IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Suite No. 14 of 2013

Applicant

AG & Ors

v

Secretary for Justice

Respondent

JUDGE: von Doussa, J.

DATE OF HEARING: 10th – 12th June 2013

DATE OF JUDGMENT: 18th June 2013

CASE MAY BE CITED AS: AG & Ors v Secretary for Justice

MEDIUM NEUTRAL CITATION: [2013] NRSC 10

CATCHWORDS: **Immigration – refugees** - Constitutional application for release from detention – habeas corpus – applicants brought to Nauru by Australian air transport without their consent – entered Nauru under visas granted on application by Australia – visa conditions requiring holders to reside in processing centre – restrictions on movement – whether applicants detained by Nauru – whether detention authorized by *Immigration Act 1999* (Nr) and regulations thereunder – whether detention in breach of Article 5(1) of the Constitution of Nauru – whether detention for the purpose of effecting lawful removal from Nauru under Article 5(1)(h) of the Constitution.

APPEARANCES:

For the Applicant Mr JWK Burnside QC with Mr J Williams

For the Respondent Mr S Donaghue SC with Ms K Evans

von Doussa J

1. The applicants seek an order for their release from a Regional Processing Centre situated at Topside in the District of Meneng, Nauru. They alleged they are unlawfully detained.[1]

2. Initially the applicants obtained leave from the Registrar of the Supreme Court to issue a writ seeking habeas corpus. However, no writ was issued as the Registrar soon afterwards informed the parties that the application would be treated as an application under s213(1) of the *Criminal Proceedings Act 1972 (Nr)* which empowers the Court to direct that any person within Nauru be brought before the Court, and to direct that the person be set at liberty if illegally or improperly detained in public or private custody within Nauru. The power of the Court under s213(1) mirrors the jurisdiction and powers which the Court would exercise on an application for habeas corpus. The writ of habeas corpus remains as a remedial writ in Nauru through section 4 (1) of the *Custom and Adopted Laws Act 1971* (Nr)[2].

3. The proceedings rely as well upon Article 5(4) of the Constitution of the Republic of Nauru contained in Part II – PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS. That Article provides:

> *Where a complaint is made to the Supreme Court that a person is unlawfully detained, the Supreme Court shall enquire into the complaint and, unless satisfied that the detention is lawful, shall order that person to be brought before it and shall release him.*

4. It is agreed that nothing turns on the point of procedure: the matter before the court for enquiry is whether the applicants are unlawfully detained.

The present situation

5. Each of the applicants arrived at the Christmas Island, Australia, as offshore entry persons within the meaning of the *Migration Act 1958* of the Commonwealth of Australia on or about 1 September 2012. On about 24 September 2012 they were taken by aircraft to Nauru, arriving probably on 25 September 2012. The applicants say they were brought to Nauru against their will. Such as it is on the point, the evidence supports only that conclusion and I so find.

6. On 24 September 2012 permits were issued by Nauru to permit the applicants lawful entry into Nauru. It was then, and remains the case, that it is an offence for a person who is not a Nauruan citizen to enter or remain in Nauru without a valid visa authorizing entry or presence. As a sovereign State Nauru can determine who it will allow to enter its territory, and can in its absolute discretion refuse entry to an alien.[3]

7. The permits, called Australian Regional Processing visas, were issued under the *Immigration Act 1999*(Nr) and the reg 9A inserted into the *Immigration Regulations 2000*

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[1] The names of the applicants are not used in these proceedings as the Supreme Court must maintain confidentiality as to the identity of the applicants at all times: the *Refugee Convention Act 2012 (Nr)*,S 48 (1).
[2] See *Amiri v Director of Police* [2004] NRSC 1 at [24].
[3] See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 29-30.

(Nr) by the *Immigration (Amendment) Regulations 2012 (Nr)*. That class of visa was available for someone brought to Nauru under the *Migration Act 1958 (Cth)* for the purpose primarily of making a refugee status determination in respect of the entrant. The visa had conditions attached in terms prescribed by reg 9A(3). In particular the holder of the visa must reside in specified premises set aside for the visa holder. On 25 December 2012 each applicant was granted a further visa under reg 9A, and on 25 March 2013 each was granted a Regional Processing Visa (RPV) under reg 9 of the *Immigration Regulations 2013 (Nr).* On 10 May 2013 the *Immigration Regulations 2013* were further amended, and shortly thereafter the visas that had been issued on 25 March 2013 were cancelled by the Minister for Justice, acting pursuant to reg 9(9). On 12 May 2013 each applicant was granted a new RPV pursuant to reg 9 of the *Immigration Regulations 2013,* as amended. Each of those visas will expire on 24 June 2013.

8. Each applicant says that he made no application for any of the visas that there have been granted to him. This assertion is not disputed. The *Immigration Regulations 2013* provide that an application for a RPV may only be made by an officer of the Commonwealth of Australia: reg 9(3).

9. On the return of an order nisi for habeas corpus the relevant date for determining whether an applicant is unlawfully detained is the date of the hearing. I consider that on applications under either Art 5(4) of the Constitution or s213(1) of the *Criminal Procedure Act,* it is also the state of affairs at the date of the hearing that must be considered. The merits of the present application must be decided having regard to the RPVs granted to the applicants on 12th May 2013. Those visas remain current.

10. On 28 June 2011, Nauru became a signatory to the *Convention Relating to the Status of Refugees done at Geneva on July 1951* and the *Protocol Relating to the Status of Refugees done at New York on 31 January 1967* (together referred to as the Refugees Convention).

11. On 29 August 2012 the Government of Nauru and the Government of Australia as Participants entered into a Memorandum of Understanding relating to the Transfer and Assessment of Persons in Nauru (the MOU). The preamble says that the Participants recognize, amongst other things,
    - *the need for practical action to provide a disincentive against Irregular Migration, People Smuggling syndicates and transnational crime and intended to promote orderly migration and humanitarian solutions.*
    - *The need to ensure, as far as possible, that no benefit is gained through circumventing regular migration arrangements*.

12. One of the stated objectives of the MOU in Clause 1 is:
    The Participants have determined that combating People Smuggling and Irregular Migration in the Asia-Pacific region is a shared objective.

13. Clause 7 of the MOU provides; "The Commonwealth of Australia may transfer and the Republic of Nauru will accept Transferees". A transferee is defined to mean a person transferred to Nehru under the MOU. By clause 9 persons to be transferred to Nauru are persons who are required by Australian law to be transferred to Nauru. By clause 6 the Commonwealth of Australia will bear all costs incurred under and incidental to the MOU as agreed between the Participants. Clauses 10 and 11 provide:

10. The Participants will establish a processing centre at a site or sites to be jointly determined and agreed between the Participants.

11. The Commonwealth of Australia will make all efforts to ensure that all persons entering Nauru under this MOU will depart within as short a time as is reasonably necessary for the implementation of this MOU, bearing in mind the objectives set out in the Preamble *and* Clause 1.

14. By clause 14 the Republic of Nauru assures the Commonwealth of Australia that it will make an assessment, or permit an assessment to be made, of whether or not the transferee is covered by the definition of a *refugee* in Article 1A of the Refugees Convention.

15. Whether Nauru appreciated at the time that the concluding words in clause 11 of the MOU can be construed to mean that the timing of the removal of a transferee from Nauru would be subject to Australia's "no advantage" policy is not disclosed by the evidence. Perhaps it did not as the Preamble to the *Immigration (Amendment) Regulations 2012* made on 14 September 2012 reads:

1. The Republic and the Commonwealth of Australia have entered into an arrangement for regional processing of asylum seekers in Nauru.

2. The terms of the arrangement are that the Commonwealth of Australia will take responsibility for the resettlement or removal of each person on completion of the processing.

3. These regulations are made to give effect to the arrangement between the Republic and the Commonwealth of Australia.

(Emphasis added)

16. Those regulations provided for the grant of an Australian regional processing visa, but did not set up a regime or administrative processes for a visa holder to apply for recognition as a refugee or to have such an application determined.

17. Legislation to provide for these matters was passed on 10 October 2012; in particular the *Refugee Convention Act of 2012 (Nr)*. The *Asylum Seekers (Regional Processing Centre) Act 2012 (Nr)* was passed in December 2012 to regulate the operation of processing centres.

18. Upon their arrival in Nauru the applicants were handed a two page document headed with the Australian coat of arms and "Australian Government - Department Immigration and Citizenship" setting out Information for People Transferring to Nauru. The document informed the recipient that he had been transferred to the Regional Processing Centre of Nauru because he arrived by boat in Australia without a visa on or after 13th of August 2012. The assessment of claims for refugee status would be assessed under Nauruan law against the definition of "refugee" in the Refugees Convention. The document continued:

The process to assess refugee claims is still being agreed and developed by the Australian and Nauruan governments. This will take several months.

After a process to determine refugee status is agreed, it will be necessary to recruit qualified staff and arrange accommodation for them. Interpreters will also be needed.

It is intended that assistance will be provided so that refugee claims are made properly. A contract will be required to provide this assistance. This contract cannot be put in place until the governments of Nauru and Australian have first reached agreement.

All of these steps and people are needed before the first interviews of refugee status can occur.

How long will it take to assess my refugee claim?

It is not known, at this stage, exactly how long it will take to hear and assess your refugee claim once the process has been established.

How long will I need to remain on Nauru?

It is not possible to say precisely how long you may need to remain on Nauru. Remember that you can decide to leave Nauru voluntarily at any time.

If you are found to be a refugee, your individual circumstances will need to be considered as part of any resettlement option. Only a small number of countries have regular resettlement programs.

With millions of refugees worldwide, the demand for places in these resettlement countries is always greater than the number of places available. This is the reason that it takes a long time.

You will also need to wait and see how the "no advantage" principle applies to your case. This principle ensures that people who arrived unlawful in Australia by boat, and who are processed in a regional processing country, do not gain any advantage over other refugees outside of Australia who are awaiting resettlement.

Overall you can expect it may take several years, from when you first arrived in Nauru, to being potentially resettled if you are found to be a refugee. This will be regardless of when you may be determined to be a refugee, and in accordance with the no advantage principle.

If you are found not to be a refugee, you will be expected to leave Nauru and return home. Information and help to do this will be available to you at any time.

Will I be resettled in Australia if I'm found to be a refugee?

If you are found to be a refugee, it is possible that you could be resettled in a country as part of broader regional arrangements, or that you are eventually resettled in Australia. However, you will not have priority if resettlement is considered in your case. You will have to wait the same amount of time other people do who apply for refugee status from outside of Australia.

Where do I live on Nauru?

You will need to reside at the regional processing Centre.

Will I be able to come and go from the regional processing Centre?

You will be able to leave the Centre for certain activities. In the meantime, the ability for you to come and go from the Centre will be linked to the visa conditions imposed by the Nauruan Government. These conditions vary depending on health and security checks, which are still being finalized.

Can I go home from Nauru?

Yes. This is an important decision, so the International Organization for Migration (IOM) is available if you want to talk with them about going home. IOM is independent from the Australian and Nauruan governments.

You also can return with a package of assistance to help you re-establish yourself in your home country. Assistance may include training, help to find a job or start a small business, and a small amount of cash. Talk to IOM to find out more about what kind of help would be best for you.

19. Additional information was also given in the form of a brochure from the International Organisation for Migration (IOM) explaining the procedure which the IOM would follow if an application for return was made to it. For a person seeking refugee status on the ground of genuine fear of persecution in his country of nationality return is hardly an attractive option. The option has been taken up by some 64 people who were transferred to Nauru, but not by the applicants who each assert such a genuine fear.

20. The processes for making an application for recognition as a refugee are now in place, and each of the applicants has very recently been interviewed as part of the determination process. The Secretary of Justice who is empowered under s 6 of the *Refugee Convention Act 2012* to make the initial determination of refugee status has informed the Court that on her best estimate she anticipates making determinations on each of the applicants claims within the next four months.

21. The current visas held by the applicants state that they have been granted for one or more of the following purposes which are, or could become, relevant to the applicants, depending on the progress of their applications:

    (a) the making by the Secretary of a determination in respect of the person under section 6 of the Refugees Convention Act 2012;

    (b) enabling a person in respect of whom the Secretary has made a determination that he or she is not recognized as a refugee, or a decision to decline to make a determination on his or her application for recognition as a refugee, to remain in Nauru until all avenues for review and appeal are exhausted and arrangements are made for his or her removal from Nauru;

(c) enabling a person whose recognition as a refugee has been cancelled to remain in Nauru until all avenues for review and appeal are exhausted and arrangements are made for his or her removal from Nauru;

(d) enabling a person in respect of whom the Secretary has made a determination that he or she is recognized as a refugee to remain in Nauru pending the making of arrangements for his or her settlement in another country;

22. Each visa is subject to the following conditions that apply to the applicant:

(a) the holder must reside at the Regional Processing Centre, Topside, in Meneng District; and

(b) until a health and security clearance certificate is granted to the holder, the holder must remain at those premises or at common areas notified to the holder by a service provider, except:

(i) in case of emergency or other extraordinary circumstances; or

(ii) in circumstances where the absence is organized by a service provider and the holder is under the care and control of a service provider or of another person into whose care and control the holder is delivered by a service provider;

(c) after a health and security clearance certificate is granted to the holder, the holder must remain at those premises or at common areas notified to the holder by a service provider, except:

(i) in case of emergency or other extraordinary circumstances; or

(ii) in circumstances where the absence is organized or permitted by a service provider and the holder is in the company of a service provider or another person approved by a service provider.

(d) the holder must not behave in a manner prejudice to peace or good order in Nauru;

(e) the holder must not engage in any activity for which a business or employment visa may be granted, except with the approval of the Secretary;

(f) if a person covered by subregulation (4)(a), the holder must cooperate in having a determination made in respect of him or her by the Secretary under section 6 of the Refugees Convention Act 2012;

23. The applicants are persons within paragraph (f) of the conditions as they have made application for refugee status under subregulation (4)(a).

24. The purposes for which the visas were granted, and the stated conditions are those prescribed for a regional processing centre visa by reg 9 of the *Immigration Regulations 2013.*

25. Evidence by affidavit has been tendered about the layout of the Topside processing centre, its operation, and the restraints that have been imposed on visa holders residing there from the time the centre opened in September 2012 until now. The evidence shows that the level of discomfort suffered by the visa holders, and the degrees of restriction placed on their movements may have been greater at the beginning than is now the case. It is the present situation that is important in this case.

26. At present there are approximately 417 adult male visa holders housed at the centre, all of whom are applicants for refugee status.

27. The day to day management of the centre is run by service providers contracted by the Australian Government. Wilson Security is responsible for the general security of the centre, including when visa holders leave the centre for any reason. Wilson Security supplies the Client Service Officers (CSOs) who manage the day to day operations of the centre. The Salvation Army has been engaged to provide humanitarian support, including organising recreational and educational activities, and to provide counseling and pastoral care with the aim of supporting the welfare and mental well being of the visa holders.

28. There is a measure of disagreement between deponents as to the level of restriction and constraint imposed on the visa holders, but there is no dispute that they are required to spend virtually all their time in a compound that contains their sleeping, eating and recreational facilities. The compound is in part fenced with a two meter high mesh through which ingress and egress is monitored at the Charlie 5 gate. The compound is otherwise bounded by impenetrable jungle and limestone pinnacles resulting from phosphate mining in past decades. It is true, as the manager of the security firm says, that the mesh fencing is not electrified or capped with razor wire. Nevertheless it is kept under constant watch. The inmates are well instructed that they are not to breach the perimeter of the compound, and on the few occasions that someone has, that person has been escorted back inside.

29. The only access to the Topside area, and to the centre, is by one road through the pinnacle area. The centre is geographically isolated from the Nauruan community.

30. Entry to the Topside centre is though a closely monitored and controlled access point, a gatehouse, designated Charlie 2. All those entering require clearance, including the CSOs. Between Charlie 2 and Charlie 5 is another secured area designated as the staff area which includes administration buildings and a medical centre.

31. Should a visa holder wish to seek medical care, or to speak with someone in the administration, the CSOs on duty at Charlie 5 monitor, and it seems very frequently control, the visa holder's movement.

32. I consider that it is telling that at any given time there are normally 73 CSOs rostered for duty at the centre.

33. Under conditions (b) and (c) of the visa the freedom of movement of a visa holder is severely constrained. Presently the applicants have received health clearances, but have not received security clearances and have not been issued with certificates, so are

governed by condition (b), and save in the two excepted circumstances must "remain" at the centre.

34. The Salvation Army has put in place a range of activities. Those of a physical nature include excursions from the centre to play tennis and football, for swimming in the sea, and for evening runs outside the centre. However, most of these activities involve about 20 visa holders at a time, save for the running where there may be up to around 40 at the one time. Each of these activities is of fairly short duration, and is supervised by both the Salvation Army personnel conducting them, and by Wilson Security CSOs. Indeed the evidence shows that the latter closely watch the activities and so regulate them that the chance of a visa holder moving away from the activity is negligible. Wilson Security say that this oversight is a necessary part ensuring that the visa condition as to care and control is met. But the degree of oversight demonstrates the degree of constraint on the movements and activities imposed on the visa holders.

35. When it is remembered that there are in excess of 400 visa holders, the excursions enjoyed by any one visa holder are few, perhaps only one, each week, and then for a period of only an hour or so each time.

The issues

36. I propose to consider the matter by addressing the following three broad questions:

- Are the applicants presently detained within the meaning of Article 5(4) of the Constitution and s312(1) of the *Criminal Proceedings Act*, and for the purpose of the habeas corpus remedy;
- If so, is the detention authorized by the *Immigration Act 1999* and the *Immigration Regulations 2013;*
- And if so, are those laws valid having regard to the Fundamental Rights and Freedoms guaranteed by the Constitution.

Are the applicants detained?

37. The burden of establishing that they have been detained rests on the applicants, although if they establish this, it is then for the respondent to satisfy the Court that the detention is not unlawful.

38. It is convenient at this point to deal with the respondent's argument that there is a material distinction to be drawn between the concept of detention for the purpose of s312 of the *Criminal Proceedings Act* and habeas corpus, and the concept of deprivation of personal liberty for the purpose of Art 5(1) of the Constitution.

39. The language of Art 5(1) bears similarity, in some respects close similarity, to Art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).The respondent has referred the Court to jurisprudence concerning that Article which has developed in Europe under the influence of decisions of the European Court of Human Rights. The respondent argues that there is a distinction to be drawn between "detention" and "restriction on liberty". In particular,

the Court has been taken to the leading case of *Guzzardi v Italy* [4] and to *Secretary of State for the Home Department v JJ and others*[5]

40. I do not understand these authorities to assert that there is a material distinction between being "deprived of … liberty" and being "detained". Both expressions appear in both Art 5 of the ECHR and Art 5 of the Constitution and appear to be used as conveying the same meaning. Even if that not be so in Art 5 of the ECHR, I consider it is plainly so in Art 5 of the Constitution. In the Constitution, the remedy for a breach of the Art 5 protection is given by Art 5(4) the text of which is set out at the commencement of this judgement. It is a remedy in respect to "detention".

41. In my opinion the importance of the cases to which the court has been referred is not to draw a distinction between being "deprived… of liberty" and being "detained", but to explain that there can be many restrictions on liberty and movement which will not amount to a deprivation of liberty, i.e. detention. The difference between deprivation of and restriction on liberty is one of degree not substance, and the task for the court is to assess into which category a particular case falls. The task is to consider the particular "concrete" situation of the individual and, taking into account a whole range of criteria including the type, duration, effects and manner of implementation of the measures in question and to assess their impact on that person.

42. This Court has twice previously considered claims by asylum seekers who had been brought to Nauru under arrangements in place in 2003 and 2004 between Nauru and Australia; *Mahdi v Director of Police* [6] and *Amiri v Director of Police*[7]. In both instances Connell CJ held that the applicants were lawfully detained.

43. In *Amiri* the Chief Justice considered in detail submissions by the respondent that the applicants were not detained. In that case the terms of the visas and the conditions held to amount to detention were very similar to these in the present case. At that time the Nauruan police were involved in providing security, but the degree of restraint on freedom of movement was not materially different. The Chief Justice said [26]-[27]

> *Whilst close custody involving prison incarceration is clearly a situation where habeas corpus lies, the custody requirement includes other forms of restriction short of imprisonment. In Eatts v Dawson 93 FLR 497 at 506, the Australian Federal Court explored cases involving 'police custody' and quoted without criticism, the United States Supreme Court in Jones v Cunningham [1963] USSC 8; (1963) 371 US 236. After the Court had made reference to authorities in the United States and in England, the Supreme Court said at 240 -*
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> > *"History, usage and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-*

[4] (1980) 3 EHRR 333
[5] [2008] 1 AC 385.

[6] [2003] NRSC 3
[7] [2004] NRSC 1

speaking world to support the issuance of habeas corpus."

> *Later in the same judgment of Morling and Gummow JJ. in Eatts' case, the broader view of custody is taken up again where they state (at 510) - "Elements in the lexical meanings of 'custody' include the notion of dominance and control of the liberty of the person , and the state of being guarded and watched to prevent escape". I have no difficulty in finding that, for the purposes of habeas corpus, the Applicants were in a custodial situation. They were confined to a particular location (Yasmin Ali Shah v Attorney-General [1988] SPLR 144), and that location had certain restraints such as perimeter fencing, controlled entrance and exit, and an overall police control.*

44. I consider the reasoning of Connell CJ is entirely consistent with the approach adopted in the European jurisprudence to which the Court has been referred.

45. In reaching his conclusion that the applicants were detained the Chief Justice rejected the respondent's argument that there had been no deprivation of liberty because the asylum seekers arrived within the boundaries of Nauru without passports, and that the immigration officer in granting them visas to permit them to enter and stay within a specified location in Nauru, did not deprive them of any liberty that they otherwise had. The Chief Justice described this argument as an 'anything is better than nothing rule'. The respondent has again put a similar argument to the Court, this time supported with reference to the reasoning of the majority of the Federal Court of Australia in *Ruddock v Vadarlis* (2001) 110 FCR 491 (the M V Tampa case). In my opinion that decision does not assist the respondent.

46. In that case Australia had refused entry to the asylum seekers, a refusal that was held not to amount to their detention aboard the M V Tampa, which had rescued them on the high seas. It was held that the refusal merely closed off one option out of a situation in which they had come to be placed by other factors. That situation stands in contrast with the situation here. Nauru agreed to the entry of the applicants, and to that end granted them visas but on conditions that restricted their liberties.

47. The applicants did not apply for the visas, and did not voluntarily accept the conditions imposed by them. Once in Nauru the applicants became subject to Nauruan law, and the restrictions imposed under the *Immigration Act*. In my opinion it cannot be said in these circumstances that the restraints are due not to Nauru but to a situation caused by circumstances in their countries of nationality, their flight therefrom, and the refusal of Australia to accept them.

48. Further, in my opinion it is not the case that the applicants situation in Topside is due not to restraints imposed by Nauru, but because they choose not to exercise the option of returning to their country of nationality.

49. The argument that the applicants are not detained because they have voluntarily chosen not to return to their country of nationality is a hollow one in the circumstances of those on Nauru who are subject to RPV conditions. Nauru has agreed in the MOU not to expel or return a transferee to another country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. This is the *non-refoulement* obligation under Art 33 of the Refugees

Convention to which Nauru is also a party. The purpose of the RPV is to allow the applicant's entitlement to refugee status to be determined, and until it is, it is a denial of the very purpose of the visa to assert that the holder has a real option not to be subject to the RPV conditions.

50. In the course of his discussion on the principles developed by the European Court of Human Rights, Lord Bingham in *Secretary for State for the Home Department v JJ and others* said[8]:

> *Thus the task of the court is to assess the impact of the measures in question on a person in the situation of the person subject to them.*

51. As I understand the argument, the respondent contends that here the situation of the applicants is that they are people in flight from their country of nationality with nowhere to go and no right to be in Nauru save on the conditions imposed by Nauru, and for this reason the impact of the restrictions imposed on them is less than if the same restrictions were imposed on other people. This seems to be no more than a reformulation of the 'anything is better than nothing rule' argument that Connell CJ rejected in *Amiri.* I do not think there is any merit in the point. Nauru has allowed entry, and the applicants are entitled to the same rights under the Constitution as anyone else in Nauru.

52. The respondent contends that the restrictions imposed by the visa conditions in any event do not amount to detention. The respondent emphasizes that a range of activities are provided outside the confines of the camp; movement through Charlie 5, though controlled, is not prohibited; the mesh fencing is capable of being easily breached; there is no power of arrest of a visa holder who moves outside the centre in breach of the visa conditions; physical force is not used to restrain visa holders; interaction with the outside world via telephone and internet is available; and the restrictions presently applying are temporary and will lessen in the case of those found to be refugees.

53. These are topics to be considered. I have already commented on the activities that are provided, and on the confinement and degree of supervision that occurs in the centre. Whilst physical force is not used by CSOs, I am left with the strong impression from the evidence that life in the centre has instilled in the visa holders a culture of compliance that they feel compelled to follow, and that they accept that they have no free choice in the matter. And whilst there is no general power of arrest for breach of a visa condition, a breach enlivens the power to cancel the visa thereby removing the right of the holder to be lawfully in Nauru whereupon he would become guilty of an offence and liable to arrest.[9]

54. The applicants have been brought to Nauru against their will for the sole purpose of processing their claims for refugee status. They are required to live in a location that effectively confines them in a limited and finite area that is isolated from the residential and urban areas of Nauru, and their lives are closely regulated and monitored 24 hours

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[8] At [15]

[9] His presence in Nauru would be unlawful and he could be arrested either by an immigration officer or a police officer, ss2 and 5(2) of the *Act 1999*; and he could suffer a fine not exceeding $10,000 under s9(1).

of each day. At all times they are effectively being guarded and watched to prevent their escape. Whilst the restrictions fall short of those to be found in the close confinement of a prison, they are very extensive in their impact on the daily lives and movement of the applicants. At present the applicants' movements are restricted by condition (b). It seems probable that once the applicants receive health and security clearances the range of permitted outings will increase, and for those that receive favourable determinations the restrictions on their movement will be further relaxed. However for the purpose of this application, the restrictions in condition (b) apply.

55. I find that the applicants are presently being detained.

Is the detention authorized by the Immigration Act and regulations?

56. I have already noted that the RPV conditions that require the detention are a mirror of the requirements for such a visa set out in reg 9(6) of the *Immigration Regulations 2013.* The regulations are made under s44 of the *Immigration Act.*

57. In their written submissions the applicants seek a declaration, if their primary claim for relief fails, that the visa conditions should be construed to require no more than that the applicants sleep at the Topside camp, but that they are otherwise at liberty to move about Nauru in the same way as a Nauruan citizen. It is not explained how such a construction could result from the wording of the conditions. I am unable to find any basis for construing the conditions in this restrictive way. I consider the restrictions which as a matter of fact are imposed on the applicants, and which bring about the detention, are authorized by the terms of the conditions, and in turn that the conditions are authorized by the *Immigration Act* and the regulations thereunder.

Are the restrictions imposed by the *Immigration Act* and the regulations valid?

58. Applicants contend that the restrictions are not lawfully imposed as they contravene the guaranteed protection of personal liberty given in Article 5(1) of the Constitution.

59. Article 5(1)provides:

Protection of personal liberty

(1) No person shall be deprived of his personal liberty, except as authorized by law in any of the following cases:-

(a) in execution of the sentence or order of a court in respect of an offence of which he has been convicted;

(b) for the purpose of bringing him before a court in execution of the order of a court;

(c) upon reasonable suspicion of his having committed, or being about to commit, an offence;

(d) under the order of a court, for his education during any period ending not later than the thirty-first day of December after he attains the age of eighteen years;

(e) under the order of a court, for his welfare during any period ending not later than the date on which he attains the age of twenty years;

(f) for the purpose of preventing the spread of disease;

(g) in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community; and

(h) for the purpose of preventing his unlawful entry to Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.

60. In their submissions the parties have referred to a number of the exceptions set out in Art 5(1), but only to dismiss them as being not relevant. The respondent relies only on par 5(1)(h), contending that it squarely covers the situation of the applicants. The applicants on the other hand contend that par 5(1)(h) has no application, and that they have been deprived of their personal liberty contrary to the constitutional protection available to every person in Nauru.

61. The applicants argue that the first limb of par 5(1)(h) can have no application as they entered Nauru on a valid visa granted to them by Nauru. It cannot therefore be the case that their detention is for the purpose of preventing their unlawful entry into Nauru. I do not understand the respondent to contest this. I agree that the first limb is not relevant.

62. The respondent relies on the second limb, contending that each applicant's detention is "for the purpose of effecting his …. lawful removal from Nauru". In both *Mahdi v Director of Police* and *Amiri v Director of Police* Connell CJ found that asylum seekers detained under the earlier arrangements with Australia in similar circumstance to the present were not being detained contrary to par 5(1)(h). He held that it was always the intention that the asylum seekers, of whom the applicants were some, would only have temporary residence in Nauru, and after their refugee claims were determined none would remain in Nauru. For this reason their detention was for the purpose of determining their lawful removal from Nauru, either to a country willing to accept them or to the country of their nationality.

63. The applicants contend that these decisions should not be followed. By reference to the European jurisprudence that has developed relating to Art 5(1) of the ECHR they contend that the exception in par 5(1)(h) of the Constitution can only operate once an actual decision has been made to remove a person from Nauru. A decision to remove a person would be evidenced by a removal order made under s11 of the *Immigration Act.* No such decision has been made to this point in time against the applicants and cannot be made until their applications for refugee status have been determined. On the evidence it will be at months before this happens.

64. It may be accepted that the drafting of Article 5(1) of the Constitution of Nauru was influenced by the provisions of the ECHR, as well as by other international human

rights instruments. For this reason courts of Nauru may have regard to the jurisprudence emanating from international courts and tribunals relating to those human rights instruments. Whilst learning from those sources may be of assistance, perhaps considerable assistance in some cases, ultimately the function of the courts in Nauru is to apply the Constitution of Nauru according to its terms. For this reason great care must be exercised in applying international jurisprudence based on laws that are set in very different economic and social environments, and especially so if the jurisprudence is based on written laws which are in terms different from the text of the law in Nauru.

65. The relevant provision of the ECHR that is relied upon by the applicants reads:

> *Article 5(1)*
> *Everyone has the right to liberty and security of person.*
> *No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
> . . . . . .
> *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

66. It will be noted that the language in the ECHR is not same as in par 5(1)(h) of the Constitution.

67. Under the ECHR provision lawful detention is only permitted "of a person against whom action is being taken with a view to deportation or extradition". In contrast under par 5(1)(h) of the Constitution lawful detention is permitted "for the purpose of effecting …lawful removal from Nauru". The differences in wording are important. Under the ECHR lawful detention follows the happening of an event – the taking of action with a view of deportation or extradition. Under the Constitution lawful detention is permitted so long as it is for the permitted purpose. The two situations are not the same.

68. The purpose of effecting a lawful removal can exist whether or not a removal order has been made under s 11 of the *Immigration Act*.

69. Under the ECHR the applicants submit that detention will be lawful only "where a person is *truly the object of removal,* that is, as a result of *a decision actually having been made to remove a person* and not where there is *no actual, present intention to remove* that person". If this is also the test to be applied under par 5(1)(h), in my opinion it is met in this case anyway.

70. In *Ruhani v Director of Police (No2)*[10] the High Court of Australia recognized that:

> *As a sovereign State, it is for the Republic of Nauru to annex whatever conditions it pleases to permission given to an alien to enter it. This is so whether the entry be voluntary or, as the appellant says was the case here, it be involuntary"*

[10] (2005) 222 CLR 580 at [26].This case reviewed, as if on appeal, the decision of Connell CJ in *Amiri v Director of Police.*

71. In the present case the visas granted to the applicants, and in particular their current RPVs, are stated to be for the purpose of determining their claims for refugee status, and for purposes that will have to be addressed leading up to their removal from Nauru when their applications for refugee status have been finally determined.

72. It never has been the intention of Nauru in granting visas to the applicants that their stay in Nauru will be other than temporary. In the MOU, clause 11, Australia agrees to make all efforts to ensure that transferees will depart Nauru in as short a time as is reasonably necessary for the implementation of the MOU. Paragraph 2 of the preamble to the *Immigration (Amendment) Regulations 2012* recognised that Australia would take responsibility for resettlement or removal of transferees from Nauru on completion of the processing of claims for refugee status. The stated purposes of the RPVs reflect the temporary nature of the applicants' presence in Nauru, leading ultimately to the removal of the holder.

73. In terms of the ECHR test propounded by the applicants, the holder is the object of removal; there is a decision that the person will be removed; and there is a present intention that the holder will be removed.

74. That the processing of the claims of transferees would take an uncertain and probably slow time has been acknowledged by Australia from the outset. The transferees were so advised in the document handed to them at the time of their transfer.

75. It is well recognized that that the process of investigating and determining claims for refugee status may take a protracted time[11]. Nevertheless, at the end removal will occur either to another country for resettlement, to the country of their nationality.

76. So understood, the provisions of the *Immigration Act* and the regulations which permit the detention of RPC visas are valid as the detention is for the very purpose of ultimately "effecting …lawful removal from Nauru" of the holder.

77. This process of reasoning was applied by Connell CJ in both *Mahdi* and *Amiri*. Those decisions should be followed.

78. The appellants point out that their current visas expire on 24 June 2013 and on the evidence there is no prospect whatever of their applications for refugee status being determined by then; accordingly detention under the present visas cannot be said to be for the purpose of effecting their lawful removal. It is the case that under the reg 9(4) that no RPC visa can be granted for longer than 3 months, but the visa can be renewed. In my opinion the purpose for which the detention is taking place is not different even though it occurs under a series of visas.

79. The exception to the protection under Art 5 (1) must be "authorized by law". The appellants argue that long and unreasonable delay by the respondent in processing their claims and in arranging their removal, for example because of compliance with Australia's "no advantage" policy, will render their detention "not authorised by law" because in those circumstance it is arbitrary and beyond the contemplation of the

[11] See Gleeson CJ in *Al-Katab v Godwin* (2004) 219 CLR562 at [1]

constitutional exception. This is an interesting argument that I think should be left for decision should excessive delay occur. I do not think such a point has yet been reached. However, if the excessive delay occurs after the favourable determination of refugee status another question will arise. The visa conditions can then allow much greater freedom of movement. Depending on how far the present restrictions are eased, they may not impose detention.

80. For these reasons I consider that the applicants have not made out their case, and the application must be dismissed.

81. Finally I record that late on the Friday preceding the Monday when this matter came on for trial, the court unexpectedly received by electronic means an application from Amnesty International (Australia) and the Refugee Advice and Casework Service (Australia) to be heard as amicus curiae. The application was supported with a very extensive written submission which the court was invited to receive without additional oral intervention. The application was not received by the respondent whose counsel was unaware of it when the case was called. The respondent opposed the application, both on the ground of its lateness, and on the ground of the range of matters the submission sought to address. I disallowed the application. It was received without prior and timely notice to the parties. Much of it dealt with matters that are not relevant to the cases presented by either party. Part of the submission ranged onto arguments about the facts which the parties are better able to address. In so far as the submissions deal with legal questions raised by the cases of the parties, much of the same material is contained in the applicants' submissions. In so far as new cases and materials were added to those contained in the applicants' submissions, the respondent's counsel was not in a position to deal with them.

82. The application is dismissed. There will be no order as to costs.

JW von Doussa
Judge
18 June 2013