The Nauru 10

The Habeas Corpus Challenge

Asylum Seekers as Victims of the International System.

UNHCR Global Report 2013.

- 45.2 million forcibly displaced people worldwide.
- 15.4 million refugees, 937,00 asylum seekers and 28.8 internally displaced people.
- 55 per cent come from just five war-affected countries, namely Afghanistan, Somalia, Iraq, Syria and Sudan.
- Women and girls made up 48% of the refugees population.
- 46 per cent of refugees are children below 18 years.
- Developing Countries host 80% of the refugee population.
- UNHCR Total Budget $US 3.07 Billion.

Asylum Seekers as Victims of the International System.

Australia's Refugee Statistics.

- The current intake of refugees is 20,000 for 2013.
- 23,000 people displaced per day worldwide – more than the total claiming asylum in Australia per year.
- 12,194 asylum seekers have arrived on 180 boats in 2013.
- 93.5% were found to be refugees in 2010-11.
- Australia hosts 30,083 Refugees or 0.3% of the global population.
- Out of 88,600 refugees resettled worldwide in 2012, Australia received 5,900.
- Australia is ranked 49th in terms of hosting.
- However, Australia was 11th for unprocessed claims.
- Total Costs of Detention and Offshore Programs - $2.97 billion for 2013-14.

The Nauru 10 -
The Human Face of the Statistics.

The Story of JHB.

- JHB is a national of Iran of Arab ethnicity.
- JHB arrived in Australian territory by boat, SIEV 431, on or around 1 September 2012 and was taken to Christmas Island and then forcibly deported to Nauru on 24 September 2012.
- JHB is seeking protection due to his membership of a political party that stands for the rights of Arabs in Ahwaz.
- JHB's fear of persecution includes the fear of crucifixion and execution.

> "The Security forces came and took my father. They are now after me. If I go back, I will be imprisoned, tortured and I believe within a week I will be dead."

The Nauru 10 - The Criminal Charges.

- On 30 September 2013, there was an alleged riot at the Nauru Regional Processing Centre.
- It is alleged that on that afternoon, the Manager of DIAC addressed the camp and informed the detainees that it would take 5 or more years for processing.
- It is alleged that later that night, an argument broke out between the Iraqi, Iranians and Tamils over a television.
- It is alleged that this sparked the alleged incident causing approximately $24,000 worth of damage.
- As a result, 15 detainees were charged with 3 offences under the Nauru Criminal Code 1899, which is based on the Queensland Criminal Code.

1. Section 63 - Riot - liable to 3 years hard labour

2. Section 469 - Willful Damage - liable to 3 years hard labour.

3. Section 66 - Rioters injury building, machinery, etc - liable to 7 years hard labour.

The Mental Health Conditions.

Multiple Reports of:

- Attempted suicide.
- Hangings.
- Self Mutilation and Self Harm.
- Lip Sowing,
- The Banging of Heads against Steel Poles and Concrete Floors.
- Hunger Strikes on Mass.
- Visible Signs of Extreme Mental Stress – Breakdowns, Eyes Rolling, Rocking, Shaking.

The Humanitarian Conditions of the Camp.

- Over 400 men were detained in tents.
- Multiple reports of excessive force by security.
- The refusal of medical treatment.
- 40 plus degrees and the humidity oppressive.
- Mosquito born diseases - dengue fever and yellow fever.
- Violent gastro-enteritis and influenza.
- The camp is built on a disused phosphate mine site.
- Surrounded by active phosphate mines, which expose the detainees and contractors to toxic dusts.

The Right to Legal Representation.

- Article 10 of the Nauru Constitution guarantees the Right to Legal Representation.
- For over 6 months, the Detainees were denied access to legal representation.
- The Office of the Public Defender has been vacant for over 10 months.
- The local pleader had carriage of the matter and is not a qualified lawyer and is essentially a paralegal and had been off island for 3 months.
- The Solicitor General of Nauru moved into the role as acting Public Defender and took carriage of the matter.
- The prosecutor's brief was incomplete and inadequate.
- Missing witness statements, unsigned witness statements, missing pages, misidentifications, incorrect ID numbers.
- More generally, there is no independent legal officer on site, no ombudsmen, no representative from the Republic of Nauru and no representative from UNHCR or the Red Cross on site.

The Lack of Funding for the Defences.

- Citing Article 6 of the Memorandum of Understanding, the Republic of Nauru maintained that the Commonwealth of Australia is responsible for all direct and indirect costs of the RPC.
- The Republic of Nauru was therefore unwilling or unable to provide any public money for the defences.
- Formal submissions regarding the conditions of detention and funding for the defence were made to the Commonwealth Attorney General by Legal Aid NSW, National Legal Aid, the respective Bar and Solicitor Associations and Societies, PILCH, the Australian Council of Human Rights and the Law Council of Australia.
- After nearly 2 months, the Commonwealth Attorney General finally determined that funding for the defence was the responsibility of the Republic of Nauru.

The Nauru Processing Centre.

- On 25 September 2012, the Applicants were forcibly deported to Nauru where they were housed in tents.
- The Applicants were issued with Nauruan visas, against their will and without their consent.
- At the time, there was no legislation in place for processing refugee claims in Nauru.
- The Refugees Convention Act 2012 (Nr) came into force on 10 October 2012, more than one month after the initial deportation.
- There was no legislation governing the Regional Processing Centre, (RPC).
- The Asylum Seekers (Regional Processing Centre) Act 2012 (Nr) came into force on 15 March 2013, about 6 months after the initial deportation.

The No Advantage Regime.

- The processing for refugee determination did not commence until 31 March 2013, almost 6 months after arrival.
- On the best estimate of the Secretary of Justice of Nauru, the first determination will be made in September 2013, some 12 months after arrival.
- The Commonwealth of Australia estimates that it will be 5 or more years to resettle if found to be a legitimate refugee.

The Criminal Advice – Dina Yehia SC.

The key elements of Riot:

- Unlawful assembly,
- Common purpose,
- Tumultuousness.
- Misidentification.

Alternative Criminal Defences.

- Unlawful detention.
- Necessity.
- Duress.
- Self Defence.
- Mental illness.

The Constitutional Advices.

1. Whether the right to a defence has been breached in violation of Article 10(2)(3)(c)(e)(f) of the Constitution of the Republic of Nauru.

- David Grace QC, assisted by Albert Dinelli, addressed this question.

2. Whether the detention constitutes an unlawful detention in contravention of Article 5(1)(h) the Constitution of the Republic of Nauru

Julian Burnside QC, assisted by Professor George Williams addressed this question.

3. Whether the detention constitutes inhuman and degrading treatment in contravention of Article 7 of the Constitution of the Republic of Nauru.

- Kate Eastman, SC, assisted by Special Counsel, George Newhouse and Dan Mori, addressed this question.

4. Whether the detention constitutes a breach of international law, in particular, the Convention and Protocol Relating to the Status of Refugees, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Behavior, and the Rome Statute.

- Geoffrey Robertson QC and Professor Ben Saul addressed this question.

5. The Australian Human Rights Commission and the United Nations Human Rights Commission were invited to intervene as Amicus.

The Habeas Corpus Application.

- On 23 April 2013, the Registrar of the Supreme Court of Nauru, granted leave for the Applicants to file an ex parte writ of habeas corpus.
- On 10 June 2013, the Supreme Court of Nauru, presided by Judge von Doussa heard the application for the writ of Habeas Corpus.
- Lead Counsel for the Applicant: Julian Burnside QC, leading myself as Junior Counsel.
- Lead Counsel for the Respondent: Stephen Donoghue SC, leading Kylie Evans as Junior Counsel.

The Return of the Writ.

- On 15 May 2013, the Respondent, the Secretary of Justice and Border Control of the Republic of Nauru, returned the Writ of Habeas Corpus.

- The Respondent relied on 3 primary arguments as to why the detention was lawful.

1. The Applicants are free to leave Nauru at any time 'if they asked to do so.'

2. The restrictions on freedom of movement do not amount to detention.

3. The detention is authorised by the Article 5(1)(h) of the Constitution of the Republic of Nauru.

Argument 1 By the Respondent: The Applicants are Free to Leave Nauru.

With regard to Argument 1, the Respondent submitted:

- The Applicants are not detained by the respondent because the Secretary of Justice of Nauru would not prevent them from leaving Nauru at any time if they asked to do so.

Relying on Ruddock v Vadarlis (Tampa Case) (2001) 110 FCR 491, the Respondent submitted.

- …on the basis of *Ruddock v Vadarlis* the critical issue is not whether there is a real or genuine choice but whether, to the extent that there are constraints on the Applicants choices, those constraints can be attributed to the Respondent.

Argument 1: The Reply by the Applicants. The Applicants are unable to Leave Nauru.

In reply, the Applicants submitted that they are unable to leave Nauru because:

- The Applicants face the threat of persecution, torture or execution.
- The Applicants are yet to be processed by Nauru.
- No safe third country has been identified.
- The "freedom to leave Nauru" is therefore a choice between returning to their state of origin and face persecution, or remain in detention in Nauru for 5 or more years.
- The claim that the Applicants are free to leave without assessment, constitutes an indirect form of *non-refoulement*, in violation of the 1951 Convention and its 1967 Protocol on the Status of Refugees.

***Amuur v France* 1996-III; 22 EHRR 533 at [95}.**

- The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty… Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.

Held by von Doussa J.

Agreeing with the Applicants, von Doussa J., found at [49] that the Applicants were not free to leave Nauru:

- The argument that the applicants are not detained because they have voluntarily chosen not to return to their country of nationality is a hollow one in the circumstances of those on Nauru who are subject to RPV conditions.

Argument 2 By the Respondent: The Restrictions do not amount to Detention.

With regard to Argument 2, the Respondent submitted:

- Further or alternatively, the restrictions on the Applicants freedom of movement while they remain in Nauru, to the extent that they are attributable to the Secretary, are not of the severity required to reach the threshold of a deprivation of liberty.

The Respondent relied on 2 Affidavits:

- The affidavit of the Secretary of Justice and
- The Affidavit of Head of Wilsons Security.

Reply by the Applicants:
The Restrictions do amount to Detention.

In reply, the Applicants submitted the cumulative effect of the restrictions did indeed amount to detention, including:

- Compulsory residency and curfew.
- The failure to issue health and security clearances after 9 months of detention.
- The supervision and control by security.
- The use of the gatehouse, fencing, perimeter wall, the pinnacles and the jungle to control movement.
- Restrictions on freedom of movement within and outside the camp.
- Response by security to escapes and breakouts.
- Highly supervised and controlled excursions and activities.

***Guzzardi v Italy* A 39 (1980); 3 EHRR 333**.: **[95].**

- Deprivation of liberty may … take numerous other forms [than a closed prison]… It is admittedly not possible to speak of "deprivation of liberty" on the strength of any one of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorisation from the viewpoint of Article 5… In certain respects the treatment complained of resembles detention in an "open prison".

Held by von Doussa J.

Agreeing with the applicants, von Doussa J., found at [54] that the restrictions did amount to detention:

- The applicants have been brought to Nauru against their will for the sole purpose of processing their claims for refugee status. They are required to live in a location that effectively confines them in a limited and finite area that is isolated from the residential and urban areas of Nauru, and their lives are closely regulated and monitored 24 hours of each day. At all times they are effectively being guarded and watched to prevent their escape. Whilst the restrictions fall short of those to be found in the close confinement of a prison, they are very extensive in their impact on the daily lives and movement of the applicants.

Argument 3 By the Respondent:
The Detention is authorised by Article 5(1)(h).

With regard to the 3rd ground, the respondent submitted:

- The detention is nevertheless lawful because it falls within the exception in s 5(1)(h) of the Constitution.
- Further, the respondent claims that the Applicants' reliance on the decisions of the European Court of Human Rights is misplaced because there is an important difference between the wording of s 5(1)(h) of the Constitution and Art 5 of the ECHR.

Article 5(1) provides:

> (1) No person shall be deprived of his personal liberty, except as authorized by law in any of the following cases:-
>
> (h) for the purpose of preventing his unlawful entry to Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.

Reply by the Applicants:
The Detention is not Authorised by Article 5(1)(h).

- In reply, the Applicants submitted that the power to expel, extradite or remove under the second limb of Article 5(1)(h) should be given a narrow or strict construction.
- Detention should only be authorised when an operative expulsion, extradition or removal order is in place.
- The relevant authoritative ECHR jurisprudence supports such a narrow construction.
- There was no expulsion order in place against any of the Applicants.
- There was no extradition order in place against any of the Applicants.
- There was no removal order in place against any of the Applicants.
- Where no removal order has been made, Article 5 does not authorise detention under Article 5(1)(h) of the Constitution of the Republic of Nauru.

In the Alternative – For the Purposes of Lawful Removal' under a Broad Construction.

- In the alternative, the Applicants submitted that if the court applies a broader construction of the second limb of Article 5(1)(h), the detention must be 'authorized by law' and must not be arbitrary or indefinite.
- The phrase 'authorised by law' under Article 5 of the Constitution of Nauru is based on Article 5 of the ECHR, which uses the expression 'prescribed by law.'
- According to the European Court in *A & Others*, detention will be 'prescribed by law' where:

(i) The legal basis of detention must be relatively clear, certain, accessible and foreseeable.

(ii) Detention must not be arbitrary or excessive in duration, such as where detention may continue for an unlimited or unpredictable period; and

(iii) Procedures must be 'fair and proper', with 'adequate legal protections.'

Held by von Doussa J.

von Doussa J., found at [78] in favour of the Respondent:

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

However, in Obiter – His Honour gave some glimmer of hope by observing at [79]:

- The appellants argue that long and unreasonable delay by the respondent in processing their claims and in arranging their removal, for example because of compliance with Australia's "no advantage" policy, will render their detention "not authorised by law" because in those circumstance it is arbitrary and beyond the contemplation of the constitutional exception. This is an interesting argument that I think should be left for decision should excessive delay occur. I do not think such a point has yet been reached.

Application Dismissed.

No order for costs.