In re Article 36 of the Constitution and In re Bobby Eoe

Supreme Court
Donne C.J.
25 November 1988

Constitutional law—Members of Parliament—absence of Member for two months—art. 32(1)(d) of Constitution—whether Member vacated his seat.
Constitutional law—sittings of Parliament—whether an inquorate meeting can be valid—whether a court can inquire into the validity of a parliamentary proceeding.
Constitutional law—Speaker's ruling—standing orders—whether court can review ruling of Speaker re permission to be absent—whether Speaker's ruling is proceeding in Parliament.

The petitioner, Bobby Eoe, had been elected to Parliament as the Member for Meneng at the general election of 1986. On 5 May 1988 he accompanied his son to Melbourne, Australia, where the son was to undergo surgery. Petitioner Eoe did not return to Nauru until 23 July 1988. While he was in Melbourne, Parliament met thirteen times, from 19 May to 22 July. Article 32(1)(d) of the Constitution provides that: "A member of Parliament vacates his seat . . . if he is absent without leave of Parliament every day on which a meeting of Parliament is held during a period of two months". It was common ground that Parliament had not, in fact, granted leave of absence to Eoe. The Speaker issued a writ for a by-election, to fill Eoe's vacated seat, and the Court issued an injunction restraining the returning officer from holding that by-election until further order of the Court.

Eoe argued that Article 32(1)(d) meant that the meetings of Parliament should be read in the context of a "session", as defined in the standing orders, and a session includes seven days after the last sitting.

Eoe also suggested that the meeting of 22 July was not a sitting because Parliament was at that time inquorate. Eoe further argued that the Speaker wrongfully disallowed a motion which, if granted, would have given Eoe a leave of absence, and that the Court should review that Speaker's ruling.

HELD:

(1) The Court had jurisdiction to entertain the application and determine the right of Bobby Eoe to be or to remain a Member of Parliament: Article 36 of the Constitution.

(2) Parliament having met on 19 May and 22 July, and eleven times in between, and the applicant having been absent during all of that period, the applicant satisfied the conditions laid down in article 32(1)(d) which requires the vacation of his seat.

(3) Parliament "sat" on 22 July 1988, although no business had been transacted, and that sitting is included in the computation of the two-month period.

(4) The Speaker's ruling may not be appealed against in court.

(5) The petitioner having breached the conditions specified in article 32(1)(d) and the seat having been properly declared vacant, in terms of article 32(1)(d), the injunction against the returning officer is to be lifted, and the by-election is to go ahead, at a date to be fixed by the returning officer.

Other cases referred to in judgment:

Bradlaugh v. *Gossett* (1894) 12 QBD 271
British Railways Board v. *Pickin* [1974] A.C. 765; [1974] 2 W.L.R. 208; [1974] 1 All E.R. 609
Browne v. *Cowley* (1895) 5–6 Q.L.J.R. 234
Burdett v. *Abbott* (1811) 14 East 1, 104 E.R. 501
Coffin v. *Coffin* (1808) 4 Mass. 1 (S.Ct.)
Constitutional Reference No. 1 of 1977 (1969–1982) Nauru L.R. 57
Kirkness v. *John Hudson & Co. Ltd.* [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345
Ormond Investment Co. v. *Betts* [1928] A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400; [1928] All E.R. Rep. 709
R. v. *Clixby (Inhabitants)* (1847) 11 J.P. 568
Rua and Others v. *Moate* [1987] S.P.L.R. 11
Sanft v. *Fotofili and Others* [1987] S.P.L.R. 354; [1987] L.R.C. (Const.) 247
Sope and Others v. *Attorney-General and Speaker* [1988] S.P.L.R. 393
Stockdale v. *Hansard* (1836) 9 Ad. & E. 1, 112 E.R. 1112

Legislation referred to in judgment:

Constitution, articles 32, 36, 40, 41, 62, and 81
Electoral Act 1965–1973
Members of Parliament (Vacation of Seats) Act 1983 (Vanuatu)
Parliamentary Oaths Act (U.K.)
Parliamentary Powers, Privileges and Immunities Act 1976, sections 21 and 26

Other sources referred to in judgment:

Blackstone, *Commentaries*
de Smith, *Judicial Review of Administrative Action* (4th. ed.)
Halsbury, *Laws of England*, 34 (4th. ed.) paragraph 1143, page 455
May, *Parliamentary Practice* (20th. ed.)
Shorter Oxford Dictionary
Standing Orders of Parliament (Nauru)

Editorial Observation:

For judicial consideration of the power of a legislative body to exclude or expel one of its members, see the decision of the United States Supreme Court in *Powell* v. *McCormack* 395 U.S. 486, 81 S. Ct. 1944, 23 L. Ed. 2d. 491 (1969). The judgment includes a most useful and extensive historical survey of British and English practice.

Counsel:

P. Aingimea for the petitioner
Saksena for the Republic

DONNE C.J.

Judgment:

This is a reference under article 36 of the Constitution in which the petitioner asks whether his seat in Parliament has lawfully been vacated under the provisions of article 32(1)(d). Specifically he asks these two questions:

1. if his seat has been declared vacant on the grounds of the conditions specified in article 32(1)(d); and
2. has he breached the said conditions specified in the article.

The matter was first heard on 19 August 1988. The Secretary for Justice was made a party to the proceedings as representing the Republic and the case was adjourned for written submissions to be made. I received the last of these on 31 October and again heard the parties on 8 November.

The petitioner, who was elected a Member of the constituency of Meneng at last general election held in 1986, is alleged to have vacated his seat by reason of his absences from Parliament without its leave for the period of two months as specified in article 32(1)(d) of the Constitution. It is established and agreed that the absences extended from 19 May 1988 to 22 July 1988. There were thirteen occasions on which Parliament met during that period. The petitioner was absent in the case of each meeting. He had left for Melbourne on 5 May 1988 with his wife and son. He did not return to Nauru until 23 July 1988. The purpose of the visit was to obtain medical treatment in Melbourne for the son who was due to receive surgery there. The petitioner, before leaving, arranged with one of his parliamentary colleagues to obtain leave of absence for him from Parliament to cover the period of his absences. Towards the end of May the commercial operations of Air Nauru ceased by reason of there being a strike by certain of its pilots. The petitioner in June considered returning to Nauru. He had been told that Parliament would meet to debate on the main Appropriation Bill. He heard in early June about a non-commercial flight of Air Nauru which he believed was being made by the airline from Nauru to New Zealand returning to Nauru on 5 June. There was some confusion over this flight and he alleges that he inquired from the Consul-General of Nauru at Melbourne about it and believed he would take steps to get him on the flight. It appears he never heard from the Consul-General further thereon and did not get on the plane. The reason for this confusion is not clear but in the result it plays but a small part explaining the reasons for the petitioner's absences. Counsel for the petitioner tends to emphasize this particular incident as indicating that the petitioner's inability to return to Nauru before he did was due to some political machinations preventing him from doing so. Although the petitioner in fact did not return until 23 July there were non-commercial flights from Melbourne to Nauru between 5 June and 23 July which were available on which I am satisfied he could have travelled. He has given evidence. In the witness-box he was completely frank and honest and his evidence dispelled any suggestion of the political interference suggested. He said that his main concern was the health of his son. His wife returned by Air Nauru on 11 June and he was left alone with the boy and it is understandable that he should desire to stay with him. He said he did not leave a contact address in Melbourne with the Consul-General, but had been in communication with Air Nauru about flights. The airline had told him about some but not all. During his time in Melbourne, the petitioner made enquiries from time to time from his colleagues in Nauru about the progress of Parliament.

The petitioner believed that Parliament had granted him leave of absence over that particular period, during which there were thirteen meetings of Parliament. In fact no leave was ever granted. Surprisingly, there was only one attempt over the whole period to obtain leave and that was on 16 June 1988. On that day the House was meeting and was about to consider an adjournment of an uncompleted debate in committee. The Member for the constituency of Ubenide, Mr. Kennan Adeang, intervened and addressed the Speaker as follows:

> May I ask leave for my other colleague from Meneng or not? He has to be excused on medical grounds.

The Speaker replied:

> This is not the time. I think you have missed your cue. You should have asked that during motion time. Now this is an adjournment of the committee stage.

The House business proceeded with the Minister for Finance moving the adjournment. There the matter rested, and thereafter during the period in question the matter of leave for the petitioner was never raised and Parliament has never granted leave. Nor was there any objection taken in Parliament to the Speaker's ruling at the time it was given or later.

The last meeting of Parliament of the period under review at which the petitioner was absent was 22 July. On that day, due to the fact that some members refrained from entering the Chamber of the House, there was no quorum and the Deputy Speaker, after having ascertained that fact, adjourned the House until 25 July. On that day the petitioner was present, he having returned to Nauru by air on 23 July. At this meeting the Minister for Works and Community Services questioned the right of the petitioner to sit in Parliament in view of his absences. Subsequently, the Deputy Speaker of the House notified the petitioner by letter that his seat had been vacated by reason of his being disqualified pursuant to the provisions of article 32(1)(d).

The Speaker issued a writ for election under the provisions of the Electoral Act and the by-election to be conducted by the returning officer was fixed for 27 August 1988. On 19 August 1988 this Court issued an injunction halting the holding of the election by the returning officer until further order of the Court.

I. Jurisdiction

Article 36 of the Constitution gives this Court the jurisdiction to entertain this application. It reads:

> Any question that arises concerning the right of a person to be or to remain a member of Parliament shall be referred to and determined by the Supreme Court.

This article may be invoked by any person with the necessary *locus standi* who questions the qualification or disqualification in law of a Member of Parliament. In this case it is the Member himself who petitions, but, the right is also available to a constituent who questions the legal capacity of a person to represent him in Parliament. Likewise the Cabinet, the Speaker, or Parliament itself would have the necessary legal standing to initiate proceedings under the article, but it does not

follow that on the happening of any of the events provided for in article 32(1) the Court must be called upon to make a determination thereon. Article 36 gives the right to any person legally entitled so to do, to challenge the legality of a disqualification under article 32(1). Here, the petitioner challenges the legality of the vacation of his seat on the grounds that he has not breached the conditions laid down in article 32(1)(d) for the vacation of a seat in Parliament. He requires this Court to determine that he is still lawfully a Member of Parliament.

II. The Operation of Article 32(1)

It is well-established in law that the vacancy of the seat of a Member of Parliament becomes automatic immediately the disqualifying circumstances have arisen (see *Constitutional Reference No. 1 of 1977* reported in Part A Nauru Law Reports (1969–1982) at page 57). A similar provision to article 32(1)(d) is enacted in Vanuatu in the Members of Parliament (Vacation of Seats) Act 1983, section 2(d), which requires the vacation of a Member's seat if he is absent without leave from three consecutive sittings of Parliament. In a decision interpreting this provision, recorded in case no. 116 of 1988, *Sope and Others* v. *Attorney-General and Another* [reported at p. 393 below], delivered on 16 August 1988 in the Supreme Court of Vanuatu, Ward C.J. said at page 8:

> Section 2(d) is mandatory. . . . Once a member is absent from three consecutive sittings without permission, he shall vacate his seat . . . no declaration is required and the vacation is of immediate effect . . . neither does the fact of any legal challenge suspend the vacation of the seat.

This was also the view of Speight C.J. in the Cook Islands High Court case of *Rua and Others* v. *Moate* O.A. No. 1/1987 delivered on 23 August 1987 and affirmed on appeal [reported at [1987] S.P.L.R. 11], and to which further reference will be made hereunder.

Counsel for the parties appeared to place some weight on the notification by the Deputy Speaker of the vacancy of the petitioner's seat, indicating the view that such notification was a requisite step to be taken before the vacancy could occur. As I have said, the seat of a Member becomes vacant immediately the disqualifying circumstances occur, and whether the Speaker or his Deputy did or did not make any declaration to the House or give any notification to the Member makes no difference to the fact that the seat has been vacated, and no procedural step is required in law by the Speaker to effect the vacancy.

A. *The Meaning of Article 32(1)(d)*

It is pursuant to article 32(1)(d) of the Constitution that the petitioner is required to vacate his seat in Parliament. It reads:

> 32(1) A member of Parliament vacates his seat:
>
> . . .
>
> (d) If he is absent without leave of Parliament every day on which a meeting of Parliament is held during a period of two months.

The petitioner submits that the meaning of the phrase "on every day on which a meeting of parliament is held during a period of two months", is not clear. He refers to the standing orders of Parliament and in particular the definition of "session"

therein, and contends the words "on every day in which a meeting . . . is held" relates to that definition which says:

> "A session" means any series of sitting days during which the Parliament does not adjourn for a period longer than seven days.

That being so, he argues that the meetings referred to in the article are the "series of sitting days" which constitute a "session" of Parliament within the meaning of the standing order so that in order that a seat be vacated the member must be absent without leave of Parliament "in a session of Parliament (i.e., as defined in Standing Orders) held during a period of two months". Therefore, he says, the "period of two months" commences "on each first sitting of a session and ends 7 days after adjournment of the last sitting of the session". However, the support he seeks from standing orders, in particular from the definition of "session" therein, does not help him.

The standing orders of Parliament were promulgated fifteen years after the enactment of the Constitution and were never at that time contemplated by Parliament. Apart from the fact that they do not have the force of a statute, being rules laid down for the regulation of the proceedings of Parliament, even if they had, how far one may look to a later statute is questionable. This was pointed out by Lord Reid in *Kirkness* v. *John Hudson & Co. Ltd.* [1955] A.C. 696 who said (at page 735) that the earlier decision in *Ormond Investment Co.* v. *Betts* [1928] A.C. 143 afforded "conclusive and binding authority for the proposition that, in construing a provision of an earlier Act, the provisions of a later Act cannot be taken into account except in a limited class of case". For that later statute to become relevant the words or phrase used in the earlier statute must be on the face of them "obscure or ambiguous" or "open to diverse meanings". Besides the Constitution itself defines "session" in article 81(1) and, if that term is to be considered in the process of interpreting the phrase in question, then it must be considered in the light of the meaning given to it in the Constitution. The meaning is in conflict with that in standing orders. Article 81(1) defines the term as:

> "Session" means the period beginning . . . after Parliament has at any time been prorogued or dissolved and ending when next Parliament is prorogued or dissolved.

That definition and article 40(1) fix the meaning and bounds of a session of Parliament. That is the meaning which must prevail. Using the term in that sense cannot assist the petitioner in his interpretation. While it is perhaps irrelevant, I should mention that the submission of the petitioner to the effect that to apply the term as defined in the Constitution to articles 41(3) and 62(3) would result in "an absurd" meaning has no substance. These articles provide for the Speaker to summon Parliament in the event of certain contingencies arising at any time. If it happened that they arose while Parliament was prorogued and thus was not in session, it would be necessary for the Speaker to appoint and fix a new session, as opposed to a sitting, and the respective articles give him that power.

There is, however, no necessity to resort to external aids in interpreting the article. The primary duty of the Court is to find the natural meaning of the words used in the context in which they occur, that context including any other parts of the

enactment which may throw light on the sense in which Parliament used the words in question *R.* v. *Clixby (Inhabitants)* (1847) 11 J.P. 568. The article sets out the elements which must be satisfied before a Member's seat in Parliament is vacated as being:

1. there must have been daily meetings of Parliament held;
2. the meetings must have been held during a period of two months;
3. during that period the Member must have been absent without the leave of Parliament on each occasion a meeting was held.

As to element (1), while there is no definition of the term "meeting" in the Constitution, a meeting in the ordinary meaning of the term is "an assembly or getting together" (*Shorter Oxford Dictionary*, 3rd. edn.). A meeting of Parliament is an occasion when Parliament assembled. We are here concerned with "meetings" on "every day on which a meeting of Parliament is held". That qualifies what days count.

As to element (2), the question as to how the period specified is calculated must be considered. The result must be consistent with the Constitution as a whole, do justice to the persons involved, as well as give effect to the apparent intention of the makers of the Constitution. Now the purpose and intent of the article is to punish effectively Parliamentarians who do not give their time and attention to their duties in Parliament by attending to its business when sitting. Parliament has said that absences of Members without its leave during a period of two months disqualifies that Member from sitting. His seat becomes vacant. The period is "during" two months. The period defined is not an absolute one. To treat the term as absolute would imply that if the transgression is greater than two months there is no penalty. This would be absurd and defeat the intention and purpose of the article.

For the period to apply there must be two qualifications:

1. The article requires that the absence must be on days when meetings are held during the period. Use of the expression "every day" and the requirement for there to be a "period" indicate the necessity for a plurality of days so that there can be both a commencement and a completion.
2. The period must start with a sitting and finish with one, and also include at least one sitting day in between. The reason for this is that to be able to choose a start or a finish which is *not* a sitting day opens the way for arbitrary application of the article. Further, the failure to require that there be at least one sitting day in between would fail to acknowledge that the article requires there to be a failure "during" the period.

The context in which the word "during" occurs in the article is, I consider, "during the whole". We must therefore look to the whole period concerned (any given period of two months) and to every qualifying event that takes place within that period. If we can delineate a period which starts and finishes with a qualifying event, then it follows that the events all occurred during the period. The context of the article is the context of attendances at meetings of Parliament which, in places such as Nauru, do not occur on every day of the year. Therefore there can be no suggestion that the whole period in this case means each and any every day of the two months. On the contrary it means each and every day when there is a sitting of Parliament in any period of two months.

In the result I find that, for article 32(1)(d) to be applicable in relation to the period specified therein, the following conditions must be satisfied:

1. the commencement date of the period of two months must be a day when

Parliament met;

2. the conclusion of the period must be a day upon which there is a meeting of Parliament, and that day must be two months or more from and including the first meeting day when the member was absent; and
3. there must be at least one meeting day during the period of two months.

As to element (3), that speaks for itself. There must be absence without the leave of Parliament on each occasion Parliament was held during the period.

Applying this interpretation of the article to the present case, Parliament met this year on 19 and 31 May, on 9, 10, 11, 13, 14, 15, 16, 17, 20, and 21 June, and on 22 July (the legality of this latter meeting is challenged). The first and last meeting extend during a period of two months, with eleven meetings in between. The petitioner was absent on each of these days without Parliament having granted him leave on any of them. Assuming all these days are legal meetings, it is clear he satisfies the conditions laid down in article 32(1)(d) which require the vacation of his seat in Parliament.

However, it is contended that the conditions for the vacation of the petitioner's seat have not been met because, firstly, the final day of the period was not legally a meeting day since Parliament was not quorate on that day and, secondly, that a motion for the granting by Parliament of leave of absence for the petitioner was wrongfully disallowed by the Speaker of Parliament on 16 June. We shall now consider these contentions.

III. The Parliament of 22 July 1988

Business was transacted on all the meetings of Parliament over the two-month period under review except at the meeting held on 22 July 1988. The Clerk of Parliament has certified that, on that day, the Deputy Speaker took the Chair at the time appointed for the meeting, he read the prayers. It was then pointed out to him by a Member that the required number of Members to constitute a quorum was not present after the bells were rung pursuant to standing order 29. Parliament was then adjourned by him without transacting any business until 25 July. There was, apparently, on that day a concerted decision by a body of Members not to attend Parliament. There is no evidence to indicate for what reason that step was taken.

The contention is that as that Parliament was not quorate on that day, the sitting was invalid and of no effect. However I have no doubt that there can legally be a meeting or sitting of Parliament even though no business may be transacted at it. "Sitting" is defined in standing order no. 2 of Parliament as "the daily meeting of the Parliament from the ringing of the bells at the appointed time until the adjournment of the Parliament". The definition of the term in the Constitution is of the same effect. That means that the moment the bells ring, the meeting of Parliament begins and continues until Parliament is adjourned. When Parliament met on 22 July 1988, the bells were rung, the formal entry was made, the Deputy Speaker took the Chair, and prayers were said in accordance with standing order no. 30, and then in accordance with standing order no. 29 and standing order no. 31 the Deputy Speaker instituted the proceedings for determining that a quorum was not present. On being satisfied that a quorum was not present, he then adjourned Parliament in accordance with the authority given in the said standing orders. Until Parliament was adjourned it was sitting although it was debarred by the article 45 of the Constitution from transacting any business other than ascertaining whether a quorum was present. This was a situation with which the Parliament of the Cook Islands was confronted in

1987 when members of a political party, one of whose members was in danger of being unseated for non-attendance, in the belief that absence of a quorum aborted a siting, entirely refrained from entering the Chamber of the House. The Speaker, after prayers and the ringing of the bells, adjourned the Parliament without any business being transacted because of the lack of a quorum. (The relevant standing order providing for this procedure is similar to that of the Nauru Parliament.) Speight C.J., dealing with the point in *Rua's* case (*supra*), said at page 4:

> . . . . this formality of procedure . . . contrary to the belief of some members constitutes a sitting of the House [and further] The whole affair arises therefore from a futile misunderstanding.

I therefore hold that the assembly of Parliament on 22 July 1988 was a lawful meeting of Parliament and as such must be included in the computation of the two-month period specified in article 32(1)(d). It was the last meeting of that period and is properly included therein. The petitioner was not present at it.

IV. Leave of Absence

In order to avoid disqualification under article 32(1)(d), the member must obtain leave of absence. The leave is granted by Parliament in accordance with standing order no. 22 which reads:

> Leave of absence may be given by the House to any member on motion without notice, stating the cause and period of absence; and such motion shall have priority over all other business.

The effect of such leave of absence is stated in standing order 23 as:

> A Member shall be excused from service in the House, or on any Committee, so long as he has leave of absence.

It is common ground that the petitioner was never granted leave of absence by Parliament. During the relevant period of two months he was in Melbourne, he had attempted without success to get on a flight to Nauru from Auckland on 4 June 1988 by communicating with the Consul-General at Melbourne, but was unsuccessful. When his wife returned to Nauru by Air Nauru on 11 June he has said he decided to stay in Melbourne to be with his son who was receiving medical attention. He had arranged with a parliamentary colleague, the Honourable Kennan Adeang to obtain leave of absence from Parliament. On 16 June 1988 Mr. Adeang raised the question of leave of absence for the petitioner in the House. According to official English version in Hansard this is what happened:

> Mr. Adeang (Ubenide): May I ask leave for my colleague from Meneng or not? He is to be excused on medical grounds.
> The Speaker: This is not the time. I think you have missed your cue. You should have asked that during the motion time. Now is the adjournment of the committee stage.

While there does not appear to be a direct ruling that the application for leave was

disallowed, it being suggested only that it was the wrong time for it, it can, I believe, be inferred it was such a ruling. It is also clear that there was no objection raised to the ruling and the matter has never been pursued further in Parliament by Mr. Adeang or any other Member. The consequence is that Parliament, the only authority that can grant leave, has not done so. Leave cannot be granted because there was silence on the issue: if there is no decision, there is no leave.

Standing orders of Parliament are quite clear as to the right of a member to object to a ruling given by the Speaker and it is quite wrong to suggest, as has been done in this case, that to dissent from the Speaker's ruling would "amount to misconduct or disobedience" and be "contemptuous". Standing order no. 82 states:

> If any objection is taken to any ruling of the Speaker, such objection must be taken at once, and a motion of dissent, to be submitted in writing moved without notice, if seconded, shall be proposed to the House, and debate thereon shall ensue.

Every Member must be presumed to be aware of this order. It provides the procedure for the settling in the House of any objection to the Speaker's ruling. It is, in effect, an appeal to the House which is empowered to adjudicate on it. Whether the Speaker was right or wrong in his ruling is thus decided.

The petitioner, nevertheless, submits that, notwithstanding this, article 36 gives a right of judicial review in the circumstances and that if the Speaker's ruling was wrong in law this Court can correct it. Should that be the case there is, of course, still the very real problem that the nub of the matter is that it is Parliament that grants the leave of absence and, even if the Court is able in law to correct the Speaker's ruling, in the event of it being wrong, does the Court then have the lawful authority in the circumstances to supplant Parliament and itself grant the leave or alternatively order Parliament to do so?

The sovereignty of Parliament is reinforced in the Constitution. It confers on Parliament the right to declare its powers, privileges, and immunities (article 30) and, under the authority of that article, Parliament enacted the Parliamentary Powers, Privileges and Immunities Act 1976. Section 21 thereof declared that Parliament's powers, privileges, and immunities, and those of its members and officers, are identical to those of the United Kingdom House of Commons. It also provides in section 26 as follows:

> 26. Neither the Speaker nor any officer of the parliament shall be subject to the jurisdiction of any Court in respect of the lawful exercise of any power conferred on or vested in the Speaker or the officer by or under this Act.

This effectively answers any argument that this Court has jurisdiction to correct any rulings of the Speaker of the Parliament of Nauru. There is no question that in this case the speaker was lawfully exercising his power in ruling on the motion for leave. He is the interpreter of the rules and procedures of the House (34 Halsbury (4th. edn.) paragraph 1143, page 455). It is contended he made an error in ruling. If he did there is no appeal in this Court against the ruling.

Furthermore it is an ancient privilege of Parliament embodied in the claim in article 9 of the Bill of Rights 1689 that "freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court of law or place

outside Parliament". De Smith's *Judicial Review of Administrative Action* (4th. edn.) at page 469 states the position in this way:

> The courts have no jurisdiction to restrain by injunction, or otherwise to pass upon, any conduct that forms part of proceedings in Parliament, even though the matter in issue is not directly connected with the process of legislation. In the well-known case of *Bradlaugh* v. *Gossett* (1884) 12 Q.B.D. 271, the court refused to award the plaintiff an injunction against the Serjeant-at-Arms to restrain him from enforcing an order of the House of Commons requiring him to exclude the plaintiff from the House, or a declaration that the order of the House was void. *Assuming that the plaintiff was right in his contention that the order of the House was based upon the misconstruction of a statute, nevertheless the courts had no jurisdiction to interfere, for the matter fell exclusively within the scope of the privilege of the House to regulate its own internal proceedings.* (Emphasis added)

What is sought here by the petitioner is an investigation into what undoubtedly was "a proceeding in Parliament". The term, while never having been expressly defined by the courts, has been the subject of oblique references from time to time. An American judge, Parsons C.J., in *Coffin* v. *Coffin* 4 Mass. 1 (a judgment of the Supreme Court of Massachusets) said:

> I will not confine it to delivering an opinion, uttering a speech or haranguing in debate, but will extend it to giving a vote to the making of a written report, and to every other act resulting from the nature and in the execution of the office.

Erskine May on *Parliamentary Practice* (20th. edn.) quotes at page 83 the 1938–39 Parliament Select Committee of the House of Commons on the Official Secrets Act which states the term included "everything said or done in the House in the transaction of Parliamentary business".

Acknowledgement by the courts of this privilege of Parliament, namely, that the control of the House over its internal proceedings is absolute and cannot be interfered with by the courts, is to be found in many cases, the most quoted being *Bradlaugh* v. *Gossett* (supra). In that case, Mr. Bradlaugh, having been returned as a Member of Parliament, required the Speaker to call him to the table for the purpose of swearing him in as a Member. He claimed to make an affirmation instead of taking an oath. The Speaker declined to allow him to do this and the House subsequently resolved he could not qualify himself by making the affirmation and that he should be excluded from the House. The Sergeant-at-Arms accepted the instruction of the House and an action was brought by Mr. Bradlaugh against the Sergeant praying for an injunction to restrain him from carrying out the instruction. The question before the Court was whether such an action could be entertained. Lord Coleridge C.J. page 275 said:

> What is said or done within the walls of Parliament cannot be inquired into in a court of law. On this point all the judges in the two great cases which exhaust the learning on the subject,—*Burdett* v. *Abbott* 14 East, 1, 148 and *Stockdale* v. *Hansard* 9 Ad. & E.1.—are agreed, and are emphatic. The jurisdiction of the Houses over their own members, their right to impose discipline within their

walls, is absolute and exclusive. To use the words of Lord Ellenborough, "They would sink into utter contempt and inefficiency without it" (14 East, at p. 152).

Stephen J. at pages 278–279 said:

Many authorities might be cited for this principle; but I will quote two only. The number might be enlarged with ease by reference to several well-known cases. Blackstone says at 1 Com. 163: "The whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'" This principle is re-stated nearly in Blackstone's words by each of the judges in the case of *Stockdale* v. *Hansard*. As the principal result of that case is to assert in the strongest way the right of the Court of Queen's Bench to ascertain in case of need the extent of the privileges of the House, and to deny emphatically that the Court is bound by a resolution of the House declaring any particular matter to fall within their privilege, these declarations are of the highest authority. Lord Denman says at p. 114: "Whatever is done within the walls of either assembly must pass without question in any other place." Littledale, J., says at p. 162: "It is said the House of Commons is the sole judge of its own privileges; and so I admit as far as the proceedings in the House and some other things are concerned." Patteson, J., said at p. 209: "Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examination elsewhere." And Coleridge, J., said at p. 233: "That the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules or derogation from its dignity, stands upon the clearest grounds of necessity."

Mr. Bradlaugh contended that the Speaker and the House had acted unlawfully since the decision to prevent him making his affirmation was contrary to the Parliamentary Oaths Act then in force. On this point Lord Coleridge said at pages 276–277:

It is said that in this case the House of Commons has exceeded its legal powers, because it has resolved that the plaintiff shall not take an oath which he has a right to take. . . . But there is nothing before me upon which I should be justified in arriving at such a conclusion in point of fact. Consistently with all the statements in the claim, it may be that the plaintiff insisted on taking the oath in a manner and under circumstances which the House had a clear right to object to or prevent. Sitting in this seat I cannot know one way or the other. But, even if the fact be as the plaintiff contends, it is not a matter into which this Court can examine. If injustice has been done, it is injustice for which the Courts of law afford no remedy. On this point I agree with and desire to adopt the language of my Brother Stephen. The history of England, and the resolutions of the House of Commons itself, shew that now and then injustice has been done by the House to individual members of it. But the remedy, if remedy it be, lies, not in actions in the courts of law (see on this subject the observations of Lord Ellenborough and

Bayley, J., in *Burdett* v. *Abbott*, 14 East, 150, 151 and 160, 161), but by an appeal to the constituencies whom the House of Commons represents.

Stephen J. said at page 285:

> The House of Commons is not a Court of Justice; but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament. We must presume that it discharges this function properly and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal.

And, at page 286:

> In my opinion the House stands with relation to such rights and to the resolutions which affect their exercise, in precisely the same relation as we the judges of this Court stand in to the laws which regulate the rights of which we are the guardians, and to the judgments which apply them to particular cases; that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever, to guide their conduct by the law as they understand it. If they misunderstand it, or (I apologize for the supposition) wilfully disregard it, they resemble mistaken or unjust judges; but in either case,there is in my judgment no appeal from their decision. The law of the land gives no such appeal; no precedent has been or can be produced in which any Court has ever interfered with the internal affairs of either House of Parliament, though the cases are no doubt numerous in which the Courts have declared the limits of their powers outside of their respective Houses. This is enough to justify the conclusion at which I arrive.

More recently in *British Railways Board* v. *Pickin* (1974) AC 765, Lord Morris of Borth-y-Gest commented:

> It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. . . . It would be impracticable and undesirable for the High Court of Justice to embark upon an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an enquiry whether in any particular case those procedures were effectively followed.

In the case of *Browne* v. *Cowley* (1895) Vol. 5–6 Q.L.J.R. 234, the Supreme Court of Queensland, dealing with an action by a member of the Legislative Assembly against the Speaker thereof relating to an incident which occurred in the Assembly, was concerned with this question of parliamentary privilege. Griffith C.J., at page 241 (1st. Column) said:

The error alleged, if it be one, is in my opinion one of procedure only, of which I think the Legislative Assembly themselves are the judges, without appeal to this court. It is hardly necessary to point out that the practice of Parliament is a branch of knowledge of itself, of which successive Speakers have been distinguished exponents. I believe this is the first instance in which the ruling of a Speaker, which is subject to appeal to the House itself, has been sought to be submitted to the review of a court of justice. I am not disposed to be the first judge to review a Speaker's decision on the construction of the Standing Orders—a function which requires not only a consideration of the printed document, but an acquaintance with the law and practice of Parliament, with reference to which the Standing Orders themselves are framed, and without which the judge undertaking the duty would be ill-equipped for the task.

Recently in the Pacific, the Supreme Court of Tonga, in the case of *Sanft* v. *Fotofili and Others* (1987) LRC (Const.) 247, [1987] S.P.L.R. 354, was called upon to consider the validity of a certain enactment passed by the Legislative Assembly of Tonga on the grounds that several steps of irregular procedure in Parliament had occurred which rendered the enactment invalid. In striking the action out, Martin J., at page 249 (lines a5–line d4) [S.P.L.R., 356], said:

For any reasons given in my previous judgment, which I will not repeat here, I hold that this court does have the power to decide whether a constitutional or statutory requirement has been observed. If not, any act of the Legislative Assembly in contravention of that condition would be invalid. But this Court has no power to pronounce on the validity of the "internal proceedings" of the House. That, in my view, includes the procedure adopted within the House to conduct its business.

I turn back to the words of Stephen, J., in *Bradlaugh* v. *Gossett* (1884) 12 QBD 276 at 280:

> ... the House ... has the exclusive power of interpreting the statute, so far as the regulation of its proceedings within its own walls is concerned; and ... even if that interpretation should be erroneous, this court has no power to interfere with it directly or indirectly.

Even if the Rules of Procedure were breached (and I can make no finding whether or not this was so), this is a matter over which this court has no jurisdiction.

In this present case there is no question that what is sought by the petitioner to be reviewed by this Court is a "Proceeding in Parliament". There was an attempt to move a motion to obtain the leave of Parliament for him to absent himself. This was made to the Speaker in Parliament. The mover was Mr. Adeang. His attempt to do so was rejected by the Speaker. Now, as I have already said, there was a clear procedure available under standing orders to have the Speaker's ruling reviewed by Parliament, which, of course, was the authority, and indeed the only authority, empowered to grant leave. Parliament did not get the opportunity to consider further either the ruling of the Speaker or the application for leave since the matter was not pursued after the Speaker's decision. The matter arose in Parliament, the procedures of which allowed the whole matter to be adjudicated upon in Parliament. To use again the oft-quoted words "whatever is done within the walls of Parliament

must pass without question in any other place". Consequently this Court, I am satisfied, has no jurisdiction to review what is here a proceeding in Parliament and the application to do so is declined.

In the result it is clearly established that the petitioner was absent without leave of Parliament for the period laid down by article 32(1)(d) of the Constitution and 620 therefore the conditions specified therein have been satisfied. The seat in such circumstances must be considered vacant. I accordingly answer the questions posed in the petition as follows:

Question 1: Has the seat of the petitioner been declared vacant on the grounds specified in article 32(1)(d) of the Constitution?

Answer: Yes.

Question 2: Has the petitioner breached the conditions specified in the said article 32(1)(d)?

Answer: Yes.

When this petition was filed, contemporaneously therewith was an application for an 630 injunction to prevent the holding of the election ordered by the returning officer pursuant to a writ under Electoral Act 1965–1973 issued by the Speaker for an election of a member of Parliament to fill the vacancy of the seat formally held by the petitioner. I accordingly issued an order restraining the returning officer from taking any further steps in the election until further order of this Court. It should be noted that this order did not impugn the Speaker's writ but merely postponed the date of the holding of the election. The Speaker's writ is still a valid one and all steps taken in pursuance of it, such as the acceptance of nominations for the election, are valid. The Court now orders the injunction to be lifted and the election may now proceed at a date to be fixed by the returning officer.