relating to the admission of legal practitioners to act for the defendants. He told the Magistrate that a number of petitions had been filed and that two legal practitioners had been admitted. Those who had filed petitions included Stephen Lawrence and Felicity Graham, both of counsel, and Christian Hearn, a solicitor.

115 Mr Batsiua advised the Court that he anticipated that the admission procedure would take at least another month, and that applications for business visas could take another month. He said, however, that the power to waive the admission and visa conditions was entirely within the hands of the Minister for Justice and that "if the Minister for Justice genuinely wishes for these matter to be expedited, all the

Minister needs to do is waive the admission and visa requirements and grant the applicants access to their legal representatives, yet the Minister refuses to do so". He indicated that because of that the matters cannot proceed until legal representatives are admitted, they have been engaged by the defendants and the defendants have received legal advice. In light of that, the defendants will not be in a position to enter pleas at the mention date on this day, 20 April 2016.

116 The Affidavit of Ms Tabuakuro of 25 July 2018, filed by the DPP on the permanent stay application before me, referred to this hearing on 20 April 2016. What was contained in paragraph 60 was disputed on behalf of the defendants and both parties agreed that I should rely on the "Court's Record". No Court's Record for this day could be located. It appears, however, that Magistrate Garo raised for consideration of the parties whether a case should be stated to the Supreme Court to resolve the constitutionality of the *Nauru Police (Amendment) Act 2015* and possible apparent inconsistencies between the *Nauru Police Force (Amendment) Act 2015* and the Unlawful Assembly and Riot provisions in the *Criminal Code 1899* regarding the definition of "unlawful assembly". It appears that there were other matters of the similar type that she raised, including whether the District Court had jurisdiction to determine the issues she raised.

117 On 22 April 2016, Magistrate Garo stated a case to the Supreme Court. The case stated concerned apparent inconsistencies in the definition of the offence of "unlawful assembly" in the *Criminal Code 1899* and in a recent amendment to the *Nauru Police Force Act*. She also stated a case by which she asked questions as to the interrelationship between the phrase "to associate peaceably" in the recently amended *Nauru Police Force Act 2015* and Article 13 of the Constitution of Nauru which guaranteed Nauruans the right to assemble and associate peaceably.

118 On 27 April 2016, Magistrate Garo confirmed that she had received the DPP's submissions on the preliminary issues she had raised on 22 April 2016. She asked the parties if her "background information to the questions formed sufficient basis of her fact finding in order for the case to be stated to the Supreme Court". The DPP and the defendants agreed that it did. The matter was transferred to the Supreme Court on that basis.

119 On 12 May 2016, the DPP filed a charge sheet against the defendant Lena Porte.

120 At some time between 27 April 2016 and 6 June 2016, the Registrar of the Supreme Court indicated that the case stated would be heard on 9 and 10 June 2015, with the parties being directed to file their submissions by 3 June 2016. The case was adjourned to 6 June 2016.

121 On 6 June 2016, Mathew Batsiua indicated to the Registrar that the defendants had liaised with their lawyers overseas. He advised that Christian Hearn had filed his application to appear for them in this matter, and that Arthur Moses SC was unable to appear on 9 June 2016 and, although admitted, he was awaiting approval for a visa into Nauru. The defendants asked that the case be adjourned to 8 August 2016 to give their legal representatives time to seek visas to enter the country and to appear in the matter. The Registrar ordered that the Republic file its submissions by

1 July 2016, with the defendants filing by 15 July 2016. He adjourned the matter to 18 July 2016.

122 On 22 July 2016, the case stated was before Khan J. The parties were informed that the hearing before the Supreme Court would take place before a single Judge of the Court on 8 August 2016. Mathew Batsiua informed the Court that Arthur Moses SC was lead counsel and that Christian Hearn and Michelle Swift were solicitors. He further informed the Court that the defendants did not wish to be heard on the questions before the Supreme Court "because the referral or case stated was premature in light of the fact that no findings of fact had been made". The defendants "reserved their right to make submissions at the trial on legal issues based on the evidence and how the charges are proffered".

123 On 25 July 2016, when the matter was again before Khan J, John Jeremiah indicated that he did not wish to be heard on the issues that had then been stated to the Supreme Court.

124 The Case Stated came before Khan J in the Supreme Court for hearing on 8 August 2016. The defendants maintained that "at the request of their lawyers they did not wish to contest the hearing and would not be filing any submissions". Khan J heard the DPP and then indicated that he did not have the authority to deal with the questions posed as there were no constitutional issues implicated.

125 On 12 August 2016, Khan J delivered written reasons for his decision. In his reasons his Honour stated that "it is quite clear that no finding of facts has been made by the learned Magistrate. Although the issues are purely legal in nature, it is still a requirement for case stated that a finding of fact should always be made". In the DPP's written submissions dated 4 July 2016, the DPP had addressed all the questions of the case stated, without addressing s 38 of the *Courts Act 1972* which gives jurisdiction to the Supreme Court to deal with Constitutional interpretation. Khan J noted that the DPP had addressed s 41(3) of the *Courts Act 1972* in his supplementary written submissions filed on 8 August 2016. The DPP had submitted that "the Resident Magistrate (had) provided sufficient background information to form the basis of a finding of facts on the matters to be stated to the Supreme Court in its entirety. Section 41(3) … allows for all proceedings in the cause or matter to be heard in the Supreme Court".

126 Khan J went on to consider whether the questions involved the interpretation or effect of any provision of the Constitution. He referred to s 38 speaking of questions arising which involve the interpretation or effect of any provision of the Constitution. He stated that the jurisdiction of the Supreme Court "will only trigger if I were to answer questions 1 to 5, and only then the issue of constitutional interpretation **will** arise". He considered that the Magistrate was correct when she used the word "**potential**" when referring to the interpretation of a provision of the Constitution.

127 Khan J held that he did not have the power to answer the questions asked. He remitted the matter back to the District Court. He noted, however, that in his view two Acts of Parliament had enacted "2 sets of unlawful assembly … with different elements and ingredients".

128 Sometime in early 2016, Mr Jay Williams approached Mr Christian Hearn and a number of other legal practitioners in Australia, including Ms Felicity Graham, of counsel, and Mr Stephen Lawrence, of counsel, to represent the defendants. 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.

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

130 In August 2016, Ms Graham, Mr Hearn and some other Australian-based legal practitioners initially communicated with some of the defendants on Nauru by Skype from Australia. At that time there were 20 defendants before the District Court of Nauru. Mr Hearn was retained by the defendants to advise them in relation to the case stated that was then before Khan J of the Supreme Court. Mr Hearn made arrangements for Ms Graham, another solicitor, Ms Penelope Purcell, and himself to travel to Nauru to obtain instructions from the defendants in relation to the substantive proceedings. 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.

131 On 31 August 2016, the matter was before Magistrate Garo for mention to fix a trial date. Mathew Batsiua appeared as a representative for the defendants. The then DPP suggested a four week estimate for the prosecution case at trial. Magistrate Garo indicated that it may take about eight weeks for the entire trial and foreshadowed blocking her court diary out from November to December 2016. The DPP informed the Court that he had communicated with Mr Hearn who had told him that he, Mr Hearn, would be on the island on 14 September 2016 and that a trial could be fixed for 31 October 2016. He indicated that his estimate of four weeks depended upon whether the defendants were willing to admit any facts and also upon the question of any pre-trial issues.

132 On 6 September 2016, Mr Hearn communicated by email to the DPP that at that time he could only arrange legal representatives to appear at the trial for a two week period.

133 In the lead up to the first trip to Nauru by Ms Graham, Ms Purcell and Mr Hearn in September 2016, it was evident to Mr Hearn 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 the 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.

134 On 22 September 2016, Mr Hearn travelled to Nauru with Ms Graham and Ms Purcell for the first time. They arrived in Nauru on the morning of 22 September 2016. As at that date, the proceedings against the defendants had been on foot for over 12 months. In fact, it was just over 15 months.

135 During this trip Ms Graham, Ms Purcell and Mr Hearn met with 19 of the 20 defendants. In his affidavit dated 26 February 2018, Mr Hearn affirmed the following:

During this trip a number of matters of concern became apparent:

- 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.

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.

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.

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.

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.

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.

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

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.

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

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.

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.

136 On 3 November 2016, the Minister for Justice, the Honourable David Adeang MP, was asked a question in the Parliament of Nauru by the Member for Aiwo. The Member prefaced his question by saying this:

> Last year, since one and a half years, we just heard that the court just commenced last Monday involving the riot, those people from the riot at the Parliament. 17 months to be exact just last Monday the proceedings just commenced meaning 17 months, it took us 17 months the court just started. People have been suffering unemployment due to the government policy, can't fly out because everyone is waiting for this court matter. In short these people suffer just because of waiting for this court. My question I want to raise now, why taking this long? Over 1 and a half years they just started court last Monday.
>
> Secondly why the court house is it performing, is the courthouse performing?
>
> Thirdly, if the court is not performing why don't you think, why don't we think to do something about those people in the courthouse? As we speak now, after 17 months, 17 months people suffer waiting for this court. Why do we have to wait for 17 months. Why the courthouse is not that efficient and it is not performing? The courthouse itself is okay but the people inside the court are people we should think about.

137 The Minister for Justice and Border Protection, the Honourable David Adeang MP, responded in this way:

> First of all, I just want to outline the contributing factors to the delay. It took time to gather the statements including the video to strengthen the evidence against those who came to protest outside the Parliament. Following that it took a while for the rioters get lawyers. It took a while, it even reached to the stage that we waived visas for their lawyers to come so there is no excuse for them to come and defend the rioters. Then the District Court had a question posed to the Supreme Court, handballing it to the Supreme Court, a couple of questions. I think there were two provisions on unlawful assembly and she sought guidance from the Supreme Court which of those provisions she should follow, whether it was that provision or the other one. Supreme Court handballed it back down. We all know that the Supreme Court character is different to what we do here on the administration side because it is said that it is very important the concept of separation of powers.
>
> At the same time Speaker I can relate with the frustrations from the Member of Aiwo. If it were up to me alone maybe the same criticisms will rise again about me as we have seen in the media and Facebook. I should say Speaker the latest now, they were in Court on Monday this case relating to the rioters. Out of the 19 I know that 10 want to negotiate in terms of offering to plead guilty to some if the prosecution drops some others. We are not here to negotiate. We

> are not here to be lenient and we have faith that the court and the prosecution will not exercise any consideration of negotiations or leniency because what they have done is serious. They came here. They damaged the Parliament and they stopped work that was vital to feeding Nauruans through the passing of the budget last year. This is not small and it is not insignificant. In other countries they will be in gaol for a lifetime. We will get to that Mr Speaker but at this time we want to hasten the charges relating to riot and assault, for entering the aerodrome and disturbing the Legislature. I should say that the person in charge of the court, their contract is nearly finished. On this matter, I leave it in the capable hands of the President to make a reconsideration.

138 There are some aspects of this exchange that I consider to be particularly important. They include, but are not limited to, the statement by the Member for Aiwo to the effect that "people have been suffering unemployment due to the government policy"; the Minister's reference to waiving visas for the defendants' lawyers to come to Nauru; the statement by the Minister that he knew that 10 of the defendants (to whom he referred as "the rioters") wanted to negotiate in terms of offering to plead guilty to some charges if the prosecution dropped others; and the Minister's statement that "We are not here to negotiate. We are not here to be lenient and we have faith that the court and the prosecution will not consider negotiations or leniency"; the statement that in other countries the so called rioters "will be in gaol for a lifetime" and that "We will get to that Mr Speaker"; and finally, the Minister's statement that the contract of the person in charge of the court is nearly finished and that matter he leaves "in the capable hands of the President to make a reconsideration".

139 Between 4 and 9 November 2016, the defendants were variously arraigned and sentencing proceedings commenced in relation to four of them: Ms Grace Detageouwa, Mr John Jeremiah, Mr Job Cecil and Mr Josh Kepae. On 25 November 2016, Magistrate Garo sentenced Ms Detageouwa and her matter was finalised. On that same day, Magistrate Garo also sentenced Messrs Jeremiah, Cecil and Kepae. Those three defendants appealed their sentences to the Supreme Court. In relation to the defendants who entered pleas of not guilty, Magistrate Garo listed a trial to commence on 18 April 2017 with an estimate of three weeks. Despite the defendants' request, she declined to allocate hearing time for pre-trial issues.

140 On 27 November 2016, Ms Graham and Mr Hearn departed Nauru.

141 Since late September 2016, Mr Hearn has been the sole solicitor representing the 16 defendants listed for trial, and representing the three appellants in relation to the sentence appeals.

142 Shortly after returning to Australia on 27 November 2016, Mr Hearn was served with a Notice of Appeal filed by the DPP in which the Republic complained that the sentences imposed on Messrs Jeremiah, Cecil and Kepae were too lenient. Shortly after that, in December 2017, Mr Hearn learned that Magistrate Garo's contract was not renewed.

143 After some time, a team comprising Mr Hearn 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 legal representative in a way which best managed the potential conflicts of interest. This allocation was set out in a Pre-Trial Conference

Question and Answer form that was filed on behalf of the defendants at the request of District Court Magistrate Lomaloma. That pre-trial conference was held before Magistrate Lomaloma on 30 March 2017. Mr Funnell and Mr Hearn appeared in the District Court of Nauru at it. Prior to that time Mr Hearn had advised the DPP that the defendants were committed to the trial dates of 18 April 2017 to 5 May 2017. The DPP was also committed to those trial dates. He had communicated with Mr Hearn via email regarding admitted facts and other pre-trial matters.

144 The matter had been listed for mention in the District Court of Nauru in the early months of 2017 before the Pre-Trial Conference on 30 March 2017. The defendants' Australian lawyers did not travel to Nauru for those mentions because the Magistrate to replace Magistrate Garo had not yet been appointed.

145 The defendants' Pre-Trial Conference Question and Answer Form was filed on 29 March 2017 (it is Exhibit E to Mr Hearn's Affidavit of 26 February 2018).

146 On 14 March 2017, Magistrate Lomaloma was appointed as Resident Magistrate of the District Court of Nauru.

147 At the Pre-Trial Conference on 30 March 2017 the defendants' legal team indicated to Magistrate Lomaloma that they wished that Lena Porte be tried together with the other defendants. The DPP indicated that he had a potential conflict in that regard and it was for that reason he wished to keep the two matters separate. He had been Lena Porte's supervisor at one time. It was for this reason that another public prosecutor had been given carriage of that trial. The defence team indicated that they intended to call two witnesses from Australia. The DPP indicated that there were 109 witness statements and that the Republic had filed and served 21 summonses to witnesses. He indicated that a set of proposed admitted facts had been forwarded to the defence and that photographs and video footage upon which the Republic intended to reply had been disclosed to the defence.

148 The defence indicated that they intended to seek orders for a temporary stay of proceedings on the ground of reasonable apprehension of bias, and for a *Bunning v Cross* exclusion of all of the evidence obtained with respect of the case. The DPP indicated that he expected that the later be dealt with by way of a *voir dire* challenge in respect to the admissibility of documents, photographs and the video footage. The defence indicated they intended to deal with these discrete *voir dire* issues during the first two days of the trial. The defence indicated that they wished that the Minister for Justice and the Secretary for Justice be summonsed because in their view those two persons were material to their stay application on the ground of a reasonable apprehension of bias. The DPP noted that these two persons were not material witnesses to the trial.

149 Magistrate Lomaloma indicated that he would sign and release the subpoenas and it would then be for the served parties to file any objections, if any were to be made. He fixed a time-table for certain things to be done and adjourned the case to 19 April 2017, as the day previously listed for the trial to commence was a public holiday in Nauru.

150 A week prior to the Pre-Trial Conference on 30 March 2017, the defendants had tried to have issued subpoenas directed to a number of people. These were the

subpoenas Magistrate Lomaloma said, at the Pre-Trial Conference, that he would "sign and release" and that "it would then be for the served parties to file any objections if there were any to be made".

151 The defendants had issued subpoenas direct to:

a. Ms. Sharain Hiram, the Director of Media, Nauru media requesting copies of all video and/or visual recordings of the Nauruan Parliament for certain dates between 16 June 2015 and November 3rd 2016;

b. Mr. Bernard Grundler/the Proper Officer, Department of Justice and Border Control, Republic of Nauru requiring the production *inter alia*, of all judicial contracts relating to former Magistrate and Registar, Peter Law; former Chief Justice Geoffrey Eames, former Magistrate Emma Garo and for the present and intended Magistrate.

c. Summons to the Honourable David Adeang, the Minister for Justice and Border Control and to Graham Leung, Secretary for Justice and Border Control to be cross-examined on the issues.

152 On 6 April 2017, the Solicitor-General of Nauru, Mr Jay Udit, had had filed at court various Notices. There was a Notice of Objection to produce documents by the Chief Secretary, a Notice of Objection by the Minister of Justice and Border Control to attend as a witness, and a Notice of Objection that the Secretary for Justice and Border Control attend as a witness. The two Notices to the Minister for Justice and the Secretary for Justice to attend as witnesses referred to their objection to do so for them "to testify on whether the judiciary of Nauru meets the minimum standard of judicial independence; and the operations of the judiciary of Nauru and recent history in respect of former judicial Officers namely Magistrates Mr Peter Law and Ms Emma Qaro (sic) and Chief Justice Mr Geoffrey Eames". The grounds of objection included that the evidence intended to be obtained was privileged and immune from disclosure in court proceedings; that it had "no legitimate forensic purpose which would materially assist the accused persons in the respective criminal charges laid against them"; and that "the nature of the proposed evidence sought to be produced will be injurious in the public interest". A ground of "National security" was also raised, as was the alleged "lack of particulars as to the relevance of the proposed evidence to the substantive issues of the criminal charges laid against the accused persons". Similar grounds were raised by the Chief Secretary in the Notice filed on his behalf. That is, that the documents belong to a class which were "privileged and immune from production or disclosure in Court proceedings" and that "The reasons provided for the production of documents has no legitimate forensic purpose which would materially assist the accused persons in their respective criminal charges".

153 When the trial in this matter commenced on 19 April 2017, the defendants' Australian legal team of Mr Higgins, Mr Lawrence, Ms Graham and Mr Funnell, all of counsel, and Mr Hearn appeared for the defendants. The applications filed on 6 April 2017 by the Solicitor-General, Mr Jay Udit, were mentioned although the Solicitor-General did not appear "as he was vacationing in Fiji". The matter was adjourned to 2.00pm on 21 April 2017.

154 On 21 April 2017, the Australian legal team appeared for the defendants and the Solicitor-General for the Republic of Nauru, Mr J Udit, appeared for the Minister for Justice, the Secretary for Justice and the Chief Secretary of Nauru. An affidavit by the Chief Secretary attached a Certificate of Public Interest Immunity by His

Excellency the President of the Republic of Nauru under his seal as Chairperson of Cabinet. The defendants had also attempted to file in Court five affidavits proffered on their behalf. There were affidavits of Geoffrey Eames QC, of Mr Peter Law, of two of the defendants and of Christian Hearn.

155 On 21 April 2017, submissions were made by the parties in relation to the summonses. Magistrate Lomaloma directed the parties to file any further written submissions by 25 April 2017 and adjourned the matter for mention on 26 April 2017. The Solicitor-General submitted, amongst other things, that one of the applications by the defence team was "tantamount to contempt of court". A member of the defence team sought an undertaking from the Solicitor-General and the Minister for Justice that "tortious (sic) proceedings" would not be brought against them. The defence team further invited the Solicitor-General to withdraw other statements which he had made during the course of his submissions. The Solicitor-General declined to do so.

156 Before 26 April 2017, written submissions were filed by the Solicitor-General and on behalf of the defendants. The Solicitor-General's submissions included the following:

> 22. If indeed they had found the Judiciary was not independent or impartial, they ought to have filed a proper Constitutional case sometime age. Article 54 of the Constitution provides that:-
>
> > *54.-(1) The Supreme Court shall, to the* ***exclusion of any other court, have original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of this Constitution.***
>
> 23. Since the relief sought is of a general nature, it cannot be raised in a criminal matter and be escalated as late as now to be a constitutional issue. They ought to have filed an appropriate action in the Supreme Court challenging all the issues now being raised. These are not new facts or issues. They have been alleging this since 2015 and yet they have not done anything about it until the eve of the trial to simply adjourn or delay the prosecution, which is based on relatively straightforward facts.
>
> 24. With respect, such an important issue involving persons not at all involved with the offences to is an abuse of the process of court which will be submitted next.
>
> …
>
> 34. It is humbly submitted that that the accused by their counsel have failed to any evidence an iota of evidence which may be adduced from the former judicial officers which is relevant to the case.
>
> …
>
> 46. Based on this well settled principle of law, it is submitted that the approach adopted by the accused is again an attempt to split the criminal trial. With respect it is submitted that the proposed attempt to collate evidence before the accused's right to give evidence arises after the prosecution case is to simply avoid the criminal trial. Any issues of the fairness of the judiciary must be dealt with within the trial and appeal therefrom.
>
> …
>
> 58. Judiciary is an arm of the Government. Unless all the three arms of the Government are functional, the Government Machinery will collapse. Therefore in the national and

economic security of the country, a robust and independent judiciary is necessary, which is submitted concurrently to be the case. The accused are speculating at best that the current judiciary is interfered by the executive. *Have they adduced any evidence of this?* It is unfortunate the judicial officers cannot publicly speak or respond to such allegations. However, that does not mean that the offenders can hurl all sorts of allegations against it. The judiciary needs the protection from the Executive and Legislature. This protection is provided to it by law, finance and administrative support.

59. In this case the Head of Republic has stood up to defend the judiciary in his Certificate when attacked by the accused persons. Not only that, he accorded the due importance to the judiciary of Nauru. It is important because, if the Executive publicly accord this responsibility, it is surprising that the offenders assert without any evidence that the executive are interfering. His Excellency in the certificate specifically states:-

> *"18. In my view, the efficient operation and discharging of judicial functions is a national security, issue. Obedience to court orders is a pre-requisite to the law, order and good* ***governance of the Republic****. Once the authority of the Court is diminished or undermined, it will take a long time to re-establish.* ***In considering the role of an authoritative and credible Court system, which the Republic currently has, the production, disclosure or giving of any oral or written evidence is a threat to national security.***
>
> *17. I have noted that the Applicants are claiming that the production, discovery and testimonies of the witnesses have a legitimate forensic purpose. I have weighed this supposed purpose against the potential instability which more likely than not will be created as a result of the documents being sought to be produced.* ***Not only will it scandalise the judiciary but it will also diminish the public confidence in it. The past, present and future decisions of the Courts, (which even were not appealed) will all become subject to public criticism, ridicule and contempt for no good reason."***

59. His Excellency goes further in saying that:

> *"19. Any preliminary investigation and finding of the means and mode of judicial appointments or their terms and conditions of employment in the midst of the trial of criminal case is not relevant to the facts of the criminal case. The court in trying a criminal case is not the appropriate forum to make such broad findings more so as a trial within trial issue. Be that as it may any finding will not only have nationwide but internationally adverse effects. It will impact upon entering contracts with foreign nationals without surrendering to foreign jurisdiction and laws. It will impact upon the Republic fulfilling its international obligations under various international treaties, conventions, protocols and agreements."*

60. The allegations of Executive interference in judiciary without any scintilla of evidence is repulsive in itself. This Government, which was also in power when the current judicial officer including Magistrate Emma Qaro were appointed. If there was any element of truth in such baseless allegation it is answered by this fact:-

(a) Before there were only two judicial officers (could have manipulated if fewer in numbers and not 5 now).

(b) This Government appointed a Chief Justice, two Judges, Registrar and a Magistrate. The total number has increase from 2 to 5.

(c) Separated the role of Registrar and the magistrate to give the Magistrate court full autonomy and clear demarcation of different hierarchies of court. Before the Magistrate used to be the Registrar of the court as well.

(d) Appointed 4 lay Magistrates.

…

65. His Excellency has been instrumental in this process as the appointing authority for Judicial Officers. Will any one destroy the seeds of his or her own hard work and more so in politics if that can give credibility in public. In this submissions, it is emphasised **THAT IT IS ONLY THE ACCUSED PERSON WHO TOOK THE LAW IN THEIR OWN HANDS AND NOW THAT ALLEGE JUDICIARY IS NOT INDEPEDANT?** *Can their counsel, who have been appearing the cases honestly belief this as officers of this court after being admitted to the bar here?* It is questionable where would any anyone in the world survive the wrath of contempt of court for making such broad and sweeping allegation of judiciary that is "*does not enjoy the minimum level of independence*". As officers of the court, they ought to have exercised care and caution before making any such assertion to scandalise the judiciary. ***There are no affidavits filed by the accused making such allegations***. It is coming from the Counsel from the bar table. With respect it is submitted that this issue must be treated very seriously by the court as counsel stand before it and scandalise the entire court system.

66. The vague application without any formal summons and motion or relief, seeking to obtain evidence to be adduced from Republic to establish a case that the judiciary is not independent is a "*fishing expedition*" and not legitimate forensic purpose. It is submitted for a good reason. The original submissions was to ***stay the criminal proceedings for 6 months***, it now has changed to ***permanent stay. What is the legitimate forensic purpose?*** Changing the purpose is an abuse of the process of the court.

67. Be that as it may, his Excellency has claimed that any attempt to bring any disrepute or diminish the authority of the entire judicial system of Nauru, is a national security issue. As the Head of the Republic, he is the best person to decide this. His reason are clear succinct. It is humbly submitted that on this ground of national security, no evidence documentary, oral or affidavit is to be admitted in evidence in court.

…

75. Considering on the other hand, the repercussions of even any examination by any court as to the independence of the judiciary would have. Vast majority of the population, who have civil and family matters pending will be prejudiced. The criminals may take the advantage of such malicious findings of judiciary does not meet the minimum standard of independence. What will happen to over 200 refugee appeals pending before the Supreme Court as refugee Appeals tribunal? As his Excellency has alluded, this will put Nauru is a very precarious position to recruit qualified and competent professionals as judicial officers.

…

100. With respect it is submitted that the accused by the counsel have submitted to the effect that that Nauru's current judiciary as the whole institution is not independent. The allegations are made of Executive interference imputes that the judicial officers are writing decisions to please the Executive Branch. Such imputations bring in to disrepute the entire judiciary and diminish its reputation and authority. They have not adduced any evidence that Executive are actually interfering. This despite the fact that the court has given decisions in their favour as well. The Republic has lost many cases in Court since 2014 and continue to lose. This is evidence itself of the fact that judiciary operates in a free and fair environment. All the Executive does is to ensure judicial appointments are done to serve the people of the Republic.

157 The defendants opposed the declaration and the proposed orders sought by the Solicitor-General. Their submissions included the following:

88. The Solicitor General suggests that the contents of the certificate issued by the President is sufficient alone to warrant a finding that the claim of privilege is upheld.

89. It seems the Solicitor General intends to adduce no further evidence on the public interest immunity question except the certificate.

90. Reliance is placed upon *Air Canada v Secretary of State for Trade* [1983] 2 AC 894 where Lord Denning stated:

> *it all depends on the certificate. If it describes documents in sufficient detail and gives the reasons with sufficient clarity that should be sufficient for the judge to refuse production of without ado. Inspection is only necessary where the certificate is lacking in detail or the scales are very unevenly balanced.*

91. It is submitted by the Solicitor General at [52]:

> *based upon this leading authority the court cannot order the discovery of any documents.*

92. This is to misstate the effect of the authority.

93. The authority cited is concerned with questions of evidence and as to whether the court needs to examine the documents.

94. It is not concerned with the application of the public interest immunity test, in terms of the balancing of the two public interests.

95. If the Solicitor General was correct, there would be no test for the court to apply, so long as the documents were identified sufficiently in a certificate, public interest immunity would apply. The same submission is made at para [67] of the Solicitor General's submissions.

96. This is untenable in a democratic society based on the separation of powers. It is for the judiciary to determine public interest immunity on the basis of evidence not just of the description of documents, but as to the harm that would be caused by disclosure.

97. The Solicitor General suggests it is simply determined by executive certificate.

98. The Solicitor General submits at [58] that the Accused are "*speculating*" that the judiciary is interfered with and asks, "*have they adduced evidence of this?".*

99. At [60] it is submitted that, "*the allegations of executive independence in judiciary without any scintilla of evidence is repulsive in itself*".

100. This submission is not mindful of the evidence that has been led and is in any event hardly an answer to subpoenas that are being issued to obtain further evidence.

…

108. At para [67] to [78] the Solicitor General make submissions concerning the public interest immunity question

109. All these submissions are based on the Solicitor General's erroneous assumption that the certificate signed by the President is evidence in the case. In fact, it evidences no more than the fact a claim has been made by the executive.

110. There is no evidence for the submissions made at [69] that there will be harm caused to the public interest if the process for the appointment, termination or non-renewal of contract of judicial officers is examined in these proceedings.

111. The irony in the submissions of the Solicitor General is obvious. The same executive who deported without process the Resident Magistrate and banned without process the Chief Justice now claim that examination of these matters will undermine the judiciary.

112. In fact, a failure by this Court to allow the transparent examination of these matters will undermine public confidence, because the inevitable conclusion of the reasonable observer will be that the Court might be acting to protect the executive from examination of their misconduct.

113. At [75] and [76] the Solicitor General suggests that "*any examination by any court as to the independence of the judiciary*" will have deleterious consequences including prejudice to the "*vast majority of the population*" and therefore should not occur. It is suggested that judicial scrutiny of these matters will cause "*grave and irreparable damage*".

114. This logic suggests that the judiciary must never allow its circumstances to be examined and must simply continue on with cases at all costs.

115. This in fact would gravely damage the future of the judiciary of Nauru. Only by recognising and acting upon the harm done to the independence of the judiciary in fact and perception by the executive misconduct will public confidence be ensured and restored.

…

138. At [101] to [102] the Solicitor General relies on a range of civil authorities for the submission that,

> *"it is for the accused to lay the foundation before the discover process can be activated by the Court. This the accused have failed to do. There is no affidavit evidence not any formal application for such discovery. In Air Canada v Secretary of State for Trade (No. 2) (1983) 1 ALL ER 161 it was held that the first step to discovery is for the party seeking discovery to discharge the onus imposed on him to show that the inspection or discovery is necessary for disposing of the matter fairly. Lord Scarman said that:*
>
> > *"The Court will not inspect unless there is a likelihood that the documents will be necessary for disposing fairly of the case or saving costs"*
>
> *It is submitted that the accused have failed to discharge their onus that the discoveries sought will fairly dispose of the criminal charges"*

139. With respect to the Solicitor General, this is not a civil case and nor due the accused seek discovery. His submissions are irrelevant.

…

144. The Solicitor General, Mr. Jay Udit, suggested in his submissions at paras [65] to [66] that counsel for the accused have engaged in abuse of process and contempt of court. The same submission in respect of contempt of court is made at [95] to [100]. The same allegation of abuse of process is made at [25] to [31].

145. It is said by the Solicitor General at [65]:

> "*It is questionable where would anyone in the world survive the wrath of contempt of court for making such broad and sweeping allegation of judiciary that it, "does not enjoy the minimum level of independence".*

146. It is said by the Solicitor General at [100] even more directly that counsel for the Accused have committed a contempt of court.

147. This submission should be understood as precisely what it is, a threat made by a key member of the executive of the institution of criminal charges against lawyers who suggest that the events of recent years in Nauru in respect of the judiciary have compromised the capacity of the Court to proceed with the trial of the Accused.

148. The reality of course is that in a wide range of jurisdictions worldwide this precise allegation is made.

149. That is why there exists the wide range of case law interpreting the provisions on the European Charter of Human Rights and the International Covenant on Civil and Political Rights and like documents as outlined in the submissions already filed by the Accused.

150. Lawyers the world over defend their clients in circumstances where the level of judicial independence is in question by questioning that very thing.

…

152. The Solicitor General employs the bullying, threatening and intimidating tactics of authoritarian regimes the world over. His tactics should be rejected by this Court.

153. Counsel for the Accused respectfully request the Court to caution the executive against continuation of such threats.

154. The threatening actions of the Solicitor General should be understood as a continuation of a series of acts involving the deportation of the former Magistrate, the blatant violation of a restraining order in that respect, banning of the Chief Justice from the country, the suspension of the opposition members for the entire of the remainder of the term of the last parliament and the non-renewal of the former Magistrate's contract following her granting appeal bail to certain of the former co-accused.

155. The picture painted is of an executive unrestrained in its conduct by democratic norms.

156. It is this picture that would lead the reasonable observer to apprehend that the Court might simply be removed if it displeases the executive.

157. The Solicitor General's threatening submission strengthens the case of the Accused that this trial cannot proceed.

158 On 26 April 2017, Magistrate Lomaloma indicated that he had received submissions from the parties. He declined to hear oral submissions. He indicated that he intended to rule on the extensive written submissions and adjourned the matter for decision on 27 April 2017.

159 On 27 April 2017, Magistrate Lomaloma delivered his ruling. In his ruling Magistrate Lomaloma wrote that when the Court had received the subpoenas "it was clear that the document summoned could be the subject of privilege or public interest immunity and that therefore it would be necessary to get the views of the relevant authorities". Accordingly, he corresponded through the Registrar with the DPP and Mr Hearn.

160 Magistrate Lomaloma referred to the fact that on 30 March 2017 a Pre-Trial Conference was held in court at which the defendants indicated that they intended "to file for a temporary stay of proceedings until a fair trial before a properly independent Judge, both in fact and perception is able to proceed on Nauru and that evidence in support for the application was to be found in the documents subpoenaed and the oral evidence of Honourable David Adeang, the Minister for

Justice and Border Control, and Graham Leung, the Secretary for Justice and Border Control".

161 Magistrate Lomaloma wrote, in his ruling, that the defendants "knew that the remedy they were seeking were in their nature not criminal and therefore bound by the rules of civil procedure and they should have filed affidavits showing" various matters. The affidavits would then have been available to the recipients to object, they would then have a right of reply and the Court would then decide what to do.

162 Magistrate Lomaloma noted that the Chief Secretary had sworn an affidavit stating, *inter alia*, "that he had received a Certificate of Public Interest Immunity by His Excellency the President of the Republic of Nauru under his seal as Chairperson of Cabinet which he had perused and verily believe the contents to be true to the best of his knowledge, information and belief". The President had claimed immunity as to both the class and contents of the documents enumerated in the summons. The President had claimed immunity in any oral or affidavit evidence to be adduced in Court proceedings. The Chief Secretary swore that he was not at liberty to disclose certain documents "over which Cabinet has considered and made deliberations without Cabinet's approval as they are all confidential matters".

163 Magistrate Lomaloma noted that the Solicitor-General had filed a notice objecting to the summons to witness directed to the Minister for Justice and Border Control on the grounds that the substance of the evidence intended to be obtained belonged to a class of evidence which is privileged and immune from disclosure in Court proceedings. The Solicitor-General referred to the fact that there were a lack of particulars as to the relevance of the proposed evidence "to the substantive issues of the criminal charges laid against the accused persons; the proposed evidence had no legitimate forensic purpose which would materially assist the accused in the respective criminal charges laid against them; and the nature of the proposed evidence sought to be produced will be injurious to the public interest of national security and any other grounds that may arise".

164 The Secretary for Justice and Border Control objected to giving oral evidence for the same reasons as the Minister for Justice and Border Control.

165 Magistrate Lomaloma noted that on 19 April 2017 the defendants "had tried to file in Court affidavits of former Chief Justice Geoffrey Eames, former Magistrate Peter Law, Mr Batsiua, Squire Jeremiah and Christian Hearn, the solicitor for the defendants".

166 Magistrate Lomaloma then referred to the submissions of the Solicitor General whereby he objected to the admission of the affidavits that the defendants had tried to file because "they were filed in complete disregard to the orders of the Court". The Solicitor-General had submitted that the affidavits filed on 19 April 2017 ought to be struck out and expunged from the record. He had pointed out that the affidavit of Mr Hearn and the others had certain captions on them that referred to "Affidavit to stay proceedings", "Application for Temporary Stay", or "Application for Permanent Stay". The Solicitor-General had contended that there was no application in the Court on those matters that would allow the defendants to file the affidavits.

167 Magistrate Lomaloma stated that he agreed with the Solicitor-General. He stated that the application for a stay had not yet been filed by the defendants and therefore he would not consider the contents of the affidavits filed in the ruling he made that day. Magistrate Lomaloma state that "Procedural rules are to be observed in any Court as they are designed to ensure fairness to all parties, that cases are dealt with efficiently, and that only pertinent evidence is considered by the Court in the issues before it". He continued "Since there is no stay application yet before this Court, the affidavits of former Chief Justice Geoffrey Eames, former Magistrate Peter Law, Mathew Batsiua and the affidavit of Christian Hearn are to be removed from the record and are to be kept safe and considered once the stay application is made in line with the ruling of Khan J … delivered on 25 April 2017".

168 Whilst the affidavits apparently did have the captions referred to by his Honour Magistrate Lomaloma, the affidavits appeared to have been proffered by the defendants at the hearing before the Magistrate to justify the summonses to witnesses and to support a foreshadowed application at the Pre-Trial Conference on 30 March 2017 for a motion yet to be filed for a stay of these proceedings on the basis that the defendants could not get a fair trial, or a perception of one on Nauru. Notice that such a notice would be filed had already been given, and the summonses for documents and witnesses appeared on their face to support that notice.

169 In my view, that should have been obvious to the Solicitor-General when he appeared before Magistrate Lomaloma and I consider that it behoved him, as the Solicitor-General, not to take a "procedural point" that there was no such application yet before the Court that would support affidavits relating to a stay of the proceedings. That, to my mind, was an unmeritorious technical point taken to convince the Magistrate to reject those affidavits when it appeared clear that they were, at least on their face, directly relevant to the issue of subpoenas and Summons as well as relevant to the foreshadowed Notice of Motion for a stay.

170 Magistrate Lomaloma must have been aware of this because he then went on to indicate that he had considered "the extensive arguments" by the Solicitor-General on the issue of relevance. He said that he agreed with the authorities cited by the Solicitor-General but stated that "I must distinguish them because they deal only with the relevance of evidence which this Court will have to decide when dealing with the criminal charges". Magistrate Lomaloma then stated that "the subpoenas and summons were issued to determine a preliminary matter going to the determination of whether the judiciary in Nauru as constituted is sufficiently independent of the executive to be able to afford the defendants a fair trial as required by Article 10 of the Constitution. The issue is outside the jurisdiction of this Court and will have to be stated for the opinion of the Supreme Court."

171 Magistrate Lomaloma then dealt with the issue as to whether the documents are not to be produced because they are privileged, or subject to public interest immunity.

172 Magistrate Lomaloma referred to the President's Certificate of Immunity as being extensive. He stated that he did not propose to set out its contents fully in his ruling. He stated:

> This Court is in no position to substitute its views for those of the President. The President is from Nauru and knows better than this Court the people, the culture, history, beliefs the politics and likely reactions of the people. As the head of the executive arm of government, he would be expected to get briefed from the Police and all government departments and other sources on the matters he has based his opinions on. I defer to his opinion on the effect of the disclosures on national security.
>
> This Court is in no position to judge the threats to national security as it is not privy to information, advice, knowledge or expertise available to the Cabinet and to the President on the issues discussed above and must therefore treat with respect the reasons for non-disclosure expressed in the Public Immunity Certificate. This is a function and role given by the Constitution and the doctrine of separation of powers to the Executive arm of Government and this Court does not have the expertise, knowledge, information or advice to second guess the head of the Executive. The President and Chairman of Cabinet has stated the facts and reasoned quite succinctly the threats to the judiciary and judicial system and the effects that the production of the documents in the subpoenas and the giving of oral evidence on these matters on the perception of the judiciary, on law and order and weakening of the third arm of Government – the judiciary.

173 Magistrate Lomaloma went on to hold that contracts of employment of judicial officers, their revocation and resignations of former Chief Justice Geoffrey Eames, former Magistrate Peter Law and former Magistrate Emma Garo and any correspondence related to these matters are matters of high policy, "They are weighty matters that Cabinet decided and any correspondence involved related to this matter would be very important to the public interest of Nauru involving as it does the highest levels of the judiciary". He held that "If the contracts of employment, their revocation and resignations are of a class that is protected by public interest immunity because Cabinet considered them before they were made, then the immunity would apply to correspondence generated before and after those Cabinet decisions were made. To hold otherwise would be to expose the Cabinet privilege about these contracts, their termination or non-renewal". His Honour concluded that these documents were protected by public interest immunity or privilege.

174 Magistrate Lomaloma then concluded that the privilege which he found attached to Cabinet documents and correspondence related thereto also applied to oral evidence of the Honourable David Adeang and Mr Graham Leung.

175 As to the subpoenas directed to the Director of Media and the Secretary for Communications to produce recordings of a certain Parliamentary Session made by Nauru TV, Magistrate Lomaloma suggested that the tapes may have been in existence on 3 January 2017 but by the time the subpoenas were issued they were no longer in existence. He found that, in any event, the recordings subpoenaed were sittings of Parliament and "the law on privilege above makes further investigation of this matter a moot point as those tapes would be covered by Parliamentary privilege and not admissible in a Court of law".

176 Finally, Magistrate Lomaloma referred to what he described as a "Balancing Act" as to whether it would be in the public interest to disclose the documents required in the subpoenas in the interests of justice for the defendants, even though they belong to classes that attract public interest immunity. Magistrate Lomaloma concluded as follows:

65. It is in the public interest that defendants should not be denied access to documents or other evidence relevant to their application. The defendants should be able to access the information they require to be produced. However, the basis of this application is not only to have a fair trial under an independent and impartial judiciary but with a judiciary that "*the reasonable observer would perceive to be sufficiently independent of the executive, given the recent history in this area*."

66. Perception of independence on the other hand are a relative term depending on so many factors including but not limited to who the observer is, their experience with the Courts, their interests and their prejudices. Parties who lose their case are unlikely to hold a favourable perception of the courts while even those who win might not be fully satisfied. This is part and parcel of our adversarial system of justice. With so many factors determining the perception of the degree of independence of the courts, the influence of a particular factor plays in it, is difficult to determine conclusively.

67. My conclusions after studying the material before me is that I find that there are good valid, factual and legal reasons for the production of the documents required in the summons and subpoenas, there are no compelling reasons to overcome the privilege that attaches to them.

68. Had the documents been necessary to defend against the criminal charges, the Courts view might have been different.

69. A weighing of competing public interest not to divulge the documents against the defendants right not to be denied access to relevant evidence clearly shows that the former predominates and I therefore hold that the.

70. For the reasons given, I find that the summons and subpoenas issued by this Court on 30 March 2017 for the production of the documents enumerated therein and addressed to:-

    a. Hon. David Adeang, Minister for Justice and Border Control;

    b. Graham Leung, Secretary for Justice and Border Control;

    c. Mr. Bernard Grundler/The Proper Officer Department of Justice and Border Control;

    d. Ms. Sharain Hiram the Director of Media, Nauru Media

    should be stayed and I so order.

71. Further, the Summons and subpoena directed to Mr. Joel Waqa is stayed and I so order.

177 Following the delivery of his judgment Magistrate Lomaloma ordered, on an application by the DPP, that the affidavits of Mr Geoffrey Eames and Mr Peter Law, which had previously been received into evidence on 21 April 2017, be "expunged from the records". The defendants sought reasons from the Court in relation to the power the Court had "to expunge matters from the record".

178 Magistrate Lomaloma then heard submissions from the parties in relation to the use of an audio-visual link for evidence of Mr Geoffrey Eames and Mr Peter Law to be heard on the defendants' application at the trial. He adjourned that part-heard for further submissions to be heard on 28 April 2017.

179 On 28 April 2017, Magistrate Lomaloma heard further submissions as to the issue of AVL evidence and adjourned the hearing to 1 May 2017 for judgment on that matter.

180 On 1 May 2017, Magistrate Lomaloma ruled on the defendants' application for the Court to hear evidence via AVL during the defendants' trial, including the hearing of pre-trial applications.

181 In his decision, Magistrate Lomaloma referred to the defendants having filed a Notice of Motion on 27 April 2017 to stay these proceedings. He had been informed that the defendants "proposed that they call witnesses to enable the Court to rule on the stay application. The defendants intend to call as witnesses in this application Geoffrey Eames QC, Peter Law, Sprent Dabwido and Mathew Batsiua. The witnesses will adduce evidence in support of their application for a stay of the proceedings on whether or not the judiciary of the country is sufficiently independent of the executive arm of government following the events of January 2014".

182 Magistrate Lomaloma noted that Mr Higgins, of counsel, had submitted that since the affidavits of those two witnesses had been ruled out of the District Court on 26 April 2017, and since Geoffrey Eames and Peter Law could not come to give evidence in Nauru, he asked that they give evidence by Audio Visual Link (AVL) from Australia. Magistrate Lomaloma noted that the application raised two issues. First, whether the District Court had power to stay its proceedings and secondly, whether it can or should accept evidence by AVL. As to the first, he held that whilst there was no statutory power to grant, or to prohibit the granting of, a stay in Nauru by the District Court, there was an implied power to grant a stay of proceedings in that Court.

183 Magistrate Lomaloma then dealt with the submissions by both sides on whether or not he should receive evidence via AVL. He referred to the defendants as having "advanced powerful and convincing arguments in favour of allowing two of their witnesses to give evidence by AVL via Skype from Australia". He referred to the High Court in the Solomon Islands allowing AVL to be used in *Fretelia v R* (2006) SBHC 137 (6 September 2006). In that case Palmer CJ referred to it being necessary that courts in the Solomon Islands must have power "to control their own proceedings to enable them to ensure that (their) processes are not only fair to the accused but also the witnesses". Palmer CJ had concluded that it was appropriate in that case to order witnesses to give evidence by AVL.

184 Magistrate Lomaloma, however, pointed out that the witnesses in the above case were giving evidence from another room, presumably in the court premises, or at least in the same town in the Solomon Islands.

185 Magistrate Lomaloma then referred to other submissions put on behalf of the defendants. One was that, on policy grounds, "the taking of evidence by AVL would greatly benefit the administration of justice in the Republic" of Nauru, as it is geographically isolated and would be very useful in the future, not just for the accused but for the State, including victims of serious crime who leave Nauru. The Magistrate said "I completely agree with these arguments".

186 Magistrate Lomaloma then referred to arguments by counsel for the DPP, one of which he said "revealed an important point". That was that in New South Wales, in New Zealand, in England and Wales and in Fiji the power of courts to receive evidence by AVL are all established by statute. He noted that the District Court was established by statute and its powers were limited by statutes. He also noted that "The public interest of holding a fair trial requires that the Court allow evidence to be adduced by AVL if there is no other alternative".

187 Magistrate Lomaloma noted that the District Court "has been invited for the first time in Nauru's history to accept evidence by audio or visual link". He referred to principles of a general nature which he said had nothing to do with the proposed witnesses in the preliminary matter he was considering. He referred to the need for a criminal trial to be held "in controlled circumstances where it is clear to the witnesses that they must tell the truth, that if they lie under oath, there are consequences; that if they misbehave, they are liable to contempt proceedings". He referred to the fact that in a normal court sitting "the witness cannot communicate with anyone else in the courtroom or outside while they were giving evidence. In an AVL setting, it would be almost impossible for the magistrate in Nauru to determine whether the witness giving evidence by Skype is not getting help from somewhere off the screen, or is not getting teleprompt from the camera itself". He referred to witnesses giving evidence in any trial being not required to communicate with other witnesses who have not yet given evidence and he referred to the fact that "These controls are missing in a criminal trial where the witness gives evidence by audio or audio visual means where the witness is outside the jurisdiction". He referred to another consideration, being "the immunity of the witness and the judicial officers involved".

188 Magistrate Lomaloma concluded:

> It is clear that if arrangements are to be made to ensure the integrity of the evidence being taken, the protection of the witnesses, the co-operation of foreign governments is necessary and this is clearly the function and role of the executive and not the Courts. To make rules in this area in this ruling, this Court would be tantamount to judicial legislation and intrude on the prerogative of Parliament.
>
> This Court recognizes the need for an approach that takes account for all the concerns it has raised above and conclude that the interests of justice can best be served by statute and not a ruling by this Court in which it has given itself power from an implied source to trample over the prerogatives of the Executive and Parliament. I am supported in this view by the experience of New South Wales, various other States in Australia, New Zealand, England and Wales and Fiji who have all enacted laws to regulate the taking and reception of evidence by audio and audio visual links.
>
> For these reasons, this Court will not receive evidence from any witness overseas by audio or audio visual link.

189 Before proceeding, I note that on 24 and 25 April 2017 Acting Chief Justice Khan heard the parties in respect of the sentence appeals relating to Messrs Jeremiah, Cecil and Kepae. The Acting Chief Justice heard the appeals and reserved his decision.

190 On 2 May 2017, Acting Chief Justice Khan delivered his judgment as to the sentence appeals involving John Jeremiah, Josh Kepae, and Job Cecil. The Acting

Chief Justice allowed the appeals lodged by the DPP regarding the sentences of those persons, and he resentenced each of them. The following day he heard an application for a stay of the sentences of imprisonment he had imposed and for bail pending an intended appeal to the High Court of Australia.

191 On 4 May 2017, Acting Chief Justice Khan refused the applications for a stay and for bail to Messrs Jeremiah, Kepae and Cecil. On that day, applications were filed on their behalf for leave to appeal to the High Court of Australia.

192 On 5 May 2017, Acting Chief Justice Khan ordered that the sentences of each be stayed and he released each of them on bail pending the applications for leave to appeal to the High Court of Australia.

193 On 2 May 2017, the defendants filed and served a Notice of Motion seeking a stay of these proceedings until a fair trial before a properly independent judge, both in fact and perception, is able to proceed on Nauru.

194 On 3 May 2017, Magistrate Lomaloma, in the District Court of Nauru, heard submissions on an application on behalf of the defendants that Affidavit evidence of Mr Geoffrey Eames QC and Mr Peter Law be admitted. Further submissions were made on that matter on 4 May 2017. Also on that day Magistrate Lomaloma heard submissions as to whether the trial that he was hearing should be adjourned. He adjourned the trial and indicated that he reserved his reasons for doing so. Between 4 May 2017 and 10 May 2017 the defendants' Australian legal team had left Nauru.

195 On 10 May 2017, Magistrate Lomaloma ruled on the admissibility of the Affidavit of Geoffrey Eames QC. The defendants appeared in person.

196 Magistrate Lomaloma referred, in his reasons, to the fact that the defendants had indicated that they would seek to rely on the evidence of former Chief Justice Geoffrey Eames QC, former Magistrate Peter Law, Mr Mathew Batsiua and Mr Squire Jeremiah on the stay application that they had foreshadowed in Annexure A (to Christian Hearn's Affidavit of 26 February 2018) filed on 29 March 2017, as amended on 30 March 2017. The application foreshadowed was for a "**temporary stay of proceedings until a fair trial before a properly independent judge, both in fact and perception is able to proceed in Nauru**". Magistrate Lomaloma noted that the two "former judicial officers cannot come to Nauru to give evidence and I will come to this later, so the defendants applied to have the evidence heard by AVL from Australia". He noted that he had declined that application.

197 Magistrate Lomaloma then set out that the defendants had "then sought to read the affidavit of former Chief Justice Eames sworn on 11 April 2017 which had been tendered earlier on 21 April 2017". The Magistrate noted that he had taken the affidavit as being read on that day, but he later discovered that the affidavit was entitled "**Application to Stay Proceedings**". He noted that there was no such stay application yet in court and that the evidence was not relevant to the application then before him. He ordered, in his ruling of 27 April 2018, that the affidavits of Mr Eames and Mr Law be expunged from the records. After delivering that ruling, he had been asked by Mr Higgins, of counsel, that the power of the Court to expunge matters from the record be identified.

198 Magistrate Lomaloma then proceeded to do so under heading "**The power to Correct Procedural Mistakes**". He found that the District Court "has an implied power to prevent the abuse of its process. The power is an ancillary one that is tied to a duty. The court has a duty to control its own procedures to prevent an abuse of process. If the court has the power to "take the affidavit as being read" and by those words enter it into the record, then the court has the ancillary power to expunge it from the record if there are good valid reasons for doing so".

199 Magistrate Lomaloma then stated that the application before him on Friday 21 April 2017 was "whether documents that had been subpoenaed were covered by public interest immunity and the affidavit of Geoffrey Eames QC entitled **Filed in relation to: Application to stay proceedings** therefore should not be produced". The Magistrate stated that there was no such application before the Court "and the admission of a 100 page affidavit in the record would complicate an already complicated matter. Its filing was an abuse of the court's process and this court therefore, in exercise of the implied power to prevent an abuse of its process struck out the affidavit and ordered that it be expunged from the record until such times as the proper application for stay is filed".

200 Magistrate Lomaloma referred to *Halsbury's Laws of England*, 4th Ed 1976, where the learned authors said that "The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive, and it has an inherent right to take the affidavit off the file for prolixity … where an affidavit is ordered to be taken off the file, it is not unlawful to use a copy. The effect is to destroy the public record of the statement contained in it".

201 Magistrate Lomaloma concluded that Mr Eames' affidavit "has 101 pages and was admitted in pursuit of a co-lateral issue. On the basis of its prolixity, the Court could have taken it off the file but the Court had already used its powers to expunge it for being an abuse of the process of the Court".

202 Magistrate Lomaloma then went on to deal with the defendants' application to tender the affidavit of Mr Geoffrey Eames from the Bar table and the defendants' invitation to the Court to take the affidavit as read without having to read out the details into the record. The Magistrate noted that Mr Eames cannot come to give evidence in Nauru and so he cannot be cross-examined on his affidavit. Mr Higgins, of counsel, had sought to read the affidavit into evidence, not for the truth of the facts but only as to the issue of the apprehension that a fair trial cannot be achieved. He acknowledged that the DPP did not have an opportunity to cross-examine Mr Eames but that, he submitted, went only to the weight to be given to it when the stay is decided.

203 The DPP objected to the evidence being adduced from the Bar table and, secondly, if it were admitted, they would be denied the opportunity for cross-examination.

204 Magistrate Lomaloma noted the defendants' submission that the affidavits of the former judicial officers should be taken as read by the Court because of the length of them and that would save the Court time by reading them into the record. Further, it was contended that the reasonable observer, for the test of perceived bias, should be aware of public statements of numerous international legal bodies in

the affidavits. The Court was invited to consider reading in the evidence so that it was on the Court record for appeal purposes.

205 Magistrate Lomaloma referred to the Affidavit of Mr Geoffrey Eames QC. He referred to it as "consisting of his version of events that led to his resignation as Chief Justice of Nauru". He indicated that he had perused the Affidavit and the numerous exhibits to it. He noted that there were "several purported conversations which (Mr Eames) had with third parties and a lot of opinions by different bodies attached to the affidavit". He stated that: "The words allegedly spoken by third parties are hearsay and therefore inadmissible". He referred to the fact that the third parties would "have no opportunity to rebut those statements or to deny that they ever took place. To admit the affidavit in its then current form could therefore create injustice to the third parties".

206 Magistrate Lomaloma then stated:

> 24. Even if Mr Eames were to come and be cross-examined on those issues, the rule of collateral finality would restrict cross-examination on the credit of the witness and further, no rebuttal evidence would be permitted.

207 Magistrate Lomaloma referred to a Queensland case of *R v Lawrence* [2002] 2 Qd R 400; [2001] QCA 441. He referred to that case describing "a rule of longstanding that evidence cannot be adduced to contradict the denial of a witness in cross-examination on matters affecting only credit save for certain well-recognised exceptions". He went on to say that the basis for the rule is important. He stated that "The Court should not be distracted by side issues which though relevant to the rights of the defendants to a fair trial, do violence to the rights of the public interest that trials are not delayed or protracted endlessly by marginally relevant issues. This is particularly important in the case of Nauru where there is only one District Court and one Magistrate. The other litigants in this Court have a right also to have their matters or causes dealt with quickly".

208 Magistrate Lomaloma appears to then deal with the submission on behalf of the defendants to the effect that he should at least read the affidavit so that it is on the record for appeal purposes. The Magistrate concluded that the laws of evidence were "not designed for the court to collect evidence to be adduced in a superior court. The proper procedure is to seek the leave of the superior court in the appeal to adduce additional evidence". He stated "If the aim of getting the evidence contained in the affidavit of Geoffrey Eames QC were to obtain evidence solely for the appeal, then it is an abuse of process of this court".

209 After dealing with the question of opinions, Magistrate Lomaloma stated that the admission of the Affidavit of Geoffrey Eames QC "would deprive the DPP, on behalf of the people of Nauru, of the opportunity to test the evidence, to seek the removal of opinions not properly obtained, to protect the reputation of third parties mentioned in conversations with the deponent from the harshness of the rule of collateral finality, and to elicit evidence for the Republic".

210 Magistrate Lomaloma then noted that, although he had a discretion to admit the Affidavit of Geoffrey Eames QC, he had come to the following conclusions:

> a. The defendants have a right to a fair trial before an independent and impartial tribunal;

b. there is a public interest the accused should have a fair trial before an independent and impartial tribunal;

c. admitting the evidence of Geoffrey Eames QC would break the laws on hearsay evidence, would likely damage the reputations of certain people without the opportunity of testing the evidence or rebutting the evidence;

d. there is a public interest that the court should not dedicate all its time pursuing every collateral issue whilst the rest of the litigants in the Court wait in vain to have their cases heard;

e. there is a public interest that any evidence admitted in court be tested by cross-examination to *to expose falsehood, to rectify error, to correct distortion, or to elicit vital information that would otherwise remain forever concealed*.

(Emphasis in original, footnote omitted)

211 Magistrate Lomaloma concluded that he was "convinced that it would be in the best interests of justice that the evidence in the affidavit of Geoffrey Eames be not admitted into evidence and I so hold". He ordered that the Affidavit "shall not be read into the record".

212 Also on 10 May 2017, Magistrate Lomaloma published his reasons for granting an application by the defendants for the adjournment of the trial that he was hearing to 24 July 2018 to 4 August 2018.

213 In his reasons, Magistrate Lomaloma noted that the defendants had, on 3 May 2017, filed a motion for an adjournment of the trial in this matter. The motion was supported by an affidavit of Christian Hearn, the solicitor for the defendants. The DPP opposed the application "via an affidavit deposed to by Laisani Tabuakula and filed on Thursday 4 May" 2017. The Magistrate noted that on 3 May 2017, after considering matters raised by both parties and certain concerns the Court had, he had adjourned the hearing to 4 May 2017, "as some of the barristers had to leave the next day".

214 After setting out some history of hearings before himself and his predecessor, former Magistrate Garo, Magistrate Lomaloma referred to the affidavit of Mr Hearn wherein it was indicated that Magistrate Garo had made orders listing the matter for trial between 18 April 2017 and 5 May 2017. That followed an indication by the defendants' Australian legal representatives that the Australian legal team had limited availability for the upcoming trial.

215 Magistrate Lomaloma referred to the fact that when Magistrate Garo set the trial date for 19 April 2017 to 5 May 2017, "she was not aware of the nature and complexity of the pre-trial issues that were in fact raised". He noted that when he was sworn in as the new Magistrate on Nauru on 14 March 2017, "the pre-trial issues had still not been identified and the complex issues raised could only have been addressed if the parties were given time to deal" with them. Magistrate Lomaloma ruled as follows:

20. The pre-trial issues raised fundamentals issues that cannot be brushed off or dealt with quickly. No such application has been raised in any common law jurisdiction except perhaps Pakistan and the parties needed time to gather the evidence, prepare submissions and argue the issues raised to ensure the correct law was applied. The

Court likewise needed to inform itself of the law in these areas to be able to give properly reasoned decisions to do justice to the parties.

21. At the time the application for adjournment was made, the pre-trial matters had not been completed. The defendants had filed an application with the Registrar for leave to judicially review my decision to stay the subpoenas and summons. It is envisaged that if successful, the evidence thus obtained will be used in the application for stay. If unsuccessful, the defendants will have to complete their evidence for the stay application, followed by evidence for the prosecution, arguments and my ruling.

22. The Court could have started the trial proper by refusing the adjournment but continued but this would have resulted in the defendants counsel being unavailable but this would have resulted in an unfair trial. It is also in the public interest that the defendants be given a fair trial to maintain the public confidence in the judiciary.

23. There is also the public interest that the other litigants in the District Court be given the opportunity to have access to the Court to have their family, criminal and traffic matters heard by the Court as quickly as possible. An adjournment was the only option that was open to the Court to be able to meet all these requirements.

24. The DPP has a duty to have the trial as quickly as possible but this must be weighed against the defendants' right to be represented by counsel. It is in the public interest and in the interest of justice that competent counsel represent the defendants in this complex trial, involving as it does so many defendants and with 10 different counts. Without adequate representation, the Court could be swamped and overlook important issues that could result in injustice.

216 For those reasons, Magistrate Lomaloma adjourned the trial to commence on 24 July 2017 until 4 August 2017. He listed any pre-trial applications for hearing on 12 July 2017.

217 On 11 or 12 May 2017, the defendants filed and served in the Supreme Court of Nauru an originating summons by which they sought leave to commence judicial review proceedings in relation to the decision of Magistrate Lomaloma regarding a stay of the summonses and subpoenas issued on behalf of the defendants.

218 On 19 May 2017, the defendants' application for judicial review was called over in the Supreme Court before Acting Deputy Registrar Daoe. Directions were given that the respondents were to file affidavits in reply by 2 June 2017 and the applicants were to file replies by 9 June 2017. All parties were to file simultaneous submissions by 23 June 2017. Replies to submissions, if necessary, were directed to be filed by 30 June 2017.

219 On 5 June 2017, the respondents filed in the Supreme Court and served a notice opposing leave for judicial review.

220 In June 2017, Christian Hearn received correspondence from Ashurst Australia. The correspondence indicated 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. I have taken this from Christian Hearn's affidavit of 26 February 2018.

221 Ashurst Australia is a large international firm of solicitors based in Brisbane, Queensland, Australia. Three letters the firm sent to Christian Hearn are before me. The first letter, dated 13 June 2017, advised Mr Hearn that that firm had "recently been retained by the Director of Public Prosecutions (Nauru) (the **DPP**) in the stay proceedings brought by Mathew Batsiua and others". The firm noted that the stay application was due to be heard in the District Court of Nauru on 12 July 2017 with the trial then presently listed for 24 July 2017 in the District Court.

222 Ashurst Australia then set out its client's position, being the Nauruan DPP, that the District Court of Nauru had no jurisdiction to hear the Stay Application and therefore it should not proceed on 12 July 2017. The letter then set out why that position was being taken. That included Article 54 of the Constitution giving the Supreme Court exclusive jurisdiction to "determine any question arising under or involving an interpretation or effect of any provision of (the) Constitution". That Article provided that where such a question arose, "the cause shall be removed into the Supreme Court, which shall determine that question and either dispose of the case or remit to that other court to be disposed of in accordance with the determination".

223 Ashurst Australia noted that as the defendants had raised a constitutional point, the jurisdiction of the District Court was suspended except for the purpose of ordering a transfer of the cause or matter to the Supreme Court. Ashurst Australia suggested that it was clear that the District Court had no jurisdiction to conduct what was being contemplated in engaging in a trial of factual issues and then reporting the matter to the Supreme Court for determination of the constitutional point.

224 Ashurst Australia noted that applications for determination of points on a case stated were misconceived. Their view was that the entire "cause or matter" ought to have been transferred by the District Court to the Supreme Court.

225 Ashurst Australia informed Mr Hearn that they were instructed that their client was in the process of preparing and filing an application to the Supreme Court seeking to prohibit the District Court from continuing to deal with the criminal case, including the stay; *mandamus* against the District Court seeking the transfer of the criminal proceedings into the Supreme Court; and, in the alternative to prohibition, *certiorari* against the District Court to correct various legal rulings which go to its jurisdiction. Ashurst Australia anticipated bringing those applications before the Supreme Court in the week commencing 3 July 2017.

226 Ashurst Australia's letter goes on to note that it had always been the defendants' intention to raise the constitutional point and have it determined before the criminal case proceeds. What their client proposed achieves that aim. They indicated that they would be interested in Mr Hearn's view on that issue and on their client's proposed applications. Ashurst Australia then commented on their view as to the likelihood of a stay application, claiming the entire judiciary could not hear the matter may be putting it too high. Ashurst Australia's letter concluded in this way:

> As will now be plain, our client's view is that the criminal proceedings must be transferred to the Supreme Court, the constitutional point determined by the Supreme Court, and the matter remitted to the District Court before the District Court is again seized with jurisdiction and therefore in a position to hear the trial. It may be unrealistic to think that this can be achieved in

time to enable a trial to proceed on 24 July 2017. We would, of course, be interested in your views on this aspect of the case as well.

227 Ashurst Australia wrote again to Christian Hearn on 22 June 2017. They wrote that whilst their client disagrees with the defendants as to the effect of the Constitution on the present case (as to the constitutional point raised by the defendants) it was obvious that the constitutional point has been fairly and properly raised. Ashurst Australia were firmly of the view that the matter must therefore be transferred to the Supreme Court.

228 Ashurst Australia refers to correspondence from Mr Hearn in which he had raised "serious issues concerning disclosure, the admissibility of evidence on the stay application (and perhaps the trial) and further constitutional points". They wrote that "It seems to us totally unrealistic to think that a trial can proceed on 24 July". Ashurst Australia continued:

> The contemplated application to remove the matter to the Supreme Court seems consistent with the position your clients had adopted early in the proceedings and we wonder whether there will be any real opposition to the application.
>
> We respectfully suggest to you that the best way forward may be to have the matter transferred to the Supreme Court and agree a timetable for steps which will hopefully lead not only to resolution of the constitutional issues, but resolution of the other issues that you have raised.
>
> Our client is of course interested in having the criminal trial heard. It is not in the public interest for criminal trials to be delayed. It is also imperative that the trial be before a judicial officer who not only is independent, but is seen to be independent, and whose authority is beyond question.
>
> Could you please advise your clients' attitude to a proposal along those lines:
>
> 1. The Government of Nauru approach the President of the Australian Bar Association to nominate a retired Australian judge (of the District Court, Supreme Court or Federal Court) to hear the case;
>
> 2. The Government of Nauru appoints that judge to hear the case;
>
> 3. Your clients abandon their present constitutional point. That would enable the District Court to again be vested with jurisdiction.
>
> We are awaiting instructions on this proposal, but we are confident that our client will agree.
>
> Obviously, any such arrangements will be entered into by our client without any admissions in relation to the allegations your clients have raised in their constitutional issue.
>
> Peter Davis QC is lead counsel briefed by us and any of the counsel briefed by you are invited to telephone him to discuss the matter on a without prejudice basis if you think the matter can be thereby progressed.

229 Ashurst Australia again wrote to Christian Hearn on 22 June 2017. They introduced this letter by stating that "We have been retained to act on behalf of the Republic of Nauru in criminal proceedings and in the various constitutional matters that have arisen as a result. The charges presently before the Court are alleged in a seven count complaint, signed by the Director of Public Prosecutions. Our instructions come from the Director of Public Prosecutions and that is why we have described him as "*our client*"".

230 Ashurst Australia's letter then deals with an allegation of which Mr Hearn had informed Ashurst Australia that he and counsel briefed by him in this matter were alleged to have committed contempt of court by raising a suggestion that the entire judiciary of the Republic of Nauru lacked independence such that they were incapable of fairly trying the defendants. Ashurst Australia sought certain information from Mr Hearn so that they could seek instructions from its client "on this serious matter which, understandably, is causing you concern". Ashurst Australia wrote that "this issue has to be dealt with quickly".

231 Ashurst Australia then told Mr Hearn that he could "be assured that we are well aware of the model litigant principles and how those principles apply specifically to the prosecution by the State of the citizen". The letter indicated that they were investigating issues raised by Mr Hearn as to the objections to the admissibility of affidavits, and the opposition to witnesses giving evidence by audio-visual link.

232 On 28 June 2017, the DPP filed and served an originating summons seeking leave for prerogative relief, namely prohibition against the District Court from further hearing the proceedings, and an order removing the proceedings into the Supreme Court of Nauru or requiring the District Court to report or transfer the proceedings to the Supreme Court of Nauru.

233 By letter delivered by email on 30 June 2017, Ashurst Australia wrote to Christian Hearn as follows:

> **"Contempt of court**
>
> Further to our letter of 22 June 2017, we understand that the allegations regarding the judiciary of Nauru were made by you in court and only in court (or documents filed in court). There seems to be no evidence to suggest that the allegations were made otherwise that in good faith in an attempt to redress what your clients see as an infringement on their right to rely on the constitutional guarantee in Article 10 of the Constitution.
>
> We are instructed by our client (the DPP) that no proceedings are contemplated by the Government of Nauru against you or counsel briefed by you for contempt of court or abuse of process arising from the allegations."

234 On 5 July 2017, Acting Chief Justice Khan heard the DPP's application for leave for prerogative relief. Four Australian counsel or solicitors, including a senior counsel, appeared for the DPP. Mr Lawrence and Ms Graham, both of counsel, and Mr Hearn appeared for the respondents/defendants. They, on their clients' behalf, conceded that the DPP should be granted the he relief sought. The Acting Chief Justice reserved his decision.

235 On 10 July 2017, the Acting Chief Justice delivered his judgment. In it, he noted that the DPP sought prohibition against the District Court to further hear the proceedings; *certiorari* removing the proceedings into the Supreme Court or, alternatively, *mandamus* requiring the District Court to report or to transfer the proceedings to the Supreme Court.

236 The Acting Chief Justice set out the chronology which was detailed in the DPP's affidavit filed on 28 June 2017. He noted that the defendants' stay application before Magistrate Lomaloma was part-heard and was set down for hearing on 12 July 2017.

237 The Acting Chief Justice noted the DPP's written submissions and the oral submissions of Mr Davis QC made on 6 July 2017. The defendants did not file any written submissions and did not oppose the application. The parties had tendered proposed consent orders.

238 The Acting Chief Justice referred to the constitutional issues that had arisen in the proceedings. He stated that it was clear that on the facts asserted by the defendants in support of the stay application that it was necessary to determine a constitutional question. A constitutional question had therefore arisen in the proceedings.

239 The Acting Chief Justice then referred to what he headed "Change in the stance taken by the Republic and the defence". He wrote the following:

> 25. The Director now has a new team of lawyers lead by Mr Davis QC. Their position is that a constitutional issue arose when the respondents foreshadowed or intimated to the Court on or about 29-30 March 2017. And despite that, the District Court has not reported the pendency of the case to this Court, nor has it transferred the proceedings to this Court. When the constitutional issue arose the District Court's jurisdiction was suspended and therefore it has acted without jurisdiction since and consequently all the orders it made are void.
>
> 26. This position was not taken by the Director earlier in the case in Batsiua No. 2; nor was this position taken by the defence in these proceedings earlier until this application was filed by the Director. I would like to add that this Court has not subscribed to the position now propounded by the Director as is apparent from the rulings in Batsiua No. 1 and Batsiua No. 2.
>
> 27. If indeed the Director is correct in the position he now adopts, then I should grant all the relief that he seeks.
>
> 28. The Director's new position is a complete deviation from the established practice of this Court as is clear from Batsiua No. 1 in which the Solicitor General appeared on behalf of the Republic.

240 The Acting Chief Justice wrote that Magistrate Lomaloma "is in the midst of hearing the evidence and the stay application and he has heard evidence of five witnesses and two affidavits were tendered on behalf of two witnesses". He wrote that "The facts have not been ascertained as yet and the Magistrate is in the process of doing so. Mere allegation or assertion (that there is a breach of constitutional right) is not enough". He stated that "When the question arises the Magistrate will be required to act in accordance with s 38 as the District Court will not have jurisdiction to determine **that** as the Supreme Court has the original jurisdiction to determine "**that** question (Article 54)".

241 The Acting Chief Justice found that the question had not arisen as stipulated in Article 54 and s 38 "so the District Court is still lawfully seized of the matter and consequently all the orders that it made are lawful".

242 The Acting Chief Justice concluded as follows:

> 39. When the District Court acts in accordance with the provisions of s 38, the whole cause including "**the question**" is to be transferred to the Supreme Court, as provided for in Article 54 and s 38. In that regard, I was wrong when I decided Batsiua No. 1 [[2017] NRSC 1 (see [13])] where I stated otherwise at [13] of the decision.

40. When the Magistrate transfers the case after the constitutional question has arisen, he will have to act in accordance with s 4 of the *Custom Adopted Laws Act 1971* and in accordance with Practice Note [1972] 1 All ER 286.

41. In the circumstances, the Director's application for leave for prerogative relief is dismissed.

42. The Director having failed in this application may consider making an application under the provisions of s 162(1) of the *Criminal Procedure (Amendment) No. 2 Act 2016* which provides:

    (1) Where any charge has been brought against any person of an offence not triable by the District Court or as to which the District Court is of the opinion that it ought to be tried by the Supreme Court, the District Court may transfer the charge and proceedings to the Supreme Court.

43. My reading of s 162 gives the power to the District Court to transfer this case to this court if the District Court is of the opinion that it ought to be tried by the Supreme Court; and of course in making that determination the District Court would no doubt take into consideration the complexity and public importance of this case.

243 On 11 July 2017, Magistrate Lomaloma had this matter before him for mention. By Order, he transferred the criminal proceedings in this matter for trial from the District Court of Nauru to the Supreme Court of Nauru pursuant to s 162(1) of the *Criminal Procedure Act 1972*, as amended by the *Criminal Procedure (Amendment No 2) Act 2016*.

244 On 12 July 2017, the trial in this matter came on for mention in the Nauruan Supreme Court. The DPP applied for an adjournment. The Court was informed that the prosecution are preparing a new brief of evidence and the defendants were waiting to be served with a new brief of evidence. The Court adjourned the trial for further mention. It came on again for mention two days later on 14 July 2017. The Court was informed that a new prosecution brief was still outstanding. It was adjourned for further mention on 11 August 2017.

245 On or about 1 August 2017, the Minister for Justice released a public statement in Nauru 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.

246 On 8 August 2017, the fourth phase of disclosure by the DPP was made to Christian Hearn. These were five videos and approximately 150 photographs.

247 On 11 August 2017, the trial was listed for mention in the Supreme Court of Nauru. The DPP applied for an adjournment as a new brief of evidence was still outstanding. The trial was adjourned for further mention.

248 On 29 August 2017, the fifth phase of disclosure was made by the DPP to Christian Hearn (being 69 photographs and three videos).

249 On 31 August 2017, the trial was listed for mention in the Supreme Court of Nauru. The DPP applied for an adjournment as a new brief of evidence was still outstanding. The trial was adjourned for further mention.

250 On 6 September 2017, the sixth and final phase of disclosure by the DPP was made to Christian Hearn (being 156 items – statements, audio interviews with witnesses and transcripts of interviews with witnesses).

251 On 9 October 2017, the trial was for mention in the Supreme Court of Nauru. It was adjourned for further mention on 23 October 2017 to be heard before the Chief Justice.

252 On 20 October 2017, the legal representatives for the prosecution provided to the legal representatives for the defence a proposed timetable for pre-trial applications and the trial in the Supreme Court.

253 Also on 20 October 2017, the High Court of Australia made certain orders in respect of the sentencing appeals of Job Cecil, Josh Kepae and John Jeremiah. The orders of the High Court were as follows:

1. Leave to appeal be granted.

2. The appeal be heard instanter.

3. The appeal be allowed and the judgment of the Supreme Court of Nauru reversed.

4. The appeals to the Supreme Court of Nauru by the appellant and the respondent be remitted to the Supreme Court of Nauru, differently constituted, for hearing according to law.

5. The respondent to pay the appellant's costs in this Court.

254 On 23 October 2017, the trial in this matter was listed for mention before Chief Justice Jitoko. It was adjourned to 13 November 2017 for the parties to confer regarding an agreed timetable for trial and pre-trial applications.

255 Between late October 2017 and early November 2017 legal representatives for the prosecution and defence discussed various dates for the hearing of pre-trial applications and the trial and worked towards and agreed timetable. The timetable as agreed between legal representatives for the defendants and for the DPP at that time was as follows:

- Hearing of the *Dietrich* application listed to commence on the afternoon of 28 March 2018 (after plane arrival) and continue on 29 March 2018;

- Hearing of any further pre-trial applications listed for hearing on 23 July 2018 for 2 weeks (except not to be heard on 27 July 2018);

- Trial listed to commence on 22 October 2018 for a 4-week estimate to 16 November 2018.

256 On 13 November 2017, the trial in this matter came on for mention in the Supreme Court of Nauru. The DPP applied for an adjournment of two weeks before fixing the timetable for the trial.

257 On 24 November 2017, the Republic of Nauru terminated the retainer of Ashurst Australia and the Australian barristers to act for the DPP in this matter.

258 On 27 November 2017, the trial in this matter was listed for mention in the Supreme Court of Nauru. The Court adjourned the matter to 8 September 2017.

259 On 8 December 2017, the trial in this matter was listed for mention in the Supreme Court of Nauru. It was adjourned to 11 December 2017 to allow the defendants to file and rely on an affidavit of Christian Hearn. The DPP indicated that he was ready to take a hearing date and he sought March/April 2018 for the hearing of pre-trial matters with the trial by May/June 2018 at the latest. On that day, an Affidavit of Christian Hearn was filed and served on the DPP.

260 On 8 December 2017, the DPP filed an application dated 8 December 2017 for orders for a Declaration that this Affidavit sworn and filed on 8 December 2017 "lacks any legal basis and therefore defective" and that it be "removed from the Court File, quashed and expunged from the Record". The Affidavit was stated to be "prepared in support of the defendants' proposed orders regarding the timetabling of pre-trial issues and the listing of the trial proper". It annexed a copy of those proposed orders. They set out a timetable largely as was agreed with the legal representatives for the DPP in late October 2017 and November 2017 (being Ashurst Australia). The orders included a trial commencing on 22 October 2018 for a four week estimate to 16 November 2018.

261 Mr Hearn's affidavit indicated that based on the timetable proposed in the annexure to his affidavit, and on the oral informal agreement with prosecution counsel, he and "each of the barristers instructed to appear as counsel for the defendants have blocked out the hearing dates in their diaries to ensure they will be available to appear for the defendants during each of the proposed hearing dates". He indicated that "Ashurst Australia's retainer to act for the Nauruan Director of Public Prosecutions, and the instructions to Australian counsel for the prosecution with whom their defence legal team were liaising, was terminated before consent orders were formally agreed".

262 The affidavit indicated that on 6 December 2017, he had contacted the DPP, Mr Rabuku, regarding the proposed timetable in the annexure to his affidavit. Mr Rabuku had responded, *inter alia*:

> *Please be advised that the proposed timetable is unacceptable to me.*
>
> *I am lead prosecutor in this matter and I intend to push this matter to trial in the shortest but reasonable timeframe between now and the new year as these are charges dating back to the year 2015.*
>
> *I intend to have these riot matters dealt with to completion no later than April of next year.*
>
> *That basically means that any application that may amount to a full hearing as an interlocutory application be heard and disposed of between the starting of the legal year in January 2018 to the end of March 2018.*
>
> *I will apply to have the matter fixed for hearing proper in either the 1st week or 2nd week of April 2018 by which time all interlocutory matters that prohibits the calling of our first prosecution witness is already dealt with.*

263 Mr Hearn's affidavit then indicated that some periods of time in the first half of 2018 would be available for the defendants' legal team to hear pre-trial applications

and that they were available for the dates in March which were proposed to be fixed for the hearing of a *Dietrich* application in relation to the unfunded representation of the defendants. Mr Hearn indicated in his affidavit that "At no point prior to (his conversation with Mr Rabuku) had it been proposed by the DPP that they would be seeking a trial date at any point during the first half of 2018". He indicated that not one of the defence representatives had sufficient availability during the period to be able to attend to the pre-trial issues, let alone the trial proper on the timeframe proposed by the DPP who had informed him that he would be pushing for the matter to proceed to finality by April 2018". Mr Hearn indicated that he had assumed that the prosecution had been discussing dates with him in good faith and that each party had made arrangements to be available for substantial periods of time in the second half of 2018.

264 The Notice of Motion by the DPP for orders that the Supreme Court make a Declaration that the Affidavit of Christian Hearn sworn and filed on 8 December 2017 lacks any legal basis and is therefore defective (as it is not associated with any application); and that the Affidavit of Christian Hearn be removed from the Court File, quashed and expunged from the Record was heard by the Chief Justice on 11 December 2017.

265 The Chief Justice heard from Ms Tabuakuro, of counsel for the Republic of Nauru and Vinci Clodumar, of counsel for the defendants on instructions from Christian Hearn. He took into account an Affidavit of Kristian Aingimea in which the despondent indicated that the Affidavit of Mr Hearn had not been made in support of any Notice of Motion by the defendants and that there was no order from the Court for any Affidavit to be field.

266 The Chief Justice found and ordered that the Affidavit of Christian Hearn "does not comply with the *Nauru Civil Procedure Rules 1972* and is therefore legally defective; (and) That the said affidavit be and is hereby removed from the Court file and expunged from the Record". On the same day the Court informed the defendants that the Affidavit could be re-submitted with a Notice of Motion.

267 On 14 December 2017, the defendants filed a Notice of Motion and Affidavit in support of a pre-trial and trial timetable. The Notice of Motion was listed for hearing on 16 January 2018. I assume that the Affidavit in support was the Affidavit of Christian Hearn dated 8 December 2017.

268 On 15 January 2018, in the Supreme Court of Nauru, the DPP appeared and Mr Higgins, Mr Lawrence and Ms Graham, all of counsel, and Mr Hearn appeared for the defendants. The trial had been listed for mention and was adjourned to 16 January 2018.

269 On 16 January 2018, there were the same appearances as the previous day and the defendants' Notice of Motion in relation to a pre-trial and trial timetable was listed for hearing on 17 January 2018.

270 On 17 January 2018, in the Supreme Court of Nauru there were the same appearances and Chief Justice Jitoko listed the trial for four weeks to commence on 6 August 2018. Further, he directed that any *Dietrich* application be filed by 16 February 2018. The DPP was to file any response to any *Dietrich* application by 23

March 2018 and the hearing of any *Dietrich* application was listed to occur on 7 and 8 May 2018. The Chief Justice directed that other pre-trial applications were to be filed by 25 May 2018. The hearing of any pre-trial applications was not fixed but he indicated that they may occur from 23 July 2018.

271 I was appointed as a Judge of the Supreme Court of Nauru on 13 March 2018 to hear and dispose of the matter now before me "between Republic & Mathew Batsiua & Ors". I have set out in my judgment of 21 June 2018 the details about my appointment and my attendance in Nauru in March 2018.

272 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.

273 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.

274 On 19 April 2018, in a teleconference with the parties and which included the Solicitor-General for the Republic of Nauru representing the Secretary for Justice and Border Control and the Secretary for the Treasury, I vacated the hearing of the defendants' Notice of Motion then listed for 7 and 8 May 2018 and re-listed it for 28 and 29 May 2018. I did that because I was advised by the Solicitor-General that he was not available on the earlier dates in May.

275 I heard the defendants' Notice of Motion dated 26 February 2018 on 28 and 29 May 2018.

276 I published my judgment and made orders in respect of that, and the matters raised by that Notice of Motion, on 21 June 2018.

277 The Order that I made on that day that the Republic of Nauru pay into the Supreme Court of Nauru the sum of just over $224,000 by Friday 29 June 2018 was intended by me to ensure that the trial (including any pre-trial applications) that was listed by the Chief Justice to commence on 23 July 2018, and then 6 August 2018, could proceed such that the defendants would be represented by their Australian legal team and would guarantee, as far as I possibly could, that they would receive a fair trial, including a fair disposition of any pre-trial proceedings. I acknowledge that my order did not give the Republic of Nauru significant time to pay that money into Court, but time was running out before the trial and pre-trial matters were listed to commence. I had assumed that the DPP, the legal representatives whom I had assigned to the defendants, and myself were ready and willing to proceed to start the pre-trial matters on 24 July 2018, with the trial following my determination of them.

278 The next I heard was that it had been announced on 3 July 2018 by the Government Information Office for the Republic of Nauru that "The Government will appeal the ruling of the Nauru Supreme Court that recent legislation is unconstitutional, and that they must pay huge legal fees for a group of 19 defendants charged over the 2015 riots at Parliament House". The Minister for Justice was then

quoted as referred to in an earlier paragraph of these reasons where the Media Release is reproduced.

279 I have earlier referred to this Media Release and the lack of any application for a stay of my orders, or any of them, and the lack of any explanation before me for the failure by the Republic of Nauru to comply with my Order 3.

The hearing before me on 30 and 31 July 2018 and 1 and 2 August 2018

280 I heard the defendants' Notice of Motion dated 3 July 2018 on these four days in the Supreme Court of Nauru. Mr Higgins and Ms Graham, both of counsel, and Mr Hearn appeared on behalf of the defendants, including Lena Porte. The DPP, Mr Rabuku, and Ms Puamau, both of counsel, appeared for the Complainant, the Republic of Nauru.

281 At the hearing of the Notice of Motion, the defendants relied on the evidence adduced by them on the Notice of Motion dated 26 February 2018 by which they sought assignment of legal representatives for the defendants which I determined on 21 June 2018. That evidence included three affidavits of Christian Hearn dated 26 February 2018, 22 May 2018 and 3 July 2018. It also included an extract from an affidavit of Peter Arthur Law dated 14 April 2017. The extract comprised paragraphs 15-20 of that affidavit. The evidence also included an affidavit of Mathew Batsiua, including Annexures, dated 14 June 2018.

282 At the hearing, the DPP sought to tender and read an Affidavit of Laisani Naiqato Tabuakuro Deamer ("Ms Tabuakuro"), a barrister and solicitor employed by the Government of Nauru, in particular the Chief Secretary. Ms Graham indicated that she objected to a number of the paragraphs of Ms Tabuakuro's affidavit. Some objections were on the ground that some paragraphs were irrelevant whilst the assertions in others were disputed. In paragraphs 27 and 28 of her affidavit, Ms Tabuakuro referred to an annexed letter dated 11 July 2018 from the Secretary for Justice to the Registrar of the Supreme Court. Ms Graham told me that it was the defendants' wish to cross-examine the Secretary for Justice as to matters he asserted in that letter. The DPP informed me that the Secretary for Justice was not then in the country and would not be returning until after the time set for the hearing of the Notice of Motion. It was therefore not possible for the Secretary for Justice to be cross-examined on his letter dated 11 July 2018 before I was due to return to Australia. I was informed that the Secretary for Justice was well aware of the scheduling of the hearing of the defendants' Notice of Motion in Nauru.

283 During the course of the first day of the hearing, Ms Tabuakuro was called by the DPP for cross-examination by Ms Graham for the defendants.

284 I have earlier indicated somewhat inconsistent assertions in Ms Tabuakuro's affidavit as to her employment and whether it was with the Government of Nauru or with the Office of the DPP. It was ultimately resolved that she is an employee of the Government of Nauru in the Office of the Chief Secretary.

285 I learnt during the course of Ms Tabuakuro's cross-examination that she had nothing to do with these proceedings until she "joined" the Office of the DPP in April 2017. It appears that she first appeared for the DPP in this matter in the District

Court of Nauru on 26 April 2017. She told me during her evidence that in preparing her affidavit she had gone to documents concerning these proceedings that predated April 2017 and relied on them to prepare paragraphs 43 to at least paragraph 82, if not to 84, of her affidavit. Paragraph 85 of her affidavit refers to an attendance at the District Court of Nauru on 26 April 2017 which was the date that it appears Ms Tabuakuro first appeared in Court in this matter. Presumably, Ms Tabuakuro relied on her own knowledge as well as reference to documents when preparing paragraphs 85 to 110 of her affidavit. In paragraphs 43 to 110 of her affidavit, Ms Tabuakuro purports to set out some of the history in this matter relying, presumably, on her direct knowledge and information gained by her indirectly. These paragraphs are included under a heading "**Delay**".

286 In paragraph 6 of her affidavit, Ms Tabuakuro swore that "it is apparent that the Government of Nauru has no intention of paying the amount ordered (by me on 21 June 2018) until their grievances about the legality and correctness of Muecke's J decision, declaration and orders have been litigated and adjudicated by the Nauru Court of Appeal". She annexed here the press release I have reproduced earlier in these reasons.

287 Ms Tabuakuro said that in what she had stated as being apparent, she had relied solely on the press release. When taken to the press release she could not tell me what part or parts in particular led her to swear that the Government had no intention of paying the amount I ordered until after the Court of Appeal had adjudicated on my decision, declaration and orders.

288 In paragraphs 7 to 13 of her affidavit, Ms Tabuakuro makes certain comments of her own about what she thought happened and what she had heard when the matter was before me between March 2018 and the end of May 2018. Some of those comments are inconsistent with my memory of events, but they are of no moment, or at least I do not consider them to be of any moment.

289 In paragraph 26 of her affidavit, Ms Tabuakuro swore that on 26 June 2018, three days before the 29 June 2018 deadline imposed by the Court (to pay funds into Court), "the Director of Public Prosecutions communicated to the Court the statutory and legal limits of his position to effect payment or negotiate on behalf of the Government of Nauru in respect of the Defence Teams legal fees". She annexed the DPP's letter dated 26 June 2017 to her affidavit.

290 In that letter the DPP stated to the Registrar that the Office of the Director of Public Prosecutions is a statutory one under the *Criminal Procedure Act 1972*. The role as prescribed under that Act is limited to the prosecution of criminal matters only. The DPP stated "The Republic under the Act is not the government of Nauru, it is the nation of Nauru". The DPP went on to state that as the DPP he represented the Republic in all criminal proceedings, "I do not act for the Government of Nauru".

291 The DPP stated that my Order 3 had placed him in a difficult position. He stated "I do not have the locus, administrative or legal to negotiate with the defendants' Australian legal team in respect of their legal fees in respect of this matter; or indeed any Counsel for any defendant in respect of any matter. In my capacity as Director of Public Prosecutions I do not have the budget to expend nor

authority to direct any other officer of the Republic to pay the money from the Treasury, which is protected under the Treasury Funds Protection Act 2004".

292 When I received a copy of that letter which was sent to me by the Registrar of the Supreme Court on 29 June 2018, I immediately asked the Registrar to forward to the Secretary for Justice my orders of 21 June 2018, the reasons for my decision, and the DPP's letter of 26 June 2018. I did that solely because I was concerned that the DPP may not have advised the Executive Government of Nauru of my orders and my judgment, with the deadline of 29 June 2018 imminent. I did not ask the Registrar to "serve" my orders and decision on the Secretary for Justice, I merely asked him to forward the documents to the Secretary for Justice.

293 By letter dated 11 July 2018, the Secretary for Justice wrote to the Registrar of the Supreme Court relating to this proceeding. Mr Tabuakuro annexed it to her affidavit in paragraph 27. His letter was under the letterhead of:

> REPUBLIC OF NAURU
>
> OFFICE OF THE SECRETARY FOR JUSTICE AND BORDER CONTROL
>
> **DEPARTMENT OF JUSTICE AND BORDER CONTROL**

294 In his letter to the Registrar, the Secretary for Justice referred in particular, to "purported service" upon him of a sealed copy of various declarations that I had made on 21 June 2018, and service of a letter from the DPP dated 26 June 2018, and what he referred to as an "***amended judgment***" dated 21 June 2018. The Secretary for Justice wrote that he had received "these documents as a matter of courtesy as they emanate from the Judiciary, entirely without prejudice".

295 The Secretary for Justice went on to state that he had "no role in criminal proceedings. This responsibility has been assigned by the Parliament to the Director of Public Prosecutions under 45 of the *Criminal Procedure Act 1972*". He therefore requested reasons why I had "required the service of the declarations and amended decision and orders be served on" him.

296 The Secretary for Justice went on to state that the "Office of the Secretary for Justice is only responsible for proceedings against the Government under the *Republic Proceedings Act 1972*". As this matter was not a civil proceeding "By law, the Secretary's Office has nothing to do with this matter. This is the responsibility of the Office of the Director of Public Prosecutions". He went on to state the following:

> Furthermore, it is trite law that no party should be made liable for anything unless he or she has been heard and in the case of court proceedings, been able to present his or her case. For the purposes of the litigation, the party against whom the relief is sought must be made a party to the case. The party should be given *standing* to defend himself or herself. In any criminal matter, the Secretary for Justice is not a party to any application. Further, His Honour made it clear during the hearing of the application and call over for directional hearings, that he did not and had no intention of joining the Secretary of Justice as a party. His Honour's decision in this regard was proper as the Criminal Procedure Act 1972 makes no such provision. His Honour has apparently given directions to you for service. With respect, this is not contained in the sealed copy of the declarations nor was it contained in the judgment delivered on 21st June 2018. His Honour having sealed and signed off the Order cannot make any further orders in respect to the service of documents as he is *functus officio*. This is more so in relation to non-parties to a proceeding.

It appears that His Honour having sealed or perfected the order on 21st June 2018 has subsequently 'amended' the judgment on or about 1st July, 2018. The amended part of the judgment is unmarked or not identifiable. As such I am not aware as to what was amended. His Honour appears to have emailed the '*amended judgment'* on 1st July, 2018. However, the Decision and Orders emailed to me are still dated 21st June, 2018.

This again raises a pertinent issue as to the validity of the decision or orders of 21st June and now 1st July, 2018. The so called "*amended decision or orders*" would subsume those of the 1st June, 2018. With respect, after having published and perfected the Order of 1st June 2018, His Honour has no powers to change or alter his decisions. We consider that these actions have with respect, vitiated his initial orders. Having pursued the ***'amended decision and orders'*** I have not been able to see any express statement of such amended judgment in the body of the "decision or the order". We respectfully query the legality and propriety of the amendments and reserve our rights in respect thereof.

It is incontrovertible that the parties to the proceedings are the Director of Public Prosecutions and the accused persons. None of the parties have served any documents upon the Secretary for Justice, nor are they seeking any orders against the Republic in civil proceedings under the Republic Proceedings Act. I reiterate my query as to the necessity of serving process to the Secretary who is not a party to the current proceedings. We also respectfully point out that the directions and the issuance of the order earlier referred to by His Honour from Australia may be contrary to law. The Supreme Court is constituted and sits within the Republic. *Section 80* of the Supreme Court Act makes this plain:

> *"(1) The Supreme Court* ***shall sit for a trial or hearing of a cause or matter or an interlocutory application in the Republic*** *and at such times as the Chief Justice may direct."*

This section is expressed in mandatory terms by the Parliament. In our view, any orders or directional hearing from outside the Republic does not constitute a lawful sitting of the court. If this is correct, any subsequent directions or orders have no effect and are a nullity. May I request that you bring this administratively to the attention of the Honourable Chief Justice?

…

Since the Government was not a litigant to the criminal proceeding in its capacity as a litigant under the *Republic Proceedings Act 1972*, I regret that I have no locus or statutory authority to provide any assistance to the Court. The proposed amendment to the Criminal Procedure Act 1972 which has been declared null and void may have offered some, albeit limited relief. This was the only statutory provision for seeking funds for legal aid or assistance. This leaves no other avenue for the defraying funds from the Treasury not even under the Republic Proceedings Act which is limited to civil proceedings against the Republic (not criminal proceedings at all). Currently there is no budgetary provision for the nature of monies required to be paid under the *Treasury Fund Protection Act 2004*.

297 The Secretary for Justice asked the Registrar to bring his letter to my attention.

298 I asked the Registrar of the Supreme Court to acknowledge the Secretary for Justice's letter and inform him that his letter of 11 July 2018 had been forwarded to me. The Registrar then wrote (in a letter dated 12 July 2018):

> He (that is, I) has asked me to write to you indicating that the only reason that he asked me to forward (not serve) his orders and decision of 21 June 2018 to you was because when he became aware on 29 June 2018 of the DPP's letter dated 26 June 2018, he was concerned that the DPP may not have advised the Executive Government of his orders and decision, particularly that Order requiring the Republic to pay certain monies into court by 29 June 2018. As long as the Government of Nauru was and is aware of his Honour's Orders he is content.

299 In paragraph 30 of her affidavit, Ms Tabuakuro stated that on 12 July 2018 the DPP, having received a copy of the Registrar's letter of 12 July 2018 to the Secretary

of Justice, wrote to the Registrar by letter dated 12 July 2018. She annexed the DPP's letter to her affidavit.

300 In his letter, the DPP wrote that "As a matter of professional courtesy, the Secretary for Justice and Border Control sent me a copy of your communication to him". The DPP continued:

> With particular respect to Muecke's J. concern as communicated by you in that letter, I wish to iterate that I am cognizant of the responsibilities of my position as Director of Public Prosecutions, and the responsibilities of my role as counsel. I have done my utmost within the legal bounds of my position to ensure that Order 3 was complied with. For reasons of privilege I will not discuss this further.
>
> I will state that I provided my counter-part, the Solicitor-General; and the administrative head of the Department of Justice – the Secretary for Justice a copy of the decision, declaration and orders of Muecke J. handed down on 21 June 2018 on or very soon after 21 June 2018.
>
> Having said that, it is important in light of the phrasing of Muecke's J. concern that I make clear that I do not represent the Executive Government, I do not take legal instructions from the Executive Government and I do not provide legal advice to the Executive Government.
>
> If there is an expectation that I brief the Executive Government in respect of the decision, declaration, and orders of Muecke J or indeed any order of any court in respect of any criminal proceedings currently afoot, that expectation is misconceived. That is not the role of the Director of Public Prosecutions. For the avoidance of doubt, I did not and will not do so.
>
> In Nauru, the Executive Government is vested in Cabinet.

That concluded the DPP's letter. I return to it later.

301 I set out below paragraphs 31 to 37 of Ms Tabuakuro's Affidavit as it was filed and served. I say "was filed" because during the course of the week when I heard the defendants' Notice of Motion some of these paragraphs were withdrawn by the DPP (paras 32-35), whilst the others were not withdrawn and were pressed by the DPP.

302 Although some were ultimately withdrawn, I consider that all reflect a very significant matter that arose in this case following my judgment of 21 June 2018 and, to a certain extent, during submissions on the defendants' Notice of Motion dated 26 February 2018, in particular what was said by those who were said to be representing the Republic of Nauru or the Executive Government of the Republic of Nauru or the administrative Departments of the Republic of Nauru. The paragraphs referred to were as follows:

> **THAT** it is the Solicitor-General who provides legal advice to Cabinet.
>
> **THAT** the Supreme Court per Muecke J. has not explained who or what is meant by the phrase "Republic of Nauru".
>
> **THAT** in Nauru, in the context of the criminal trial, the Republic is a reference to the body politic, which is the State as a whole and not the Executive Government or indeed any branch of Government.
>
> **THAT** it is clear that if by Republic of Nauru, Muecke J. meant the Government of Nauru and intended that the monies constitute an unallocated draw from the budget of the Department of

Justice, then the Secretary of Justice as administrative head of the Department is right to be concerned that his voice was not heard.

THAT it is clear from paragraph 173 that Mueckes' J. decision and from the communicated position of Muecke J. in the Registrar's letter dated 12 June 2018 (*See* ***Annexure 4***) that Muecke J. meant the Executive Government in Nauru whenever he referred to the Republic of Nauru whenever he referred to the Republic of Nauru in his decision published on 21 June 2018. However, neither the Defendants' nor Muecke J. had seen fit to make the Secretary of Justice a party to the proceedings in order to legally permit the court to make enforceable orders against the Executive Government of Nauru.

THAT for the reasons articulated in the Director's letter and in this Affidavit, Order 3 is unenforceable against the Director of Public Prosecutions.

THAT it is clear that Order 3 is also unenforceable against the Executive Government of Nauru as it was not a party to the proceedings being Supreme Court Criminal Case No. 12 of 2017.

These raise important issues to which I return later.

303 Towards the end of the first day of the hearing I was informed by both sides that further cross-examination of Ms Tabuakuro by Ms Graham might not be necessary as the parties were considering if they could come to some agreement as to the paragraphs of her affidavit which would be withdrawn by the DPP, would be pressed by the DPP and where there was a dispute that dispute could be resolved by my relying on the Court's Record. I ultimately received a one page document indicating the various paragraphs of Ms Tabuakuro's affidavit that fell into those various categories. There were also some typographical errors corrected. Upon receiving that, Ms Tabuakuro was not further cross-examined by Ms Graham, nor re-examined by the DPP.

304 I have used that schedule when I earlier set out herein in considerable detail the historical facts in these proceedings. In doing so where I relied upon the defendants' "**CHRONOLOGY OF KEY DATES IN COURT PROCEEDINGS**" and paragraphs of Ms Tabuakuro's affidavit that were pressed by the DPP. I have indicated where I have not been able to rely on the Court's Record to resolve other matters.

305 I refer to some of the oral evidence of Ms Tabuakuro, not to embarrass or offend her, but because I think that some of her evidence (including her Affidavit), and the manner in which she gave it, reflected what I have concluded to be an attitude, a mindset, and an approach to this case and these proceedings of many people in authority in the prosecutorial, administrative and executive arm of the Government of Nauru, right up to and including the Minister for Justice, the Honourable David Adeang MP.

306 The final paragraph of Ms Tabuakuro's affidavit was paragraph 111. That read:

111. THAT the chronology of proceedings thus far indicates the following:

a. A consistent effort by the prosecution to proceed to the trial and the hearing of the evidence against all the Defendants;

b. Time-tabling orders that have consistently and significantly accommodated the Defendants initially, and thereafter, the Defendants' Counsel who live and practice abroad;

c. Errors in construction and jurisdiction which has now put in jeopardy the resolution of the criminal charges that the Director of Public Prosecutions' has brought.

307 Ms Tabuakuro was a very aggressive and argumentative witness. Much of what she said before me was not evidence, but were submissions and arguments made aggressively, even, at times, stridently. She seemed to me to be acting more as counsel for the Executive Government than as a witness of fact. She argued for what she considered to be what the DPP wished to assert as being relevant and important to the permanent stay application I was hearing.

308 Ms Tabuakuro also seemed to me to take every opportunity and delight in arguing with Ms Graham during cross-examination by volunteering information that she obviously considered to be important for me to know. One example concerned an affidavit of Christian Hearn dated 8 December 2017 which set out the defendants' proposal to the Supreme Court for a timetable to be set for advancing the matter ultimately to a trial in this Court. For some reason, Ms Tabuakuro considered that she should point out to Ms Graham that the Court had rejected that affidavit in December 2017, and expunged it from the record. She argued that Ms Graham should have made that clear in her questioning of her regarding the affidavit. When Ms Graham put before Ms Tabuakuro the DPP's Notice of Motion seeking a declaration from the Supreme Court that that affidavit "lacked any legal basis and was therefore defective" and that it should be "removed from the Court File, quashed and expunged from the Record", and Ms Graham asked her whether that Notice of Motion was a "filibuster" on the part of the DPP, Ms Tabuakuro argued forcefully that it was not, it was *in response* to a filibuster by the defendants.

309 Ms Tabuakuro used the word "filibuster" many times during her evidence. Her thesis (it was more than a theory) was that ever since the defendants before me were charged on the day after the events at Parliament House on 16 June 2015, they had made filibustering applications to the various courts in Nauru, and had used other filibustering tactics to prevent the charges against them from ever coming to trial. Further, she argued this was despite "a consistent effort by the prosecution to proceed to the trial and the hearing of the evidence against all the Defendants". Her "submission" was that timetabling orders of the Court had "consistently and significantly accommodated the Defendants initially (before they were legally represented), and thereafter, (after they were legally represented) the Defendants' Counsel who live and practice abroad".

310 When Ms Tabuakuro was challenged on some of these matters, and sometimes challenged repeatedly, she vehemently maintained the position that she had expressed that both before and after the defendants were legally represented the courts accommodated them. She maintained her reliance on the documents that she had looked at before she joined the Office of the DPP, and on her own observations in and out of Court since then. Sometimes, however, when pressed about the detail of the proceedings before she became involved in them, she retreated into an assertion that she was not involved at that time, and therefore she could not give a full explanation of what had happened before she was involved.

311 My very clear and firm conclusion regarding Ms Tabuakuro, the evidence that she gave before me and her demeanour in giving it was that her view and her attitude was, and had always been, that all of these defendants were guilty of the

charges against them, that all the charges against them are supported by incontrovertible evidence implicating each of them, and that they should have, from a very early stage, admitted their obvious guilt of the charges by pleading guilty, and accepted the consequences of doing so. Further, that it was only because of their own initial misguided views that they might have a defence to the charges, and later the misguided advice they received from overseas lawyers to exercise their constitutional and due process rights as persons charged with criminal offences, that here we are at the end of July 2018, and still yet to have a trial. Ms Tabuakuro's position and view was that this was entirely the fault of the defendants and their Australian legal representatives and that, if they were going to riot outside the Nauruan Parliament and commit these serious offences, then they should be man enough to admit their crimes and be sentenced for them without seeking to rely on and hide behind constitutional protections or due process rights.

312 I am satisfied and find that Ms Tabuakuro was, and is, not alone in these views in the prosecutorial, administrative and Executive branches of the Government of Nauru. I find that she learnt these views, attitudes and approaches from others in those branches, both directly and indirectly. These others included Ministers and the officers within the Office of the DPP, including the DPP and his predecessor.

313 This leads me now to mention some of the submissions made to me by the DPP in the afternoon of Wednesday 1 August 2018. In his submissions dealing with factors relevant to a permanent stay, the DPP referred to the fact that in some cases accused persons do not want to go to trial. He then submitted that he could "insinuate that these defendants don't want to go to judgment day" on the charges they are facing. When I pressed him to identify on what facts or evidence he relied to insinuate that, he said that there was no evidence and there were no facts. However, he maintained the insinuation he had expressed as part of his submissions to me regarding matters that may be relevant to a permanent stay.

314 At the time the submission was made, it struck me as a rather unusual one for a DPP to make. My view is that such a submission in such circumstances is inappropriate for, and unbecoming of, a DPP to make in any jurisdiction. I do not consider it to be an appropriate submission for a Director of Public Prosecutions, who is the Officer responsible for the representation of a State in criminal proceedings against one its citizens before the courts, to make, whilst acknowledging that there were no facts or evidence to support it. The submission he made reflected however, although not quite so stridently, the position as taken and expressed by his witness Ms Tabuakuro earlier in the hearing before me.

315 When Court resumed at 10.00am the next morning, Thursday 2 August 2018, Mr Rabuku and Ms Puamau withdrew the insinuation made by the DPP the evening before. Not only that, they conceded that the proceedings to date in the District Court, at least those initiated by the defendants, were on applications they had to make and that that explained a significant part of the three year and two months delay since the defendants were charged.

316 This conduct by Mr Rabuku reflected, at least to me, a seismic shift in the attitude of the current DPP from that he himself had previously adopted, and from that of his predecessors, and certainly of those who acted as counsel for the Government of Nauru in higher office than the DPP, including the former and present

Solicitor-General. To me, it reflected conduct by both Mr Rabuku and Ms Paumua that was more consistent with a recognition by both that they are lawyers and members of an Office in Nauru with important, if not vital, responsibilities to the community of Nauru under the law, and with responsibilities to their consciences.

317 Not only did they withdraw the submission to which I have just referred, they then conceded that there were, at least potentially, three instances of Executive Influence that I might consider contributed to the time that it has taken to get these defendants to trial.

318 First, was the fact that the Public Defender's Office refused to act for the defendants just after the "riot" at Parliament House. It was submitted that this was a policy decision of the Executive Government through the Minister for Justice.

319 Secondly, was the fact that the Minister for Justice had refused to allow the former DPP to enter into any plea bargaining with any of the defendants. It was submitted that these were political statements made in Parliament. Although it was submitted that plea bargaining was not conducted in Nauru and it would thereby "be an error of law to plea bargain", I am not prepared to, and do not, accept this as a matter of fact or of law in this country. I consider it no more than a valiant attempt by counsel for the DPP to explain why the Minister for Justice had ordered plea bargaining not to be done, but I do not accept it as a fact or as a reason. It was certainly not the reason given by the Minister for Justice in Parliament for his "ordering" that plea bargaining would not be entertained.

320 And thirdly, the fact that the Republic had not paid the money I had ordered to be paid on 21 June 2018. As to this matter, the DPP had made what I consider to be vague and inconsistent submissions as to what he had done, if anything, regarding my Order 3 of 21 June 2018. Initially, he told me that he never gave any advice to the Executive Government in criminal matters and would not presume to advise them on any matter relating to my Order 3, including whether to advise them as to whether a failure to pay would be a contempt of court. I had earlier asked the DPP about what he had written in his letter to the Registrar of the Supreme Court dated 12 July 2018 when he wrote: "I have done my utmost within the legal bounds of my position to ensure that Order 3 was complied with. For reasons of privilege I will not discuss this further". I had asked him to what privilege he was there referring if he did not act for the Executive Government of Nauru. He did not give me a satisfactory answer. Indeed, I am not sure that he gave me any answer. However, after the "seismic shift" had occurred, I was informed by Mr Rabuku and/or Ms Puamau that advice had been given to the Executive Government by the Office of the DPP to pay pursuant to my Order 3 in order to secure the trial date so that the trial would proceed when it had been listed to do so in July and August 2018. I appreciate their ultimate candour. The money was not paid. So the trial did not proceed when listed.

321 Paragraph 111 of Ms Tabuakuro's affidavit, which I have reproduced above in paragraph 306, was ultimately withdrawn by the DPP in the hearing before me.

The law on permanent stays

322 Article 10 of the supreme law of Nauru, the Constitution of Nauru, under the heading "**Provision to secure protection of law"**, provides in sub-article (2) that:

> A person charged with an offence shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court.

323 Article 10 also provides that a person charged with an offence shall be presumed innocent until proved guilty according to law; shall be informed promptly and in a language that he understands and in detail the nature of the offence with which he is charged; shall be given adequate time and facilities for the preparation of his defence 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. Article 10 provides other protections to a person charged with an offence.

324 Counsel for the defendants submitted that the purpose of the right provided by the Constitution of Nauru for a person charged with an offence to be afforded a fair hearing within a reasonable time "is not only to ensure protection of the accused's individual rights to liberty, security and a fair trial. It is also to protect society's interests by ensuring that criminal cases are ruled upon quickly and fairly. The right to a speedy trial is fundamental to both the rights of an accused in receiving a fair trial, and also the public interest in criminal matters being resolved". It was submitted that a reasonable time is relative, so "any enquiry into whether an accused has had a trial within a reasonable time necessitates how that right is exercised within the context of a particular case". I accept and adopt these submissions.

325 Mr Higgins, of counsel, carefully took me to various authorities in the United States, Canada and Fiji that had set out factors that were considered to be relevant in those jurisdictions to test whether a delay in bringing an accused person to trial is such that that person will not receive a fair trial within a reasonable time or would infringe the right to a "speedy trial".

326 Counsel for the defendants submitted that at the time I heard their Notice of Motion in late July and early August 2018, the delay in their clients being charged and the trial then listed to commence at the pre-trial application stage, was approximately three years and two months. It was submitted that that delay in this case was unreasonable such that the right guaranteed to the defendants by the Constitution is infringed. That is, the defendants have not had a hearing within a reasonable time.

327 Counsel for the defendants submitted:

> 8. It is unreasonable as:
>
> a. The delay in attributing to institutional circumstances (eg. reliance on foreign judicial officers) and/or the Republic's approach to the proceedings.
>
> b. The Defendants have not waived the right to a trial within a reasonable time.
>
> c. The Defendants have not caused or consented to the excessive delay in these proceedings.
>
> d. The number and complexities of the charges and the number of defendants does not justify the degree of delay in these proceedings.

9. The Defendants have been overly subjected to the vexations and vicissitudes of the pending criminal proceedings. In particular, the prejudice to the Defendants includes:

   a. The Defendants have endured the stigmatisation brought about by the lengthy and notorious proceedings against them.

   b. The Defendants have suffered a loss of privacy.

   c. The Defendants have endured onerous bail conditions, including inhibiting several Defendants from departing the island for necessary medical treatment, or other familial obligations.

   d. The Defendants have suffered disruption to their families, social life, education and work.

   e. The Defendants have incurred significant financial costs to engage even *pro bono* legal representatives.

   f. The Defendants have laboured under the uncertainty as to the outcome and sanction.

   g. A key defence witness, Doneke Kapae, has passed away.

328 Counsel for the defendants submitted the following, and I acknowledge with gratitude their assistance in this regard:

14. In *Barker v. Wingo*, 407 U.S. 514 (1972), the US Supreme Court considered whether an accused had not received a "speedy trial" within the terms of the Sixth Amendment. The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence."

15. The balancing is undertaken by reference to four factors identified by Powell J. as the test for infringement of the right to a "speedy trial". They are as follows:

   (a) the length of the delay;

   (b) the reason for the delay;

   (c) the accused's assertion of the right; and

   (d) prejudice to the accused [at 531ff].

16. In Canada, the Courts have upheld the Canadian Charter of Rights and Freedoms as protecting a right to be tried within a reasonable time. It is in the following terms:

   Proceedings in criminal and penal matters

   11. Any person charged with an offence has the right

      (e) to be informed without unreasonable delay of the specific offence;

      (f) to be tried within a reasonable time;

17. The Canadian courts have recognised that the purpose of that right is not only to ensure protection of the accused's individual rights to liberty, security and a fair trial. It is also to protect society's interests by ensuring that criminal cases are ruled upon quickly and fairly.

18. In *Askov* [*Elijah Askov v Her Majesty the Queen* [1990] 2 SCR 1199 *Per* Dickson C.J. and La Forest, L'Heureux-Dubé, Gonthier and Cory JJ] the Supreme Court of Canada considered s. 11(*b*) of the *Charter*. It found that this right was primarily concerned with an aspect of fundamental justice guaranteed, viz, to protect and individual's rights and justice to the accused. The Court determined:

> *"The primary aim of s. 11(b) is to protect the individual's rights and to protect fundamental justice for the accused. A community or societal interest, however, is implicit in the section in that it ensures, first, that law breakers are brought to trial and dealt with according to the law and, second, that those on trial are treated fairly and justly. A quick resolution of the charges also has important practical benefits, since memories fade with time, and witnesses may move, become ill or die. Victims, too, have a special interest in having criminal trials take place within a reasonable time, and all members of the community are entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The failure of the justice system to do so inevitably leads to community frustration with the judicial system and eventually to a feeling of contempt for court procedures."*

19. Consistent with the approach advanced by the US Supreme Court in *Barker v Wingo*, the court advised consideration of a number of factors in determining whether the delay in bringing the accused to trial has been unreasonable:

    (1) the length of the delay;

    (2) the explanation for the delay;

    (3) waiver; and

    (4) prejudice to the accused [At 1200].

20. The Court considered the longer the delay, the more difficult it should be for a court to excuse it, and very lengthy delays may be such that they cannot be justified for any reason. Relevant to the current matter before the Court, the Court in Askov observed:

> "*Delays attributable to the Crown will weigh in favour of the accused … Systemic or institutional delays will also weight against the Crown. When considering delays occasioned by inadequate institutional resources, the question of how long a delay is too long may be resolved by comparing the questioned jurisdiction to others in the country."*
>
> (Emphasis added) [Ibid]

21. In circumstances where the delay is attributable to institutional delay: eg listing standards of the court, unavailability of publicly funded lawyers, preparation of briefs, it is incumbent upon the Crown to show that the institutional delay in question is justifiable.

22. In *Morin* [*Morin v Her Majesty the Queen & Attorney General of Canada* [1992] 1 RCS 771] institutional delay within the context of affording an accused person a trial within a reasonable time, had as its primary purpose, the protection of three individual rights: first, to minimise the anxiety, concern and stigma associated with criminal proceedings; secondly, minimising the exposure to restrictions on liberty as a result of incarceration or restrictive bail conditions; and attempting to ensure that trials occur when evidence is fresh in the mind of witnesses [At 8772].

23. In *Askov*, the Court deemed unreasonable a delay of almost two years between the end of the preliminary hearing and the beginning of the trial. On the other hand, in *Morin*, a delay of 14.5 months between the accused's arrest and her trial was not found to be unreasonable because the Court determined that little or no prejudice could be inferred from the delay.

24. Since *Askov* and *Morin*, the Supreme Court of Canada has recognized that there is a limit to the extent of the institutional delay that can be tolerated, though it acknowledged that some delays are inherently part of the justice system and will inevitably slow things down.

…

26. In Fiji, Art 5(5) of the 1982 Constitution provided:

> *(5) If any person arrested or detained as mentioned in subsection (3)(b) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.*

27. In *Sahim v State* [[2008] FJCA 124], the Court of Appeal in Fiji reviewed the law on criminal trial delay, as to whether it was still the law that where delay was unreasonable, prejudice to the accused could be presumed. The Court adopted the approach of the majority of the Supreme Court of Canada in *R v. Morin*. Noting that the common law position was that where delay was found to be an abuse of the process, that it was only in the most exceptional cases that the indictment was stayed "… and only if there was evidence that the accused was so prejudiced in the conduct of his or her defence, that a fair trial was no longer possible." [At [11]]

28. The common law position was that in the absence of prejudice, hardship arising from delay was merely a factor to mitigate sentence [At [6]]. However, the passing of legislation changed this. By way of example, the Court considered Article 6(1) of the European Convention on Human Rights as guaranteeing a right to a hearing within a reasonable time in both civil and criminal proceedings.

29. Section 29(3) of the Fiji Constitution guarantees the right to trial within a reasonable time. In *Sahim*, the court noted that the factors that they were relevant in the assessment of when delay becomes unreasonable or statutory guarantee of a right to trial within a reasonable time. They are:

    a. The complexity of the factual or legal issues of the case.

    b. The conduct of the parties.

    c. The conduct of the judicial authorities and of the administrative arm of the government.

    d. The effect of the delay on the defendant.

30. It has not always been necessary for the defendant to show resulting prejudice. However, each case depends on its own facts.

Remedy if delay established

31. What the appropriate remedy is where delay is found to be unreasonable is uncertain within the Commonwealth [*Sahim*, at [18]]. The Privy Council held that the breach of the right does not depend on proof of prejudice and that the ordinary remedy for "inordinate and oppressive" delay was the quashing of the conviction [*Darmalingum v. The State*

[2000] 2 Cr. App. R. 445]. However, this was rejected by a differently constituted Privy Council when it distinguished *Darmalingum* and held that in deciding on the impact of delay and on whether there had been a breach of the right, the courts should consider:

a. The length of the delay;

b. The reason for the delay;

c. Whether or not the defendant had asserted his right to speedy trial;

d. The extent of any prejudice. [*Flowers v. The Queen* [2000] 1 WRR 2396 per Lord Hutton]

32. The House of Lords has since determined that it will rarely be appropriate to stay proceedings for delay, if the proceedings have not yet begun because of the strong public interest in ensuring that suspects are tried [*Attorney-General's Reference (No. 2 of 2001)* [2003] UKHL 68].

33. In Fiji, the issue of delay and the basis of a stay application on the ground of delay, was considered by the Court of Appeal in *Mohammed Sharif Sahim v. The State* [Misc. Act No. 17 of 2007].

34. In that case the court considered whether, once systemic post-charge delay was found to be unreasonable, a stay of proceedings was inevitable even in the absence of specific prejudice to the accused. The Court of Appeal held that the correct approach of the courts is two-pronged. Firstly, is there unreasonable delay and a breach of section 29(3) of the Constitution? Secondly, what is the remedy? In determining the appropriate remedy, proceedings should not be stayed in the absence of evidence of specific prejudice [This was subsequently approved in *Bhika v State* [2008] FJHC 179; HAM85D.2008S (18 August 2008).

329 Counsel for the defendants submitted that in "the case of the Nauru 19, the delay is attributable to institutional circumstances (eg. reliance on foreign judicial officers) and/or the Republic's approach to the proceedings. There is no waiver to the right to a trial within a reasonable time; the delay does not fall at the feet of the defendants and the defendants have been subjected to both periods of incarceration referrable to these offences, and onerous bail conditions for over three years".

330 Further, it was submitted that:

> In the case of the Nauru 19, there is no circumstance where the unfairness to the accused by reason that the non-payment of the professional costs and disbursements to their assigned lawyers, can be remedied by any expedition. The Court, having determined that the accused cannot receive a fair trial without their assigned lawyers being publically funded, in the amount ordered, the only remedy which gives effect to that determination, is a permanent stay. The Republic failed to provide legal representation as required by the Constitution, from the outset. This forced the accused to go overseas, and *pro bono*. If the Republic says that the Public Defender's Office was not sufficiently resourced to deal with so many accused, then it should have done what it did in 2013, 2014 and 2015 for the immigration detention centre riots … fund overseas lawyers to appear. Accordingly, these proceedings should be permanently stayed.

331 In the penultimate sentence above Counsel were referring to the extract from an Affidavit of Peter Arthur Law dated 14 April 2017 that was tendered before me at the hearing in May 2018. This extract established, and I find, that following an incident at the Asylum Seeker Detention Centre on or about 19 July 2013, the Minister for Justice asked Mr Law "to prepare a written submission on behalf of the judiciary and the Department of Justice outlining the funding required for additional

positions and legal practitioners to advise and appear for the asylum seekers and to conduct the hearings". Mr Law took considerable time managing the courthouse, supervising staff, and arranging applications for funding to obtain assistance from lawyers from overseas.

332 The DPP, on behalf of the Republic, submitted that before "a stay of proceedings can be considered, there must be a factual basis for that consideration. The burden of establishing the facts which might justify the intervention of a superior court of record by way of an order to permanently stay proceedings rests upon the Defendants. Further, the standard of proof is proof to the civil standard, ie. proof on the balance of probabilities. Finally, the facts must be established by evidence which is admissible under law: see *Takiveikata v the State* [2008] FJHC 315".

333 The DPP submitted (and I acknowledge with gratitude his assistance in this regard):

> 3. In *R v Taillefer & R, R v Duguay* [2003] 3 SCR 307, a decision of the Supreme Court of Canada, Cory J. wrote at [35]:
>
> > "… an accused person who seeks the extraordinary remedy of a stay of proceedings must not only establish on the balance of probabilities that the right to make full answer was impaired, but must also demonstrate irreparable prejudice to that right."
>
> 4. In *R v Taillefer & R v Duguay* supra, the Supreme Court of Canada per Lebel J remarked:
>
> "[117] This Court has frequently underlined the draconian nature of a stay of proceedings, which should be ordered only in exceptional circumstances. A stay of proceedings is appropriate only "in the clearest of case", this is "where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued…
>
> [118] In *O'Connor, supra*, at para. 75, this Court adopted principles to circumscribe the power to order a stay of proceedings. These principles confirm the seriousness of such a decision and the need for a careful and balanced analysis of all the interests at stake – the interests of the accused, of course, but also the interest of the public in crime being punished and in criminal cases being diligently prosecuted. Those principles hold that a stay of proceedings will be an appropriate remedy and fair remedy where:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice."
>
> …
>
> 11. While the Supreme Court has inherent power to grant a permanent stay if that is what the justice of the case clearly demands (see *R v Humphrys* [1977] 1 AC 1, 55E), the Court must:
>
> A. recognise that the power to impose stay is a residual, discretionary power that "should only be exercised in exceptional circumstances" (see *R v Humphrys* [1977] 1 AC 1; *Barton v R* [1980] HCA 48; (1980) 147 CLR 75; *Moevao v*

Department of Labour [1980] 1 NZLR 464; *R v Derby Crown Court, ex parte Brooks* (1985) 80 Cr App R 164; *Attorney-General's Reference (No 1) of 1990)* [1992] QB 630; *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23; *Tan Soon Gin v Judge Cameron & Anor* [1992] 2 AC 205; *Takiveikata v the State* [2008] FJHC 315; HAM039.2008 (12 November 2008)).

B. consider other remedies before it (i.e. the Court) considers imposing a stay (*R v Heston-Francois* (1984) Cr App R 209; *Attorney-General's Reference (No 1) of 1990)* [1992] QB 630; *R v O'Connor* [1995] 4 SCR 411, (1996) 130 DLR (4th) 235; *R v Taillefer & R v Duguay* [2003] 3 SCR 307; *Takieveikata v the State* [2008] FJHC 315; HAM039.2008 (12 November 2008) at [43]).

12. As Bruce J. observed in *Takiveikata v the State* [2008] FJHC 315 at [41]:

> "41. The authorities recognise that the power to impose a stay is discretionary, and that a stay "should only be employed in exceptional circumstances". See: *R v Humphrys* [1977] 1 AC 1; *Barton v R* [1980] HCA 48; (1980) 147 CLR 75; *Moevao v Department of Labour* [1980] 1 NZLR 464; *R v Derby Crown Court, ex parte Brooks* (1985) 80 Cr App R 164; *Attorney-General's Reference (No 1) of 1990)* [1992] QB 630; *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23; *Tan Soon Gin v Judge Cameron & Anor* [1992] 2 AC 205. The power has always been considered a residual one: *Connelly v DPP; R v Humphrys* [1977] 1 AC 1. That carries with it the obvious implication that only when all else fails or no other remedy is realistically available may the court even consider imposing a stay."
>
> Emphasis added

13. Summarizing the law on stay of proceedings across the common law world since at least 1994, Bruce J. observed in *Takiveikata*, supra at [31]:

> "From at least 1994, courts of high authority have held that a stay might be imposed in essentially two circumstances. The first is where it is demonstrated that the accused cannot have a fair trial. That line of thought falls for consideration in this case and I discuss the principles concerning this later in the judgment. The second group of circumstances is less easy to define – especially if the definition is restricted to one sentence. The second category is essentially concerned with conduct on the part of the executive which has an impact on the criminal proceedings and, which is so outrageous – whether that outrageousness is unlawful conduct or otherwise – that for the court to countenance such behaviour would bring the system of justice in to disrepute."
>
> (see *Takiveikata v the State*, supra at [31])

14. Examples of the first category are:

- Unreasonable delay;
- Stand-alone applications based on Non-Disclosure of Relevant and Material Evidence;
- Stand-alone applications based on Destruction of Evidence or the Death of a Witness; and
- Pre-Trial Publicity.

15. The second category on the other hand involves Executive conduct that shocks the conscience. Per the holding of Lord Griffiths in *R v Horseferry Road Magistrates'; Ex parte Bennett* [1994] 1 AC 42 at pp. 61-62:

> "In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to

have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

16. In *R v. Loosely, Attorney-General's Reference (No 2 of 2000)* 2001 1 WLR 2060, Lord Nicholls of Birkenhead observed:

> "Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. **By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive law enforcement functions of the courts and thereby oppress citizens of the state."**
>
> Emphasis added

17. It is for these reasons that the jurisdiction is sometimes termed "the jurisdiction to prevent abuse of executive power" (see *Looseley*, supra per Hoffman J. at [40]).

18. In *Ridgeway v R* [1995] HCA 66; (1995) 129 ALR 41; (1995) ALJR 484; (1995) 184 CLR 19 (19 April 1995), the High Court of Australia articulated the legal principles that permits the Supreme Court the extraordinary course of permanently staying proceedings on the basis of executive misconduct that brings the administration of justice in to dispute in this manner:

> "15. At least since Bunning v. Cross, it has been "the settled law in this country" that a trial judge has a discretion to exclude prosecution evidence on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police. That discretion is distinct from the discretion to exclude evidence of a confessional statement on the grounds that its reception would be unfair to the accused. The discretion extends to the exclusion of both "real" (or non-confessional) evidence and confessional evidence. As Barwick CJ pointed out in Reg. v. Ireland, in a judgment with which the other four members of the Court agreed, the rationale of the discretion is that convictions obtained by means of unlawful conduct "may be obtained at too high a price". In its exercise, a trial judge must engage in a balancing process to resolve "the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law". The basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of "high public policy" relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty."

19. In *Jago v District Court (NSW) supra*, Mason CJ expressly approved the following approach exemplified in the judgment of Richardson J. in *Moevao v Department of Labour* (1980) 1 NZLR 464, at p 481:

> "It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizens alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the

maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend itself to oppression and injustice."

20. Mason CJ went on to remark at the end of that quote:

> "In essence then, the power to prevent an abuse of process in this context is derived from the public interest, first that the trial and the processes preceding them are conducted fairly and secondly, that, so far as possible, persons charged with criminal offences are both tried and tried without unreasonable delay. In this sense, fairness to an accused is not the sole criterion when a court decides whether a criminal trial should proceed."

21. At paragraph 13, Mason CJ. held:

> "For the reasons given, I agree with the approach of Richardson J. as I have explained it. Bearing in mind his Honour's relatively broad view of what may amount to an "abuse of process", I agree also with his explanation of the rationale for the exercise of the power to stay a prosecution. His Honour stated (at p. 482):
>
> > "The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor … that the Court processes are being employed for ulterior purposes or in such a way … as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular processes seems in the circumstances to be unfair to him. That may be an important consideration. **But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice and so continues an abuse of the process of the Court."**
>
> Emphasis added

334 The DPP set out what he referred to as the Australian position as follows:

28. In *R v Marshall (No 2)* [2007] SADC 97 (17 September 2007), Clayton DCJ. Observed at [6], [7] and [8]:

> "[6] The power of the court to grant a permanent stay of criminal proceedings is well understood. A permanent stay should only be granted as a remedy of last resort in extreme cases if the accused can establish that to proceed with the trial would be an abuse of the processes. The court is required to undertake a balancing process which takes into account the interests of the accused, the interests of the alleged victims of the crime and the interests of the community generally (*Jago v District Court of New South Wales; Barton v The Queen, R v Abdulla*).
>
> [7] The requirement that a stay should not be granted too readily was discussed by Brennan J. in *Jago* where His Honour said (at 50):
>
> > "The reasons for granting stay orders, which are as good as certificates of immunity, would be difficult of explanation for they would be largely discretionary. If permanent stay orders were to become commonplace, it would not be long before courts would forfeit public confidence. The granting of orders for permanent stays would inspire cynicism, if not suspicion, in the public mind."

[8] Delay in a prosecution is a relevant factor but is not by itself a reason for a permanent stay of proceedings."

Emphasis added

29. Clayton DCJ. dealing with the application for stay on the specific ground of delay, in the case just cited, held:

> "47. The authorities are clear, and it is accepted by the applicant, that mere delay, even a very long delay, is not by itself to give rise to a permanent stay of proceedings: *R v Liddy (No 4), R v Polyukkovic, R v Wagnar*. Accordingly, the existence of delay is significant, but only if it leads to something else which causes actual prejudice.
>
> 48. I accept the submission of the prosecutor that presumptive prejudice will not ground a stay and that actual prejudice must be shown. *Jago* (supra) per Mason CJ. (at 33) and *Gill v DPP.* In the latter case, Allen J. in the Supreme Court of New South Wales commented that the fading of memory over the years which inevitably occurs over the years can be inferred to cause actual prejudice where the circumstances are such that it is necessary to rely upon detail of the events. It has not been shown that (*sic*) present case is one where detail is likely to assume any significance. In *Jago*, Mason CJ, referring to the reasons of Wilson J. in *Barton*, said (at 34):
>
> > "To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences."
>
> Emphasis added

30. In *Breyer (a Pseudonym) v The Queen* [2017] VSCA 117 (24 May 2017), the Supreme Court in Victoria per Maxwell P and Kyrou JA applied legal principles relevant to an application for permanent stay derived from the decisions of the High Court of Australia in *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLE 23, and Victorian Courts in *Hermandus (a Pseudonym) v The Queen* (2015) 44 VR 335 and *Bauer v the Queen* (2015) 46 VR 382.

31. In *Jago v District Court (NSW) supra*, Mason CJ held at:

> "[19] In the safeguarding of the interests of the accused in the manner I have described, the touchstone in every case is fairness …
>
> [20] **The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial:** see Barton, at pp. 102, 106; Sang, at p. 437; Carver v Attorney-General (NSW) (1987) 29 A Crim R 24, at pp. 31, 31. At the same time, it should not be overlooked that the community expects trials to be fair and to take place within a reasonable time after a person has been charged. The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused … In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare…
>
> [21] **To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial 'of such a nature that**

nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences' ...

Emphasis added

32. In *Hermanus* supra, Priest JA (with whom Maxwell P agreed) set out the following propositions that he drew from Osborne's JA judgment in R v FJL (2014) 41 VR 572 and the cases cited by Osborne JA in that case:

> "First, the exercise of the power to stay must be exceptional since it results in effect in a refusal to exercise jurisdiction. The primary responsibility for deciding whether criminal proceedings should be maintained lies with the Executive and not with the court.
>
> Secondly, in cases involving delay, to justify a permanent stay of criminal proceedings there must be a fundamental defect which goes to the root of the trial of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences. The accused must demonstrate that the delay is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute.
>
> Thirdly, circumstances that the court should consider in determining an application for a stay include: the length of the delay; reasons given by the prosecution to explain or justify the delay; the accused's responsibility for an past attitude to the delay; proven or likely prejudice to the accused; and the public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime. The critical factors are on the one hand the proven or likely prejudice to the accused, and on the other, the public interest in the prosecution and conviction of the guilty.
>
> Fourthly, in order to justify a stay, it is the probability of unacceptable unfairness – rather than the possibility – that is critical.
>
> Fifthly, a trial will not necessarily be unacceptably unfair where relevant documents, recordings or other kinds of evidence have been lost or destroyed, or witnesses have died, so that the jury will be called upon to determine issues of fact on less than all of the relevant material which might bear upon the issues thrown up for determination.
>
> Sixthly, the trial judge may avoid obstacles to a fair trial by evidentiary rulings – including by the exclusion of evidence which is technically admissible, but which might operate unfairly against the accused – and by directions to the jury designed to counteract any prejudice that the accused might otherwise suffer."

335 The DPP set out what he referred to as the New Zealand position as follows:

34. In *CT v The Queen* [2014] NZSC 155 at [32], the New Zealand Supreme Court per Elias CJ, and McGrath, William Young, Glazebrook and Arnold JJ held that the following principles adequately summarized the common law position on stay on the basis of delay:

> "(a) Delay between offending and prosecution does not erase criminal liability and the adoption of limitation periods is for Parliament and not the courts. There is no scope for a presumption that after a particular time memories are too unreliable for the purposes of a criminal trial.

(b) The adequacy or otherwise of the explanation for delay may be relevant to credibility but perceived inadequacy of such explanation is not a ground for a stay, at least in the case of a serious crime.

(c) A judge should grant a stay if persuaded that, despite the operation of the burden and standard of proof and the steps which a trial judge must take to mitigate the risk of prejudice there cannot be a fair trial

(d) There exercise does not turn on whether the Judge is satisfied on the balance of probabilities as to any particular item of alleged prejudice (for instance, that for the delay there would have been identifiable evidence, which might have assisted the defendant). Rather what is required is a judicial evaluation based on assessments of the circumstances as they are at the time of trial and of the likely prejudicial effects of the delay.

(e) Material to such assessments will be the availability (or more commonly, the unavailability) of defence witnesses, relevant documents and independent evidence of whereabouts and activity, the general impact of time on memory, any deterioration in the defendant's physical or mental health (with consequent impact on ability to mount a defence), indeterminacy as to the specifics of the alleged offending (particularly where an isolated act of offending is in issue) and the apparent strength or weakness of the Crown case.

(f) While a defendant facing serious charges will usually have to be able to point to tangible delay-related prejudice, a combination of a very lengthy delay and a weak Crown case may justify a stay.

(g) Judges must approach stay applications on the basis that an evaluative assessment is required of the facts of the case at hand without any presupposition as to what the result should be."

Emphasis added

336 The DPP set out what he referred to as the Fijian position as follows:

35. The leading authority on stay on the ground of delay in Fiji is *Nalawa v The State* [2010] FJSC 2; CAV002.2009 (13 August 2010), a decision of the Supreme Court of Fiji per Byrne, Marshall and Madigan JJ.

36. At paragraph [25] of the judgment, the Supreme Court observed

"[25] From the Case Law this Court at the risk of re-affirming well established principles and for the guidance of the courts and the public states the following factors as relevant to any case in which the question of delay affecting a fair trial is an issue:

(i) the length of the delay;

(ii) the reason for the delay;

(iii) whether or not a defendant has asserted his or her right to a speedy trial and

(iv the extent of any prejudice."

37. The Supreme Court of Fiji held at [26]:

"[25] At all times the Court must take into account local circumstances such as Fiji's limited resources, and particularly those available to the administration of Justice."

Emphasis added

38. Byrne, Marshall and Madigan JJ. Also approved the Court of Appeal's summation of the common law position on stay as follows:

"[27] At paragraph 25 of its judgment the Court of Appeal said that, "There are many previous decisions of this Court which have reviewed the relevant principles concerning delay and the proper application to the facts of the individual case in the terms in Section 29(3) of the former Constitution." The Court then said, "The collection jurisprudence shows us that there are many different factors to consider when determining if an appellant's case was determined within a reasonable time.

These factors include:

(a) The length of the delay;

(b) The reasons for the delay (including on the part of the accused, the judiciary, the prosecution or the legal aid);

(c) The inherent time requirements of the case;

(d) The limitations on institutional resources (including the judiciary, the prosecution and legal aid);

(e) Any waiver by an accused of his rights;

(f) Acquiescence to delay by an accused;

(g) The effect of delay on fairness of a trial;

(h) Any prejudice to the accused caused by the delay.

[28] The Court then said that the above list was not intended to be exhaustive because each case must be examined in the context of its own particular facts before unreasonableness can be determined. It said, "One must balance all the particular circumstances of a case and then determine firstly whether the length of the delay is unreasonable, and secondly, even if the delay was unreasonable determine whether it affected the unfairness of the trial."

[29] We agree with these remarks."

337 The DPP submitted that the various authorities that he referred to could be summarised as follows:

40. The case authorities indicate that the following can and ought to be considered by a Court faced with a permanent stay application on the basis of delay:

From Fiji

(a) The length of the delay;

(b) The reasons for the delay (including on the part of the accused, the judiciary, the prosecution or the legal aid);

(c) The inherent time requirements of the case;

(d) The limitations on institutional resources (including the judiciary, the prosecution and legal aid);

(e) Any waiver by an accused of his rights;

(f) Acquiescence to delay by an accused;

(g) The effect of delay on the fairness of a trial;

(h) Any prejudice to the accused caused by the delay;

(i) Local circumstances such as Nauru's limited resources, and particularly those available to the administration of Justice.

From Australia

(a) There must be actual or likely prejudice [*cf Sahim v State* [2007] FCA 17 at 2007].

(b) The public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime.

(c) Balancing any proven prejudice to the accused, against the public interest in the prosecution and conviction of the guilty.

From New Zealand

In assessing prejudice, the Court must turn its mind to the availability (or more commonly, the unavailability) of defence witnesses, relevant documents and independent evidence of whereabouts and activity, the general impact of time on memory, any deterioration in the defendant's physical or mental health (with consequent impact on ability to mount a defence), indeterminacy as to the specifics of the alleged offending (particularly where an isolated act of offending is in issue) and the apparent strength or weakness of the Crown case.

From Canada

The Defendant must prove on the balance of probabilities that his or her right to make full answer to the charge or charges against him or her was irreparably impaired.

338 The DPP submitted that the length of the delay here is approximately three years and a month.

339 As to the reasons for the delay, the DPP submitted that no trial date could reasonably be fixed between June 2015 and at least early August 2016 because, "through no fault of their own, a majority of the Defendants' needed that time to secure legal representatives". He submitted that a trial date was fixed for 18 April 2017 but the Court's Record will show that the Defendants' trial on the charges ultimately, did not then take place. He submitted that the District Court granted an application to adjourn the trial to 24 July 2017 to 4 August 2017. That trial did not then proceed because Magistrate Lomaloma transferred the proceedings from the District Court to the Supreme Court. Ashurst Australia was acting for the DPP by that time and the DPP submitted before me that between 10 July 2017 and 6 September 2017 "Ashurst Australia for the Director of Public Prosecutions applied for adjournments to permit them time to compile and disclose a new brief of evidence. The new brief of evidence was disclosed in six phases in that period". The DPP referred to the fact that between late October 2017 and early November 2017, the

legal representatives for the defendants and for the DPP agreed a timetable for early 2018 and the second half of 2018, which including an estimated four week trial to commence on 23 October 2018.

340 The DPP referred to the fact that on or about 24 November 2017, Ashurst Australia's retainer was terminated. He submitted that "this is relevant … to the proceedings that unfolded thereafter". It was not entirely clear, to me at least from his written submissions, how it was said by the DPP to be relevant to the proceedings that unfolded thereafter. Notwithstanding this, I have no doubt that it was relevant to what happened thereafter. I shall deal with that in more detail later.

341 The DPP then referred to the history of the matter after late November 2017 to the time when the Republic made no payment into Court following my Order 3 that I made on 21 June 2018.

342 The DPP expressly stated in his written submissions that it was "not submitted (by him) that the Defendants' have waived their rights to a trial within reasonable time". He submitted, however, that the "Defendants' can safely be presumed to know or believe that this is also a case that involves complex matters of interpretation and effect of various parts of the Constitution, statutory interpretation of other legislation, admissibility of evidence and criminal liability". He referred to paragraphs 36 and 57 of the Affidavit of Christian Hearn dated 27 February 2018. He submitted that paragraph 56 of that affidavit was also relevant. In that paragraph, Mr Hearn affirmed:

> The brief of evidence is now in eight volumes plus electronic material such as audio recordings of witness interviews and video evidence. In addition 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.

343 The DPP submitted that "the number and complexities of the charges; the number of the Defendants; the complex matters of the interpretation and effect of various parts of the Constitution, statutory interpretation of other legislation, admissibility of evidence and criminal liability does justify the degree of the delay and the progress of these proceedings".

344 I contrast this submission with submissions made by the DPP in May 2018 when dealing with public interest considerations for the alternative relief then sought by the defendants on their Notice of Motion dated 28 February 2018. The alternative relief was for a temporary stay. In his written submission made then, he submitted:

> 98. The charges have been hanging over the Defendant's heads since April 2015; and the offences involve a significant breach in public order. The Republic of Nauru, having instituted these criminal proceedings, has now been waiting since April 2015 for the resolution of this matter. It is now 3 years since the events that constitute the alleged offences took place. The impact that any further delay past 6 August 2018 may have upon witnesses for the Republic and the defence will have to be weighed in the balance.
>
> 99. In addition, public interest, and in particular, the legitimate right of the public to expect the criminal justice system in Nauru to operate fairly and expeditiously is a vital consideration.
>
> 100. The Republic respectfully submits that there is nothing deposed in the Affidavit of Christian Hearn (of 27 February 2018) or indeed, on the face of the documents filed in

support of the application that (at present) outweighs the great public interest in seeing this object fulfilled.

The DPP then went on to submit that "no novel or particular complex issues of culpability is implicated" in the charges against the defendants. He submitted:

> 108. Disclosures have been served upon the Defendants and the evidence relied on by the Republic at trial is direct in nature and will comprise eye witness accounts and video footage.
>
> 109. The Republic respectfully submits that volume should not be conflated with complexity.

345 The DPP had put before me an Affidavit of Salote Tagivakatini, a Police Legal Advisor in his Office, for the hearing on the defendants' Notice of Motion dated 26 February 2018 for legal representatives to be assigned to the defendants. In his affidavit, the deponent said "that the history of the proceedings (in this case) is long but not complex".

346 Before me, at the end of July 2018, the DPP submitted that "For a small jurisdiction like Nauru; and it is submitted, for many jurisdictions across the South Pacific, this is not an unusual or unreasonable time-frame for bringing a case of this nature to trial on the charges". He was there referring to the delay of three years and one month as not being "unusual or unreasonable" in Nauru and in many jurisdictions in the South Pacific.

347 When I asked the DPP about that paragraph he was not able to support the submission he made in it. It seemed to me to be inconsistent with a submission that he did make when he told me: "I think that no other case in Nauru is like this one", referring to the one before me.

348 The DPP submitted that the authorities established that I must be satisfied, and the defendants have the onus to so satisfy me on the probabilities, that the defendants are unfairly prejudiced in their capacity to make full answer to the charges at trial. In the absence of any such evidence, he submitted that the defendants' application for a permanent stay must fail. He submitted further, that I cannot take account of any personal prejudice that the defendants may have suffered in the delay thus far. It can only be prejudice to their trial, and/or the evidence to be adduced in it. Further still, the DPP submitted that I cannot take account of any prospective prejudice, in the sense that the defendants may suffer prejudice in the future by the fact that any trial in this matter is not imminent and probably would not occur for a considerable time (many months) into the future if a stay were not granted.

349 In dealing with any prejudice to the accused, the DPP submitted on behalf of the Respondent that there was "no evidence before (me) to support an assertion that the Defendants' have been overly subjected the vexations and vicissitudes of the pending criminal proceedings". He submitted, in support of that, the following:

> a. There is no evidence before this Court to show that the proceedings are notorious; that the Defendants' have been stigmatized; that the stigmatization happened because of the proceedings; or because the proceedings are notorious.

b. There is no evidence before this Court to support the assertion that the Defendants' have suffered a loss of privacy.

c. There is no evidence before this Court to support an assertion that the bail conditions of the Defendants' have been so onerous that it has inhibited one or several of the Defendants from departing the island for necessary medical treatment, or other familial obligations.

d. There is no evidence to support an assertion that the Defendants have suffered disruption to their families, social life, education or work; and no evidence to show the extent of that disruption so as to permit the Court to determine whether the disruption is such that it permits a finding that the delay is unreasonable in all of the circumstances (see *Sahim*, supra).

e. There is evidence to support an assertion that the Defendants' have incurred financial costs to engage *pro bono* legal representatives; but there is no evidence of how much each Defendant has incurred, and how this has caused them individual specific hardship. On its own this ground is insufficient to justify a permanent stay order because:

   (i) Securing and retaining legal representation is not an inexpensive exercise and is a cost that all Defendants who choose to be represented by a lawyer of their own choice have to bear;

   (ii) Permitting a permanent stay on this ground alone would be wrong in law and bad for the administration of justice. The reason for this is self-evident. It would set a bad precedent.

   (iii) Further, it is important for the Court to first assess how much each Defendant has spent and how this individually affected them. Without that information, it is respectfully submitted, the Court cannot fairly come to a decision on the existence, nature and extent of the asserted prejudice. The Respondent respectfully submits that this is important for proving *actual prejudice*.

f. The Respondent accepts that a person charged with an offence will suffer the uncertainty as to the outcome and sanction of a trial on his or her charge. However, this on its own is insufficient to justify the grant of permanent stay of proceedings.

g. The Respondent accepts that Mr. Doneke Kepae has passed away. In response, the Respondent indicates that the Police Officer who Mr. Kepae had that conversation with is still living and is available to testify at trial.

The DPP submitted that none of the above matters, save the last, "go to prejudice in being able to fully answer the charges at trial. This, it is submitted, is the primary consideration for the Court when assessing prejudice on the basis of unreasonable delay (see *Taillefur, supra; Jago, supra* and *Takiveikata, supra*)". In his oral submissions, however, the DPP submitted it was the *only* consideration for the Court when assessing prejudice on the basis of unreasonable delay.

350 The DPP submitted (in paragraph 71) that "Local conditions must be taken into account when arriving at a decision to grant permanent stay on the basis of delay … the Court must exercise a degree of judicial tolerance when taking local conditions into account". When I asked the DPP what local conditions he was submitting I should take into account, he did not tell me what they were.

351 The DPP concluded (in his written submissions) that the defendants' submission for a permanent stay on the basis of unreasonable post-charge delay was without merit. He submitted "that no one is at fault" for the time taken to arrive

at the point of submissions in late July 2018 and the delay "was reasonable in all the circumstances of this case". This submission is to be contrasted with Ms Tabuakuro's Affidavit and her evidence which laid the whole blame for the delay on the defendants and on the courts for accommodating them.

352 In the Republic's written submissions on the defendants' Notice of Motion of 3 July 2018, submissions were made on Ground 1 of that Notice of Motion (from paragraph 76). That ground was that Order 3 of "the Nauru Supreme Court made on 21 June 2018 required the Republic to make payment of funds into Court".

353 The Republic submitted that the "Jurisdictional Issue" that was argued before me in May and was referred to in the letter of the Secretary for Justice and Border Control dated 11 July 2018 was relevant to the non-payment by the Republic of the sum ordered by me on 21 June 2018.

354 The DPP deals with this matter from pages 27 to 36 inclusive of the written submissions of the Republic. Those pages also include submissions by the Republic as to "***A Way Forward***". I come back to that topic later.

355 A number of assertions and submissions by the Republic over these pages are, in my opinion and judgment, either incorrect, unsupported, or already decided by me in my judgment of 21 June 2018.

356 What seems to be submitted is that because I did not join as a party to the proceedings that I heard in May 2018, either or both of the Secretary for Justice or the Secretary for Finance, then the order I made for the Republic of Nauru to pay certain monies into Court does not bind anyone, or anybody who constitutes the Republic of Nauru. I had no doubt that when I ordered the Republic of Nauru to pay monies into Court, that order was addressed to and binding on the Republic of Nauru, including the Executive Government of the Republic of Nauru.

357 I accept the description by the DPP that the Republic of Nauru, in the context of a criminal trial, "is a reference to the body politic, which is the State as a whole and not the Executive Government or indeed any branch of Government".

358 However, the Republic of Nauru, as a whole and as a body politic, is constituted, under the Constitution of Nauru, by three branches. They are the Legislature (being constituted in Part IV of the Constitution); the President and the Executive (being constituted by Part III of the Constitution); and the Judicature (being constituted by Part V of the Constitution). This is common to every system of government which is based on the Westminster System as the Republic of Nauru is (and is asserted to be by the DPP in paragraph 78 of the written submission on behalf of the Republic of Nauru). That submission, however, incorrectly went on to state:

> Parliament makes the law, the Director of Public Prosecutions prosecutes for alleged breaches of the law and criminal courts adjudicate on guilt or innocence.

359 Whilst it is true that the DPP "prosecutes" alleged crimes, he does so as part of the Executive Government of the Republic as the representative of the Republic. The DPP is not a branch of the Republic. Section 45 of the *Criminal Procedure Act 1972* provides as follows:

45. The President shall appoint a public officer to be the Director of Public Prosecutions and such Director of Public Prosecutions shall be responsible for the representation of the Republic in criminal proceedings before the Courts. He shall be *ex officio* a public prosecutor.

360 During submissions, I was asked by the DPP why it was that I had not joined the two Secretaries to this matter. I answered that I had not done so for a number of reasons. First, to do so would have been inconsistent with what I considered to be the proper construction of provisions of the Constitution. Secondly, to do so would have meant that the upcoming trial would not have proceeded because the Solicitor-General had informed me that if joined as parties to a civil suit, the two Secretaries would have insisted on pleadings, discovery of documents, possibly interrogatories, and a hearing with documentary or oral evidence. Thirdly, it was my view that the Republic of Nauru was represented at the hearing before me at the end of May and that the Solicitor-General, representing the two Secretaries, had withdrawn partly because he considered and told me that what he wanted to put to me could ably be put by the DPP who represented the Republic of Nauru at that hearing. Fourthly, it was not part of the Solicitor-General's Summons that brought him before me at the end of May 2018 for orders that the two Secretaries be joined as parties to these proceedings. He had made no such application and indeed, part of a relief he sought was to set aside "service" of the defendants' Notice of Motion on the two Secretaries.

361 When I asked the DPP why was it, in light of the correspondence from himself and the Secretary for Justice after 21 June 2018, and the failure by the Government to pay the sum I ordered the Republic to pay, that the Solicitor-General did not remain at the earlier hearing and sought leave to personally withdraw and to withdraw his Summons, his affidavit and his written submissions, counsel suggested that it may have been because I had indicated that I would not join the two Secretaries as parties. I do not recall so indicating at the hearing on 28 May 2018. My memory is as I have indicated above, that the Solicitor-General informed me that he no longer sought, on behalf of his two clients, the orders he sought in his Summons and for that reason, and because he understood that the DPP represented the Republic and could put the submission that he had wished to put before me, that he withdrew the documents he had filed before me and withdrew personally.

362 In addition to the matters above, I indicate that I never received what I consider to be a satisfactory statement from the DPP as to the circumstances in which he may or may not give legal advice to the Executive Government as part of his statutory role in being "responsible for the representation for the Republic in criminal proceedings before the Courts". I also indicate that I do not consider that I received satisfactory information as to the role of the Solicitor-General in representing the Republic and/or giving legal advice to the Republic in criminal proceedings. The DPP submitted that in contrast to his role (which he purported to set out in paragraphs 79 to 88 of the Republic's written submissions):

> … it is the Solicitor-General who represents the Republic of Nauru in civil proceedings.

363 It will be noted from the history I set out earlier in these reasons that the Solicitor-General has at various times appeared in the courts of Nauru in the matter the subject of the charges against the defendants in this case. The Solicitor-General

had also filed Notices of Motion or other originating applications from time to time since June 2015. I earlier referred to what I described as a "seismic shift" in the DPP during the hearing before me in late July 2018/early August 2018 which included the DPP submitting that one instance of Executive Interference in this matter (at least potentially) was the non-payment of the sum I ordered the Republic to pay in my judgment of 21 June 2018. That acknowledges that it is the Executive Government that has (potentially) caused, in what I consider to be a very significant way, this matter not to go to trial in July and August this year. The failure by the Government to pay as I had ordered, had the direct result that the trial listed to commence in July/August 2018 did not proceed because if it had, the defendants would have not been legally represented and I had found in my judgment of 21 June 2018 that they would thereby not get a fair trial.

364 I now come to further findings and conclusions.

Further Findings and Conclusions

365 In my judgment of 21 June 2018, I made a number of findings and conclusions that are relevant to this judgment. Most of the evidence that was before me for my earlier judgment was before me for this judgment.

366 In addition, I have earlier in this judgment made findings where I have considered it appropriate when I was dealing with particular matters of history and of principle. I shall try to refer to these findings, conclusions and comments here, although I may omit to mention some. If I do, that is not because I consider them unimportant.

367 I am satisfied and find that shortly after being charged with criminal offences arising from the events outside the Nauruan Parliament on 16 June 2015 several of the defendants approached the then Public Defender, Mr John Rabuku, requesting that he represent them in regard to the charges laid against them. I am satisfied and find that the then Public Defender refused to provide legal representation to any of the defendants as he had received orders not to provide legal representation to any of the persons charged in relation to "the riot outside Parliament" and that he and his office were "not allowed to represent anyone connected to the protests".

368 I received no evidence or indication in the hearings before me in May 2018 and in July/August 2018 that the position I have found to exist in June/July 2015 has changed. I am satisfied that such evidence, if it existed, could easily have been presented to me by various counsel who appeared before me, or by the witness Kristian Aingimea, a Pleader employed in the Office of the DPP, who met with the Public Legal Defender on 1 May 2018. The failure to adduce any such evidence or any indication of any sort leads me to infer that the Minister for Justice of Nauru has made it plain, directly and/or indirectly, to those on Nauru who could have provided legal representation to the defendants in this case that they are not to do so.

369 I find that it has been understood by the Public Legal Defender and those in his office, by all legal practitioners on Nauru, and by all Pleaders on Nauru that the Minister for Justice expects that no legal assistance or representation is to be provided by them to any of the defendants before me. Further, I find that it is understood by those persons that the Minister for Justice of Nauru considers that all

these defendants are guilty of very serious crimes against the Parliament of Nauru, they should be shown no mercy, and they should be locked up for considerable periods. It is understood that the Minister for Justice believes that as such, the defendants are criminals who deserve no assistance or representation by anyone on the Island of Nauru.

370 In my judgment, the findings and conclusions to which I have just referred, constitute a shameful affront by the Minister for Justice to the Rule of Law in Nauru, which he professes to operate for and give protection to the citizens of the country, under its Constitution.

371 I am also satisfied on the evidence before me and I find that ever since the so-called "riot" at Parliament on 16 June 2015, the defendants have been on a Government imposed employment "blacklist", which has prevented them, or severely limited them, from obtaining employment on Nauru since the 16 June "riot". I am satisfied and find that this "blacklist" does not exist on a piece of paper, but that the Government has made it known to employers and businesses on the Island that it wishes and expects that the "rioters" be not offered paid employment on Nauru. Whether that "blacklist" applies to persons other than the actual persons charged, including their families and others, is something upon which I cannot make a finding.

372 I do find, however, that the "blacklist" as I have found it to be was and has been a matter of "Government policy" and is so understood by people on Nauru. I am satisfied and find that the Member for Aiwo was referring to the "Government policy" of such a "blacklist" when questioning the Minister for Justice in Parliament on 3 November 2016 when he referred to the fact that "people have been suffering unemployment due to the Government policy".

373 There is uncontroverted evidence before me which satisfies me that the "blacklist" has continued since June 2015, it is continuing, and it applies to more than refusing or denying employment to those on it. Such evidence is found in the affidavit of Mathew Batsiua dated 14 June 2018. That affidavit indicates, and I find what follows to be the facts, that in October 2017 Mr Batsiua entered into a leasing agreement with an organisation to provide primary mental health services to the people and residents of Nauru. The lease concerned his house on Nauru. In June 2018 (after I had reserved my decision of 21 June 2018 in May 2018, but before I delivered it), Mr Batsiua received a telephone call from a person associated with the mental health service. He was told "about a directive she had received by the Nauru Cabinet (Government) to vacate my premises and abandon the lease immediately". She informed him she wanted to let him know "that the Cabinet from the Government of Nauru instructs us to leave the house as soon as possible. They even asked us today to move today" but she had negotiated a move on the coming weekend. She told him that she was sorry but "We have no choice. If not, we have to go out". This last comment was understood by Mr Batsiua "to mean that if (the service) did not stop leasing my property, then (it) would be forced by the Government to leave Nauru altogether". I find that that understanding by Mr Batsiua was how what was said to him was meant to be understood.

374 When the service vacated Mr Batsiua's premises and abandoned the lease in June 2018, he no longer received a significant sum in rent per month from renting out his home, to support his wife and family. I find that he had been forced to move

out of his house and to rent it as he could not get paid employment on Nauru because of the "blacklist".

375 In my judgment, this Government imposed "blacklist" is a further shameful affront to the Rule of Law in Nauru which I indicated in my judgment of 21 June 2018 includes "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" (paras 178-179). I referred to that in my earlier judgment in relation to the "blacklist" in Nauru relating to the defendants in this case. If "Government policy" had changed since then, I would have expected to have heard about the change during the hearing before me in late July/early August 2018. I did not, although there were submissions regarding the "blacklist" during that hearing.

376 I am satisfied and find that not only did the Minister for Justice make it plain to the "legal community" on Nauru that legal advice or assistance to the defendants would not be tolerated by the Government, he thereafter, consciously and deliberately, made it as difficult as he possibly could to prevent the defendants from obtaining legal advice and assistance from off Nauru, and, in particular, from Australia. It was 15 months after the events outside the Parliament on 16 June 2015 before lawyers were able to come to Nauru to represent these defendants in court. That occurred for the first time on 27 September 2016. Before that time the defendants appeared for themselves, sometimes with legal assistance from off Nauru, and sometimes from a Pleader Mr Clodumar, as a friend of the Court.

377 I am satisfied and find that the matters of concern that became apparent to the defendants' Australian legal team when they met with some of them upon their first trip to Nauru in September 2016, as deposed to by Christian Hearn in paragraph 27 of his Affidavit dated 26 February 2018, were true, correct and justified. They included that "Almost without exception this was the first time 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 they faced nor the evidence put against them by the DPP". It also included that many of the defendants spoke poor English, they were functionally illiterate in English and that the "brief of evidence that had been served on the defendants had been produced in type written English text". It included further that "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".

378 In my judgment, that such a situation existed 15 months after the alleged "riot" was a further shameful affront to the Rule of Law in Nauru and also to some freedoms guaranteed to all Nauruans by their Constitution.

379 I find that the Nauruan Government, through its various instrumentalities, including the Department for Justice, fought in the Nauruan Courts against the admission to practice in Nauru of legal practitioners the defendants sought to engage to represent them in these proceedings during the 15 months before Mr Hearn and some of his legal team first arrived on Nauru. The Minister for Justice also resisted

the granting of, or even the processing of, visas for some of the legal representatives the defendants sought to instruct to represent them in this matter, even for at least one who was admitted to practice by the Supreme Court over opposition by the Secretary for Justice.

380 Notwithstanding this, on 3 November 2016, only about five weeks after Mr Hearn and some of his team arrived in Nauru, when answering the Member for Aiwo's question in Parliament as to why it was that for one and a half years people had suffered when the court case had just started and whether the "people inside the Court" were performing, the Minister for Justice informed the Parliament that "it even reached the stage that we waived visas for their lawyers to come so there is no excuse for them to come and defend the rioters". There was no evidence before me that the Minister for Justice had waived visas for Australian lawyers to come to Nauru to represent these defendants. The only evidence I received was evidence to the contrary.

381 The Minister for Justice also told Parliament on 3 November 2016, in answer to a question from the Member from Aiwo, that "Out of the 19 (rioters) I know that 10 want to negotiate in terms of offering to plead guilty to some if the prosecution drops some others. We are not here to negotiate. We are not here to be lenient and we have faith that the Court and the prosecution will not exercise any consideration of negotiations or leniency because what they have done is serious … In other countries they will be in gaol for a lifetime. We will get to that Mr Speaker…".

382 The Minister for Justice said this at a time when Mr Hearn and Ms Graham were in Nauru and were appearing for the defendants on a number of occasions in the District Court of Nauru. During that time, Mr Hearn and Ms Graham had "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 (Christian Hearn's Affidavit of 26 February 2018)". I am satisfied and find the above to be the true and correct facts.

383 I earlier referred to the fact that Ms Paumua had submitted before me in July/August 2018 that there was a practice, if not a law, that prohibited plea bargaining in Nauru. I am sure that she meant well by that submission, but I am satisfied that that was her attempt, without any knowledge or experience to support it, to explain why the Minister for Justice might have overruled the DPP. I do not accept that Nauru has a practice or a law that prohibits plea bargaining. That was certainly not relied upon by the Minister for Justice when he told Parliament that "We are not here to negotiate. We are not here to be lenient and we have faith that the Court and the prosecution will not exercise any consideration of negotiations or leniency". I am satisfied and find that the Minister for Justice said what he said because he had ordered the DPP not to negotiate and he had ordered the DPP that there would be no plea bargaining, no negotiations and no leniency. I am also satisfied and find that the Minister for Justice intended by his statement in the Nauruan Parliament on 3 November 2016 that his expectation, and the expectation of the Executive Government of Nauru, was that not only was the DPP and his prosecutors not to give any consideration to negotiations or to leniency, but that the Courts of Nauru should not exercise any leniency towards any of the defendants in

this matter. I am satisfied and find that he also intended to convey to the Courts that he and the Executive Government expected that considerable terms of imprisonment for the heinous crimes the defendants had committed would be imposed on them by the Courts. Further, I find that the Minister for Justice intended to convey to the Magistrate who then had carriage of these charges in the District Court of Nauru, that she should take particular note of what he had said to the Parliament as he expected that the President could "make a consideration" in respect of her contract as Nauru's Magistrate, which was "nearly finished", if she did not heed what he said to Parliament.

384 In the circumstances, I have no doubt and I find that the Minister for Justice was, in parts of his statement to the Parliament of Nauru on 3 November 2016, consciously and deliberately seeking to influence the Nauruan Courts in their dealing with the "rioters", each of whom were expected by the Executive Government to be brought to justice by the Courts and be sentenced severely.

385 In my judgment, in all these respects, the conduct of the Minister for Justice in Parliament on 3 November 2016 was a further shameful affront to the Rule of Law in Nauru.

386 The resistance by the Executive Government of Nauru to legal practitioners from Australia being admitted to practice in Nauru and to be granted visas to enter Nauru, is to be contrasted to the position the Executive Government seems to have taken in mid-2017 when the then DPP instructed Ashurst Australia to represent him in the prosecution of these defendants on the charges laid against them. Ms Tabuakuro told me that the Secretary for Justice had arranged the terms of Ashurst Australia's engagement to be instructed by the DPP to act for the Republic in these proceedings, or at least the funding for their retainer.

387 I do not know what the Republic of Nauru paid in legal fees to Ashurst Australia and its team of counsel. Ashurst Australia and its team acted in this matter from about early June 2017 to 24 November 2017. That is about six months. I was informed that one or two lawyers from Australia spent considerable time on Nauru preparing for the trial, including preparing a new brief of evidence.

388 I find that that new brief of evidence was not completed and disclosed to the defendants' Australian legal team until September 2017, two years and three months after the alleged "riot" at the Parliament. I am in no position to judge whether there were only limited differences between the various versions of the briefs of evidence, as was asserted by the DPP before me, but some of my findings referred to in paragraph 36 above lead me to infer that the differences were much more than limited as the briefing of Ashurst Australia caused the trial to be abandoned in July 2017. Further evidence of this is that lawyers from Ashurst Australia spent significant time on Nauru preparing the new Brief of Evidence and there were a number of adjournments in the Supreme Court to await the complete new brief (see paragraphs 387, 244-250 above).

389 I am prepared to infer and find that briefing Ashurst Australia and its team of barristers to act for the DPP to prosecute these defendants cost the Republic hundreds of thousands of dollars.

390 I do not know why the DPP briefed Ashurst Australia in what was probably early June 2017. Ms Tabuakuro's evidence was that it happened because it was thought outside the Office of the DPP that the DPP and those lawyers in his office were not up to the task of prosecuting the case effectively. I do not rely on Ms Tabuakuro to make such a finding, but I suspect that there was something in what she told me, at least from the point of view of the lawyers then in the Office of the DPP.

391 There was no evidence before me as to why Ashurst Australia's retainer was terminated on 24 November 2017. I do know that it was in September 2017 that Mr John Rabuku, the current DPP, was appointed DPP. He was what was described as a Senior Government Officer before that appointment. I can say, however, and my finding and conclusion from the material before me is, that when Ashurst Australia and its team of barristers were involved in the prosecution of the defendants in this matter they adopted, as prosecutors, a very different approach to the one that had been adopted before their retainer.

392 The first thing Ashurst Australia did was to consider the state of proceedings in the matter and write to Christian Hearn, the instructing solicitor for the defendants. The letters they wrote to Mr Hearn in June 2017 were thoughtful, reasoned, and professional. In them, they acknowledged their professional and public duties as prosecutors of crime, and they acknowledged that the defendants had properly raised significant matters which should and must be addressed and dealt with by the courts of Nauru. They proposed reasonable, even conciliatory, proposals to address these matters and to bring the prosecution of these defendants to as earlier a trial as could possibly be achieved.

393 Very important amongst these was their assertion that it was "imperative that the trial be before a judicial officer who not only is independent, but is seen to be independent, and whose authority is beyond question". They proposed that the Government of Nauru appoint a retired Australian Judge to hear this case. They expressed confidence that their client, the DPP, would agree with this proposal. This was a significant change in approach from that "argued" by the President and the Solicitor-General in the proceedings before Magistrate Lomaloma just a few months before.

394 I am satisfied and find that when the retainer of Ashurst Australia was terminated in late November 2017, the DPP and his Office adopted the same approach that his predecessor and others in the Executive Government of Nauru had adopted before Ashurst Australia were retained in June 2017.

395 Although it seems, and I find, that Ashurst Australia were retained at about the beginning of June 2017, four lawyers from Australia, including a senior counsel, appeared for the DPP in the Supreme Court of Nauru on 5 July 2017 in this matter. I infer that each lawyer had been admitted to practice in Nauru and that each had a valid visa to enter the country so that each could and did appear in the Supreme Court of Nauru on 5 July 2017.

396 The period between the beginning of June 2017 and the first week of July 2017 is to be contrasted with the 15 months it took for the defendants in this matter to get lawyers from Australia to appear in a court in Nauru. Something must have happened within the Executive Government of Nauru to allow four Australian lawyers

to attend in court in Nauru to represent the Republic within six weeks, when it took 15 months for the defendants to get lawyers from Australia that they wished to represent them to Nauru.

397 This leads me to conclude and to find that the Executive Government of Nauru, including the Minister for Justice, had a quite different approach to getting Australians into Nauru when they were coming to act for the Republic, than he had to getting Australians into Nauru whom the defendants wished to act for them.

398 That is something I take into account in my ultimate conclusions.

399 I next consider the approach of the prosecuting authorities within the Executive Government of Nauru between 17 June 2015 (when the first of the charges was laid by the DPP against these defendants) and June 2017 (when Ashurst Australia were retained by the Republic to act for the DPP on behalf of the Republic in these criminal proceedings). That is a period of approximately two years. Of that period, for almost three quarters of it the defendants appeared in courts in Nauru unrepresented by legal practitioners.

400 At one point in the submissions in July/August 2018, the DPP submitted that no one involved, for the prosecution or for the defence, sat on their hands and did nothing in this matter during the about three years between the charges and the last submissions before me.

401 The history of the matter, insofar as it concerned the proceedings in various courts in Nauru, makes it quite obvious that what the DPP submitted to me was factually correct. At the same time he made that submission, he informed me that he could "think that no other case in Nauru is like this one". The history I set out also indicates that that was likely true or, if it was not, I was not informed of any other case like this one. Although it was submitted at some time by those prosecuting that it is not a complex case, and that the defendants had not made out a submission that this matter is "notorious", I am satisfied and find not only that this case is notorious on Nauru, and even beyond Nauru, I am absolutely convinced that it is a highly complex case both in fact and law. Whilst a new Information laid by the DPP on 1 June 2018 no longer charges any accused with the offence of "unlawful assembly", before that such an offence appeared to be contained in two different Acts of the Nauruan Parliament with different elements to each of them.

402 Further, it seemed, to me at least, that, at least on the face of it, there was considerable force in the defendants' proposed contention that an Act of the Nauruan Parliament that was passed not long before the events of 16 June 2015, being s 24(1) and (6) and (7) of the *Nauru Police Force (Amendment) Act 2015* which made it an offence to congregate in groups of three or more without a permit, was unconstitutional because it impermissibly infringed on the protection of freedom of expression and peaceable association under Article 12(1) and Article 13 of the Constitution" (see Annexure A of Exhibit E of the affidavit of Christian Hearn dated 26 February 2018). There were also, potentially, difficult points of law arising from the resolution of the Nauruan Parliament by which five of its members were excluded or expelled from the Parliament for a considerable time, including at the time of the so-called "riot" of 16 June 2015.

403 Those circumstances, including the fact that at the time the "rioters" were charged three of their number were then serving Members of the Parliament of Nauru, who were three of the five Members who had been excluded from the Parliament by vote of the Parliament, where Standing Orders of the Parliament had to be suspended for the expulsion resolutions to be passed, made this case one of unique significance in Nauru.

404 All of the matters to which I have just referred had the potential to, and did in fact, make the trial of these defendants notorious, complex, difficult and challenging for everyone involved, including the courts in Nauru.

405 If everyone involved in these proceedings had conducted themselves, both in the Nauruan courts, in Parliament and in the community, with a careful consideration and application of the Rule of Law in its many manifestations, both written and unwritten, to achieve the objective of a fair and just trial according to law within a reasonable time, then any delays as a result of the complexity of these proceedings and the trial of it could be forgiven as being a consequence of the complexity of the proceedings, the number of defendants charged, the inevitable conflicts of interest between the defendants and possibly between others involved in the case which might have occurred on a small island with a small population, where many people know people involved either directly or indirectly with those in the trial and in the proceedings generally.

406 Regrettably, in my judgement, the prosecuting, administrative and executive authorities on Nauru did not, in the first two years after the charges were laid, approach this case in a way that came close to being conducive of getting the trial of these accused heard within a reasonable time.

407 The influence of both the Minister for Justice and the Solicitor-General appears to me to have been evident from a very early time, even, in the case of the Minister for Justice, within the first few days after the alleged "riot" at Parliament. I have already made findings as to the Minister for Justice's role in preventing the defendants from obtaining legal representation for the first 15 months after the charges and to his role in creating within government and the prosecuting authorities a climate of no cooperation for these persons who were accused of serious crimes of which they were guilty and for which they must be punished severely. I also referred to the Minister for Justice's inappropriately seeking to influence the Nauruan courts to deal with these defendants in an adverse way as was expected of the courts by the Executive Government of Nauru.

408 A consideration of the history of these proceedings that I have set out in detail earlier in this judgment discloses that the Executive Government, through the Secretary for Justice and the Solicitor-General at various times, brought what I consider to be inappropriate, and sometimes improper, applications relying on many occasions on unmeritorious assertions of "abuse of process" and applications which sought to equate these criminal proceedings with civil proceedings. This was evident not only in procedural contentions, but was also evident in substantive matters such as the "jurisdictional" arguments that were advanced both in May and July/August 2018 to the effect that the Republic could not (apparently in any of its manifestations) be ordered to pay legal costs for legal representation of the defendants at a trial on these charges.

409 I do not go through the litany of applications, affidavits which were alleged to be filed without leave and without a Notice of Motion to support them, or to submissions by senior legal officers of Nauru, such as the Solicitor-General, to the effect that subpoenas addressed to the Minister for Justice and the Secretary for Justice and for documents that were sought to be issued and returned on a Notice of Motion that the judiciary in Nauru were not sufficiently independent of the Executive Government such as to give the appearance of impartiality, should not be permitted because nothing that those witnesses could say or those documents could disclose could be relevant in any way to the charges laid against the defendants. That seems to me to be one example of a submission that should not have been made to the courts in Nauru by one of the country's senior law officers.

410 I was told by counsel for the DPP during submissions that the current Solicitor-General, when he first came to Nauru, took the view that the justice system required court procedures to be addressed and resolved first, before looking at matters of substantive law.

411 That seems to me to be the wrong approach, particularly if procedure overrides justice and fairness, which I consider to be the predominant objectives of any court, anywhere.

412 I have come to the conclusion that it was the Republic, by its prosecutorial, administrative and executive representatives in the courts of Nauru, that caused the first two years after the alleged "riot" to be as unproductive as they were in the courts of Nauru, particularly as for the majority of that time the defendants were unrepresented by legal practitioners. Even during that period, when the defendants were unrepresented, submissions were made on their behalf by Mr Batsiua, with advice from lawyers offshore, that certain courses that were being promoted to the court should not be adopted by it. Those submissions, as history determined, were prescient and justified.

413 The courts of Nauru might have to bear some blame for some delays, but the judiciary on Nauru were responding to submissions on behalf of the prosecuting authorities that were often inappropriate and misguided, with the courts applying what they considered to be the law applicable to the arguments and applications that were put before them.

414 The Nauruan courts were also put in a difficult position because they had to consider at various times evidence proposed to be adduced on behalf of the defendants from previous judicial officers of Nauru, including a former Chief Justice of the country. Further, they had to consider these matters in light of an application by the defendants to stay their trials until a fair trial for them could be had on the Island.

415 Ultimately, the applications, or foreshadowed applications, by the defendants as to this matter resulted in a retired Judge from Australia being appointed to hear and dispose of this matter.

416 Other conduct of the prosecutorial, administrative and executive arms of the Nauruan Executive Government that I find contributed to the delay in getting this matter to trial was that on several occasions lawyers for the defendants were

accused by those arms of the Executive Government of contempt of court, scandalising the judiciary and the entire court system, and even threatening the defendants' Australian legal team with proceedings being brought against them, including seeking orders for costs against them personally.

417 In my judgement, such conduct by the prosecuting and administrative authorities within the Executive Government of Nauru was inappropriate, unjustified and unjustifiable, intimidatory, unprofessional and wrong. My assessment of the defendants' Australian legal team is that at all times they acted appropriately, professionally and courageously in putting their clients' case to the courts. In all these respects, I am satisfied and find that each and every one of them upheld their duties as lawyers and their responsibilities to their clients. The threatening conduct and the submissions that they were constantly abusing the processes of the court, in contempt of it and scandalising it were, in my judgement, symptomatic of how the Executive Government, including the Minister for Justice, considered and expected others to consider that these defendants deserved no assistance and anyone who gave them assistance deserved whatever they got, including threats, intimidation and abuse.

418 In my judgment of 21 June 2018 and earlier in this judgment, I referred to the *Criminal Procedure (Amendment) Act 2018* that was passed by the Parliament of Nauru on 6 June 2018, after I had reserved my decision on the defendants' Notice of Motion dated 26 February 2018 for, *inter alia*, an order that the defendants' Australian legal team be assigned to represent them at their trial, at the cost of the Republic.

419 In my judgment of 21 June 2018, I declared that whole of that Act to be void and of no effect as it was inconsistent with the Constitution of Nauru. I concluded that the Act was passed "not with the legitimate objective of invoking a reasonable policy for legal aid in Nauru consistent with limited funding here and balancing the interest of all Nauruans, but to frustrate the defendants' Notice of Motion that I am deciding" (para 121).

420 In that judgment, I indicated that I had 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 indicated that I had also been unable to discover the Second Reading Speech when the Bill was introduced into the Parliament by whomever introduced it. I indicated that I considered that that information may be relevant to what I had to then decided as it may be that I may need to construe the provisions of the amending legislation, including the Saving provision (para 57).

421 Before I delivered my decision on 21 June 2018, neither the Bill nor the Second Reading Speech had been provided to me.

422 When I was in Nauru to hear the defendants' permanent stay application at the end of July/early August 2018, I was provided with a copy of the Bill and the Second Reading Speech.

423 The Bill does not indicate when it was introduced into the Parliament of Nauru. The Second Reading Speech does indicate that it was delivered by the Minister for

Justice, the Honourable David Adeang MP, on 5 June 2018. That was the day before it was passed on 6 June 2018.

424 The Minister for Justice informed the Parliament that the "Bill seeks to amplify the provisions with respect to legal aid in Article 10 of the Constitution of the Republic". He refers to the office of the Public Legal Defender as being relatively new, comprising two fulltime lawyers and one pleader, and having "a big vision, but only very modest resources. They not only manage criminal, but other cases including property, matrimonial and civil matters".

425 The Minister for Justice then went on:

> To date, Parliament has never made specific budgetary provision for legal aid payments other than payment of staff salaries.
>
> What this Bill does for the first time is to allocate funds for legal aid and clarify in more detail the legal fees that can be paid out by that office for each case. This has never been done before, so this is a start.
>
> This Bill is consistent with the Constitution and reinforces the legal aid provisions in it.
>
> Critics may query the sums allocated for handling cases to legal representative's assigned briefs by the Public Legal Defender as being paltry and inadequate.
>
> I concede that the payments or ceiling for payments are modest but as I just mentioned, this is only the beginning.
>
> The coffers of government are not unlimited. Indeed, to be fair they are stretched as the demand for government's services is increasing. There is a need for fiscal austerity and belt tightening given our recent history which members will be all too familiar with.
>
> Nauru is not a rich country and unless we learn from our history we are doomed to repeat it. We now have to deal with our profligate spending in the past.
>
> As the economy improves however, Government will be willing to revisit the ceilings provided in the Bill, so the possibility of some increases in legal fees exists in the future.

426 Nowhere in his Second Reading Speech that he made to Parliament on 5 June 2018 does the Minister for Justice refer to the fact that in the week before, the Supreme Court of Nauru had heard two days of submissions, including for a time submissions from the Solicitor-General of Nauru, on the proper construction of Article 10 of the Constitution of the Republic, other provisions of the Constitution and other provisions of statute law within the Republic, and that those submissions were on the very same subject matter that was contained in the Bill that he introduced and read a second time on 5 June 2018, a week after a Supreme Court Judge had reserved his decision on the same subject matter as the Bill.

427 I infer and find that on 5 June 2018 the Minister for Justice knew of what I have just referred to as having happened in the Supreme Court of Nauru the week before he introduced this Bill. I also infer and find that he sought a draft of the Bill in the days after I had reserved my decision on 29 May 2018, with the intention of introducing a Bill the following week with the express purpose of frustrating the defendants' Notice of Motion of 26 February 2018 argued before me the previous week.

428 I do not know why the Minister for Justice for the Republic of Nauru did not inform the Parliament of Nauru of what had happened in the Supreme Court of Nauru the week before he introduced this Bill, which became an Act, which I declared to be unconstitutional and void.

429 I consider my findings and my conclusions as to this matter very relevant to the determination by me of the defendants' Notice of Motion dated 3 July 2018 for a permanent stay of these proceedings. They reflect, to my mind, the attitude of the Minister for Justice and the Executive Government of Nauru to these proceedings. They are consistent with what happened next.

430 What happened next was that the Republic of Nauru, through its Executive Government, failed to comply with an order of the Supreme Court of Nauru that a sum of money be paid into Court by it for the legal representatives of the defendants here such that a trial then listed to commence, in its pre-trial proceedings on 23 July 2018, could proceed.

431 The failure by the Republic to pay that money had the direct effect that the trial did not proceed.

432 I have already, in my decision of 21 June 2018 and in this judgment, referred to the various positions, contentions or attitudes of the prosecutorial, administrative and executive arms of the Executive Government of Nauru to my order that the Republic pay into a court a sum of money to ensure that the trial in this matter proceed as then scheduled, such that the defendants would have a fair trial according to law, with legal representation.

433 I have been told by a variety of different "government" sources that the Government of Nauru is not bound by my Order 3 of 21 June 2018, it cannot be enforced against the Government of Nauru, the DPP has no money to comply with my Order 3, that I never made it clear to whom the order was addressed as binding, that the Secretary for Justice cannot be responsible for the payment of it and that it cannot be enforced against him, that the Secretary for Justice has "no locus or statutory authority to provide any assistance to the court", and that there "is no budgetary provision for the nature of monies required to be paid under the *Treasury Fund Protection Act 2004*". The DPP informed me that he does not act for the "Government of Nauru", and that in his capacity as DPP he does "not have the budget to expend, nor authority to direct any other officer of the Republic to pay, the money from the treasury, which is protected under the *Treasury Funds Protection Act 2004*".

434 So just who is the "Republic" for which the DPP is acting in these criminal proceedings (see s 45 of the *Criminal Procedure Act 1972*)?

435 It was in these exact same proceedings that Messrs Cecil, Kepae and Jeremiah and the DPP went to the High Court of Australia to appeal the sentences imposed on them by the Supreme Court of Nauru on 2 May 2017. Although it was within these proceedings, which have had as their header throughout the "Republic of Nauru" as the Complainant, it seems that when leave was sought of the High Court to appeal, leave was either sought by Messrs Cecil, Kepae and Jeremiah as Applicants where the DIRECTOR OF PUBLIC PROSECUTIONS (NAURU) was named as the

Respondent or that the DPP named himself as the Applicant with the three men as Respondents, as I was informed by the defendants' counsel to be the fact.

436 On 20 October 2017, the High Court of Australia allowed the appeals of Messrs Cecil, Kepae and Jeremiah and ordered that "The Respondent pay the Applicant's costs of the appeal". The same order was made in respect of the three applicants.

437 On 5 February 2018, Christian Hearn emailed a letter to Mr John Rabuku, the DPP for Nauru. The letter concerned the appeals by Messrs Cecil, Kepae and Jeremiah to the High Court of Australia. Mr Hearn enclosed a schedule of legal costs in relation to the three matters and he proposed "payment of costs in the sum of $51,734.98". He asked Mr Rabuku to respond "within 30 days indicating when payment has been made".

438 By email dated 6 February 2018, Mr Rabuku asked Mr Hearn to provide "a specific breakdown of both the Solicitors and Barristers fees please". Mr Hearn supplied those to Mr Rabuku by email dated 30 March 2018.

439 On 21 May 2018, Mr Hearn wrote again to Mr Rabuku. He asked: "Could you please advise as to when these costs will be paid". Mr Rabuku responded to Mr Hearn by email saying: "Let me get back to you about this as I need to chase it up with Mr Leung". Mr Leung is the Secretary for Justice of Nauru.

440 By email dated 23 May 2018, Mr Rabuku wrote to Mr Hearn (copied to Mr Leung and Mr Udit) and offered "to settle your total bill of cost (both Solicitor & Barristers) at $35,000. Please kindly advise as to your acceptance or otherwise of this offer".

441 By email dated 25 May 2018, Mr Hearn wrote to Mr Rabuku indicating "We will accept a reduced fee of $50,000 if payment is deposited in my account within 7 days from today. I note that our fees are very reasonable, and that we have not included the fees of senior counsel who appeared for the appellants, which means there has already been a substantial discount to the Republic". Mr Rabuku replied on 25 May 2018 that he would get back to Mr Hearn "as soon as I get endorsement of the same".

442 On 7 June 2018, Mr Hearn emailed Mr Rabuku asking: "Can you please advise whether the Republic intends to pay costs as ordered in this matter. If so, can you please advise what the delay is".

443 Mr Hearn wrote again to Mr Rabuku by email attaching a letter on 22 June 2018. The letter informed Mr Rabuku that "unless the costs issue is resolved within 14 days we will commence an action for taxation of costs" pursuant to the *High Court Rules*.

444 Mr Hearn received a reply from Mr Rabuku, by email on 8 July 2018. In it, he stated: "The matter is with the Solicitor-General, Jay Udit. You can liaise directly with him as I don't handle Government funds directly in my office".

445 Mr Hearn emailed Mr Udit on 8 July 2018 informing him that "Mr Rabuku has referred me to you on the issue of the payment of the costs ordered by the High

Court of Australia. Can you please advise whether it is the intention of the Republic to comply with this costs order".

446 Mr Udit replied to Mr Hearn by email on 8 July 2018. He informed Mr Hearn: "I am sorry. I do not deal with criminal cases. That is DPP. Mr Rabuku may have said it as I was acting Secretary for Justice. Mr Leung is back. You may discuss with him. He would know about it. I am sorry for not being able to provide as assistance. If claims are under Republic proceedings Act o would have some locus".

447 By email dated 8 July 2018, Mr Hearn wrote to Mr Graham Leung. He wrote: "Mr Udit has referred me to you on the issue of the payment of the costs ordered by the High Court of Australia. Can you please advise whether it is the intention of the Republic to comply with this costs order".

448 Mr Leung replied by email of 9 July 2018. He wrote to Mr Hearn: "I have been away on duty travel and returned to the office today. I will be in a position to reply as soon as possible".

449 As at the end of July/early August 2018, Mr Hearn had heard nothing further on the matter of the costs ordered by the High Court of Australia.

450 It is my firm and clear conclusion that the assertions that have been made to me as to who or what does or does not constitute the Republic of Nauru in my Order 3 that I made on 21 June 2018, and in respect of the costs ordered by the High Court of Australia to be paid in respect of the appeals of Messrs Cecil, Kepae and Jeremiah in October 2017, are, at best, disingenuous. At worst, they are a conscious and deliberate assertion of something that I consider no lawyer could seriously maintain as being their true and honest belief that my Order 3 did not bind the Republic of Nauru and those responsible for its finances, being that the Executive Government of Nauru, must ensure that an order of the Supreme Court of Nauru must either be sought to be stayed, or failing that, be complied with.

451 In this case, I received no explanation in court as to why my order has not been complied with. The first I heard of the Nauruan Government's response to my orders was in a Media Release by the Government Information Office of Nauru that "The Government will appeal the ruling of the Nauru Supreme Court that recent legislation is unconstitutional; and that they must pay legal fees for a group of 19 defendants charged over the 2015 riots at Parliament House".

452 In that media release, the Minister for Justice was reported to have stated that "The ruling His Honour means that we must pay hundreds of thousands of dollars to provide expensive international lawyers to defendants charged with criminal acts. This is not only unprecedented but excessive".

453 It seems to me that the Minister for Justice understood and knew that it was the Government of Nauru that must pay the money I ordered the Republic of Nauru to pay.

454 My conclusion as to this matter is important as it provides significant evidence as to the prospects of the defendants in this matter ever getting a fair trial according to law and the Constitution of Nauru, let alone one within a reasonable time.

455 Earlier in these reasons (paragraphs 328, 333-336), I set out the authorities that each party submitted were relevant to the matters I have to decide in this application by the defendants for a permanent stay of these proceedings. I again express my gratitude to both parties.

456 I did not, at the time that I set out those authorities, indicate the principles that I consider important and that I consider should guide me in determining this application. That was because a number of the authorities cited indicated, I consider correctly, that particular matters may be of particular importance and relevance in a particular case, depending upon the circumstances of that case.

457 A number of the authorities cited refer to the need for a court to balance a number of factors when considering whether the court should exercise its discretion in granting what I agree should be an exceptional order, being a permanent stay of proceedings. They refer to the need for the court to take into account the interests of the defendants, the interests of any alleged victims of the crime or crimes, and the interests of the community generally.

458 Other authorities suggest that the granting of a permanent stay may not necessarily be exercised by a judge in his or her discretionary power following the balancing of the various interests to which I have just referred.

459 Before me, it was submitted that in *Jago v District Court (NSW)* (1989) 168 CLR 23, Mason CJ expressly approved the following approach exemplified in the judgment of Richardson J in *Moevao v Department of Labour* (1980) 1 NZLR 464, at p 481:

> It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizens alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend itself to oppression and injustice.
>
> …
>
> In essence then, the power to prevent an abuse of process in this context is derived from the public interest, first that the trial and the processes preceding them are conducted fairly and secondly, that, so far as possible, persons charged with criminal offences are both tried and tried without unreasonable delay. In this sense, fairness to an accused is not the sole criterion when a court decides whether a criminal trial should proceed.
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> …
>
> For the reasons given, I agree with the approach of Richardson J. as I have explained it. Bearing in mind his Honour's relatively broad view of what may amount to an "abuse of process", I agree also with his explanation of the rationale for the exercise of the power to stay a prosecution. His Honour stated (at p. 482):

> "The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor … that the Court processes are being employed for ulterior purposes or in such a way … as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular processes seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice and so continues an abuse of the process of the Court."

I consider that the passages just reproduced from Mason CJ's judgment in *Jago* are important in this case.

460 Further, the fact that the making of a permanent stay order may not be a discretionary power, but a mandatory one, is indicated by what Gaudron and Gummow JJ stated in *Carroll v R* (2002) 213 CLR 635, where they said at [73]:

> … The power to stay is said to be discretionary. In this context, the word "discretionary" indicates that, although there are some clear categories, the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse. It does not indicate that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not.

461 I consider that what I have referred to above from Mason CJ and Gaudron and Gummow JJ are particularly apposite to the circumstances in this case when viewed in light of the findings and conclusions I have made and expressed, as is what is sometimes termed "the jurisdiction to prevent abuse of executive power" (see para 333(16 and 17) above).

462 My conclusion is that the Executive Government of Nauru does not want these defendants to receive a fair trial within a reasonable time as guaranteed to every Nauruan in the country's Constitution, being the Supreme Law of Nauru. Further, I conclude that instead of fair trial for these defendants within a reasonable time, the Executive Government of Nauru wishes as only that they, and each of them, be convicted and imprisoned for a long time, and that the Government of Nauru is willing to expend whatever resources, including financial resources, as are required to achieve that aim.

463 I conclude that the Executive Government of Nauru does not wish or intend to provide any resources, including financial resources, to these defendants so as to ensure that they do receive a fair trial according to law within a reasonable time according to the country's Constitution. Even in mid to late 2017, the Minister for Justice rejected a suggestion that the Republic consider a $10,000 *ex gratia* payment towards the legal costs of the defendants (see para 68 of Christian Hearn's affidavit dated 26 February 2018).

464 The conduct of the Executive Government of Nauru after I reserved my decision of 21 June 2018 on 29 May 2018 has been such that there is absolutely no doubt in my mind as to the conclusions I just expressed. After I had reserved that

decision, the Parliament was moved by the Minister for Justice to enact legislation which I have found to have had the express purpose of frustrating the defendants in having appropriate legal representation for a fair trial of this matter. The Minister for Justice does not appear to have informed his Parliamentary colleagues, at least through his Second Reading Speech, of what I consider to be the real purpose of that legislation, or even of the background to it.

465 What happened after I made my orders on 21 June 2018 was that the Government of Nauru announced that it would be appealing my decision and it would not be paying any monies towards legal representation for the defendants at their trials.

466 As far as I know, no appeal papers have been lodged by "the Government of Nauru". My view is that it is unlikely that the Nauruan Court of Appeal could sit to hear any appeal within the next several months. There is already an appeal lodged by Messrs Cecil, Kepae and Jeremiah in the Nauruan Court of Appeal against their sentences. That will need to be decided at some unknown time in the future.

467 If the Government of Nauru has a right of appeal, or if the DPP has a right of appeal and he seeks to exercise his right, then, according to the press release from the Government Information Office, what will be sought will be to set aside my orders assigning the defendants' Australian legal team to them for the trial, and for the Republic to pay their legal costs of the trial.

468 Who knows what will happen if either or both of these orders are set aside?

469 Who knows what will happen if they are not?

470 On present indications, it is unlikely, in my judgement, that the Executive Government of Nauru would pay anything towards a trial of the defendants, or any of them.

471 In my judgement, it would be unlikely that any appeal in respect of any of my judgments would be heard and determined before the end of this year, and any further timetable for a trial, should any appeal be successful, would unlikely to contemplate a trial date before a year from this judgment has passed. That is probably, in my assessment, the most optimistic assessment should there be a successful appeal. That, of course, does not take into account whether the Government of Nauru would pay any monies towards the defendants' trial, should any appeal set aside my orders assigning the defendants' Australian legal team to them for the trial and /or for the Republic to pay for such representation.

472 Of course, if the Republic did not pay, the defendants would be facing a trial in which they are unrepresented by any legal practitioner. That is because of my finding that there is an insufficient number of legal practitioners on Nauru to adequately represent 16 accused at a trial. Even that assumes that there is an adequate number of qualified practitioners or pleaders on Nauru who could do so, or who are allowed by the Executive Government to do so. That is very much a matter that could not be predicted with any degree of confidence.

473 On 21 August 2018, the defendants' Australian legal team submitted this:

> 40. The animus demonstrated by the above methods is reflected also in the way the Republic has conducted itself in the courtroom – threats of contempt, threats of personal costs orders, false allegations of unmeritorious and vexatious defence applications and the like. The prosecution have not adduced any evidence to rebut the evidence of executive animus towards the defendants. The irresistible inference from all the evidence is that the executive government of Nauru intends to put the defendants to trial in circumstances of unfairness; it intends to continue to use the criminal justice processes to persecute political opponents and dissenters. A fair trial of the defendants will never be possible.
>
> …
>
> 44. The primary reason why the strength of the case and the seriousness of the alleged offences is not a relevant consideration tending against the making of a permanent stay order is that once a court is satisfied that a fair trial is not possible, the making of a permanent stay order is not a discretionary power. It is mandatory. The power to order a permanent stay must be exercised where the grounds for it are proved (*Carroll v R* is cited).

I agree with these submissions.

474 I consider that in the circumstances the power to make a permanent stay order in this case is not a discretionary power of mine. It is mandatory.

475 I consider that this case is a very rare case where Executive Inference, virtually from the day after the events outside Parliament on 16 June 2015, has been such that I consider that "the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so continues an abuse of the process of the court" (see Mason CJ in *Jago*). I consider that in denying the defendants legal representation and resisting their obtaining legal assistance, in imposing a "blacklist", in forbidding any plea bargaining, and in publicly denouncing and vilifying the defendants and those seeking to assist them, the Executive Government of Nauru has displayed persecutory conduct towards these defendants which is all the more serious in the unique context of Nauru. In this respect I agree with the submissions of the defendants' legal representatives of 30 July 2018 that:

> 36. The Government of Nauru exists to serve its people. The unique Nauruan context means the State plays a tremendously important role in service provision, including in the provision of legal services. In this context an arbitrary and capricious and unexplained direction was given as to who could not access publicly-funded legal services. Presumably based on political animus towards the defendants.

476 If I am held to be wrong in this conclusion, I consider that what the Fijian Court of Appeal held in *Sahim v State* [2008] FJCA 124 and what the Fijian Supreme Court held in *Nalawa v The State* [2010] FJSC 2 (13 August 2010) should guide me when considering the relevant principles concerning delay, in the proper application to the facts of this case, when considering whether the defendants here can now receive "a fair hearing within a reasonable time", a right which is guaranteed to them by Article 8(2) of the Constitution of Nauru. The Fijian Constitution has a similar provision. I have referred to these cases in paragraphs 328 and 336 above. I also consider that what the Supreme Court of Canada held in *Elijah Askov v Her Majesty the Queen* [1990] 2 SCR 1119 and in *Morin v Her Majesty the Queen and Attorney General of Canada* [1992] IRCS 771 is very valuable in my assessing and balancing the factors

relevant to the exercise of my discretion, should I be wrong on my primary conclusion. I have referred to these cases in paragraph 328 above.

477 From my consideration of the above cases I consider that in this case the following principles and factors are important.

478 The length of the delay

I consider that the length of the delay in this case has been extensive, and will be even more extensive should any trial of these defendants occur in the future. I do not consider that will, or could, occur within a year of this decision. I consider that it is of such length and significance that it enlivens consideration and the application of what the Supreme Court of Canada said in *Askov* (see para 328(18) above) that "A quick resolution of the charges also has important practical benefits, since memories fade with time, and witnesses may move, become ill or die. Victims, too, have a special interest in having criminal trials take place within a reasonable time, and all members of the community are entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The failure of the justice system to do so inevitably leads to community frustration with the judicial system and eventually to a feeling of contempt for court procedures*".* The Member for Aiwo obviously felt at least this frustration, if not contempt, when he asked the Minister for Justice a question in the Parliament as long ago as 3 November 2016, nearly 2 years ago (see para 136 above). Further, in this case an important defence witness has died since the so-called riot at the Parliament. Doneke Kepae was one of the persons who spoke to police at the police roadblock near the Catholic Church near Parliament. He allegedly said to police that it was a peaceful protest under a Constitutional right (see Exhibit D10). I was informed at the hearing that the police officer concerned "is still living and is available to testify at trial". I was told that he does not dispute what would have been Mr Kepae's evidence as to that conversation. I cannot recall being told that that evidence will be agreed. Mr Kepae would, presumably, give other evidence as to the lead up to the conversation, and the events thereafter. It is, therefore, hard for me to judge what prejudice, if any, the defence would suffer by the death of this witness.

479 The explanation or reasons for the delay

In *Askov* the Court observed that delays attributable to the Crown will weigh in favour of an accused, and systemic institutional delays will weigh against the Crown. The reasons for the delay, and for the continuing delay, cannot, in my view, be laid in any way at the feet of these defendants. I do not consider that "inadequate institutional resources" have occasioned any delay. Rather, ironically, my view is that too many resources were committed to the prosecution of this case, with barely any committed to getting these charges tried fairly and within a reasonable time, and none committed to the defendants. My conclusion is that the most significant factor causing the delay has been Executive Interference with court proceedings, with some responsibility to institutional factors within the judiciary. I include in "Executive Interference" the Office of the DPP. My clear and firm conclusion is that institutional delay in this case has gone way past what this Court should, consistent with this Country's Constitution, tolerate.

480 Prejudice to the defendants

My view is that prospective prejudice to any defendant is a relevant consideration. It seems to me to be contrary to logic and principle that a court should not take into account, when considering the length of a delay getting to trial, the time it will take into the future for the trial to be heard. Further, I consider that personal prejudice, including prospective personal prejudice, to the defendants caused by any delay must also be taken into account, consistent with logic and principle. Further still, I consider that prejudice to a defendant is not confined solely to any prejudice that might be caused in the conduct of the trial, as was submitted by the DPP. I reject that submission, as I consider it to be contrary to principle and logic. If an accused person has been in custody awaiting trial for 3 years since his arrest, and he has already served longer in custody than the likely period of any sentence of imprisonment if he is found guilty at trial, then delaying any trial further would increase the prejudice already suffered by him in not being brought to trial earlier. I consider and I find that the prejudice to each and every accused, caused by the delay to date and continuing, has been very extensive and egregious. I find that each accused has been subject to, and subjected to, "the vexations and vicissitudes of the pending criminal proceedings", as submitted by counsel for the defendants (see para 327 herein). I am satisfied and find that each accused has endured "this stigmatisation brought about by the lengthy and notorious proceedings against them"; each has suffered disruption to their families, social life, education and work; each has incurred significant financial costs to engage even *pro bono* legal representatives; and each has laboured under the uncertainty as to the outcome of and the sanction for this matter. I have found that the defendants did not receive personal advice from legal representatives until 15 months after the alleged "riot" at Parliament on 16 June 2015. I have found that each was on the Government policy "blacklist", and each remained on it. I find that each would have heard from time to time what the Minister for Justice publicly stated about each of them, their conduct, their characters and what the Government wished and expected to be visited on them by the courts. There is evidence before me as at February this year indicating that the defendants and their Australian legal representatives had, by that month, spent at least $58,000 on legal costs and expenses in respect of these proceedings. There have been further significant legal and other expenses since February 2018. They continued until I reserved this judgment on 2 August 2018. I find it hard to imagine what each of these defendants must have suffered, living on a small island, without work, without income, with worrying about their fate and their families for over three years, when trying to assist their Australian legal team to come to Nauru to act for them and to assist them. And these are citizens of Nauru who have not been found guilty or convicted of any crime. I find that the past, existing and possible future prejudice to each of the defendants has been, is and will be beyond comprehension, or at least beyond my comprehension.

481 Local circumstances

Although I was asked by the DPP to take into account local circumstances, such as Nauru's limited resources, and particularly those available to the administration of justice, I have earlier indicated that the DPP was unable to inform me of how those limited resources and how those local circumstances have affected the delay in bringing this matter to trial.

482 In my judgment the "seriousness" of the charges laid against the defendants in this case and the "strength" of the prosecution case against them are not factors I should take into account in this application. I note that the prosecutorial authorities have, at different times, taken a different view as to whether or not the charges are "serious". There is a real sense that that matter may be relative and a matter of judgment. I am in no position to judge the "strength" of the prosecution case against these defendants as I was given no Brief of Evidence, Case Statement or even a summary of the evidence. My view is that the cases on permanent stays convince me that the strength and seriousness of the prosecution case is not a relevant consideration for me in deciding this application. If they were, I cannot and do not make any findings on those matters.

483 I indicate that my conclusions on what I might call the more traditional tests for a permanent stay, I would have found, in applying those more traditional principles, that this is an appropriate case for a permanent stay. I have no doubt that, on any test, I should permanently stay these proceedings.

484 I referred in para 354 above to that part of the DPP's submission by the Republic as to **"A Way Forward".** In that part of his submission the DPP sought to draw an analogy between Article 10(3)(d) of the Constitution permitting a person charged with an offence to have the assistance of an interpreter "without payment" and Article 10(3)(e) of the Constitution permitting such a person to have assigned to him a legal representative "without payment by him", if he does not have sufficient means to pay the costs incurred. He submitted that "It is well settled that the right to an interpreter is deemed a *fair trial* executive guarantee that a *court of law* is required to provide, and which the Judicial Department ordinarily funds out of its annual budget". He submitted that "If provision for interpreters are then taken from the budget of the Judicial Department, then we invite this Court to find that provision for Court assigned lawyers should be the responsibility of the judicature and as such, Parliament or Cabinet should make annual budgetary provision for the payment of the fees of Court assigned legal representatives".

485 The DPP submitted that "If this Court accepts the proposition that payment can be made by the judicature through budgetary allocation to it; then perhaps arrangements can be made between the Judicial Department and the court assigned representative to continue to represent the Defendants and for payment to be made if funds are currently available now; or at such time as funds can be made available through the budget assigned in the judicature".

486 There was no evidence before me as to how interpreters are paid; whether there is a Judicial Department in Nauru; whether the "judicature" makes annual budgetary submissions to Parliament or Cabinet; whether what, if any, funds are currently available now in the Judicial Department to pay for legal representation for persons charged with offences; and, if not, whether or when they will be made available from "the budget assigned to the judicature".

487 Whatever funds are available to the Courts in Nauru, or in "the budget assigned to the judicature" are presumably subject to Part VI – Finance of the Constitution. Cabinet must have prepared and laid before Parliament before the commencement of each year estimates of the revenues and expenditure of Nauru for that year. I do not know anything about those estimates for the Courts or the judicature of Nauru.

488 In light of my findings and conclusions in this judgment, the likelihood that the Cabinet has provided, or will in the future provide, funding for these defendants to get a fair trial, with legal representation, within a reasonable time is, in my view, fanciful.

489 The defendants sought an order the costs of their Notice of Motion dated 3 July 2018, should I grant a permanent stay of these proceedings.

490 The Court has a "discretion to award such costs in a cause or matter as it deems fit" (s 24 of the *Supreme Court Act 2018*). A "course or matter" includes any "original proceeding…between the person originating the proceeding and" another party "as…respondent, and includes any original criminal proceeding" (s 3 of the *Supreme Court Act 2018*). I rule that by the defendants' Notice of Motion dated 3 July 2018 the defendants originated a criminal proceeding against the respondent Republic of Nauru in this Court.

491 All costs "imposed by (this) Court in criminal proceedings may be demanded and received in the Supreme Court, by the Registrar or any other public officer nominated by him to do so" (s 95, *Supreme Court Act 2018*).

492 The defendants' Notice of Motion dated 3 July 2018 resulted directly from the failure of the Republic of Nauru to comply with my Order 3 of 21 June 2018 when no application for that order to be stayed was made, let alone an order being made that it be stayed.

493 My orders of 21 June 2018, including Order 3, were made to ensure that the defendants received a fair trial with legal representation, such trial being set to commence on 24 July 2018.

494 As the direct result of the failure by the Republic to comply with an order of the Supreme Court of Nauru, the trial of these defendants did not proceed as scheduled.

495 No explanation has been proffered by or on behalf of the Republic in Court for that failure.

496 The defendants have succeeded in their application for a permanent stay.

497 I can think of no reason to deny them the costs of their application.

498 I shall order that the Republic of Nauru pay the defendants' costs and disbursements of and incidental to their Notice of Motion dated 3 July 2018.

499 I fix these costs in the sum of $81,352.65 (see Exhibit D13).

500 I shall hear the parties as to the bail agreements of the defendants, including Lena Porte.

Orders

1. That these proceedings be, and are hereby, stayed permanently. I note that this includes the defendant Ms Lena Porte.

2. That the Republic of Nauru pay the defendants' costs and disbursements of and incidental to their Notice of Motion dated 3 July 2018, which I fix in the sum of $81,352.65.