

**IN THE HIGH COURT OF  
NIUE (CIVIL DIVISION)**

**CV 21/11**

UNDER	Article 5, Niue Constitution
IN THE MATTER	Application for a Declaratory Judgment
BETWEEN	TOGIA SIONEHOLO Applicant
AND	BILLY TALAGI DALTON TAGELAGI Respondents

Hearing: 14 November 2011

Judgment: 27 January 2012

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**DECISION OF HIS HONOUR JUSTICE W W ISAAC**

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[1] The applicant, Togia Sioneholo, is a member of the Niue Legislative Assembly. He seeks an order declaring that the appointment of Assistant Ministers or Members to assist a Minister is ultra vires the Constitution and therefore invalid. In addition, he seeks a declaration that any extra remuneration paid to those appointed to this role which is above that of ordinary members is illegal, must be paid back to the government and such payments ceased.

[2] The Crown's response is that section 11 of the Civil List Act 2009 provides for the appointment of a member to assist a Minister. This position is not an executive role and is not inconsistent with the Constitution. Further, members of the Niue Assembly appointed to this role ought to be remunerated for their extra work as appropriate.

[3] In my view, there are two main questions to answer:

- (i) Is section 11 of the Civil List Act 2009 inconsistent with the Constitution?
- (ii) Can members assisting a Minister be paid more than the prescribed salary of an ordinary member of the Niue Assembly?

### **Background**

[4] Following the General Election on 5 May 2011, Toke Talagi was elected Premier at the first meeting of the Niue Legislative Assembly on 16 May 2011. On 19 May the Premier nominated four persons as Ministers of Cabinet and two "Members of Parliament to assist the Ministers". These two persons were the respondents, Hon Billy Graham Talagi and Hon Dalton Tagelagi.

[5] On 13 June 2011, the Premier announced several changes to the port folios. In this letter, the two Members who were appointed to assist the Ministers were referred to as "Assistant Ministers" and were stated as being responsible to the several of the Premier's port folios and would be involved with projects and NZAID Maintenance Program.

[6] During debates in the Niue Assembly it has been confirmed that the two members appointed to assist the Ministers are being remunerated at a higher level than the ordinary members.

### **Law**

[7] Section 4(1) of the Niue Constitution Act 1975 states that the Constitution "shall be the Supreme law of Niue".

[8] The following articles from the Niue Constitution are relevant:

#### **2 Cabinet of Ministers of Niue**

- (1) There shall be a Cabinet of Ministers of Niue (hereinafter referred to as the Cabinet) which shall consist of the Premier of Niue (who shall be a member of the Niue Assembly) and 3 other members of the Niue Assembly.

- (2) Subject to this Constitution, the executive authority of Niue may be exercised on behalf of Her Majesty by the Cabinet, which shall have the general direction and control of the executive government of Niue and shall have such other functions and powers as are conferred on it by law.

3 Ministers to be collectively responsible

- (1) The members of the Cabinet (hereinafter referred to as Ministers) shall be collectively responsible to the Niue Assembly.

...

5 Appointment of Ministers after election of Premier

- (1) As soon as practicable after his election to that office, the Premier elect shall nominate to the Speaker, with their consent, 3 other members of the Niue Assembly for appointment as Ministers.
- (2) Upon receiving those nominations, the Speaker shall appoint as Ministers the premier elect and the members so nominated.
- (3) Appointment under subclause (2) of this Article shall be made by the Speaker by instrument under the Seal of Niue.
- (4) If the Premier elect has not within 7 days after but excluding the date of his election to that office submitted to the Speaker his nominations for appointments to the Cabinet pursuant to this Article, his election to that office shall have no effect, and, subject to Article 26(1)(d) of this Constitution, a meeting of the Niue Assembly shall be held as soon as practicable for the purpose of again electing a Premier.

...

10 Official oath

Every Minister shall, before assuming the functions of his office, take and subscribe before the speaker the follow oath...

11 Allocation of Responsibilities to Ministers

- (1) The Premier shall from time to time, by writing under his hand countersigned by the Clerk of the Cabinet and published in the *Niue Gazette*, allocate to any Minister (including himself) the primary responsibility for any Department or function of Government, and may from time to time in like manner carry any such allocation.



25 Remuneration of Niue Assembly and its members

- (1) The Niue Public Service Commission may from time to time, and shall when there is a general alteration of the levels of remuneration of employees of the Niue public Service, report and make recommendations to the Assembly as to the levels of remuneration and other entitlements of the Premier, other Ministers, the members of the Assembly who are not Ministers, and the Speaker.
- (2) The Premier, the other Ministers, the members of the Niue Assembly who are not Ministers, and the Speaker may receive such remuneration and allowances and such other benefits as may be prescribed by Act.
- (3) If, in the opinion of the Speaker, any Bill, or any amendment to any Bill, deals with a matter to which this Article relates, that Bill or that amendment may not be introduced unless –
  - (a) There is before the Assembly a report and recommendations made by the Niue Public Service Commission pursuant to this Article; and
  - (b) The issues raised by that Bill or by that amendment are, in the opinion of the Speaker, substantially similar to those considered in the Commission's report and recommendations.

28 Power to make laws

...

- (4) Except to the extent to which it is inconsistent with this Constitution, no Act and no provision of any Act shall be deemed to be invalid solely on the ground that it is inconsistent with any law in force in Niue.

[9] Section 11 of the Civil List Act 2009 states:

11 Members assisting a Minister

- (1) The Premier may, as the premier sees fit, at any time appoint a member to assist a Minister.
- (2) No more than three members may at any time hold appointment under subsection (1).



- (3) Every appointment of a member under subsection (1) is effective from the date of notification of the appointment, and ends on the date of notification of termination, by the Premier in writing to the Financial Secretary.
- (4) Public notice shall be given of every appointment and termination of appointment under this section.

## Discussion

[10] There is no authority in the Constitution of Niue or any other Act in force in Niue allowing the Premier to appoint 'Assistant Ministers'. Counsel for the Crown agrees with the applicant that Article 5 of the Constitution is very clear with respect to only allowing 4 Ministers, including the Premier. As stated in Article 2, this Cabinet of four Ministers exercises executive authority on behalf of her Majesty. As noted by Counsel for the Crown, ministerial status and responsibility lies solely with these 4 Ministers; only the Cabinet of Ministers holds collective responsibility to the Niue Assembly under Article 3 and the Ministers take the oath outlined in Article 10.

[11] Further, Article 82 of the Constitution provides a helpful interpretation for 'Member' and 'Minister'. Member means "any person elected as a member of the Assembly pursuant to Article 16 of this Constitution; but does not include the speaker". Minister means a member of the Cabinet; and includes the Premier; and also includes any member of the Niue Assembly appointed as a temporary Minister pursuant to Article 8 of this Constitution. Accordingly, there is no authority for the role of an Assistant Minister with executive powers.

[12] However, section 11 of the Civil List Act 2009 provides that the Premier may appoint up to three members of the Niue Assembly to assist a Minister. Counsel for the Crown argues that a member is appointed to assist a Minister does not contradict the Constitution; there is nothing in the Niue Constitution that proscribes the appointment of a member to assist a Minister. The appointed member's status is still that of a Member of the Assembly, but who has been assigned additional tasks for the purpose of assisting Ministers in the discharge of their many portfolios. This role does not include any executive powers or responsibilities.

[13] In recognition that there is no authority for the appointment of Assistant Ministers, the Clerk of the Cabinet issues a new notice on 24 November noting the two 'Member assisting a Minister' and their responsibilities in terms of assisting with several

of the Premier's port folios as well as being involved with "Projects and NZAID Maintenance program". Crown counsel states that the used of the term "Assistant Minister" in the 13 June notice was an administrative error.

[14] The applicant submits that simply because the Constitution does not proscribe appointment, does not mean the there is authority to do so. He argues that the appointment of a member to assistant a Minister is an appointment to the executive government and that this specific power of appointment must be found within the Constitution to be legal. Further he submits that the Constitution provides no power to the Assembly to establish by an Act posts in the executive government, therefore section 11 of the Civil List Act 2009 is inconsistent with the Constitution. According to the applicant this means that under Article 28, the section, and any action purportedly authorised by the section is illegal, void and of no effect.

#### **The position of 'a member to assist a Minister' and the Constitution**

[15] I now turn to whether the appointment of members appointed to assist a Minister under section 11 of the Civil List Act 2009 is inconsistent with the Constitution. In my view the answer depends on the nature of the role 'Assistant to a Minister', as provided for in the Civil List Act 2009. If it is not an executive role, with none of the corresponding powers or responsibilities, as submitted by the Crown, then it could be seen as analogous to the role in New Zealand of a Parliamentary Private Secretary, as outlined below. If however, the position is an executive role, it would seem inconsistent with the Constitution.

[16] A brief examination of the situation in New Zealand is helpful at this juncture. New Zealand does not have a written entrenched Constitution, so the legal background is different. However, the Constitution Act 1986 is New Zealand's premier constitutional statute and consolidates the primary elements of New Zealand's statutory constitution law under five headings: 'The Sovereign', 'The Executive'. 'The Legislature, "The Judiciary' and 'Miscellaneous Provisions'.<sup>1</sup>

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<sup>1</sup> P Joseph, Constitutional and Administrative Law, at 126 and 129.



[17] The Constitution Act 1986 prescribes several roles for Members of Parliament which involve assisting a Minister. These roles provide a helpful point of comparison. At the highest level, there are Associate Ministers, who assist Portfolio Ministers to carry out task relating to their portfolios. The executive powers and functions Associate Ministers exercise on behalf of the portfolio Minister are exercised under section 7 of the Constitution Act 1986. Associate Members are members of the Executive Council and may be part of the Cabinet.

[18] There are also Under-Secretaries, who under section 8 of the Constitution Act 1986, can be appointed by the Governor-General on advice of the Prime Minister. Under-secretaries do form part of the executive government, however, they are not members of the Executive Council and their authority derives solely from the Minister they are assisting.<sup>2</sup> However, they do have specific delegated responsibilities.

[19] Finally, there are also Parliamentary Private Secretaries. This role is not set out in the Constitution Act 1986. Parliamentary Private Secretaries are members of Parliament who may be appointed by the Prime Minister to assist Ministers. However, they are not part of the executive government and have no executive responsibilities and no policy, financial, statutory, or operational authority. Nor do they receive any extra remuneration.<sup>3</sup> The Constitution Act 1986 does not permit Ministers to delegate authority to Parliamentary Private Secretaries. They do not act for the Minister, but only advise.<sup>4</sup>

[20] It seems to me that the role provided for in section 11 of the Civil List Act 2009 is one analogous to Parliamentary Private Secretaries in New Zealand. The language of the section suggests this, as does the fact that such a role is not included in the Constitution. Were this role to have any executive powers and responsibilities, that is, a role analogous to either Under-Secretaries or Associate Minister, it would have been provided for in the Constitution.<sup>5</sup> Indeed, if it is necessary to have such executive roles, then the Constitution must be amended in the manner prescribed in Article 35.

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<sup>2</sup> Section 9, Constitution Act 1986.

<sup>3</sup> Cabinet Manual 2008, 2.49 and Prime Minister John Key, media statement, 21/12/2011.

<sup>4</sup> National Party website, Parliamentary Private Secretaries appointed, 21/12/2011.

<sup>5</sup> I note that in 2008, when offered the role of Associate Minister, MP Ester Pavihi turned it down, stating there was no authority in the Constitution for such a role. NZ Radio International, 1 July 2008.



[21] Care must be taken to ensure that the members appointed to assist a Minister under this section do not overstep their powers. They have no executive responsibilities, for example, no policy, financial, statutory or operational authority. They cannot act for the Minister; but can advise and support the Minister in portfolio, administrative and representational issues.<sup>6</sup>

[22] As noted by Crown counsel, a member appointed to assist a Minister is not bound by the doctrine of collective responsibility; that is confined to the Cabinet.

### **Remuneration**

[23] Remuneration above that of an ordinary MP is not provided for in the Civil List Act 2009. The respondent argues this is an "administrative oversight" and that section 11 "clearly intended for a member to assist a Minister and to be compensated as appropriate". The applicant submits that article 25 of Constitution means that payments to members of the Niue Assembly must be authorised by an Act.

[24] I agree with the applicant that remuneration and allowances of MPs must be prescribed through an Act, in accordance with article 25. To ensure good governance and transparency, all payments to members of the government and Niue Assembly ought to be outlined in an Act. Indeed, article 25, and article 32 include a further check on the power of the government in relation to this issue by requiring that the Niue Assembly shall not proceed any Bill without receiving a report and recommendations by the Niue Public Service Commission (NPSC) if, in the opinion of the Speaker, it relates to the pay of the Assembly members (article 25) or the Niue Public Service (article 32).

[25] I consider that regardless of whether the lack of mention of extra remuneration for a member appointed to assist a Minister is an oversight or not, it must be amended only by an Act of the Niue Assembly. Remuneration over and above what is specifically authorised for an MP under the Civil List Act 2009, must be paid back and such payments stopped immediately.

[26] I also note that Parliamentary Private Secretaries in New Zealand are not provided extra remuneration for the assistance they provide to Ministers because they

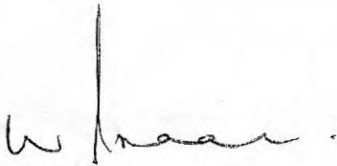
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<sup>6</sup> National Party website, Parliamentary Private Secretaries appointed, 21/12/2011, "What are Parliamentary Private Secretaries?"

are not members of the executive. They are paid only the salary of an ordinary MP. The executive roles however, of Associate Minister and Under-Secretary, are remunerated at a different level, in accordance with the Civil List Act 1979.

[27] A copy of this decision is to go to all parties.

Signed at Wellington on the 27th day of January, 2012.

A handwritten signature in black ink, appearing to read 'W W Isaac', with a long vertical stroke extending upwards from the first 'W'.

W W Isaac

**JUSTICE OF THE HIGH COURT**