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Prot. No. 32108/01 CA
WOLLONGONG
Exercise of Priestly Ministry
(Bishop of Wollongong – Congregation for Clergy)

DEFINITIVE SENTENCE

In the Name of God. Amen.

Pope Benedict XVI happily reigning, in the first year of his pontificate, on 18th March 2006, the Supreme Tribunal of the Apostolic Signature, in the persons of Petrus Card. Erdo, Augustinus Card. Cacciavillan, Ponens, Ioannes Ludovicus Card. Tauran, Iulianus Card. Herranz, + Augustinus Vallini, Prefect, + Iosephus Mercieca, + Franciscus Coccopalmerio, + Thomas Georgius Doran, + Xaverius Echevarria Rodriquez, in the presence of Ms M. Wegan, Advocate for the Bishop of Wollongong, Mr. M. Musumeci, Advocate for the Congregation for Clergy, and Rev. P. Janusz Kowal, Promotor of Justice for the case, gave this definitive sentence.

THE FACTS OF THE CASE

On 4 October 1998 Rev. John Nestor made hierarchical recourse to the Congregation for Clergy against two decrees of 7th August 1998, in which Bishop Philip Wilson, then bishop of Wollongong, had decreed that, because of doubts concerning his suitability to exercise priestly ministry, he should undergo tests before “Encompass Australia” as a “prerequisite to any further ecclesiastical appointments” and declared that in the meantime he be “restricted from celebrating the liturgy publicly.”

On 21 December 2000 the Congregation for Clergy invalidated the two decrees and declared that “the Rev. Nestor is to be restored immediately to the full exercise of his priestly ministry in the Diocese of Wollongong and restitution is to be made of that of which he was deprived in keeping with the diocesan norms for remuneration of the clergy and can.281.” On 12th January 2001, Bishop Wilson, then diocesan Administrator, requested of the Congregation a withdrawal of the decree.

Since no reply had been received within a month, the new diocesan administrator, Rev. Bryan Jones, appealed on 22nd February 2001 to this tribunal against the decree of the Congregation, requesting furthermore the suspension of the execution of the same decree. On 19th May 2001 the Congregation rejected the submission of 12th January 2001. On 24th July 2001 the Rev. Administrator explained the reasons for the requested

suspension. The Rev. Nestor on 24th July 2001 and the Congregation on 19th February 2002 expressed a contrary opinion. This tribunal, in a session of 22 April 2002 granted a suspension of the decree in relation to the order that the Rev. Nestor should be immediately restored to the full exercise of the priestly ministry in the diocese of Wollongong.

The doubt has been formulated as follows: "Whether it is proven that a violation of law occurred in procedure or in discernment in relation to the decision of the Congregation for the Clergy of 21 December 2001, confirmed on 19th May 2001."

IN LAW AND IN FACT

The contested decision of the Congregation dealt not only with the full exercise of priestly ministry being immediately restored to the Rev. Nestor, but also with the question of whether "restitution is to be made of that of which he was deprived in keeping with the diocesan norms for remuneration of the clergy and can.281." Since, however, Rev. Nestor himself, in his letter of 14th January 2001, declared that correct remuneration had been restored to him in the month of December and that he had not asked for more or intended to ask for more, nothing further will be said on this subject.

The Rev. diocesan Administrator in his letter of 22nd February 2002 gave the following reasons for his recourse to this tribunal: a) the Rev. Nestor made his hierarchical recourse to the Congregation only after the peremptory time had elapsed; b) the Congregation for the Clergy was incompetent in the case; c) the Congregation did not provide to the Bishop of Wollongong either an authentic copy or a summary of the documentation presented by Rev. Nestor, such that the Bishop could not adequately reply and there were errors of fact in the contested decree of the Congregation. The Bishop's advocate, in a submission of 27th March 2002, noted in particular that the Congregation had erroneously held that Rev Nestor had been subjected to a penalty by the decrees of 7th August 1998.

It is not possible to sustain the argument that Rev. Nestor did not submit his recourse within the peremptory time. The decree of the Congregation indicates the day when the recourse arrived at the Congregation, not the day on which it was sent, which without doubt would have been within the peremptory time. Furthermore, even if the recourse had been presented after the required time, the Congregation could on its own discretion and *ex officio* deal with it.

Concerning the alleged incompetence of the Congregation for the Clergy in the case, the matter is more complex. Bishop Wilson, in a letter of 28th January 1998, asked a question of the Congregation for the Doctrine of the

Faith concerning the procedure to be followed “regarding the case of a priest accused of sexually molesting a minor”, and on 28th February 1998 the Secretary replied that he should proceed in the manner set out in Chapter Five of *De Crimine Pessimo*, the instruction on the mode of procedure in cases of solicitation published by the same Congregation in 1962. It is a cause of wonder that Bishop Wilson said nothing of this reply, neither to the Congregation for the Clergy nor to Rev. Nestor, but the Rev. Diocesan administrator Bryan Jones then raised it in his recourse of 22nd February 2001 to the Apostolic Signatura. Having considered art.52 of the Apostolic Constitution *Pastor Bonus* concerning the competence given to the same Congregation in dealing with the more serious crimes against morals, together with articles 112 #2 and 121 #2 and 137 #1 of the General Ordering of the Roman Curia of 1992, (cf. articles 128 #2 and 137 #1 or the Ordering of 1999), and accepting that the case of the Rev. Nestor had in some manner already been referred to the Congregation for the Doctrine of the Faith, whose exclusive competence in the matter in the meantime has been confirmed by the *Motu Proprio Sacramentorum sanctitatis tutela*, the undersigned Fathers believe that the incompetence of the Congregation for the Clergy has been sufficiently established.

When the Bishop of Wollongong was informed by the Congregation for Clergy of the recourse made by Rev. Nestor, he was heard on the matter by the same Congregation. It is perhaps true that he was not informed of all the arguments and documents presented by Rev. Nestor, but it is more probable that, in the process carried out in Wollongong before the contested decrees of the bishop, Rev. Nestor himself had not been fully informed of the accusations and proofs brought against him, apart from accusations presented in a rather generic form.

Whatever the truth of this, it seems that the Congregation in this case did not study the replies of the bishop with sufficient attention. Indeed, even though he had spoken of having set up a preliminary investigation to a penal procedure in accordance with canon 1717, in fact he had used another form of procedure (“Towards Healing”), namely that proper to the Church in Australia, whose aim is to look, not at the likelihood of the crime alleged, but at the suitability to exercise a ministry in the Church. Even though the Bishop explicitly informed the Congregation that the preliminary penal investigation had not been completed, the contested decision of the Congregation erroneously held the decrees of the bishop to be penal. However, the decision by which, e.g. the conferring of an ecclesiastical office by a competent authority is impugned because of the lack of suitability of the candidate or the faculty either to preach or to hear confessions is revoked, respectively in accordance with canons 764 and 974 #1, is in no way the inflicting of a penalty, for which is required moral certainty concerning a gravely imputable crime committed, but a non-penal disciplinary decision, which may be imposed because of a positive

and probable doubt concerning the suitability of the cleric in the matter concerned.

Perhaps in the process it followed the diocese of Wollongong should have more clearly expressed what exactly happened, when, where and in what circumstances, so that the positive and probable doubt concerning the suitability of Rev. Nestor in the case might more clearly have appeared to be founded on arguments not simply subjective but also objective, and hence the condition that he subject himself to an examination by the institute "Encompass Australia" as a "prerequisite to any further ecclesiastical appointment." Perhaps it should also have been more fully explained in what way the imposing of that examination may be reconciled with the right of every person to protect his own privacy (cf. can.220) and on what canonical norms is based the general ban on celebrating a public liturgy. It is not up to us, however, to consider these matters, for it is already sufficiently evident that the Congregation for Clergy in this case erroneously considered the decrees as penal and hence erroneously decreed that "the Rev. Nestor is to be restored to the full exercise of his priestly ministry in the Diocese of Wollongong."

It is also not up to this tribunal to decide on the conformity with the universal law of that manner of proceeding entitled "Towards Healing"; if it is warranted, this is a matter for the Pontifical Council for Legislative Texts.

CONCLUSION

Having considered all aspects of the case in law and in fact, the undersigned Fathers sitting as a tribunal and having only God before their eyes, decree that the doubt is to be responded to and do so respond:

Affirmative, that is, the violation of the law both in procedure and in discernment in the decision of the Congregation for Clergy of 21st December 2000, and confirmed on the 19th May 2001, has been proven.

Concerning the expenses, the amounts deposited in the funds of this tribunal are to be kept. Each of the parties is to pay a just sum to his Advocate.

We decree that this definitive sentence is to be communicated to all whom it concerns and executed, with all legal effects.

Given at Roma, from the offices of the Supreme Tribunal of the Apostolic Signature, on the 18th March 2006.

Signed: Petrus Card. Erdo

Augustinus Card. Cacciavillan
Ioannes Ludovicus Card. Tauran
+ Augustinus Vallini, Prefect
+ Iosephus Mercieca
+ Franciscus Coccopalmerio
+ Thomas Georgius Doran
+ Xaverius Echevarria Rodriquez, Ponens

Let it be notified,
20th July 2006

Velasius De Paolis, Secretary
Donatus Catenacci, Notary.