REPUBLIC OF NAURU

IN THE SUPREME COURT OF NAURU

Civil Action No. 10/2003

In the matter of the Application for a Writ of Habeas Corpus
In the Matter of a Complaint under Article 5(4) of the Constitution

Between	**Abbas Al Sayed Mahdi**	**1st Applicant**
	Mohammed Sagar	**2nd Applicant**
	Worsan Al Asadi	**3rd Applicant**
And	**Director of Police** (through Secretary for Justice as Director of Public Prosecutions)	**1st Respondent**
	Steve Hamilton, Manager, IOM	**2nd Respondent**
	Officer in Charge, Australian Protective Services	**3rd Respondent**

R. Kun and R. Kaierua for Applicants
Secretary for Justice with W. Togomae for 1st Respondent
Paul Aingimea for 2nd Respondent
Dr. Stephen Lee for 3rd Respondent

REASONS FOR DECISION
DELIVERED ON 27 MAY 2003

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1. The three Applicants were all Iraqi citizens, who were being processed on Nauru, under an Agreement between Australia and Nauru dated 9 December 2003, in order to determine whether each was entitled to refugee status or not. The three Applicants had been denied, after processing by the International Organisation for Migration (IOM), refugee status.

2. Each of the Applicants under separate affidavits sought release from the area where each was detained by an application for *Habeas Corpus* and by a complaint pursuant to Article 5(4) of the Constitution.

3. On an application in Chambers on 16 May 2003 the Applicants were granted by the Court a *rule nisi* that the writ issue and the matter was adjourned to the return date to show cause on 22 May 2003. The Court extended, upon the application of the Director of Police, the return date to 26 May 2003 at 10:00am. By that date it was expected that return affidavits showing cause would be filed by the Respondents when there would be a hearing on the affidavit evidence.

4. The Court allowed the Applicants to proceed against the three Respondents as it was not then clear to the Applicants to whom the writ and complaint should be addressed. In fact, on the day of the hearing, there was some divergence of view expressed between the first and third Respondents.

5. So far as the complaint was concerned under Article 5(4) of the Constitution, the court adopted for convenience that the matter be heard on the affidavit evidence. The issue both on the *Habeas Corpus* application and the complaint was the same, namely, whether there had been wrongful detention or not.

6. It appeared also that the three Applicants had been charged with a number of criminal offences, which have yet to be heard in the District Court. Application was made by the prosecution initially that the three Applicants, amongst a number of others, be remanded in custody. However, the learned Resident Magistrate on 12 February 2003 granted bail on conditions that they return to the State House camp, keep the peace and good order, allow the IOM to enter and administer the camp in a safe manner and attend Court when summoned.

7. Following the granting of bail, it appears that two of the Applicants with others were held in prison against the terms and conditions of the bail. Upon a further hearing in the District Court, the learned Resident Magistrate made an Order dated 27 February 2003 that the accused, which included two of the Applicants, be released from prison and returned to their original place of residence at the State House camp.

8. When these applications came before the Court, there was no longer any question arising about the earlier incarceration. In fact, though, in the affidavits of the Applicants, there was some criticism of the conditions at the State House camp matters had obviously improved. Mr. Kun, on behalf of the Applicants, admitted that the conditions at the State House camp had considerably improved by the time these applications were heard by the Court.

9. At the outset of the hearing, the Second Respondent made an application that he be struck out as he was not the person who had custodial control over the Applicants. The Applicants disputed this. The Court did not, at that point, accede to the application.

10. The First Respondent sought to be struck out as the Applicants had not made application for Cabinet approval for the applications pursuant to Section 3 of the Republic Proceedings Act 1972, and the Proceedings Against the Republic Regulations 1973. I ruled against the First Respondent upon the ground that the complaint lodged by the three Applicants was made under Article 5(4) of the Constitution. The terms of that provision of the Constitution removes by clear implication the effect of Section 3(1) of the Republic Proceedings Act 1972. The terms of Article 5(4) are mandatory. That, in itself, was sufficient to enable the case against the First Respondent to proceed. It was not necessary to hear further argument with respect to the position of an application for *Habeas Corpus* as a complaint under Article 5(4) would have the same effect. The Supreme Court had also entertained such an application in the matter of Uti Siose reported in 1969-1982 N.L.R. Part A, p. 202.

11. The burden of proof in both the application for *Habeas Corpus* and the complaint under the Constitution falls on the Respondent to justify the Applicant's detention. (See R v Lindbergh: ex p. Jong Hing (1906) 2 CLR 93, R v Governor of Metropolitan Gaol; ex p. DiNardo [1963] VR 61, Schlieske v Federal Republic of Germany 1987) 71 ALR 215 at 223 (F.C.).) The granting of the *rule nisi* calls upon the respondent to show cause. The matter will be then determined upon the balance of probabilities though the degree of probability will be high. (Khawaja v Secretary for State for the Home Department [1983] 1 All E.R. 765 (H.L.).)

12. All the three Applicants were brought to Nauru by Australia under an asylum seeker management plan contained within an agreement between Nauru and Australia dated 9 December 2002, which replaced an earlier agreement of 11 December 1001. It was clear that the asylum seekers transported to Nauru would only obtain temporary residence while being processed, and that no persons would be left behind in Nauru. Those asylum seekers that obtained refugee status would be moved to other countries of asylum, whilst those who were unsuccessful and were not granted refugee status would be returned, presumably, to their country of citizenship. This is to be noted for under Article 5(1)(h) of the Constitution no person shall be deprived of his personal liberty, except as authorised by law in any of the following cases -

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

13. It was the case of the First and Third Respondents that, in accordance with the joint government arrangements the temporary residence on Nauru which allowed processing of the asylum seekers was to determine to which country each asylum seeker would be lawfully removed. In other words, any detention under Article 5(1)(h) was for the purpose of determining a lawful removal from

Nauru. That was the constitutional power under which, as described below, the Principal Immigration Officer issued his visas with special conditions.

14. There were to be two campsites, 'Topside', and 'former State House' where the asylum seekers were housed. The sites were to be secured, and Australia was to provide security personnel along with the use of the Nauru Police Force. In fact, the evidence of the Third Respondent was to the effect that each of the Australian protective personnel were sworn in as reserve officers under the Nauru Police Force Act. That last fact points clearly to the situation that ultimately, in law, the areas set aside for the asylum seekers remained subject to the laws of Nauru, and that any surveillance over the areas was also subject to Nauruan law. The fact that the three Applicants had been charged with a number of offences whilst detained in the secure areas of the camp sites is further evidence that the authorities believed that the asylum seekers were subject to the laws of Nauru. There was no intention from the evidence to create at the two sites anything in the form of an international servitude. In fact, quite the opposite as the ensuing paragraphs make clear.

15. So far as the permission of aliens to enter Nauru and remain there for any period, the matter is determined by the Immigration Act 1999 ('the Act') and the Immigration Regulations made pursuant to the Act. Under Section 8(2) of the Act, no person shall enter Nauru from overseas without a valid permit to do so. However, the Principal Immigration Officer may, under Section 9(1), grant a visa to enter and the classes, terms, conditions and fees of visas shall be as prescribed (Section 9(2).

16. Regulation 8(1) of the Immigration Regulations provides for special purpose visas. Paragraph (g) of Regulation 8(1) provides that a special purpose visa may be granted to a person who enters Nauru without a passport in accordance with Regulation 12(4).

17. Regulation 12(4) reads: -

> "Notwithstanding sub-regulation (1), the Principal Immigration Officer may, on humanitarian or other grounds, permit a person who arrives in Nauru without a passport to enter and remain in Nauru, or, where the person has already entered Nauru, to remain in Nauru, and for the purpose may grant to the person a special purpose visa, on such conditions as the Principal Immigration Officer thinks fit.'

18. Each of the Applicants was granted a special purpose visa. The visa granted to some 127 named asylum seekers, which included the three Applicants, contained conditions and was in the following terms -

> "I, Amos Cook, Principal Immigration Officer, by virtue of the Immigration Act 1999 of the Republic of Nauru, and under the powers vested in me under section 3 of this Act, do hereby grant this SPECIAL PURPOSE VISA pursuant to regulation 8 (1)(g),

in accordance with regulation 12(4) of the Immigration Regulations 1999 to the following person/s:

(Name/s) 127 Asylum Seekers - Iraqi, Palestine, Bangladeshi and Pakistan national as per attached list.

For Extension stay in Nauru on humanitarian grounds for such time as is reasonably necessary to complete humanitarian endeavours whereby such stay shall not exceed beyond 6 months from the date of arrival/visa grant. Extension of this visa can be granted subject to approval by submitting an application in written form to the Principal Immigration Officer. This Special purpose visa is granted subject to the following conditions:

1. Residence in Nauru shall be restricted to sites designated by the Government of Nauru for the accommodation of asylum seekers or as directed by the Office of the President of Nauru;

2. Movement within Nauru shall be restricted to within the above-mentioned sites except with the consent of the Office of the President of Nauru;

3. Movement within Nauru outside of the designated sites shall be under escort of security personnel, or other designated persons as authorised by the Office of the President of Nauru;

4. Residence and movement within Nauru shall be subject to compliance with lawful directions which may be made by the Principal Immigration Officer, the Chief of Police, or any other person so authorized by the Office of the President of Nauru.

5. Completion of humanitarian endeavours shall, for the purpose of this Visa, be as determined by the Office of the President of Nauru, through directions of the undersigned and shall constitute termination of such visa.

Dated this 29th day of January 2003

Amos Cook
Principal Immigration Officer"

19. The Special Purpose Visa was in terms providing conditions that restricted movement and made it clear that it was granted for a limited time which would be determined by the Office of the President of Nauru. The visa may, however, be extended from time to time. It was noted that the date of this issue was 29 January 2003 which was long after the original arrival of the asylum seekers but was clearly the visa which was operative at the time of the hearing of these applications.

20. The Court accepted that the Applicants entered and were accommodated on Nauru in accordance with the conditions contained in the Special Purpose Visa. The Applicants were

not illegally detained in terms of the Constitution or as Applicants for the grant of *habeas corpus*.

21. That may have ended the matter. However, at the commencement of the proceedings it appeared from the affidavits of the Applicants that the complaints were as much about the conditions of the accommodation as the legality or otherwise of the detention. It is not necessary to pursue this matter as Mr. Kun for the Applicants conceded that whatever may have been the case earlier at the time of the hearing the conditions had much improved. In any event, the notion of 'residual liberty' has not found much favour with the Courts (R v Deputy Governor of Parkhurst Prison; ex p. Hague [1992] 1 AC 58).

22. I am quite satisfied upon the materials before the Court on the balance of probabilities and with high probability as the test requires the Applicants were not illegally detained. I, therefore, discharge the rule *nisi* granted on 16 May 2003 with respect to each Respondent, and, further, that the complaint made by each of the Applicants under Article 5 paragraph 4 of the Constitution is dismissed with respect to each Respondent.

23. In reaching the above decisions, I also find that the proper respondent in the action was the Director of Police and not the Second or Third Respondents. Nevertheless, for reasons earlier given in my decision dated 27 May 2003, my Order of the same date is not varied.

Barry Connell
CHIEF JUSTICE

Dated: 6 June 2003