

IN THE SUPREME COURT OF NAURU
(CIVIL JURISDICTION)

CIVIL ACTION NO. 12/92

BETWEEN : GARY JOHN GREEN

PLAINTIFF

AND : THE MINISTER FOR JUSTICE
THE PRINCIPAL IMMIGRATION OFFICER

DEFENDANTS.

Date of Hearing : 7:8:92
Date of Decision : 8:12:92
Audoa for plaintiff
Dwevedi for defendants.

DECISION OF DONNE C. J.

This action seeks certain declarations to the effect that a deportation order made on 22nd June 1992 against the plaintiff is invalid and of no effect.

At the conclusion of the hearing of the case on the 7th August 1992, I called for written submissions on the law applicable therein. These were provided by the parties by the end of that month. However, they were not submitted

to me until the 25th of November last.

I do not propose to detail the facts leading up to the making of the order since the first consideration must be the validity of the Deportation Order.

The sequence of events in relation to this matter is:

1. At the relevant time, the defendant was lawfully in Nauru. He held a valid Australian Passport in which was recorded a "Visa" permitting him to enter Nauru dated 23rd April 1992. The date of expiry thereof was 23rd April 1994. It was expressed to be for an authorised stay of 2 years "whilst employed by S.H.M."
2. On the 16th June 1992, Cabinet made the following decision:

"CABINET SUBMISSION NO: 148/1992

SUBJECT: DEPORTATION OF MR. GARY
GREEN UNDER THE EXPULSION
OF UNDERSIRABLES
ORDINANCES 1961-1967
(SECTION 2)

was considered and the following
Decision made:

Approved. Cabinet approves the
recommendation that the Cabinet;

a) pursuant to Section 2 of the
Expulsion of Undesirables Ordinance
declare Mr. Green as an undesirable

person; and

b) authorise the Honourable Minister for Justice to sign the relevant documents to give effect to the deportation of the said Mr. Green."

- 3 On the 22nd June 1992 an Order described as an "Order cancelling Entry Permit" was made by the Minister for Justice as follows:

"WHEREAS, Mr. Gary Green has been granted an entry permit to stay in Nauru, and WHEREAS Section 4(3) of the Immigration Act 1901-1949 confer upon me in my capacity as the Minister for Justice responsible to Customs and Immigration to cancel the entry permit.

I, PRES NIMES EKWONA, Minister for Justice responsible for Customs and Immigration, IN EXERCISE of the power so conferred DO HEREBY cancel the entry permit of Mr. Gary Green forthwith.

Passed this Order on 22nd day of June, 1992."

4. On the 22nd June 1992 an Order described as an "Order for Deportation" was made by the Minister for Justice as follows"

IMMIGRATION ACT 1901-1949
(Section 7)

read with

EXPULSION OF UNDESIRABLES
ORDINANCES 1961-1967
(Section 2)

ORDER OF DEPORTATION

WHEREAS entry permit granted to Mr. Gary Green has been cancelled, he has become a prohibited immigrant within the meaning of Section 7 of the Immigration Act 1901-1949 (hereinafter referred to as "The Act") as applicable in Nauru.

I, PRES NIMES EKWONA, Minister for Justice responsible for Customs and Immigration, IN EXERCISE of the powers conferred on me under Section 7 of the Act DO HEREBY order the deportation of Mr. Gary Green. The Authorised Officer is to deport him out of Nauru to Australia at the earliest time convenient.

Passed this Order on this 22nd day of June, 1992.

5. The plaintiff was served with the Deportation Order on the 22nd June 1992 at 5 p.m.
6. On the 23rd June 1992, the plaintiff issued these proceedings and obtained an interim injunction staying the operation of the Deportation Order pending the final decision of the Court.
7. The plaintiff has now left Nauru. However, he seeks, with justification, a ruling on the validity of the above orders.

Dealing with the Cabinet decision purportedly made under the authority of section 2 of the Expulsion of Undesirables Ordinance (now Act) 1961-1967 which reads:

"2. Where the Administrator is satisfied that any person other than a Nauruan -

(a) has at any time been convicted in Nauru of a criminal offence punishable by imprisonment for one year or longer;

(b) is a person whose conduct has been such that he should not be allowed to remain in the Territory; or

(c) is a person whose presence in Nauru is prejudicial or likely to be prejudicial to the peace, order, or good government of the Territory or to the well-being of the inhabitants of Nauru,

the Administrator may make an order for the deportation of that person."

What that Cabinet Minute does is:

(a) Declare pursuant to section 2 of the enactment the plaintiff to be "an undesirable person" and

(b) Authorise the issue by the appropriate Minister for a Deportation Order.

The Minute, in my view, has no effect as a deportation order. Firstly, the section does not mention the classification "undesirable person". Rather it defines those classes of person (other than a Nauruan) in respect of whom Cabinet itself may make an order for deportation.

Secondly, the Cabinet decision does not expressly make an order for deportation.

Thirdly, there is no finding therein on any of the grounds (a), (b) and (c) as to the reason for decision, a necessary prerequisite for an order.

I am satisfied the Cabinet decision is of no effect and so hold.

I now pass to the order cancelling the Entry Permit. The authority stated for that is section 4(3) of the Immigration Act 1901-1949, an Australian enactment which the Republic claims is adopted pursuant to the provisions of Article 85 of the Constitution. Section 4(1) of the Act reads:

"4. - (1.) The Minister or an authorized officer may issue certificate of exemption in the prescribed form authorizing the person named in the certificate (being a prohibited immigrant or an immigrant who may be required to pass the dictation test) to enter or remain in the Commonwealth, and the person named in the certificate shall not, while the certificate is in force, be subject to any of the provisions of this Act restricting entry into or stay in the Commonwealth."

Section 4(3) reads.

"(3.) Any such certificate may at any time be cancelled by the Minister by writing under his hand."

Section 4(1) allows a "certificate of exemption" to remain temporarily in Australia to be obtained by "a prohibited immigrant or one who may be required to pass a prescribed

dictation test". This is not an entry permit as was purported to be issued to the plaintiff in the form of the Visa appearing in his Passport. It is a certificate which allows a person who is a prohibited immigrant or one who cannot pass a prescribed dictation test to enter Australia notwithstanding his disqualification. In order for the section to apply to this plaintiff he must be shown to be a "prohibited immigrant" within the meaning of the Act. Section 2 thereof classifies a "prohibited immigrant". In fact, of course, the plaintiff was not a prohibited immigrant when he was given a Visa to enter Nauru. Clearly the only classification that could have applied to him is that contained in subclass (ge) which reads:

"(ge) any alien who, on demand by an officer,
fails to satisfy the officer -

(a) that he is the holder of a landing permit, issued by or on behalf of the Minister, authorizing the admission of the holder into Australia, and that he is able to comply with the conditions specified therein; or

(b) that his admission into Australia has otherwise been authorized by or on behalf of the Minister;"

(Underlining is mine)

Firstly, landing permits are issued to persons who seek to land from a ship. If, in fact, the plaintiff did need a "landing permit", there certainly was no procedure envisaged by subsection (ge) invoked to allow the consideration of his being a prohibited immigrant to arise. He therefore not being a "prohibited immigrant" either

within the meaning of either section 2 or 4 of the Act, the notice or order here has no application to him.

Likewise the Deportation is bad. It is issued "in exercise of the powers given under section 7 of the said Immigration Act. Section 7 reads:

"7. Every prohibited immigrant entering or found within the Commonwealth in contravention or evasion of this Act and every person who, by virtue of this Act, is deemed to be a prohibited immigrant offending against this Act shall be guilty of an offence against this Act, and shall be liable upon summary conviction to imprisonment for not more than six months, and in addition to or substitution for such imprisonment shall be liable pursuant to any order of the Minister to be deported from the Commonwealth."

This section is not an empowering section. It is an "offence" section. It prescribes the offence of "unlawful entry" and under it in addition to the imposition of imprisonment, the Court may order the offender to be deported. It does not empower the Minister responsible for Immigration to issue a Deportation Order before conviction.

In the result, the Deportation Order and all other orders issued in respect of the plaintiff are invalid.

This case is an important one in that it has highlighted serious deficiencies in our immigration laws. Firstly, it is clear the Immigration Act 1901-1949 is a totally inappropriate enactment to govern our immigration

administration. While I have not examined the question in depth, it seems to me to be unlikely if it can have any application as a law of Nauru. The Laws Repealing and Adopting Ordinance 1922-1965 which is relied on by the Republic does not adopt it. What is adopted by section 10 thereof is the Immigration Act 1901-1920. I have not been referred to any other adopting Legislation. The 1901-1920 enactment would appear therefore to be the enactment adopted as existing law under Article 85 of the Constitution.

It is certainly of no help to the Republic in this case. If the Act were the only legislation in Nauru governing immigration that could mean no lawful legislation exists. There is, in my view, a most urgent need for the Republic to consider this.

Fortunately, the other law touching on immigration, the Expulsion of Undesirables Act 1961-1967 provides for a measure of control over immigrants. It has been adopted by the Constitution. However it is, in my view, quite inadequate for the needs of immigration administration as a whole. There is no question however, that section 2 of that Act enables the deportation of certain immigrants to be effected. But it is mandatory that that the provisions of that section be complied with strictly.

In my view, that requires Cabinet:

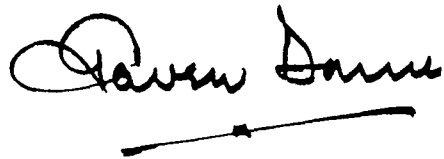
- (a) To be satisfied and declare that the proposed deportee is one of the classes specified in (a) (b) or (c) of the section.
- (b) In making the order there must be specified clearly the grounds upon which it is made. A statement that "it approves" a recommendation (as was done in this case) is not enough.

The statement that Cabinet considers a person "is an undesirable person" is meaningless. There is no such term or classification of it in the Act.

The importance of specifying the grounds of the Order is that the deportee is entitled to know what is alleged against him. Under certain circumstances, it may be possible for a challenge to the order on the basis of certain principles of natural-justice, but, I emphasise this is an observation, not a ruling, on the law.

I accordingly adjudge that the said Orders the subject of these proceedings are invalid and of no effect. I have been advised by counsel that the plaintiff has left Nauru. Consequently, there is no necessity to pursue the other facets of his claim other than to award him the sum

of \$500 by way of costs against the defendants.

A handwritten signature in cursive script, reading "Owen Dano". The signature is written in black ink and is positioned above a horizontal line that has a small diamond-shaped mark in the center.

CHIEF JUSTICE

Solicitor for the plaintiff : Anthony Audoa, Nauru
Solicitor for the defendants : Department of Justice,
Nauru.