

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBM 52 OF 2019

BETWEEN : BENJAMIN ALAOMA OKORO
APPLICANT

AND : THE ATTORNEY GENERAL
FIRST RESPONDENT

AND : THE IMMIGRATION DEPARTMENT
SECOND RESPONDENT

Appearances : Mr Okoro (representing himself)
Ms M Faktaufon for the First & Second Respondents
Ms Raman (Legal Aid Commission) at the request of the Court

Date of Hearing : 12 February 2020

Date of Judgment : 17 February 2020

DECISION

1. This is an application by Mr Benjamin Okoro for redress under s44 of the Constitution of the Republic of Fiji. Mr Okoro is a Nigerian citizen. He came to Fiji in July 2018, apparently to take part in the Suva Marathon, and for one reason or another, arising initially from his own conduct, but subsequently the actions of the second respondent, has been unable to leave. Since 23 November 2018 he has been detained in the Natabua Prison, Lautoka awaiting removal under s15 Immigration Act 2003.
2. The application for constitutional redress was filed by Mr Okoro (representing himself) on 19 November 2019, after Mr Okoro had been in custody for almost a year. His mainly handwritten application seeks:

... my liberty to be released from this prison as I am a law abiding citizen of which I don't deserve to be kept here without a court order or date

Freedom and liberty.

To a prompt in the standard form which asks:

5. *If you complain about what has happened in court, it will be necessary to have a copy of the court record. What is the case number? Which court?*

he has provided the following response:

I haven't been taken to court at any time since 23rd November 2018 till date and I don't have any court date nor court case since I was remanded.

3. In support of his application Mr Okoro provided a handwritten affidavit, in which he set out (from his perspective) the history of his incarceration. He says he missed his flight out of Fiji (his itinerary and tickets provided for a return trip to Lagos, Nigeria via Singapore and Abu Dhabi a) because he was unwell, and arrived at the airport too late to check in. This evidence is corroborated by another witness, Jason Jett who provided evidence to the Court. Mr Okoro's affidavit does not say that he had earlier (on 3 August) tried to embark on a flight to Australia, but had been unable to do so because he did not have a valid permit to enter Australia . Mr Jett says that he was told that Mr Okoro had presented 'unauthentic documents when attempting to board' the flight to Australia. This suggests something a bit more involved than simply the absence of a permit, but the issue was not explored, because, in the end, how Mr Okoro came to be an overstayer is not the main issue for his application. It may be however that this failed attempt to get to Australia coloured the Immigration Office's and airlines' view of Mr Okoro thereafter. Perhaps also the Office's view of Mr Okoro was affected by the fact that there were apparently three other Nigerian citizens in the same position as Mr Okoro at the same time. However there is simply no evidence from either Mr Okoro or the Immigration Office that would enable the court to reach any finding about these matters. The fact that this has not been put in evidence suggests that neither Mr Okoro nor the Immigration Service thinks it is relevant, and with one reservation (which I will refer to later), I agree.
4. After he missed his flight on the 6th August Mr Okoro made a further attempt to leave the country on the 29th September. It seems he was expecting the Immigration Office to facilitate his departure on that date. For reasons that are not clear Mr Okoro was unable to board the flight to Singapore. Mr Okoro says that the Immigration Office failed to 'facilitate' his deportation. The Immigration Office's view of the matter is that Mr Okoro was at this stage still making his own arrangements to leave, and although the office was interested in that process, it had not intervened in any way. In an affidavit by the Immigration Manager, Western Division, the Immigration Office says that on 29 September the airline *refused to uplift [Mr Okoro] on the basis that [he] had attempted to enter Australia on a fake Australian vis and because his airline ticket was invalid.* This seems odd, since on 6th August and 29th September Mr Okoro was attempting to board a flight for Singapore, not Australia. Again however, it is not necessary to resolve this issue, for the reasons referred to earlier.

5. Throughout this period Mr Okoro was keeping the Immigration Service apprised of what he was doing, and where he was staying. There is no evidence or suggestion that Mr Okoro has at any time attempted to evade the Immigration Service, or tried to stay in Fiji. Each time his plan to leave the country has gone astray, he has reported promptly thereafter to the Immigration Service to let it know what has happened. After the failed attempt to leave on 29th September Mr Okoro (who was now residing with and being assisted by the Salvation Army) went to see the Immigration Office on 1 October. He says that the Office at that point took his phone and travel documents (passport etc) and have kept them ever since.
6. On 8 October a removal order and detention warrant were issued by the Permanent Secretary for Immigration, under sections 13 & 15 Immigration Act 2003 directing that Mr Okoro be taken into custody and detained by the Prison Authority until he could be returned to Nigeria. The detention was implemented on 16 November when Mr Okoro was taken from the Salvation Army premises where he had been staying, and put in a safe house detention centre at Nadi. Thereafter on 23 November 2018 he was taken to Natabua Prison, Lautoka, where he has been ever since. Again, the reasons for Mr Okoro to be put in prison are not particularly clear. In his affidavit on behalf of the Immigration Office Mr Deepak Karan (Immigration Manager, Western Division) says that Mr Okoro had become *uncooperative and aggressive with the Department's staff*, but provides no further details that would enable the court to assess how serious this was. Since the Immigration Office's response to Mr Okoro's application for constitutional redress has included the offer to return him to the safe-house, I assume that the conduct referred to was/is not particularly serious.
7. Since 23 November 2018 it seems that the Immigration Service has been attempting, in a fairly desultory way, to have Mr Okoro returned to Nigeria, but these attempts became more focussed and urgent only after Mr Okoro had filed his application for constitutional redress. Mr Karan has provided, as annexures to his three affidavits filed in response to the application, and to keep the Court apprised as to progress in removing Mr Okoro, what he says is all the correspondence from and to the Office in connection with Mr Okoro. This suggests that in mid-March 2019 a couple of brief emails were sent to Fiji Airways to try to establish the airlines requirements for removing *the 2 Nigerians* (Mr Okoro and a Mr Emmanuel Nwadiaru) from Fiji. None of these emails show any sense of urgency, and it seems that after the third of these was sent on 19 March 2019 nothing further was done to follow up with their removal until May. Thereafter the email correspondence provided by Mr Karan shows:

24 May

email to Fiji High Commission in Canberra

17 June	email to Ministry of Foreign Affairs
7 August	email from Nigerian High Commission (NHC), Canberra setting out the requirements for the issue of new travel documents
14 August	response to NHC
11 & 12 September	follow-up with NHC, and response from NHC asking for photographs, and completed application forms, for Mr Okoro and stipulating that NHC would on receipt of these documents want to arrange a telephone interview with him
On 19 November	Mr Okoro filed his application for constitutional redress.

Thereafter the affidavits show a much greater sense of urgency:

6 December	email from the Immigration Office to the Fiji Corrections Service asking it to facilitate the telephone interviews.
16 December	email from Fiji High Commission in Canberra about it contacting the NHC.
9 January 2020	Telephone interviews took place
7 February	Email from Fiji High Commission to Immigration Office reporting on a discussion with NHC about its requirements for issue of new travel documents.

8. These dealings with the NHC were necessary only because, on 7 April 2019 Mr Okoro's passport expired. Had he been removed prior to that date, none of the delays arising from having to obtain new travel documents would have been necessary. I was interested to know why he was not removed sometime between 16 November 2018 when he was taken into detention by the Immigration Office, and the end of March during which he could have travelled on his existing papers. Mr Karan attended the hearing of this case on 12 February, and I am assisted by and grateful to him for his evidence.

9. It seems that the Immigration Office was dealing with four Nigerian overstayers. For reasons that are not disclosed, Fiji Airways initially took the position that it required the four to be accompanied by two officers from the Immigration Service, presumably to ensure that there was no disruption of the flights by the four men. This would be costly, so the Immigration Service first sought to persuade the airline that this requirement for the four to be accompanied was not necessary, thus avoiding the cost of having to pay for flights for the accompanying officers. Also, because of the possible need to pay for accompanying security, the Office wanted to remove all four men together (meaning that they would only have to pay for two Immigration officers on one occasion, not four separate occasions as would have been necessary if the men had been removed separately). So instead of removing the men as soon as it could, the Immigration Office kept them in detention until it

could remove them as conveniently and cheaply as possible. Eventually (it is not clear exactly when) the airline was persuaded that the additional security was unnecessary, but by then the passports of Mr Okoro and one of the other Nigerians had expired.

10. It appears that even after the airline agreed that the deportees could travel unaccompanied, the Immigration Service wished to send them all away together. Mr Karan acknowledged that this plan was abandoned by the Immigration Service only after Mr Okoro's application for redress was served on the Immigration Service on 19 November 2019. At that point, Mr Karan acknowledged, it was decided to remove the two Nigerians who still had current travel documents. Tickets were purchased on 21 November, and they were removed and left Fiji on 25 November 2019, thus demonstrating (less than six days) how quickly the Immigration Service could act when it wanted to.
11. So in conclusion about the factual background, it would seem that Mr Okoro's long stay in prison has arisen because the Immigration Office has been excessively casual about following up on the process of removing Mr Okoro. Had it acted promptly to remove him, once it decided to act, it could have done so within days after he was detained, and long before his passport expired, and the difficulties and delays (and no doubt expense) that have arisen with the issue of replacement travel documents became an issue. The sequence of events set out above shows that throughout the process, until Mr Okoro filed his application for redress, the Immigration Office has been slow to act, and slow to press others for a response. Mr Okoro had been in detention for over four months before the first email was apparently sent to Fiji Airways (on 17 March 2019) to follow up on an earlier discussion that had taken place *a few weeks ago*. Two further months passed before anything else happened, by which time Mr Okoro's passport had expired. I agree that the Nigerian High Commission sometimes appears to have been slow in some of its responses, but its requirements for the issue of new travel documents were clear in early September 2019, and it still took the Immigration Office and the Department for Corrections 4 months to arrange the telephone interviews that the NHC reasonably asked for. The authorities in Fiji cannot shift the responsibility for these delays onto someone else.
12. The question is, do these actions (and inaction) amount to a breach Mr Okoro's rights under the Constitution, and – if it does – is he entitled to redress?

The Constitution and the Law

13. As Madigan J pointed out in **Rulade v Fiji Corrections Service** [2017] FJHC 132 the starting point in any assessment of the Constitution is the very important declarations in the Preamble:

WE, THE PEOPLE OF FIJI,

- RECOGNISE the Constitution as the supreme law of our country that provides the framework for the conduct of Government and all Fijians
- COMMIT ourselves to the recognition and protection of human rights, and respect for human dignity
- DECLARE our commitment to justice ...

and section 3, which is headed Principles of Constitutional Interpretation and provides:

- (1) Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.
- (2) If a law appears to be inconsistent with a provision of this Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the provisions of this Constitution over an interpretation that is inconsistent with this Constitution.

Madigan J in that case also observed that in a situation, as often happens in connection with these applications for redress, where the applicant is not represented by counsel, a certain amount of leeway needs to be allowed in observing the procedural requirements of the High Court Rules. The Rules themselves (O.2, r.1) have the same reminder:

Non-Compliance with rules (O.2, r.1)

- (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgement or order therein.
- (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such term as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
- (3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.

The Rules are a set of guide lines, the object of which is to achieve justice. They will be strictly enforced where necessary, but are intended to facilitate, not obstruct their ultimate purpose. Too often parties and their advisers treat the Rules as an obstacle course ('minefield' might be more apt) to be negotiated by the other side,

where any misstep is gleefully noted and exploited, and will lead to fatal consequences for that party's case. I hasten to say that the respondents have not adopted that approach in this case.

14. The relevant sections of the Constitution on which he relies have not been identified in Mr Okoro's application for redress. It is not reasonable to expect that someone in Mr Okoro's position will understand what declarations or injunctions are so as to correctly (in terms of the Rules and legal procedure) outline what he is seeking. Nevertheless his application makes it clear what he wants; to be released from prison because he does not deserve to be kept [there] without a court order or date. This complaint – with which I have every sympathy - is about the process whereby he finds himself in prison (*without a court order*), but also the purpose of his incarceration (*I don't deserve to be kept here*), and the length of time he has been kept there (*without a ... date*).
15. So looking at the Constitution itself it seems to me that the following sections are likely to be the most relevant to this situation (for the sake of brevity I have left out sections or parts that are not applicable here, unless they are relevant to context and interpretation):

Right to personal liberty

- 9(1) *A person must not be deprived of personal liberty except—*
 - (a) *for the purpose of executing the sentence or order of a court, whether handed down or made in Fiji or elsewhere, in respect of an offence of which the person had been convicted;*
 - (b) *for the purpose of executing an order of a court punishing the person for contempt of the court or of another court or tribunal;*
 - (c) *for the purpose of executing an order of a court made to secure the fulfilment of an obligation imposed on the person by law;*
 - (d) *for the purpose of bringing the person before a court in execution of an order of a court;*
 - (e) *if the person is reasonably suspected of having committed an offence;*
 - (f) ...
 - (g) ...
 - (h) ...
 - (i) *for the purpose of preventing the unlawful entry of the person into Fiji or of effecting the expulsion, extradition or other lawful removal of the person from Fiji.*
- (2) ...
- (3) ...
- (4)

Rights of arrested and detained persons

- 13(1) *Every person who is arrested or detained has the right—*
- (a) *to be informed promptly, in a language that he or she understands, of—*
 - (i) *the reason for the arrest or detention and the nature of any charge that may be brought against that person;*
 - (ii) *...*
 - (iii) *...;*
 - (b) *...*
 - (c) *to communicate with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission;*
 - (d) *...*
 - (e) *to be held separately from persons who are serving a sentence, and in the case of a child, to be kept separate from adults unless that is not in the best interests of the child;*
 - (f) *to be brought before a court as soon as reasonably possible, but in any case not later than 48 hours after the time of arrest, or if that is not reasonably possible, as soon as possible thereafter;*
 - (g) *at the first court appearance, to be charged or informed of the reasons for the detention to continue, or to be released;*
 - (h) *to be released on reasonable terms and conditions, pending a charge or trial, unless the interests of justice otherwise require;*
 - (i) *to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;*
 - (j) *to conditions of detention that are consistent with human dignity, including at least the opportunity to exercise regularly and the provision, at State expense, of adequate accommodation, nutrition, and medical treatment; and*
 - (k) *to communicate with, and be visited by,—*
 - (i) *his or her spouse, partner or next-of-kin; and*
 - (ii) *a religious counsellor or a social worker.*
- (2) *Whenever this section requires information to be given to a person, that information must be given simply and clearly in a language that the person understands.*
- (3) *A person who is deprived of liberty by being detained, held in custody or imprisoned under any law retains all the rights and freedoms set out in this Chapter, except to the extent that any particular right or freedom is incompatible with the fact of being so deprived of liberty.*

Executive and administrative justice

- 16(1) *Subject to the provisions of this Constitution and such other limitations as may be prescribed*
by law—
- (a) *every person has the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair, and reasonably prompt;*
 - (b) *every person who has been adversely affected by any executive or administrative action has the right to be given written reasons for the action; and*

- (c) *any executive or administrative action may be reviewed by a court, or if appropriate, another independent and impartial tribunal, in accordance with law.*
- (2) ...
- (3) ...

Freedom of movement and residence

- 21(1) *Every person has the right to freedom of movement.*
- (2) *Every citizen has the right to apply for and be issued a passport or similar travel document, in accordance with any condition prescribed by written law.*
- (3) *Every citizen, and every other person lawfully in Fiji, has the right to move freely throughout Fiji and the right to leave Fiji.*
- (4) *Every citizen, and every other person who has a right to reside in Fiji, has the right to reside in any part of Fiji.*
- (5) *Every person who is not a citizen but is lawfully in Fiji has the right not to be expelled from Fiji except pursuant to an order of a court or a decision of the Minister responsible for immigration on a ground prescribed by law.*
- (6) *A law, or anything done under the authority of a law, is not inconsistent with the rights granted by this section to the extent that the law—*
 - (a) *provides for the detention of the person or enables a restraint to be placed on the person’s movements, whether—*
 - (i) *for the purpose of ensuring his or her appearance before a court for trial or other proceedings;*
 - (ii) ...
 - (iii) ...
 - (b) *provides for a person who is a non-citizen to be detained or restrained as a consequence of his or her arrival in Fiji without the prescribed entry documentation;*
 - (c) ...
 - (d) ...
 - (e) ...
 - (f) ...
- (7) *To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights mentioned in this section—*
 - (a) *in the interests of national security, public safety, public order, public morality, public health or the orderly conduct of elections;*
 - (b) ...
 - (c) ...
 - (d) *for the purpose of imposing a restriction on the person that is reasonably required to secure the fulfilment of an obligation imposed on the person by law; or*
 - (e) ...
- (8) ...

Analysis

- 16. All of the sections quoted above appear in a chapter of the Constitution headed Bill of Rights. While some of these rights apply only to citizens (for example, section 21(2)-(4), which don’t apply here, but I have included above to make the

distinction), others apply to everyone. 'Every person' is entitled to the rights to Personal Liberty (section 9), Executive and Administrative Justice (section 16), and Freedom of Movement (section 21(1) & (5)). 'Every person who is arrested or detained' has the Rights of Arrested or Detained Persons (section 13). Under the Constitution of the Republic of Fiji, Mr Okoro is entitled to the protection of and the rights conferred by these sections.

17. It is also important for us to remind ourselves that while the Constitution applies to everyone, the test for its usefulness is not how easy it is for those of us who are privileged by wealth, education, status and familiarity with how things work in Fiji, to rely on it, but rather how those who are not so privileged, who are impeded by poverty, ignorance, language and displacement, can have recourse to the protections it provides.
18. Counsel for the respondents (the Attorney General and the Immigration Office), who has been most helpful throughout, and for whose assistance I am grateful, argues that Mr Okoro's detention for the purposes of removal from Fiji is entirely legitimate, and cannot be challenged. The respondents rely on section 15 Immigration Act 2003 which provides:

Power to remove persons unlawfully in Fiji

- 15(1) *The Permanent Secretary may make an order directing that any person whose presence within Fiji is, under the provisions of this Act, unlawful, shall, as the Permanent Secretary may specify from the date of service of the order on such person or on the completion of any sentence of imprisonment which he may be serving, be ordered to leave Fiji or be removed from and remain out of Fiji either indefinitely or for a period to be specified in the order.*
- (2) *An order made under this section shall be carried into effect in such manner as the Permanent Secretary may direct.*
- (3) *A person against whom an order under this section is made may, before he leaves Fiji and while being conveyed to the place of departure, be kept in prison or in police custody, and while so kept shall be deemed to be in lawful custody.*
- (4) *An order made, and any directions given, by the Permanent Secretary under this section may at any time be varied or revoked by him.*
- (5) ...
- (6) *The master of a ship who is proceeding to a place to which a person is directed to be removed and is required by the Minister or by an immigration officer to do so shall receive a person against whom a removal order has been made on board the ship and afford him a passage to that place and proper accommodation and maintenance during passage. Except as provided by section 16 the cost of such passage, accommodation and maintenance shall be paid by the person removed or if the Minister so directs out of the Consolidated Fund.*

I note that for the purposes of section 15(6), 'ship' includes an aircraft (see s.2 Immigration Act 2003).

19. I accept that in light of this section the detention of Mr Okoro in November 2018 cannot be challenged. His permit to remain in Fiji had expired, he had been given the opportunity to leave by himself, and for one reason or another (the details of which are not particularly relevant) he had been unable to do so. I say 'unable' because there is no evidence, in spite of the respondent's submission to the contrary, that Mr Okoro was unwilling to leave, and he made several unsuccessful attempts to do so. His detention for the purpose of effecting his removal from Fiji is authorised by s.15(3) Immigration Act, and is in turn one of the permitted exceptions in the Constitution to the right of personal liberty (section 9(1)(i)). However, it is what happened after he was detained that is the real basis of his complaint, and of my concern.
20. Section 13 of the Constitution set out the rights of those who are arrested or detained. These rights apply to everyone who is detained, not merely to citizens of Fiji. It should be noted that the rights referred to in this section apply to those who have not yet been tried. The assumption is that they are innocent of any charges until they have been found guilty (s.14(2)(a) of the Constitution). Section 13 does not apply to those who have been convicted of an offence and sentenced to prison, and who are not therefore entitled to the right to personal liberty under section 9 (see section 9(1)(a)). In so far as section 9 abrogates the Constitutional right to personal liberty for someone in Mr Okoro's situation, it does so (s.9(1)(i)) only *for the purpose ... of effecting the expulsion, extradition or other lawful removal of the person from Fiji.*
21. I do not accept that this exception, or the provisions of s.15 of the Immigration Act allow the Permanent Secretary of Immigration to keep a person who is to be removed under the Act in prison indefinitely. Counsel for the respondents argued in her helpful written submissions that.

*There was no requirement to have the Applicant presented to a court of law. The detention was not an ordinary detention but one involving immigration laws of Fiji.
The Permanent Secretary without order of the court could detain the Applicant until his removal.*

I don't agree. Anyone who has been detained under s.15 by the Immigration Office is entitled to the rights prescribed by section 13 of the Constitution, in particular the rights under s.13(1)(f) & (g):

- (f) *to be brought before a court as soon as reasonably possible, but in any case not later than 48 hours after the time of arrest, or if that is not reasonably possible, as soon as possible thereafter;*
- (g) *at the first court appearance, to be charged or informed of the reasons for the detention to continue, or to be released;*

In case it is suggested, I don't accept that the reference in clause (f) to 'after the time of arrest' means, in this context, that the right to be brought before the court applies only to someone who has been charged with an offence, and not to someone who is merely detained for the purpose of the Immigration Act. The right of a person to appear before the court to ensure that his/her detention is lawful is too fundamental and important in our law to assume that someone who is detained without being charged with an offence (such as Mr Okoro) has no such right, and is obliged to languish indefinitely in prison until someone chooses to release him. The power of the Permanent Secretary of Immigration to detain someone under section 15 is permissive. He is not obliged to do so, and he is entitled (see s.15(4)) to vary or revoke any order or directions made under the section, including an order for detention.

22. Although the Deportation Act 1971 has now been repealed (replaced by the Immigration Act 2003) it is illuminating to see that section 6 of that act provided:

Where a magistrate has made a report to the Minister under section 5, he may order that the person charged be detained in such manner as he may direct, pending the decision of the Minister, for a period not exceeding twenty-eight days and such person shall be deemed to be in lawful custody whilst so detained.

I also note that s.3(1) of the Bail Act 2002 confers on an accused person:

A right to be released on bail unless it is not in the interests of justice that bail should be granted.

and, under section 3(3):

There is a presumption in favour of the granting of bail to a person but a person who opposes the granting of bail may seek to rebut the presumption.

'Accused person' is defined in the Bail Act as including someone who has been arrested and charged with an offence and has applied for a writ of *habeas corpus*. Of course, Mr Okoro has not been charged with an offence, but he has been arrested and detained and might easily, instead of applying for constitutional redress, have applied for a writ of *habeas corpus*. I am not suggesting that the Bail Act applies to Mr Okoro in the current circumstances; however the principles and rights that are reflected in and conferred by the Bail Act are a guide to how these issues are to be regarded in Fiji, and if these rights are not to apply to people in Mr Okoro's position, that needs to be explicitly stated, not left to a strained interpretation of conflicting sections of the Constitution. I also note that the Permanent Secretary could at any time after his permit expired have charged Mr Okoro with an offence under the Immigration Act (section 64(1)(i) is an obvious candidate), and had he

done so the Bail Act and other protections that apply to someone charged with an offence would certainly then apply to Mr Okoro. I do not accept that the Constitution allows the State to hold someone in prison uncharged indefinitely, and by doing so argue that they are not therefore entitled to the protections that the Constitution gives them.

23. Finally on this issue, I refer to the provisions of s.21 of the Constitution relating to Freedom of Movement. In clause 15 above I have underlined sections of clauses (6) and (7) of section 21. It is instructive I think that:

- i. subclause (6)(b) allows, as an exception to the right of freedom of movement, the detention of someone who has 'arrived in Fiji without the 'prescribed entry documentation' but does not refer to someone in Mr Okoro's situation who presumably had the 'prescribed entry documentation' when he arrived, but failed to leave when he was supposed to. This, I think, is consistent with the conclusion I have reached; someone who has arrived without the necessary entry papers is not entitled to the same rights as someone in Mr Okoro's position, who has arrived legally, but not left when he should.
- ii. subclause (7) allows as an exception where a restriction is *reasonably required to secure the fulfilment of an obligation imposed on the person by law*. Applied to Mr Okoro's situation this might well allow the Permanent Secretary to keep him in detention for a period, but only if and to the extent that it can be shown to be reasonably necessary to ensure that he leaves the country. In this case no evidence has been provided that satisfies me that it has been necessary to keep Mr Okoro in prison for 15 months to ensure he leaves when he can.

These well-defined and limited exceptions to the right to freedom of movement seem to me inconsistent with the notion that an unlimited and unmonitored exception to these rights should apply to Mr Okoro's situation. In any case, the State cannot be pedantic about the significance of the words 'after the time of arrest' in section 13(1)(f) of the Constitution, but still argue for a broad application of the exception to the right of free movement in s.21(6). Again, it is important to bear in mind the precedence given to the principles reflected in the Constitution as set out in the Preamble quoted above, and particularly to the need in interpreting and applying the Constitution to:

promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.

24. Taking into account the provisions of the now repealed Deportation Act, the right to bail conferred by the Bail Act, and the wording and apparent purpose of the

Preamble and sections of the Constitution and the Immigration Act referred to above (including the wording of s.15(3) of the Immigration Act which I have underlined in paragraph 18 above), I am satisfied that the Constitution and the Act do not confer a licence to keep someone in prison indefinitely while the processes of removal are undertaken, but are intended to permit detention, under supervision by the Court in terms of s13(1)(f) of the Constitution, of someone only where and to the extent that that is reasonably necessary to ensure that the person is actually removed from the country.

25. Ms Faktaufon argued on behalf of the respondents that even if there is a breach of the Constitution, the court should deny Mr Okoro relief because there are alternative remedies available to him. In doing so she relies on section 44(4) of the Constitution (the section dealing with applications for redress), which provides:

The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.

The 'adequate alternative remedy' that counsel refers to is Mr Okoro's 'right' to apply for judicial review. This somewhat conflicts with the respondents' earlier submission that the decision of the Permanent Secretary cannot be reviewed by Mr Okoro because, being now in Fiji illegally, he has no standing to do so. Reference is made to a decision of the High Court of Malawi in **Kambiningi Zones & 14 others v The Refugee Committee (Attorney General)** (2005) Miscellaneous Civil Case 313. Counsel also refers to a passage in the decision of the Privy Council in **Harrikissoon v Attorney General of Trinidad & Tobago** [1979] 3 WLR 62 at p. 64 (per Lord Diplock):

The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

26. Before discussing the application of this extract as a guide to how the Court should deal with Mr Okoro's application I would observe that the **Harrikissoon** case related to an application for constitutional redress by a school teacher who objected

to the fact that he was being moved to a different school. That factual background is so different from the present case that it alone is sufficient to distinguish the case, in spite of the respect that one must have for the advice of the Privy Council. But aside from that, the extract quoted above is careful to make the distinction between cases where the allegations are so frivolous and vexatious as to be an abuse of the process of the court, and those where a human right or fundamental freedom is contravened. I regard the present case, for the reasons I have given, as falling easily into the latter, rather than the former category. If an application for constitutional redress cannot be made by someone who has been kept in prison for a year without being brought before the court, it is hard to see what value the right to redress has. I suggest that a measure of that is the amount of progress that has been made in having Mr Okoro removed in the three months since he made his application, as opposed to what had happened over the previous twelve months. All the evidence suggests that if he had done nothing, nothing would have been done by the Immigration Service and Prison authorities.

27. I also note that the wording of s44(4) is permissive. The court has a discretion to refuse relief in the circumstances provided for, but it is not obliged to do so. I readily accept that in those situations such as arose in **Harrikissoon**, or that frequently arise in relation to appeal rights in the Courts in Fiji, where other avenues for action are readily available and more appropriate, the courts should refuse to consider applications for redress, at least until those other rights are exhausted. An example of such a situation is the decision of the Court of Appeal of Fiji in **Singh v DPP** [2004] FLR 297, also included with the respondent's submissions, in which the Court dismissed an application for redress that was filed in connection with matters arising in criminal proceedings against the applicant that had yet to be tried. The Court of Appeal understandably found in that case that the applicant had adequate alternative means in the then still current criminal proceedings to deal with the issues raised. To allow the redress application to proceed would create delays and lead to confusion in the conduct of the criminal trial. I also accept that for those who are not in prison, and have unimpeded access to legal advice and means of communication and research, an application for review may be a more appropriate course of action than an application for redress. But Mr Okoro is not in that privileged situation. To reject his application because he might have applied for judicial review (which requires first an application to the court for leave), would be to emasculate the protections and rights conferred by the Constitution. I do not accept that 'an adequate alternative remedy' is available to Mr Okoro, and I am certainly not willing to exercise my discretion to deny him relief on that ground.

Conclusions

28. Accordingly, I find that Mr Okoro's rights under sections 9, 13 and 21 of the Constitution have been breached by the respondents' actions in:
- i. Detaining him (depriving him of his personal liberty) for (now) more than fifteen months in circumstances that were not reasonably necessary for the purpose of effecting his lawful removal from Fiji
 - ii. failing to bring Mr Okoro before the Court within 48 hours of his detention
 - iii. restricting Mr Okoro's freedom of movement

and he is entitled to constitutional redress. Mr Okoro is entitled to be released unless there is some need for his continuing detention. I would accept that the Immigration Office is entitled to know his whereabouts (i.e. where he is living) at all times, and in the event that he does not keep the Office informed or otherwise appears likely to try to avoid removal, may be entitled to detain him (subject though to the need to bring him back before the court within 48 hours if he is still in the country).

29. Even if I am wrong in coming to that conclusion in relation to the rights of personal liberty, as a person who has been detained and of freedom of movement, there is also the question of Mr Okoro's right to Executive and Administrative Justice under section 16 of the Constitution. I have made clear my conclusions about the steps taken by the Immigration Office to effect Mr Okoro's removal. Section 16(1)(a) provides that:

every person has the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair, and reasonably prompt

30. The Immigration Office in the case of Mr Okoro has not acted 'reasonably promptly'. Had it done so Mr Okoro would have been removed before his passport expired, and this case would never have been brought. In this respect also I am satisfied that Mr Okoro is entitled to constitutional redress.

Redress

31. As I have directed above, Mr Okoro is entitled to be freed unless it can be shown that his continued imprisonment, pending the issue of travel documents by the Nigerian High Commission is necessary for his removal. I will allow the respondents one week for them to provide evidence that demonstrates this necessity, or to charge Mr Okoro so that he can apply for bail. If neither of these things happen by Monday 25 February at 10.00a.m. Mr Okoro is entitled to be released from prison.

32. Mr Okoro is also entitled to compensation for the breaches of his constitutional rights. In the time available since the hearing last week I have not been able to look as thoroughly as I would like to have done into the amount of compensation that is appropriate in a case such as this. My research tends to show that there have been many applications for constitutional redress, but very few of them have been successful, and the number in which monetary compensation has been awarded is very small. Certainly, I have been unable to find any previous cases in which compensation has been given in circumstances similar to this. Counsel for the respondents has responsibly referred in her submissions to the Court of Appeal decision in 2006 in the case of **The Proceeding Commissioner, Fiji Human Rights Commission v The Commissioner of Police** [2006] FJCA 75, and I have relied on the comprehensive analysis in that decision of the principles to be taken into account in assessing compensation, albeit that the cases are very different. In that case the complainant had been subjected by the police to a medical examination without her consent, and where there was no evidence that she had committed an offence, and had been driven around in a police vehicle in a cage. She was found to be entitled to \$15,000 (increased from \$5,000 on appeal). Also useful as an indicator of the level for any award of compensation is the decision of the Court of Appeal in **Attorney General v Yaya** [2009] FJCA 60, in which the complainant was eventually awarded \$4,000 (reduced to this amount on appeal) for breach of his privacy when the police published a public notice saying that they were looking for him in connection with a particular offence. This award was made in spite of the complainant's possible involvement in the offence referred to, and his extensive criminal record, because at the time of the notice the police had no evidence of the complainant's connection with the offence, and simply suspected it.
33. In settling on the figure of \$20,000 for Mr Okoro I have taken into account the following factors, some of which are referred to and discussed in the **Proceedings Commissioner v Police** case referred to in the previous paragraph:
- Damages are to be compensatory, not punitive, but that does not mean that they cannot reflect the degree to which the complainant's rights have been infringed.
 - The conduct of the complainant is largely irrelevant, not only because – as the Court of Appeal observed in the **Proceedings Commissioner** case (para 83) - ... *rights arising under a Bill of Rights are of universal application. They are not reserved for upright citizens alone.* The fact that Mr Okoro was responsible for not leaving Fiji within the currency of his permit cannot be a justification for the length of his detention. The maximum penalty for the sort of offence Mr Okoro might be charged with for not leaving the country seems to be a fine of \$2000.00 or 2 years in prison (section 65 Immigration Act 2003). Mr Okoro has already been in prison for 15 months, although he has not been charged with anything.

- The Permanent Secretary was entitled in the first instance to detain Mr Okoro, and to keep him in detention for a reasonable period necessary to deport him. It is clear that 15 months is much more than a reasonable period, but otherwise I have not attempted to say what a reasonable period might have been. If I had to, I would measure that in weeks rather than months. The significance of this is that the initial detention did not constitute a breach of Mr Okoro's rights, and the redress is not for that initial detention or for the reasonable period afterwards that it should have taken for him to be removed.
- The level of the award must *not be excessive, but restrained and moderate or prudent*. It must be *harnessed against the backdrop of the social and economic conditions of Fiji, and not by some universal standards, or by comparison with awards given in economically advanced countries (Proceeding Commissioner v Police para 51)*. I note in this regard that the minimum wage in Fiji is \$100.00 per week, or \$5,000 per year, and so the amount I have decided to award is the equivalent of approximately 4 years wages at that level. I mention this not because I am suggesting that 4 years wages is an appropriate level of compensation, but to indicate that in terms of social and economic conditions in Fiji, \$20,000 is a lot of money.
- On the other hand, any award should not be too low, because that would *diminish the respect for the essential policies which underpin the legislation. ... Were it otherwise [the authorities] may be prepared to run the risk of paying small amounts of compensation, so that they can continue to employ practices ... that infringe constitutional rights* (supra para 56).
- The need to remove Mr Okoro, and pay for his removal back to Nigeria, will no doubt cost the State a significant sum. I have no information on what that might be, but I have taken this into account in deciding on the figure above. I would not therefore expect the State to attempt to recover this cost now from Mr Okoro, or try to offset it against what is payable to him as a result of this decision.
- The absence of any apology or acknowledgement by the Immigration Office that it is in any way at fault, or even that it could have done better. Its aggrieved position is that Mr Okoro (and the Nigerian High Commission in Canberra) are entirely at fault, and that it has done all it could. Obviously, I don't agree.

I have also taken into account the amounts awarded in the cases referred to, and used those amounts, and the circumstances in which they were awarded as a guide to what might be appropriate compensation in this, very different case.

34. Accordingly, I make the following orders:

- i. Mr Okoro is entitled to be freed unless it can be shown that his continued imprisonment, pending the issue of travel documents by the Nigerian High Commission, is necessary for his removal. I will allow the respondents one week for them to provide evidence that demonstrates this necessity, or to charge Mr Okoro so that he can apply for bail (noting that being charged, or convicted may have an impact on any future travel Mr Okoro might wish to undertake). If neither of these things happens by Monday 25 February at 10.00a.m Mr Okoro is entitled to be released from prison.
- ii. The Permanent Secretary for Immigration is to pay Mr Okoro the sum of \$20,000.00 as compensation/damages for the breach of his constitutional rights.
- iii. Mr Okoro has represented himself. He is not entitled to costs. However the Court received a great deal of assistance from Ms Lal of the law firm Lal Patel Bale, who was in court when the case was first called, and who (with other members of the firm's staff) attended a number of times thereafter in the role of friend of the Court. The respondents are to pay \$500.00 cost to Ms Lal, and I direct that a copy of this decision is to be provided to her. I am grateful too to the assistance provided by Ms Raman of the Legal Aid Office to Mr Okoro and to the Court.
- iv. The case is adjourned for mention on Monday 24 February 2020 to review compliance with these orders.



A blue ink signature of A.G. Stuart, Judge. The signature is a large, stylized cursive script. Below the signature, the name "A.G. Stuart" and the title "Judge" are printed in a simple, sans-serif font.

At Lautoka this 17th day of February, 2020

SOLICITORS:

Ms M Faktaufon for the Respondents

Ms Raman at the request of the Court