



**IN THE DISTRICT COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION**

Criminal Case No. 10A of 2022

**BETWEEN:** **ZHU ZIYING**

**APPLICANT**

**AND:** **THE REPUBLIC OF NAURU**

**RESPONDENT**

**BEFORE:** Resident Magistrate Mr. Vinay Sharma

**DATE OF HEARING:** 26 March 2025

**DATE OF RULING:** 28 March 2025

**APPEARANCE:**

**APPLICANT:** R Tom and V Clodumar (via AVL)

**RESPONDENT:** W Deiye

# **RULING**

[Application for Variation of Bail Conditions]

## **INTRODUCTION**

1. I will decide on the applicant's Notice of Motion for Bail Variation filed on 17 March 2025. The motion is supported by the applicant, his wife (Zhong Guilian), and his sister (Yushuang Zhu), who have filed their supporting affidavits.
2. On 8 September 2023, the District Court imposed an additional bail condition on the applicant requiring him to surrender his passport to the Court and prohibiting him from traveling out of the Republic.
3. The applicant's motion seeks to vary the bail condition prohibiting the applicant from travelling out of the Republic. He wishes to travel to China to visit his elderly parents.
4. The applicant was initially jointly charged with Hamid Kazemizadeh and Mostafa Jesgeshilachi for unlawful possession of an illicit drug contrary to section 6(a) of the Illicit Drugs Control Act 2004. The charges were later severed. Now the defendant is charged with unlawful possession of 0.8 grams of an illicit drug contrary to section 6(a) of the Illicit Drugs Control Act 2004.
5. This matter had been set down for trial from 4 November 2024 to 8 November 2024. However, the trial could not proceed because the applicant's counsel was sick, and the court had difficulty securing a Mandarin-speaking Chinese interpreter.
6. The matter was called on 31 December 2024 to fix another trial date. Counsel for the applicant sought a trial date during the early part of this year. However, the most suitable dates were in September of this year. The matter was set down for trial from 8 September 2025 to 12 September 2025. At this stage, counsel for the applicant had indicated that the adjournment of the trial date had affected the applicant's plans to travel to China to visit his elderly parents mid this year. He had indicated that he would be applying to vary the bail conditions so that he could travel to China for this purpose.
7. The motion was listed before me on 21 March 2025. The prosecution sought time to respond. I gave the prosecution time until 25 March to file its response. On 25 March 2025, the prosecution sought further time to file its response. Time was extended to 26 March.
8. On 26 March 2025, I heard the parties.
9. I am to determine the following issues:
  - i. What are the relevant legal principles that apply to an application for variation of bail conditions?
  - ii. Are there any special facts and/or circumstances that justify a review of the bail condition made on 8 September 2023?

iii. Is there a real risk of the applicant absconding?

iv. Is there a real flight risk?

v. Should fresh bail be refused in the interests of justice?

10. The following are the reasons for my ruling on the motion.

#### **APPLICANT'S PERSONAL CIRCUMSTANCES AND REASONS FOR BAIL VARIATION**

11. The applicant wishes to travel to China to visit his elderly parents and take them to a religious festival in May of this year. His son with Zhong Guilian is looking after his parents in China.
12. The applicant is 50 years old. His father is 81 years old. His mother is 79 years old.
13. The applicant is a motor vehicle mechanic at "E4 Hongxing Rent A Car". He has lived and worked in Nauru for over 17 years and recently renewed his business visa, which cost him \$6000.
14. The applicant has not seen his parents for the past six years. He wishes to visit them and take them to the religious festival in May because he is weary of their old age and fears they may soon pass. His income from his work in Nauru supports his family and son in China. Further, upon his return to Nauru, the applicant intends to continue his work and is not sure when he will be able to revisit his parents.
15. The applicant is married to Zhong Guilian. His wife also lives in Nauru and operates a convenience store in Baitsi District, FOURT. She has been operating the store for three years now and is willing to be the applicant's surety for the bail variation.
16. The applicant's sister, Yushuang Zhu, also lives in Nauru and operates a convenience store in Aiwo District, Bridge Road Trader. The store has been operating for 13 years, and the applicant's sister is also willing to be the applicant's surety for the bail variation.

#### **RESPONDENT'S POSITION WITH REGARD TO THE VARIATION APPLICATION**

17. The counsel for the respondent objects to the bail variation, relying solely on the ground that the applicant is a Chinese national and there is a risk that he will not attend his trial.
18. The counsel for the respondent relies on the following Supreme Court decisions on bail variation applications:
  - i. R v Kauwen Aliklik [2025] NRSC 1; Criminal Case 02 of 2023 (27 January 2025);

- ii. *Dabwido v Republic* [2024] NRSC 35; Criminal Case 04 of 2021 (20 November 2024); and
  - iii. *Quadina v Republic* [2024] NRSC 29; Criminal Case 13 of 2022 (11 October 2024).
19. Bail variation determinations are made on a case-by-case basis, which depends on the circumstances of the individual cases. The Supreme Court cases referred to above are distinguishable because they involve very serious charges, which affect how the court balances the competing rights and interests involved, which I will discuss below.

#### **WHAT ARE THE RELEVANT LEGAL PRINCIPLES THAT APPLY TO AN APPLICATION FOR VARIATION OF BAIL CONDITIONS?**

20. Section 31 of the *Bail Act 2018* (“the Act”) provides the following in relation to a Resident Magistrate’s power to review a bail determination:

*31 Power of review*

...

*(2) A Resident Magistrate may review a decision made by another Resident Magistrate, including a reviewing Resident Magistrate, in relation to bail.*

...

*(5) A court which has power to review a bail determination, or to hear a fresh application under Section 15(1), may, if not satisfied that there are special facts or circumstances that justify a review, or the making of a fresh application, refuse to hear the review or application.*

...

*(7) The power to review a decision under this Part includes the power to confirm, reverse or vary the decision.*

*(8) The review shall be by way of a rehearing, and evidence or information given or obtained on the making of the decision may be given or obtained on review. (emphasis added)*

21. Section 22(2)(c) of the Act provides the following with regard to the power of the court to review bail conditions:

*22 Conditions of bail*

...

*(2) The court shall have jurisdiction to review the conditions of bail where:*

...

*(c) an accused person seeks variation for personal, humane, compassionate or health reasons; or*

*(d) circumstances exist, which in the view of the Resident Magistrate, a Judge or Justice of Appeal, justifies a review of the conditions of bail. (emphasis added)*

22. Section 31(2) of the Act grants the Resident Magistrate the power to review a decision made by another Resident Magistrate in relation to a bail determination. Further, Section 31(5) of the Act provides that where a court has a power to review a bail determination, it may refuse to hear the application for review “if it is not satisfied that there are special facts or circumstances that justify a review, or the making of a fresh *application*”.
23. Section 22(2)(c) of the Act also provides the court the jurisdiction to review the bail conditions imposed by the court where “*an accused person seeks variation for personal, humane, compassionate or health reasons*”.
24. In relation to an application for review of bail conditions, Section 31(2) & (5) and Section 22(2)(c) of the Act have to be read together because a review of bail conditions entails the review of a bail determination. That is, a review of bail conditions would require a review of the bail determination in which the conditions were made. Therefore, an applicant seeking to review bail conditions will have to make an application for a review of a bail determination on personal, humane, compassionate or health reasons.
25. The Honorable Acting Chief Justice Khan in *Denuga v Republic*<sup>1</sup> made the following observations at [11] of his honor’s judgment with regard to a court’s power to review a bail determination under Section 31 of the Act:

*[11] The Bail Act 2018 allows an accused person to make any number of fresh applications if there is change in circumstances, and the effect of the 2 subsections is that it allows the court to review bail conditions if: “there are special facts and circumstances (s.31(5)) and “to vary the bail conditions” (s.31(7)), if the court deems it appropriate.*

26. The High Court of Fiji in *Ho v State*<sup>2</sup> made the following observations at [6], [7] and [8] of its ruling with regard to an identical provision in Fiji’s Bail Act on the power of the court to review a bail determination:

*[6] The statutory test for a renewed application for bail is whether there are special facts or circumstances to consider releasing the Accused on bail. This is the test provided by section 30 (7) of the Act. That section states:*

*A court which has power to review a bail determination, or hear a fresh application under section 14(1), may, if not satisfied that there are special facts or circumstances, that justify a review, or the making of a fresh application, refuse to hear review or application.*

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<sup>1</sup> [2023] NRSC 12; Criminal Appeal 5 of 2021 (18 May 2023), at [11]

<sup>2</sup> [2019] FJHC 820; HAM146.2019 (23 August 2019), at [6],[7] and [8]

[7] *The statutory test appears to be more stringent than the common law test of material change in circumstances applied by this Court in the earlier cases of renewed applications for bail (see, Nagata v State – Bail Ruling [2015] FJHC 644; HAM152.2015 (31 August 2015), State v Dhamendra [2016] FJHC 386; HAM58.2016 (10 May 2016)).*

[8] *The Bail Act has not defined the phrase ‘special facts or circumstances’ but has left it to the courts to decide on case by case basis. The word ‘special’ has been given the meaning exceptional or unusual in a number of cases. For the facts to be special they must be “peculiar to the particular case which set it apart from other cases” (Lyon v Wilcox [1994] 3 NZLR 422, 431 (CA), following the Full Court in Re M [1993] NZFLR 74). For circumstances to be special they must be exceptional, abnormal or unusual (Crabtree v Hinchliffe (Inspector of Taxes) [1971] 3 All ER 967, 976 (Lord Reid), 983 (Viscount Dilhorne)). (emphasis added)*

27. In light of the above, in a review application to vary bail conditions, the applicant needs to establish special facts or circumstances in relation to his or her personal, humane, compassionate or health reasons for seeking the variation.
28. Once the court is satisfied that special facts or circumstances exist that justify review, then the court may confirm, reverse or vary the bail determination. However, it must be noted that the use of the word ‘may’ in Section 31(5) of the Act indicates that there remains a discretion in the court to hear the application for review despite there being no special facts or circumstances that justify a review.
29. There may arise situations in which the circumstances or facts of a particular case do not satisfy the requisite threshold of being “*special*”; however, the nature of the facts or circumstances in that case nonetheless may justify a review. For instance, Section 22(2)(c) of the Act provides the court the jurisdiction to review the bail conditions imposed by the court where “*circumstances exist, which in the view of the Resident Magistrate, a Judge or Justice of Appeal, justifies a review of the conditions of bail.*” Therefore, it is clear that Section 31(5) of the Act vests a discretion in the court to hear applications for the review of a bail determination, which is to be dealt with on a case-by-case basis.
30. The Supreme Court of Victoria in *Re Zhang*<sup>3</sup> made the following observations at [17] of its judgment with regard to the effect of a successful bail variation application:

*...A successful application to vary bail conditions results in the court — in granting the application to vary — making a fresh grant of bail with new conditions.*
31. Where an application for variation of bail conditions is allowed by a court, a fresh grant of bail with new conditions is entered into.
32. When considering a fresh bail grant with new conditions, the court needs to reconsider whether the interest of justice requires that bail should not be granted

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<sup>3</sup> [2023] VSC 8, at [17]

(Section 4(3) of the Act). Further, the factors under Sections 17, 18, and 19 of the Act may need to be reconsidered.

**ARE THERE ANY SPECIAL FACTS AND/OR CIRCUMSTANCES THAT JUSTIFY A REVIEW OF THE BAIL DETERMINATION MADE ON 6 OCTOBER 2023?**

33. The charge against the applicant has been pending since 2022. The matter was fixed for trial last year. However, the trial was vacated due to no fault of the applicant. The applicant's counsel submits that they have a strong case on the grounds that the search was improperly conducted, and the chain of custody has substantial issues because the seizing officer did not prepare the Seizing Officer's Report as required under the Illicit Drugs Control Act 2004.
34. Counsel for the respondent conceded that the seizing officer did not prepare the Seizing Officer's Report. However, she submitted that the illicit drug was seized from the applicant.
35. Counsel for the respondent referred to the judgment of this court in *The Republic of Nauru v Mostafa Jesgeshilachi*, Criminal Case No. 10 of 2022. The applicant and Mostafa were initially jointly charged with unlawful possession of illicit drugs contrary to section 6(a) of the Illicit Drugs Act 2004. In *Mostafa's* case, the prosecution witness gave evidence that they executed multiple search warrants on the same day. None of the seizing officers prepared a Seizing Officer's Report in that case, nor did they file an executed search warrant with the necessary endorsements on it at the court registry. Mostafa was acquitted because of defects in the chain of custody, and the search was conducted improperly, rendering the evidence inadmissible because of the substantial risk of contamination. Most of the prosecution witnesses in *Mostafa's* case are also prosecution witnesses in this matter. Without determining the merit of this case, I find that the defence case seems to be strong.
36. In light of the strength of the applicant's defence. There is no substantial/real risk of flight or applicant absconding. I will discuss this aspect later in my determination.
37. The defendant is 50, and his mother and father are 79 and 81, respectively. He has not met his parents for 6 years and is worried that he may not be able to spend quality time with them before they pass away. Initially, when the matter was set down for trial in November 2024, the applicant had anticipated visiting his parents in the middle of this year. However, the circumstances changed when the trial could not proceed against the applicant. He had indicated that he intended to visit his parents at the earliest and requested that the trial be conducted as early as January or February 2025. There has been urgency and genuineness in the applicant's request. Therefore, in light of the applicant's circumstances and the strength of his defence, I find that special circumstances justify the review of the bail condition.

**IS THERE A REAL RISK OF THE APPLICANT ABSCONDING?**

38. A risk that is a "mere possibility" or a "theoretical possibility" does not amount to a real risk.<sup>4</sup>

39. The nature of the offending and the possible severity of the punishment determine whether there is a real risk of the applicant absconding.<sup>5</sup> A serious offence and the possibility of a severe punishment establishes a real risk of the defendant absconding.
40. In the current matter, the applicant is charged with unlawful possession of 0.8 grams of illicit drugs contrary to section 6(a) of the Illicit Drugs Control Act 2004. Possession is the least severe offence under section 6(a) of the Illicit Drugs Control Act 2004. In the current circumstances, if the applicant is found guilty, there is a real possibility of a non-custodial sentence together with a fine of \$1000. Further, in an extreme case of unlawful possession of 0.8 grams of illicit drugs, the defendant is most likely subject to a custodial sentence between 3 months and 9 months with a fine of \$1000. The punishment that may be meted out is not severe. It is one of the least severe punishments under section 6(a) of the Illicit Drugs Control Act 2004, which provides a maximum term of imprisonment of 10 years.
41. In light of the seriousness of the current offending and the possible severity of punishment, I find that there is no real risk that the defendant will abscond.

#### **IS THERE A REAL FLIGHT RISK?**

42. When considering whether there is a real flight risk posed by the defendant in a criminal case, the court must examine the nature and seriousness of the offence, the possible sentence that the court may mete out if the defendant is convicted of the offence, and the strength of the evidence against the defendant.<sup>6</sup>
43. I repeat my findings in relation to the nature and seriousness of the offence, and the possible severity of the punishment at [40] above.
44. Further, I repeat my findings in relation to the strength of the applicant's defence at [35] above. Therefore, I find that there is a real possibility that serious issues in relation to the chain of custody of the evidence against the applicant may arise in this case, which gives rise to a real possibility that the strength of the prosecution's evidence may be affected.
45. Given the above, I also find that there is no real flight risk in this case.

#### **SHOULD FRESH BAIL BE REFUSED IN THE INTERESTS OF JUSTICE?**

46. During the motion hearing, I expressed my tentative view concerning the application of the law with regard to a determination on an application for variation of bail conditions. A judicial officer may express his/her tentative view in a matter without raising a possible apprehension of bias: see *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17; *R v*

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<sup>4</sup> *Hammond v Commonwealth* (1982) 152 CLR 188 per Gibbs CJ (at 199)

<sup>5</sup> *Sabau -v- The State of Western Australia* [2007] WASC 183 (9 August 2007) (at paragraph 23)

<sup>6</sup> *Sabau -v- The State of Western Australia* [2007] WASC 183 (9 August 2007) (at paragraph 74 & 75)



Commonwealth Conciliation & Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546; Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70; [1990] HCA 31.

47. In light of my tentative view, the defendant provided an undertaking that this court may proceed with the trial in his absence. This has been required in Supreme Court cases in which leave was granted to the applicant to travel out of the Republic. Further, the defendant agreed to pay \$20,000 into the court trust fund as security for his return.
48. When determining an application for overseas travel, the court engages in a balancing exercise involving public interests in relation to bail considerations, the applicant's right to be presumed innocent until proven guilty, and his/her right to travel out of the country, which stems from his/her right to liberty.
49. Section 4 of the Act establishes a presumption of bail.
50. Section 5(1) of the Act provides the following rights after grant of bail:

***5 Rights following the grant of bail***

*(1) An accused person who is in custody for an offence and who has been granted bail is entitled to be released, upon giving a bail undertaking, and subject to Section 26, to remain at liberty until required to appear before a court in accordance with the bail undertaking.*

51. Section 16(3) of the Act provides that once a person is granted bail then he or she must reside at the place of residence that he provided to the court or police as the case may be. Further, Section 16(6) of the Act provides that absence of more than 24 hours from the place of residence amounts to change of residence. Leave must be sought before place of residence is changed.
52. Section 17(2) of the Act provides that "*the primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charges laid against him or her*".
53. Section 18(1) of the Act makes the following provision:

***18 Refusal of bail***

*(1) A person making submissions to a court against the presumption in favour of bail shall address the:*

*(a) likelihood of the accused person not surrendering to custody and not appearing in court;*

*(b) interests of the accused person; and*

*(c) public interest and the protection of the community. (emphasis added)*

54. For the purpose of this ruling, Section 19(2)(b) & (c) of the Act requires the following:

***19 Reasons for refusing bail***

...

*(2) In forming the opinion required by subsection (1), a police officer or court shall have regard to all the relevant circumstances and in particular:*

...

*(b) in relation to the interests of the accused person:*

*(i) the length of time the accused person is likely to have to remain in custody before the case is heard;*

*(ii) the conditions of that custody;*

*(iii) the need for the accused person to obtain legal advice and to prepare a defence;*

***(iv) the need for the accused person to be at liberty for other lawful purposes such as employment, education, care of dependants;***

*(v) whether the accused person is a child, in which case Section 4C applies; or*

*(vi) whether the accused person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection; and*

*(c) in relation to the public interest and the protection of the community:*

***(i) any previous failure by the accused person to surrender to custody or to observe bail conditions;***

***(ii) the likelihood of the accused person interfering with evidence, witnesses or assessors or any specially affected person; or***

***(iii) the likelihood of the accused person committing an arrestable offence while on bail. (emphasis added)***

55. The prosecution did not proffer any material suggesting that the applicant had failed to surrender to custody or observe bail conditions on previous occasions. On the contrary, there seems to be a concession that the applicant has diligently observed his bail conditions. I also find that the applicant has been observing his bail conditions.

56. The prosecution did not proffer any material that would suggest that there is a likelihood that the applicant interfered with evidence or witnesses during the period of his bail.

57. The prosecution also did not proffer any material that the defendant committed an arrestable offence while on bail. There is also no material that would suggest a history of offending against the applicant, who is a first-time offender. I find that the defendant has been of good behaviour whilst on bail.
58. There are no public interest issues under section 19 (2) (c) of the Act in this matter. Further, there is no real flight risk or the defendant absconding. The applicant has been living and working in Nauru for more than 17 years. His wife and sister also live in Nauru. Both of them are businesswomen. Evidence in relation to business in Nauru was provided. The money earned by the applicant supports his elderly parents and son in China. The applicant has established ties to Nauru through his employment and his family's business in Nauru. Therefore, I find there is no justifiable cause to prohibit the defendant from traveling to China to visit his elderly parents.
59. The Court of Appeal for Ontario in *R. v. U.K.*, 2022 ONCA 21 granted leave to the appellant in that matter to travel to Pakistan while on bail pending appeal. In that matter, the appellant was convicted of sexual assault and was sentenced to imprisonment for two years. The appellant requested travel to sort out issues in relation to his passport from Pakistan. In that matter, after evaluating the circumstances of the case, the Court of Appeal found that there was no significant flight risk, and the risk could be mitigated by increasing the cash bond.
60. I find that in this matter, the payment of \$20,000 into the court trust account as security for his return, together with two sureties bonded in the sum of \$5000 each, will also mitigate any risk, if there is any.

## ORDERS

61. The orders of the court are as follows:
- i. That the bail granted in this matter is set aside and fresh bail is granted, with the applicant paying \$20,000 into the court trust account as security for his return.
  - ii. That Zhong Guilian is to execute a surety bond in the sum of \$5000 in her own recognisance. Further, she is to surrender her passport to the Registrar of Courts upon execution of the surety bond
  - iii. That Yushuang Zhu is to execute a surety bond in the sum of \$5000 in her own recognisance. Further, she is to surrender her passport to the Registrar of Courts upon execution of the surety bond
  - iv. That the conditions of the fresh bail are:
    - a. That upon the applicant's return, he is to reside at his current place of residence in Denig District and shall not change his place of residence without the leave of this court.
    - b. That the applicant must not interfere with prosecution witnesses;

- c. That the applicant is permitted to travel out of the Republic from 29 March 2025 and return on 15 June 2025. Upon his return, he is to surrender his passport to the Registrar of Courts and shall not travel out of the Republic without leave of the court. and
- d. The applicant shall personally attend at the Court House, District Court on the 20<sup>th</sup> day of June 2025 at 10am for review of the fresh bail conditions. Further, the applicant is required to attend at any other subsequent dates as required by the court.

Dated this 28<sup>th</sup> day of March 2025.



**Resident Magistrate**  
**Vinay Sharma**