HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, AND HEYDON JJ

MOHAMMAD ARIF RUHANI APPELLANT

AND

DIRECTOR OF POLICE THROUGH THE SECRETARY
OF JUSTICE AS DIRECTOR OF PUBLIC PROSECUTOR RESPONDENT

Ruhani v Director of Police [No 2]
[2005] HCA 43
31 August 2005
C8/2004

ORDER

1. *Appeal dismissed with costs.*

2. *Respondent's costs to be set off against any balance remaining after the setting-off of costs under orders made with respect to the objection to competency and motion seeking joinder.*

On appeal from the Supreme Court of Nauru

Representation:

J W K Burnside QC with S D Hay for the appellant (instructed by Vadarlis & Associates)

P J Hanks QC with S J Lee and S P Donaghue for the respondent (instructed by Clayton Utz)

CATCHWORDS

Ruhani v Director of Police [No 2]

Appeal from the Supreme Court of Nauru – Construction of legislation – *Immigration Act* 1999 (Nauru) ("the Act"), Immigration Regulations 2000 (Nauru) ("the Regulations").

Immigration – Refugees – Application for habeas corpus – Appellant brought to Nauru by Australian sea transport and granted a special purpose visa for entry and stay in Nauru on humanitarian grounds – Special purpose visa subject to conditions restricting residence in, and movement within, Nauru to sites designated by the Government of Nauru – Whether conditions beyond the power conferred upon the Principal Immigration Officer ("the PIO") of Nauru by the Regulations to attach such conditions as it thinks fit to special purpose visas – Whether the power to impose such conditions consistent with the power conferred by the Act upon the PIO to grant visa for entry into Nauru – Whether conditions may be severed from visa.

Immigration – Refugees – Application for habeas corpus – Where application for visa required under the Regulations to be made in writing and extension of a special purpose visa conditioned upon application by holder – Whether issue of appellant's special purpose visa invalid because appellant had not applied for it – Whether appellant's present special purpose visa a fresh visa or an extended visa – Whether, if an extended visa, extension was invalid because appellant had not applied for it.

Appeal – Mootness of issues raised by matter – Appellant in detention in Nauru granted Australian visa after lodging appeal to the High Court of Australia – Whether determination of appeal rendered moot as a result of grant of visa and removal of appellant to Australia – Order for habeas corpus can no longer be made – Whether proceedings present viable issue for the Court to determine.

Statutory construction – Nauruan legislation – Relevance of international law as an aid to interpretation – Right to liberty as fundamental principle of human rights – Relevance to determination of issues in appeal – Whether Nauruan laws providing for detention of immigrants to be subject to strict construction – Whether such laws applicable to appellant in circumstances of his detention under intergovernmental agreement between Nauru and Australia.

Immigration Act 1999 (Nauru), ss 8, 9, 13 and 19.
Interpretation Act 1971 (Nauru), s 69.
Immigration Regulations 2000 (Nauru), Regs 12(4), 13(1) and 18.
Constitution of Nauru, Arts 5(1)(h), 5(4).

1 GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ. This is an appeal from the Supreme Court of Nauru (Connell CJ). On 9 December 2004, this Court ordered the disallowance of an objection to the competency of the appeal and reserved all questions of costs. It will be necessary to return to the matter of costs later in these reasons.

2 The appellant is an Afghan national and apparently of Hazara ethnicity. He is one of a number of persons identified as asylum seekers in a Memorandum of Understanding between the Commonwealth of Australia and the Nauru Government signed on 9 December 2002. That instrument was replaced by a Memorandum of Understanding between the same state parties signed on 25 February 2004 ("the MOU"). Paragraph 1 of the MOU states:

> "The Parties have mutually decided to cooperate on the management of asylum seekers on Nauru, in accordance with the constitutions and relevant domestic laws of each country, international law, as well as acting within their respective framework of powers and responsibilities."

3 The appellant and other asylum seekers were brought to Nauru at the end of 2001 by Australian sea transport. The appellant was then aged 18. He arrived on 21 December 2001 without a passport or entry permit.

The immigration legislation

4 Section 13(1) of the *Immigration Act* 1999 (Nauru) ("the Act") stipulates that a person who "unlawfully enters or is unlawfully in Nauru" is guilty of an offence, the punishment for which is "a fine not exceeding $3,000 or imprisonment for one year, or both". No person shall "enter Nauru from overseas" without a "valid permit" (s 8(2)). In the case of a person arriving by sea, "enter" includes disembarkation in Nauru from the vessel on which that person has arrived (s 2). The term "permit" is defined in s 2 as including "any permit, permission, visa or other authorisation granted under [the] Act".

5 The Principal Immigration Officer ("the PIO") may grant to a non-citizen a permit, which is to be known as a visa, to enter and to remain in Nauru according to its terms (s 9(1)). The classes, terms, conditions and fees of visas "shall be" as prescribed by regulations made under s 19 (s 9(2)). The regulations may provide for a visa held by two or more persons (s 9(4)(a)) and for extensions of visas (s 9(4)(c)).

6 The powers conferred upon the PIO by s 9 of the Act attract s 69 of the *Interpretation Act* 1971 (Nauru) ("the Interpretation Act")[1]. The effect of that provision is that any visa or extension thereof may be issued subject to such conditions as the PIO deems expedient and which are not inconsistent with the Act. Questions of the competency of "sub-delegation" thus may be answered by reference to s 69.

7 One class of visa prescribed by the Immigration Regulations 2000 ("the Regulations") is a special purpose visa granted in accordance with reg 12(4) to a person, such as the appellant, who enters Nauru without a passport (reg 8(1)(g)). Regulation 12(4) empowers the PIO:

> "on humanitarian or other grounds, [to] 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 [PIO] thinks fit".

The special purpose visas

8 On 7 January 2002, the PIO granted to the appellant and 318 other asylum seekers a special purpose visa for entry and stay in Nauru on humanitarian grounds. The special purpose visa in respect of the appellant which was current at the time of the proceedings in the Supreme Court was that issued by the PIO on 28 January 2004 to the appellant and 282 other asylum seekers. This visa indicated that it was issued pursuant to regs 8(1)(g) and 12(4). The visa was "for such time as is reasonably necessary to complete humanitarian endeavours whereby such stay shall not exceed beyond (6) six months [from] the specified date". The visa further stated that it was 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;

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1 Section 69 states:

> "Where any written law confers a power to issue any licence, permit [or] authorisation, then unless a contrary intention appears, such licence, or permit or authorisation may be issued subject to such conditions, not inconsistent with that law, as the authority issuing it deems expedient."

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 authorized by the Office of the President;

4. Residence and movement within Nauru shall be subject to compliance with lawful directions which may be made by the [PIO], the Director of Police, or any other person so authorized by the Office of the President of Nauru;

5. Completion of humanitarian endeavors 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."

The position of the appellant

9 This Court was told that Nauru is not a party to the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 ("the Convention") or to the Protocol done at New York on 31 January 1967 ("the Protocol"). However, par 24 of the MOU provides:

> "Consistent with paragraph 4 of this MOU, any asylum seekers awaiting determination of their status or those recognised as refugees, will not be returned by Nauru to a country in which they fear persecution nor before a place of resettlement is identified."

Paragraph 4 obliges Australia to "ensure that each person will be processed and have departed Nauru within as short a time as is reasonably possible, and that no persons will be left behind in Nauru".

10 The evidence before the Supreme Court included an affidavit by an officer of the Australian Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA") who has been DIMIA liaison officer in Nauru. He deposed that the appellant was found not to be a person in need of protection under the Convention and the Protocol. This decision was handed to the appellant in 2002 and was affirmed on review. No decision by DIMIA on a further re-examination of the appellant's case had been handed down at the time of the Supreme Court litigation. However, thereafter, the appellant was not accepted as a refugee by DIMIA.

11 The evidence disclosed an arrangement whereby the International Organization for Migration ("the IOM") assisted the Governments of Australia and Nauru with respect to asylum seekers on Nauru. This was to be done "with the appropriate cooperation or consultation with UNHCR". The IOM was founded outside the United Nations in 1951 as the Intergovernmental Committee for European Migration and, by 1996, had some 83 states as members[2]. One of the purposes and functions of the IOM under its 1987 Constitution is[3]:

> "to concern itself with the organized transfer of refugees, displaced persons and other individuals in need of international migration services for whom arrangements may be made between the Organization and the States concerned, including those States undertaking to receive them".

12 In his reasons for the decision under appeal, the Chief Justice found:

> "The accommodation facilities for the asylum seekers were established at two localities in Nauru called 'Topside' and 'Former State House'. During their stay on Nauru, the asylum seekers['] claims for refugee status have been or are to be processed and determined. The management of the accommodation facilities was in the hands of the [IOM].
>
> Whilst the gates of the facilities are normally open, Chubb safety officers who are contracted by IOM monitor the access or egress of persons to and from the facilities. The overall security of the facilities is in the hands of the Nauru Police Force (NPF) who are assisted by the Australian Protective Service (APS) who have been appointed as reserve officers under the *Nauru Police Force Act*. If there is any contravention of the criminal law or breach of visa conditions then the NPF are responsible for enforcement of law and order."

13 The appellant could not leave Nauru without travel documents. If sought, those documents would be arranged through the IOM and the Afghan Embassy in Canberra. The appellant has made no request to the IOM for such assistance.

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2 Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 225. See also Perruchoud, "From the Intergovernmental Committee for European Migration to the International Organization for Migration", (1989) 1 *International Journal of Refugee Law* 501.

3 The Constitution is set out as Item 9 in Annexe 1 of Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 419-428.

The litigation

14 On 21 April 2004, the Chief Justice had granted ex parte an order nisi requesting the respondent to show cause why the appellant (and two others who are not parties to the present appeal) had been kept in detention in the Topside camp and why such detention should be continued. On the return of the order nisi, it was discharged.

15 Article 5(1)(h) of the Constitution of Nauru provides that, except as authorised by law 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, no person shall be deprived of his personal liberty. Article 5(4) states:

> "Where a complaint is made to the Supreme Court that a person is unlawfully detained, the Supreme Court shall enquire into the complaint and, unless satisfied that the detention is lawful, shall order that person to be brought before it and shall release him."

16 The Chief Justice held that asylum seekers who entered and were accommodated on Nauru in accordance with the conditions in the special purpose visa that had been issued were not unlawfully detained within the meaning of Art 5(4). No appeal may be taken from this holding respecting the interpretation or effect of the Constitution of Nauru[4].

17 The relief sought by the appellant in this Court includes a declaration that the special purpose visas issued to the appellant were invalid and of no effect. The argument here focused upon the instrument issued on 28 January 2004 and these reasons should be read accordingly. The appellant also seeks an order absolute for habeas corpus directed to the respondent and ordering the release from detention of the appellant.

18 Since the decision of the Supreme Court, the six month period specified in the special purpose visa issued on 28 January 2004 has expired. There is no evidence as to the basis under the Act upon which the appellant presently is on Nauru. However, the first task upon this appeal is to determine whether the orders of the Supreme Court were correctly made. Only if that question be answered in favour of the appellant will questions arise of consequential relief in this Court.

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4 See *Ruhani v Director of Police* [2005] HCA 42 at [101].

19 For the reasons that follow, the appeal fails and should be dismissed.

The conundrum

20 It was suggested in oral submissions for the appellant that the conditions might be severed from the special purpose visa, leaving the remainder in force. However, the Court was referred to no legislative provision in force in Nauru which would displace the operation of the common law presumption that, upon such an hypothesis, the balance of the instrument is not to be carried into effect independently of the part which fails[5]. It could not be said that to treat the visa as effective, shorn of the conditions, would be to effect no change to the substantial purpose and effect of the instrument.

21 It is here that a conundrum appears. If the visa be invalid, that would remove the foundation for the operation of the condition restricting the residence of the appellant in Nauru to the Topside camp; but, without a visa, the appellant is subject to the operation of the Act in several adverse respects. First, the appellant is liable to arrest under s 5(2) of the Act and to punishment for an offence under s 13(1) of the Act, including imprisonment. Secondly, the appellant also would be liable to removal from Nauru by order of the PIO made under the power conferred by s 11(1) of the Act, and to detention under s 11(4) pending that removal. With the approval of the Minister, the appellant might be removed "to a place in the country to which he belongs", or to any other place to which he consented to be removed and whose government consented to receive him (s 11(6)(b)).

The power to impose conditions

22 However, in this Court, the appellant reagitated the submission made in the Supreme Court that the conditions attached to the special purpose visa went beyond the power conferred upon the PIO by reg 12(4) to impose "such conditions as the [PIO] thinks fit" because they imposed a form of extra-curial punishment.

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5 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 370-371; *Harrington v Lowe* (1996) 190 CLR 311 at 326-328; *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783 at 804, 808; *Commissioner of Police v Davis* [1994] 1 AC 283 at 298-299.

23 In his reasons for rejecting this submission, the Chief Justice observed that reg 12(4) was broadly drawn to allow for the range of circumstances that might attend the arrival in Nauru of a person without a passport. With apparent reference to the MOU, and its predecessor, the Chief Justice noted:

> "It was acknowledged that it was not the intention of Nauru either to settle permanently the asylum seekers in Nauru nor necessarily settle them for any length of time within the community. They were to be present in Nauru whilst their cases for refugee status were investigated and determined by officers so authorised from the IOM, UNHCR, or the DIMIA. The numbers of asylum seekers were not insignificant and considerable time would necessarily be taken before determinations were finally made. The fact of arrival without any travel documents added considerably to the time taken in investigation of claims. The special purpose visa under Regulation 8 and 12(4) was designed to allow for such a task and left the way open for the PIO, taking account of the circumstances, to impose appropriate and suitable conditions."

24 The Chief Justice correctly stated that reg 12(4) was not inconsistent with s 9. Section 19 confers a power to make regulations "not inconsistent with this Act". Section 9(2) specifies that the classes, terms, conditions and fees of visas "shall be" as prescribed. Further, as already noted in these reasons, s 69 of the Interpretation Act answers any objection based upon "sub-delegation".

25 The Chief Justice continued:

> "In relation to Nauru, a small but relatively heavily populated island, it is not uncommon to have locality restrictions for overseas workers, and tourists, particularly, in regard to accommodation. In this instance, asylum seekers are being accommodated for the express purpose of having claims for refugee status investigated and determined, and then moved on either to countries of refuge or to countries of origin as the case may be. The imposition of the conditions for the period of the operation of the visa related to specific areas where the asylum seekers were accommodated and fed, where their claims could be investigated through interviews, and where specific arrangements could be made for their recreation and provision of facilities for communication, but with sufficient flexibility to provide outside activity such as children's education and religious observance."

26 This reasoning should be accepted. Further, in this Court, the respondent properly stressed the well-recognised principle that, as a sovereign state, it is for the Republic of Nauru to annex what conditions it pleases to permission given to

an alien to enter it[6]. This is so whether the entry be voluntary or, as the appellant says was the case here, it be involuntary[7].

27 The attack upon the validity of the conditions attached to the special purpose visa was rightly rejected by the Supreme Court.

The necessity for an application

28 There remain the objections taken by the appellant based upon what is said to be the fatal absence of an application by the appellant for the issue of the special purpose visas. The evidence is that, as at March 2004, the appellant had not applied for, or consented to, any Nauru visa and he had not authorised any person to apply on his behalf.

29 It is convenient to begin with the text of the special purpose visa dated 28 January 2004. This states that "the visa is granted subject to approval by submitting *an application* in writing, addressed and submitted to the Office of the [PIO]" (emphasis added).

30 This had been preceded on 15 January 2004 by a request to the Department of Foreign Affairs of the Republic of Nauru by the Australian Consulate-General for "an extension of the Special Purpose Visa for the 283 residents at the Offshore Processing Centres". There followed the issue of the instrument dated 28 January 2004 which was expressed in terms not of extension but that the PIO "[does] hereby issue forth this SPECIAL PURPOSE VISA". There followed a Note dated 30 January 2004 from the Department of Foreign Affairs to the Consulate-General attaching the special purpose visa for "the 283 asylum seekers residing on Nauru".

31 This context indicates that the two Governments were proceeding on the footing that what sufficed to meet the condition stated in the visa was the one application and that this had been made by the Australian Consulate-General.

32 However, the appellant refers to what are said to be the essential stipulations expressed in the Regulations. Regulation 13(1) states:

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6 See the references to the writings of Vattel in *Robtelmes v Brenan* (1906) 4 CLR (Pt 1) 395 at 400, 409.

7 See *O'Keefe v Calwell* (1949) 77 CLR 261 at 275, 288.

> "An application for a visa shall be made in writing, by the applicant for the visa or by another person acting on behalf of the applicant".

Further, the power conferred upon the PIO by regs 8(2)(b) and 18 to extend a special purpose visa is expressed in reg 18 as being exercisable "upon ... application by the holder" of a visa. The appellant submits that two things follow. First, whether the instrument dated 28 January 2004 be classified as a fresh visa or as an extension of the previous visa, an application by the appellant was necessary and none was made. The second consequence is that the instrument was invalid. Neither conclusion should be accepted. We turn to explain why that is so.

33 First, as to the alleged requirement of an application. The Regulations do not state that no visa may be issued except upon application. As might be expected, the Regulations provide for a variety of visa classifications to cover many circumstances. Within some classes there is a range of sub-classes. So, reg 8(1) provides for the grant of a special purpose visa to persons falling into any of 10 descriptions. Regulations 13(1) and 18 are so cast as to encompass all of the 10 descriptions listed in reg 8(1). However, reg 13(1) is expressed in terms which assume that there may be a requirement elsewhere arising upon a proper construction of the Regulations that there be an application. Regulation 13(1) then stipulates the form of the application, namely that it shall be made in writing by the applicant or by another person acting on behalf of the applicant.

34 Some categories of special purpose visa listed in reg 8(1) include involuntary arrivals who are unable themselves to make written applications and unable to authorise another to do so on their behalf. Those who arrive in Nauru as emergency entrants "due to stress of weather, medical or other emergency or other similar cause" (reg 8(1)(i)) may be involuntary arrivals who are incapacitated in this sense. Other arrivals may be unwilling to apply. Stowaways who arrive without a passport (reg 8(1)(g)) may be of this description.

35 The detailed provisions for emergency entrants (reg 10) and for entrants without passports (reg 12(4)) are specified in terms inapt to require the making of an application before the issue of those special purpose visas. That being so, there was no mandatory requirement imposed by reg 13(1) for the making of a written application by or on behalf of the applicant before the issue of a special purpose visa under regs 8(1)(g) and 12(4).

36 The appellant points alternatively to reg 18. This regulation would, on its face, condition the exercise of the power of the PIO to extend any special purpose visa "upon ... application by the holder" of a subsisting visa. As to this,

two points are to be made. The first is that the instrument issued on 28 January 2004 was expressed to be, not an extension of a visa, but a special purpose visa issued pursuant to regs 8(1)(g) and 12(4). The second is that, were such extension to be granted by the PIO despite the absence of an application, there would be much to be said for the respondent's submission that the breach of the application requirement in reg 18 would not entail invalidity of the extension.

37 The consequence of a holding of invalidity would be the exposure of the holder of the invalid extension to criminal liability under the Act for remaining on Nauru as a prohibited immigrant, and susceptibility to arrest, imprisonment, fine and removal. The evident purpose of the stipulation in reg 18 for an application is facilitation of the consideration by the PIO of whether it would be appropriate to extend (in the present case) a special purpose visa granted on humanitarian grounds under reg 12(4). There is not to be discerned here "a legislative purpose to invalidate any act that fails to comply with the condition"[8].

Conclusions

38 The appellant has shown no error in the decision of the Chief Justice to discharge the order nisi which had been granted on 21 April 2004. The reasons given above are sufficient for that conclusion and it is unnecessary to consider various alternate grounds on which the respondent sought to uphold the decision of the Chief Justice. It also is unnecessary to consider the respondent's notice of contention disputing the holding that, in the sense of the authorities dealing with habeas corpus, the appellant had suffered a deprivation of liberty, albeit one that was authorised by law.

39 The appeal should be dismissed with costs. The respondent's costs should be set off against any balance remaining after the setting-off of costs under orders made with respect to the objection to competency and motion seeking joinder.

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8 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 [91].

40 KIRBY J. This appeal[9] comes from a judgment of the Supreme Court of Nauru constituted by Connell CJ[10]. By that judgment, the Chief Justice dismissed applications brought by three applicants who asked that an *order nisi*, previously granted *ex parte*, for a writ of *habeas corpus* for their release from detention in Nauru, be made absolute. The Chief Justice refused the application. He discharged the *order nisi*.

41 The third of the applicants in the Supreme Court, Mohammad Arif Ruhani (the appellant), then commenced proceedings in this Court. The other applicants fell away, apparently because they were successively granted visas to enter Australia. Whilst this appeal stood for judgment, this Court was informed that the appellant too had been granted an Australian visa[11]. He was reportedly brought to Australia. The significance of this development for the proceedings needs to be considered.

42 Whilst the appeal awaited hearing, the Director of Police of Nauru (the respondent) challenged its competency, having regard to requirements of the Australian Constitution governing this Court. That challenge was dismissed by order of the Court. The reasons for that dismissal are published concurrently with these reasons[12]. This Court holds that under Nauruan and Australian law, it has the jurisdiction and power to decide this appeal. Such decision must be made within the applicable functions of this Court, giving effect to Nauruan law. In matters of Nauruan constitutional law, the decisions of the Supreme Court of Nauru are final[13].

43 As presented by the appellant, this appeal concerns his personal liberty. Personal liberty is protected by the Constitution of Nauru. Indeed, it is the second of the "fundamental rights and freedoms" referred to in the Constitution's

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9 Pursuant to the Constitution of Nauru, Art 57(2); the *Appeals Act* 1972 (Nauru), ss 44 and 45; and the *Nauru (High Court Appeals) Act* 1976 (Cth), ss 4 and 5. The legislation is considered in *Ruhani v Director of Police* [2005] HCA 42.

10 *Amiri v Director of Police* unreported, 15 June 2004 (Connell CJ) ("Supreme Court reasons").

11 By letter from the appellant's lawyers to the Senior Registrar of the Court dated 1 July 2005.

12 *Ruhani v Director of Police* [2005] HCA 42.

13 *Appeals Act* 1972 (Nauru), s 45(a).

statement of such rights, expressed at the outset of that document[14]. The appellant points to the provisions of the Constitution as a contextual consideration indicating the high value placed by the law of Nauru upon liberty and the limited instances in which derogation is permitted[15]. The appellant did not rely on the Constitution, as such, for his arguments. However, he addressed his contentions to the meaning and application of the written and unwritten law of Nauru, illuminated both by the fundamental principles of the common law of England, received as part of the law of Nauru, and by the principles of international human rights law contained in treaties to which Nauru is a party.

44 The other members of this Court have concluded that the appeal fails[16]. I disagree. In my opinion, the appellant has shown error in the reasons of the Supreme Court. Subject to considerations of mootness, occasioned by the belated grant of an Australian visa, the appellant is entitled to relief.

The facts

45 *The transfer to Nauru:* The explanation of how the appellant came to Nauru, with the result that he was detained there for nearly four years, is not elaborated in the record before this Court. However, it is referred to in the reasons of the Supreme Court[17]. Much of it is a matter of public record.

46 In August 2001, a large number of persons were rescued at sea in the Indian Ocean near Christmas Island, an Australian territory. They were transferred to a Norwegian vessel, *MV Tampa*[18]. They were denied access to Australia to prosecute claims that they wished to make to refugee status in

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14 Constitution of Nauru, Art 5. The first listed fundamental right is the right to life (Art 4). In the Supreme Court, Connell CJ rejected an argument based on Art 5 of the Constitution. See Supreme Court reasons at [32]-[33].

15 One such instance is Art 5(1)(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".

16 Reasons of Gleeson CJ, Gummow, Hayne and Heydon JJ at [38] ("the joint reasons").

17 Supreme Court reasons at [3].

18 See *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 at 456-457 [14]-[16]; *Ruddock v Vadarlis* (2001) 110 FCR 491 at 522-523 [131]-[132] (special leave refused by High Court). See also Willheim, "MV Tampa: The Australian Response", (2003) 15 *International Journal of Refugee Law* 159 at 161-162, 172-176.

accordance with the Refugees Convention and Protocol to which Australia is a party. In early September 2001, they were transferred from *MV Tampa* to a vessel of the Royal Australian Navy, *HMAS Manoora*. At that stage, proceedings for relief under Australian law were taken in the Federal Court of Australia. Those proceedings succeeded at first instance[19] but failed on appeal[20].

47 A number of the "rescuees" were then taken to Nauru[21]. The appellant was one such person. Like many, he claimed to derive from Afghanistan. The record shows that linguistic tests, to which he was subjected, indicated that he was fluent in the language spoken by the Hazara, an ethnic group from central Afghanistan quite commonly involved in refugee applications in Australia based on claimed fear of persecution[22].

48 The record before the Supreme Court included an affidavit by a pleader in Nauru confirming the truth of the facts stated in the originating summons. That summons contained statements, in support of the relief of *habeas corpus* sought, that:

> "[t]he Applicants are held in Topside Camp against their will by or on behalf of the Director of Police. None of the Applicants has applied for or consented to a Nauru visa of any sort. None of the Applicants has authorised any person to apply for a Nauru visa on their behalf."

It was the extended detention of the appellant in Nauru, in consequence of the decisions made by others, that led to his legal claims.

49 *The Memorandum of Understanding*: The record in this Court reveals something of the arrangements under which the appellant was detained in Nauru. A Memorandum of Understanding ("MoU") between the Commonwealth of Australia and the Republic of Nauru dated 25 February 2004 replaced, but essentially continued, an earlier MoU of December 2002. It records the wish of the two Governments to "co-operate on the management of asylum seekers, and support regional efforts to combat people smuggling". It allows for the reception in Nauru of "a maximum number of 1,500 persons to be accommodated at a

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19 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

20 *Ruddock v Vadarlis* (2001) 110 FCR 491 (Beaumont and French JJ; Black CJ dissenting).

21 *Ruddock v Vadarlis* (2001) 110 FCR 491 at 527 [146] per French J.

22 See eg *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 79 ALJR 94 at 103 [47]-[48]; 210 ALR 190 at 202.

number of temporary residential asylum seekers' facilities". It records Australia's obligation under the MoU to "ensure that each person will be processed and have departed Nauru within as short a time as is reasonably possible, and that no persons will be left behind in Nauru".

50 In accordance with the MoU, Australia accepted obligations of financial responsibility, as well as humanitarian and development assistance, to Nauru. A schedule to the MoU records the fact that "Nauru's economy has been in decline for more than a decade as the phosphate era draws to a close, and there are now numerous signs that the economy is reaching crisis point". Nauru, for its part, agreed to provide Australia with "management of asylum seekers"[23]. No mention is made of securing the consent of persons in the appellant's position for their "management" in this way. Management was involuntary on their part. Their agreement was treated as irrelevant. However, the record shows that Australia offered a reintegration "package" to Afghan asylum seekers in Nauru who volunteered to return to Afghanistan. A number of the detainees accepted this offer. The appellant did not. By inference, his asserted fear of persecution if returned to Afghanistan was paid for in the coinage of his prolonged loss of liberty.

51 The involvement of Australia, and its officials, in the detention of the appellant after his arrival in Nauru did not cease on the conclusion of his transport there. By the MoU, Australia undertook to provide the facilities in Nauru in which detainees such as the appellant were housed. It undertook to provide security personnel for such facilities, as well as health and medical services. Pursuant to these undertakings, the Australian Protective Service stationed approximately twenty-three officers in Nauru. They supported the Nauru Police Force and were appointed reserve officers of that force.

52 The Australian Government also arranged for the International Organisation for Migration to undertake management of the detention facilities in Nauru; to facilitate the return to Afghanistan of those Afghan citizens willing to be repatriated; and to assist in counselling and "processing arrangements", in cooperation with the Office of the United Nations High Commissioner for Refugees. For its part, Nauru specifically agreed in the MoU that "any asylum seekers awaiting determination of their status or those recognised as refugees, will not be returned by Nauru to a country in which they fear persecution nor before a place of resettlement is identified".

53 In circumstances that do not appear, the appellant arrived in Nauru without a passport or other travel documents. The respondent argued that this

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23 The title of the MoU is "Memorandum of Understanding Between Australia and Nauru for Cooperation in the Management of Asylum Seekers and Related Issues".

fact, and the large number of detainees, explained the significant delay in processing the claims to refugee status in Australia or finding a place of resettlement elsewhere. In argument, the appellant disputed that consideration of claims to refugee status by Australia continued during his detention in Nauru. However, his assertion was not supported by the provisions of the *Migration Act* 1958 (Cth) to which reference was made[24] nor the Australian regulations. These clearly contemplate the provision of refugee and humanitarian visas to applicants in refugee camps offshore. Moreover, the successive grants of visas to the three applicants before the Supreme Court (including the appellant) demonstrate the error of that submission.

54 *Issue of visas with detention conditions*: This notwithstanding, the appellant argued that the Supreme Court erred in concluding that, by Nauruan law, the provisions requiring his detention were valid and applicable. His counsel insisted that neither at the beginning of the detention on his arrival in Nauru nor at any time thereafter did the appellant apply for, or authorise anyone else to seek on his behalf, the visa to which the detention obligation (under which he had been held) was attached.

55 The original visa, granted to the appellant on 7 January 2002, contained four restrictions[25]. That visa was granted by the then Principal Immigration Officer ("PIO") of Nauru, purportedly pursuant to the *Immigration Act* 1999 (Nauru) ("the Act"), s 3 and Regs 8(1)(g) and 12(4) of the Immigration Regulations 2000 (Nauru) ("the Regulations"). It was uncontested that the "special purpose visa" provided was granted to 319 "Asylum Seekers", including the appellant. Moreover, this was done pursuant to an application made for that purpose by the Australian Consulate-General in Nauru.

56 The visa so granted to the appellant and the other "rescuees" was for a stay not exceeding six months from the date of arrival. Inferentially, it was successively renewed. The most recent visa in the record is that said to have applied to the appellant at the time of the hearing before the Supreme Court. It was granted by the then PIO, also as a "special purpose visa", to 283 named "Asylum Seekers", including the appellant, "for an extension of stay in Nauru from the date of 29th January 2004, on humanitarian grounds for such time as is reasonably necessary to complete humanitarian endeavours".

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24 Esp *Migration Act* 1958 (Cth), ss 46A and 198A ("offshore entry persons") and ss 46B and 198B ("transitory persons").

25 These restrictions are, in substance, conditions 1, 2, 3 and 5 of the visa conditions described in the joint reasons at [8].

57 Once again, this visa was stated to authorise a stay not exceeding six months from the specified date. Once again, on the evidence, the visa was not initiated by any application by the appellant. Instead, the initiation came from the Australian Consulate-General in Nauru. It did so in the following document sent by the Consulate-General to the Government of Nauru in January 2004:

> "The Australian Consulate-General presents its compliments to the Department of Foreign Affairs of the Republic of Nauru and has the honour to request an extension of the Special Purpose Visa for the 283 residents at the Offshore Processing Centres.
>
> The current visa expires on 29 January 2004 and an extension for a further six months is sought. A list containing details of the 283 residents at the two centres is attached."

58 The conditions imposed by the PIO unarguably involved detention of the appellant and the other 282 persons still then detained in the facilities in Nauru. By the visa conditions, residence by such persons in Nauru was restricted to the designated detention sites. Movement anywhere else had to occur under an escort of security personnel. Residence and movement were subject to lawful directions with which the visa holders were required to comply. Completion of "humanitarian endeavours" was to constitute termination of the visa.

59 The result of the foregoing facts, derived from uncontested evidence, is that the appellant (with a large number of other persons) was taken to, and detained in, Nauru without his consent. Although he did not wish to go to, or enter, Nauru the PIO imposed on him, at the request of an official of the Australian Government, a visa that he had never sought and to which were attached conditions of detention that he opposed, severely restricting his liberty. It was those restrictions that he contested. For nearly four years, the appellant was deprived of his personal liberty by the actions of others. Was this deprivation in accordance with Nauruan law? The Supreme Court held that it was. In my view, it was not.

The issues

60 Many issues were raised by this appeal. However, it is sufficient to confine the issues to those that have to be determined as follows:

(1) *The mootness issue*: Having regard to the remedies claimed and to the indication that the appellant has been granted a visa and been "brought to Australia" since the hearing, should this Court decline to decide the appeal on the ground that the issues are now hypothetical and do not affect the real interests of the parties?

(2) *The application of the Act and Regulations issue*: If the appeal is to be determined, do the provisions of the Act and Regulations governing the issue of visas to persons entering Nauru apply to the appellant, having regard to the established facts? Is it relevant for this purpose that the appellant originally arrived in, and entered, Nauru not by his own wishes but pursuant to an express arrangement (the MoU) between Nauru and Australia for their respective purposes? Does any such want of consent and approval thereafter affect the extension visas granted to the appellant, in turn pursuant to the application in that behalf made by Australia, not by the appellant? Is the absence of an application for a visa by the appellant, or for extension of a visa, fatal to the validity of the visa granted to the appellant on 28 January 2004? (That was the visa in force at the time of the hearing in the Supreme Court.) Was the Australian Consulate-General in Nauru authorised, in accordance with the Nauruan Act and Regulations, to make the application for the visa, and extension visa, on behalf of the appellant on humanitarian or other grounds, so as to permit the consideration and processing of the appellant's application for refugee status in Australia or resettlement elsewhere?

(3) *The lawfulness of the conditions issue*: Having regard to the answers to the foregoing, were the conditions imposed on the appellant in the original grant of a visa, and continued in the extension visas later granted (including that of 28 January 2004), lawful having regard to the consequence of the long-term detention of the appellant, with resulting deprivation of his liberty?

(4) *The conundrum issue*: Would defects in the successive visas granted to the appellant fail to assist him on the basis that, without a visa, he would have been exposed to punishment under the Act for being in Nauru without a visa and to removal from Nauru with detention pending such removal?

(5) *The habeas corpus issue*: Is the appellant, in any case, disentitled to the remedy of *habeas corpus* upon the ground that he is not, and never has been, lawfully present in Nauru and thus has no right to enter the Nauruan community[26]?

(6) *The relief issue*: Assuming error is shown in the judgment of the Supreme Court, what relief, if any, should be given to the appellant having regard to:

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26 The respondent sought to raise this point under a notice of contention.

(a) His amenability as a non-citizen of Nauru within Nauru, holding no valid visa, to be treated as a "prohibited immigrant", punished for a criminal offence and removed from Nauru?

(b) The need for up to date evidence on the status of the appellant and, in particular, in the light of his departure from Nauru and entry to Australia?

Liberty and its protection by law

61 *The quality of the appellant's detention*: In the Supreme Court, Connell CJ recorded the submission of the respondent that there had been no deprivation of the appellant's liberty. Such a submission was repeated in this Court[27]. Connell CJ had to consider it (as I will) for the issue of the availability of *habeas corpus*. He rejected the submission in that context. But what he said (with which I agree) has a wider significance[28]:

> "The [respondent's] argument ran along the lines that as the asylum seekers arrive within the boundaries of Nauru without passports or entry permits, the PIO, in permitting the asylum seekers to enter and stay within a specified location of Nauru, did not deprive the Applicants of any liberty that they otherwise had – an anything is better than nothing rule! However, once the non-citizens have been admitted to Nauru, they each became subject to Nauruan law and part of that law is the prevailing common law with respect to *habeas corpus* and the rights provisions of the Constitution both of which apply to citizens and non-citizens alike."

Connell CJ went on[29]:

> "The Respondent also pressed that the conditions imposed by the PIO did not in themselves amount to custody or detention of the asylum seekers. Some of the English cases are with respect a trifle ambivalent and speak sometimes of the need for 'total' deprivation of freedom before there is a detention that could attract *habeas corpus*[30]. While close custody involving prison incarceration is clearly a situation where *habeas corpus* lies, the custody requirement includes other forms of restriction short of

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27 Pursuant to the respondent's notice of contention.

28 Supreme Court reasons at [25].

29 Supreme Court reasons at [26].

30 See, for example, *R v Secretary of State for the Home Department; Ex parte Mughal* [1973] 1 WLR 1133.

> imprisonment. In *Eatts v Dawson*[31], the Australian Federal Court explored cases involving 'police custody' and quoted without criticism, the United States Supreme Court in *Jones v Cunningham*[32] …
>
> > 'History, usage and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of *habeas corpus*.'"

62 The Chief Justice concluded that such a deprivation of liberty applied in the appellant's case[33]:

> "I have no difficulty in finding that, for the purposes of *habeas corpus*, the Applicants were in a custodial situation. They were confined to a particular location[34] and that location had certain restraints such as perimeter fencing, controlled entrance and exit, and an overall police control. … [G]iven the detention, the issue at stake was whether it was legal or not."

63 *The presumption in favour of liberty*: In resolving the foregoing question, by the application of Nauruan law, the starting point is the strong presumption of the common law in favour of personal liberty and against indefinite detention. The decisions of courts of Commonwealth countries are replete with instances where this proposition has been upheld[35]. Thus in *Re Bolton; Ex parte Beane*[36], an Australian case, Brennan J said:

> "The law of this country is very jealous of any infringement of personal liberty and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right."

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31 (1990) 21 FCR 166 at 176.

32 371 US 236 at 240 (1963).

33 Supreme Court reasons at [27].

34 *Yasmin Ali Shah v Attorney-General* [1988] SPLR 144.

35 See eg *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *R v Governor of Brockhill Prison; Ex parte Evans [No 2]* [2001] 2 AC 19 at 32.

36 (1987) 162 CLR 514 at 523 (footnotes deleted).

In the same case, Deane J said[37]:

> "A legislative provision should not be construed as effecting such a derogation from fundamental principle relating to the freedom of the subject in the absence of a clear legislative intent that it should be so construed."

64 To like effect in *Chu Kheng Lim v Minister for Immigration*, McHugh J said[38]:

> "Absent a statutory power of detention, no public official has any power to detain an alien who has entered the country whether or not that person's entry constituted an illegal entry. In a United States immigration case[39], Jackson J reminded us that:
>
> > 'Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.'"

65 Reminding himself that the common law knew no *lettre de cachet* or executive warrant pursuant to which either citizen or alien could be deprived of freedom by mere administrative decision or action, McHugh J in *Lim* returned to the remarks of Deane J in *Ex parte Beane*[40]:

> "Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate."

66 The common law of Nauru is not different from these statements of principle in content or quality. It reflects the same values. It does so apart from the express guarantee of individual liberty in the Constitution[41]. To deprive the appellant of his liberty in Nauru, by way of long-term detention there, under conditions of severe restriction, a clear and express mandate was required in the statute law of Nauru or in regulations lawfully made thereunder.

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37 (1987) 162 CLR 514 at 532.

38 (1992) 176 CLR 1 at 63 (one footnote deleted).

39 *Shaughnessy v United States; Ex rel Mezei* 345 US 206 at 218 (1953).

40 (1987) 162 CLR 514 at 528.

41 Constitution of Nauru, Art 5.

67 *The lessons from international law*: In addition to the foregoing, it is appropriate to observe that a court, exercising the judicial power of Nauru, will construe an Act and regulations, as far as possible, so that they conform to Nauru's international obligations. Where there is ambiguity, a construction that complies with those obligations in upholding fundamental human rights and freedoms will be preferred to one that does not. Whatever differences exist in Australian courts over the extent and application of this principle in Australian circumstances[42], the general proposition is now respected in courts throughout the Commonwealth of Nations. New Zealand courts have adopted this approach to statutory interpretation for more than a decade[43]. There is every reason why this Court, exercising its present jurisdiction and powers, should apply the same principles to the elucidation of Nauruan law, specifically in the construction of the Act and Regulations.

68 Nauru is not a party to the Refugees Convention and Protocol. This fact itself made the removal of the appellant by Australian officials to Nauru a source of potential disadvantage for him[44]. Nevertheless, Nauru is a party to the International Covenant on Civil and Political Rights ("ICCPR") and the Convention on the Rights of the Child ("CRC").

69 By Art 9(1) of the ICCPR, it is provided that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

70 The CRC applies to children under the age of 18 years. The appellant was aged 18 when he arrived in Nauru. The CRC did not, therefore, apply to him. However, in the schedule of "asylum seekers" who entered Nauru with the appellant, and to whom visas were granted by Nauru purportedly in accordance

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42 See eg *Al-Kateb v Godwin* (2004) 78 ALJR 1099 esp at 1112-1115 [62]-[73], contra at 1128-1136 [152]-[192]; 208 ALR 124 at 140-145, 163-173; *Coleman v Power* (2004) 78 ALJR 1166 esp at 1172 [19], contra at 1209-1212 [240]-[249]; 209 ALR 182 at 189-190, 241-245.

43 *Tavita v Minister of Immigration* [1994] 2 NZLR 257; *Rajan v Minister of Immigration* [1996] 3 NZLR 543; *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 and *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129.

44 It is one that the MoU sought to reduce by the agreement of Nauru with Australia not to return any asylum seekers to a country in which they feared persecution or before a place of resettlement was identified. See MoU, par 24.

with the Act and Regulations, many were identified as children, some of tender years. All were immediately detained and kept in detention. There was no differentiation in their cases.

71 By Art 37 of the CRC, States parties undertake to ensure that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

72 The foregoing principles of the international law of human rights must be kept in mind in considering the assertion by the respondent that the Act and Regulations applied to arrivals in Nauru such as the appellant and empowered Nauruan officials to impose a condition upon such arrivals destructive of their fundamental right to liberty.

73 *Pacific judicial decisions*: Lest it be suggested that the foregoing principles are apt in their full measure only to developed countries of the common law, a review of the decisions of common law courts in the Pacific region shows an equal vigilance for the value of liberty and a recognition of the duty of the courts to protect it.

74 In Fiji, in *Keppel v Attorney-General of Fiji*[45], a question arose as to the lawfulness of the proposed removal of immigrants who had sought protection from the court. Fatiaki J restrained peremptory removal, citing English authority[46] not inapposite to the present case:

> "It would be a mockery of justice if an applicant for asylum, refused entry, threatened with removal and possible return to the country he fears, could be granted leave for judicial review but be flown out of the country before his case was determined. Should his fears prove well-founded it would be little comfort to his relatives to hear that his application for judicial review had been allowed posthumously."

75 In that case, Fatiaki J ordered the release of the immigrants. Whilst the legal issues are different from those arising in this appeal, they demonstrate the vigilance of courts in this region to basic rights, including liberty.

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45 [1998] FJHC 16.

46 *R v Secretary of State for the Home Department; Ex parte Muboyayi* [1992] QB 244 at 268 per Taylor LJ.

76 In Papua New Guinea, a power of detention of non-citizens is conferred on the Minister for limited purposes and a limited time[47]. In one case where detention was challenged, *Perryman v Minister for Foreign Affairs and Trade*[48], the Supreme Court of Justice (Kapi Deputy CJ, Kaputin and McDermott JJ) was at pains to emphasise the distinction drawn in the Constitution between "the imposition of a sentence and other forms of deprivation of liberty". The Court upheld the detention by the Minister under the *Migration Act* as lawful. However, that detention was pursuant to express powers of detention for the purposes of removal of the immigrant from Papua New Guinea. It was not detention as a condition of a visa granted by an official in the fulfilment of intergovernmental arrangements with the government of a foreign country in respect of a person brought to that country with its express consent, who never expected, or wanted, to enter or be there.

77 In Solomon Islands in *Jakamana v Attorney-General*[49], a challenge was brought to a declaration by an Acting Minister that a named person could not leave Solomon Islands. The High Court (Daly CJ) held that the immigration officials and the Minister had unlawfully deprived the applicant of his right to free movement. The Court insisted that the immigration officials should have queried the lawfulness of the Minister's orders. The foundation for the Court's reasoning was the strong value attached by the law of Solomon Islands to individual freedom.

78 In Vanuatu, the Supreme Court in *Benard v Minister for Immigration*[50] reviewed a decision of officials to remove the applicant from the country before the expiry of fourteen days' notice which the law required to be given. The Court held that the removal order had not been made in good faith and that the procedures had not followed the applicable requirements. The detention of the applicant pending removal was therefore unlawful.

79 In Hong Kong in *Re Pham Van Ngo*[51], officials had destroyed a boat in which Vietnamese refugees were proceeding to Japan by way of that Territory with the intention of claiming protection there. The refugees were placed in detention under a law affording officials a discretionary power to detain refugee applicants. The Hong Kong Supreme Court held that the detention of the

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47 *Migration Act* 1978 (PNG), ss 15A, 15D, 16.

48 [1982] PNGLR 339 at 340.

49 [1985] LRC (Const) 569.

50 [2001] VUSC 20.

51 [1991] LRC (Const) 987.

refugees was, by its nature, penal. It was therefore unlawful unless the officials could establish otherwise. The Court held that the officials had detained the applicants without due exercise of their discretion and that the period of detention (eighteen months) had been unreasonable.

80 Most of the newly independent countries of the common law in the region of Nauru enjoy, like Nauru, specific constitutional protections for individual liberty[52]. It is important to recognise this universality of respect for individual liberty, including, in most countries, the liberty of non-citizens as much as of citizens. It is equally important for courts such as this, on appeal from the Supreme Court of Nauru, to give real content to such legal values. It is not this Court's function to give effect to the express provision, defensive of individual liberty, in s 5 of the Constitution of Nauru. But it is its function, in deciding the present appeal, to give effect to the deeply rooted principle of the common law and to the newly expressed principles of international human rights law that together cast light on the meaning of the Act and Regulations invoked in this case. In understanding the content of the common law of Nauru, this Court, in a Nauruan appeal, should consider the judicial authority of the region and not confine itself to Australian judicial authority where it differs from that declared elsewhere.

The mootness issue

81 Because the appellant has notified this Court of the grant to him of an Australian visa, permitting him to enter Australia[53], the question of mootness of this appeal is a real one. Not least is this so because the parties, in supplementary submissions filed with the leave of this Court, agreed that, if the appeal were allowed, the appropriate orders would include remittal of the proceedings to the Supreme Court of Nauru to receive evidence in relation to the present position of the appellant.

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52 See eg Constitution of the Cook Islands, Art 64(1)(a); Constitution of the Federated States of Micronesia, Art IV, s 3; Constitution of the Fiji Islands, s 23; Constitution of Kiribati, s 3(a); Constitution of the Marshall Islands, s 4(1); Constitution of the Independent State of Papua New Guinea, National Goals and Directive Principles, s 5; Constitution of Solomon Islands, s 3(a); Constitution of the Independent State of Western Samoa, Art 6(1); Constitution of Tuvalu, ss 11(1)(b), 17; Constitution of Vanuatu, Art 5(1)(b).

53 As to such notifications being received in open court see *Re Application by Chief Commissioner of Police (Vic)* (2005) 79 ALJR 881 at 901 [120]; 214 ALR 422 at 449-450.

82 It now appears that the present position of the appellant is that he is no longer in detention in Nauru. No order of *habeas corpus* could therefore be made in his favour by the Supreme Court of Nauru. Exercising its powers on appeal from that Court, this Court should not make orders of *habeas corpus* which would be ineffective.

83 Nevertheless, other legal consequences flow from the determination of this appeal. There remain many other detainees in Nauru who are affected by the principles fully argued in what was effectively a test case. Not without some hesitation, therefore, I will treat the proceedings as continuing to present a viable issue for the decision of this Court. This justifies its determination according to the legal merits.

The application of the Act and Regulations

84 *Non-engagement of the Nauruan law*: The foregoing conclusion brings me to the supposed application of the Act and Regulations to the appellant, having regard to the proved circumstances in which he arrived, and remained, in Nauru.

85 My approach to this issue is greatly affected by the principles of interpretation favouring individual liberty and fundamental rights that I have set out above. It is also affected by the unique and extraordinary arrangements entered between the Governments of Nauru and Australia, pursuant to which the appellant arrived, entered and remained in Nauru. There may be other similar arrangements in the history of population movements of recent times[54]. However, if any exist like the present case, I do not know of them and none were suggested to this Court.

86 Instances arise where a statute, apparently drawn in general language, for application to a wide range of cases, is seen upon analysis as inapplicable to the evidence in a given case because the hypothesis upon which the statute is expressed does not apply in the facts that have been proved. One such case was recently heard in this Court in an Australian appeal: *Al-Kateb v Godwin*[55].

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54 The more typical case involves rebuffing fleeing refugees so that they are forced back to sea with dire consequences as happened in the case of the vessel *St Louis* containing Jewish refugees fleeing from Europe. They were refused entry to the United States with consequences "forcing many back to die in Nazi gas chambers". See *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 609 at 625 [98] fn 117; 213 ALR 668 at 690.

55 (2004) 78 ALJR 1099; 208 ALR 124.

87 In *Al-Kateb*, the appellant contended that he had been unlawfully detained for some years in immigration detention in Australia. He argued that mandatory detention under the *Migration Act* 1958 (Cth), s 196, was dependent on the validity of the assumption that he could be removed from Australia or voluntarily returned to his country of nationality or to some other country of resettlement. Because in that case the appellant was a stateless person, removal had proved impossible. This was so despite the passage of nearly four years. A majority of this Court (McHugh, Hayne, Callinan and Heydon JJ) held that the Act still applied according to its terms. It authorised the continuing, potentially unlimited, detention. However, a minority of this Court (Gleeson CJ, Gummow J and I) dissented. We held that because the hypothesis of the Act was incapable of fulfilment in the evidence of the case, the Act did not apply to such circumstances. The hypothesised evidentiary foundation for invoking s 196 was missing. The evidence did not engage the Act. The Act was intended to operate in the generality of cases. But it had no application to the facts of the given case.

88 I adhere to the views expressed by the minority in *Al-Kateb* on this point. In this appeal, from the Supreme Court of Nauru, this Court is exercising a distinct jurisdiction for a country other than Australia. It is not bound to apply (although it will give the closest attention to) decisions reached by this Court in Australian decisions. In this appeal, we should follow the approach of the minority in *Al-Kateb*. In my view, it states the law of Nauru and is more appropriate to its circumstances. One reason for concluding in this way is that Nauru is a nation with a comprehensive constitutional Bill of Rights. This distinguishes its system of law in a fundamental way from that of the Commonwealth of Australia[56]. Whilst this Court has no responsibility for construing and applying that part of the Nauruan Constitution, it cannot ignore its existence as a contextual circumstance affecting (amongst other things) the approach to statutory construction and the jurisprudence of basic rights.

89 When the approach of the minority in *Al-Kateb* is adopted in this appeal, it is clear that the Act, with its general provisions on immigration, was not attracted, nor did it apply, to the case of the appellant in Nauru. It was an Act designed to apply, as its terms indicate, to the ordinary case of a person entering and being in Nauru, deliberately, accidentally or by force of nature or chance. It had no application to a case of a person, like the appellant and the other "rescuees", who were deliberately brought to Nauru by the decision of the Government of Nauru, pursuant to an understanding that Nauru had with another government seemingly for reasons of international relations and financial gain.

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56 *Al-Kateb* (2004) 78 ALJR 1099 at 1115 [73] per McHugh J; 208 ALR 124 at 144-145.

90 The language of the Act bears out this interpretation. It talks of a person "entering" Nauru[57] or "travel[ing] to, enter[ing] and remain[ing] in Nauru"[58]. These verbs connote the familiar and usual cases to which an Immigration Act is addressed, namely the action of a non-citizen entering, and staying in, the foreign country for that person's own purposes without the requisite local permission. Those assumptions have no application to the appellant. According to the uncontested evidence, he was brought to Nauru unwillingly by governmental action, without any request or wish. He was immediately detained there for reasons that seemed attractive to the Executive Governments of Nauru and Australia. In no usual sense of that word was he an immigrant. He was the object of the official actions of others bringing him to an unwanted destination, locking him up and keeping him detained there.

91 It is true that the Act envisages emergency arrivals and such events would quite naturally arise in the ordinary application of immigration law. However, the nominated circumstances of such arrivals were confined by the Act to cases where "the entry or departure was caused by stress of weather, medical or other emergency or other reasonable cause"[59]. The appellant's entry, on the face of things, was far from accidental. It was the result of the deliberate action, relevantly, of the Government of Nauru which could not thereafter complain that the appellant was a "prohibited immigrant" who did not hold a valid permit granted under the Act[60] and whose presence in Nauru was "unlawful"[61].

92 As a legislature of plenary powers, it may have been competent for the Parliament of Nauru to amend the Act or to enact new legislation for the MoU to make express provisions for the arrival of the appellant and his fellow "rescuees". What was not permissible was to attempt to distort the Act, a general law on immigration, for application to the unprecedented factual circumstances which the appellant and other detainees occasioned in long-term detention.

93 In short, because the appellant and those with him were brought to Nauru under physical constraint and thereupon detained and subjected, at the request of a foreign nation, to visas they had not sought, it cannot be said, within the Act, that they have unlawfully entered Nauru or are unlawfully in Nauru[62]. It does not

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57 The Act, s 8(1).

58 The Act, s 9(1)(a).

59 The Act, s 8(6).

60 The Act, s 10(1).

61 The Act, s 10(2).

62 The Act, s 13(1)(l).

lie in the mouth of the Executive Government of Nauru and its officials, who condoned, facilitated and participated in the arrival, entry and presence of the appellant and other detainees in Nauru to contend, in the language of the Act, that they are immigrants, subject in the ordinary way to regular visas envisaged by the Act for the ordinary case. This was no ordinary case.

94 In so far as the Act provides for the imposition of visas by immigration officers upon persons whose presence in Nauru is, or would be, unlawful and condones detention in such cases, such provisions do not apply to the case of persons like the appellant.

95 The same considerations lead to the misapplication of the Act to the facts of this case, as were identified by Gleeson CJ, Gummow J and me in *Al-Kateb*. I refer to the inapplicability of the assumptions contained in the statutory language expressed for the ordinary case[63]; the principle of legality protective of human rights "of which personal liberty is the most basic"[64]; and the absence of express provisions in the Act dealing with the particular circumstances of this exceptional case[65].

96 The notion that the Government of Nauru could bring persons, such as the appellant, to Nauru, without their consent or agreement and there subject them to prolonged indefinite detention under an Act intended for the generality of immigration arrivals, is not a persuasive one. That Act envisages a power to keep such a person in custody for an unlimited period[66]. Such a power, if it is to be granted to fulfil the purposes of the MoU between the Executive Governments of Nauru and Australia, must be granted by the Parliament of Nauru expressly. Attempting to squeeze this case into the receptacle of the Act dealing with immigration fails. In default of any other law permitting the detention of the appellant, he was entitled to his liberty. No other law was relied on. In the words of Gummow J in *Al-Kateb*[67]:

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63 *Al-Kateb* (2004) 78 ALJR 1099 at 1105 [18] per Gleeson CJ, 1123 [122] per Gummow J; 208 ALR 124 at 130, 156.

64 *Al-Kateb* (2004) 78 ALJR 1099 at 1105 [19] per Gleeson CJ, see also at 1124 [126] per Gummow J; 208 ALR 124 at 130, 156.

65 *Al-Kateb* (2004) 78 ALJR 1099 at 1105-1106 [22] per Gleeson CJ; 208 ALR 124 at 131.

66 cf *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 556 per Latham CJ.

67 (2004) 78 ALJR 1099 at 1126 [141]; 208 ALR 124 at 160.

> "As it now stands, the Act itself does not authorise the imposition upon the appellant of restraints … upon his freedom of movement and action whilst he is not detained under the legislation."

97 *The decision in O'Keefe v Calwell*: To counteract such reasoning, the respondent relied on *O'Keefe v Calwell*[68]. That was a decision of this Court in an Australian case concerning the dictation test then used by Australian federal law to enforce the White Australia policy[69]. Some little care is needed in enlisting *dicta* in such a case for the ascertainment of the law of Nauru in contemporary circumstances[70].

98 In *O'Keefe*, Latham CJ[71] and Dixon J[72] (who were in dissent) rejected the argument that Mrs O'Keefe, who was born a subject of the Netherlands of Celebes ethnicity, was not an immigrant for the purposes of Australian law[73]. Their opinions were to the effect that status as an immigrant could not depend on the intention or wish of the entrant to enter the country. Mrs O'Keefe had been brought to Australia in an Australian naval vessel with her then husband in 1942, during the Second World War. Her husband, a national of the Netherlands, had escaped from Japanese forces with his wife and children. Later that husband died and the widow married Mr O'Keefe, an Australian national. However, in 1949 Mr Calwell, the Australian Minister for Immigration, claimed the power to remove Mrs O'Keefe from Australia as a prohibited immigrant. The suggested basis for doing so was that she was subject to the administration of a dictation test. But the real basis of the proposed removal was Mrs O'Keefe's skin colour or pigmentation. An unrecorded fact in *O'Keefe*, known to all at the time, was that Mrs O'Keefe was not a "white" immigrant. By majority, this Court concluded that she was not a prohibited immigrant.

99 Apart from the arrival in the country on a vessel of the Royal Australian Navy, the facts of *O'Keefe* are quite different from the present facts. The entrant there desired her removal to Australia. She participated in that removal as a

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68 (1949) 77 CLR 261.

69 See eg *Chia Gee v Martin* (1905) 3 CLR 649.

70 cf Fairall and Yeo, *Criminal Defences in Australia*, 4th ed (2005) at 113 [7.2]. Such decisions would not be applied by this Court in a Nauruan appeal and may not now be good law in an Australian appeal.

71 (1949) 77 CLR 261 at 275.

72 (1949) 77 CLR 261 at 285.

73 And for the application of the *Immigration Act* 1901 (Cth).

rescue from enemy forces. She settled in Australia. She moved freely about for many years and remarried in Australia. There is no suggestion that she was brought to Australia against her will and without her consent, still less that she arrived pursuant to an intergovernmental agreement under which Australia would detain her and gain financially as a consequence. Mrs O'Keefe was not subjected to detention for years in a country that she had never wanted to enter. In such circumstances, the characterisation of Mrs O'Keefe's conduct for the purpose of the then Australian *Immigration Act* casts no light on the characterisation of the appellant's entry and status in Nauru for the purposes of the Nauruan Act and Regulations.

The lawfulness of the applications for visas

100 *The absence of request or authority*: In the light of the conclusion that the Nauruan Act and Regulations do not apply to the circumstances of the appellant, many other arguments advanced by the appellant to challenge his detention need not be answered. They involve points of detail, upon an assumption, which I would reject, that the Act and Regulations applied to the circumstances of the appellant's arrival and presence in Nauru and provided a legal regime to empower the provision to the appellant of visas and the attachment to those visas of conditions obliging the appellant's long-term detention in Nauru.

101 *Absence does not affect validity*: Were I of the view that the Act applied the ordinary regime of Nauruan immigration law to the arrival and presence in Nauru of persons such as the appellant, I would not accept the appellant's proposition that the lawfulness of the grant or extension of special purpose visas depended on their being applied for by the person concerned, relevantly the appellant. It was the appellant's complaint that they had been applied for, on each occasion, by the Australian Consulate-General, without his authority. It was therefore submitted that the requirement that the visa be granted subject to "submitting an application in writing" was not fulfilled. Nor was the requirement of Reg 13(1) of the Regulations satisfied that applications for a visa "shall be made in writing, by the applicant for the visa or by another person acting on behalf of the applicant".

102 The power to grant visas under ordinary immigration law must be given a wide ambit because the grant is ordinarily to the benefit of the recipient. It obviates the consequence otherwise of unlawful entry, or presence, in the country concerned. Normally issue of such a visa assures liberty. Here, exceptionally, it deprived the recipients of liberty. Nevertheless, given the wide variety of persons requiring visas in the ordinary course, I would hesitate to construe the necessity of application as one affecting the validity of the visa once granted.

103 Some applicants might be illiterate, confused, demented, old or of tender years and incapable of making an application. Others might be forced to rely on the voluntary assistance of community groups or individuals acting on their

behalf. Here, the appellant's objection was that, as a consequence of the unsought-for application by the Australian Consulate-General, visas were issued but subject to purported conditions of prolonged detention that were not in his interests. In such circumstances, I can understand the appellant's objection to the suggestion that the Australian official was "acting on behalf of the applicant"[74]. However, even if that objection were made good, and the contention was rejected, namely that the "application" was made in order to advance the processing of the claims of the appellant and others to humanitarian assistance as refugee applicants, such rejection would not invalidate the application or the visa that followed it. Upon the hypothesis that the Act and Regulations applied, the visa issued pursuant to the application would remain valid. It would derive its force from a source in the Act unaffected by the validity of the application that initiated the grant.

The lawfulness of the conditions of the visa

104 *The limited power to impose conditions*: More persuasive is the appellant's submission that the general power afforded to the PIO under the Act to impose such conditions as he or she thinks fit did not extend to the imposition of the condition that he in fact imposed (then renewed and extended), namely the restraint condition confining the appellant to detention in Nauru and severely limiting his freedom of movement and other rights.

105 It is here that the issue concerning the application of the Act and Regulations to the appellant's circumstances intersects with the specific complaints of the appellant on the assumption of the application of the Act and the Regulations. There is nothing expressly stated, or implied, either in the Act or in the Regulations, that permits the PIO to impose such liberty-restricting conditions on the appellant and the other "rescuees" as he did. If Nauruan law were intended to authorise long-term detention of the kind imposed on the appellant (and those who arrived with him) the previously stated principles of interpretation require that such powers be spelt out in the clearest terms. Thus if, contrary to my view, the Act and Regulations did apply to the exceptional circumstances of the arrival and presence of the appellant and others in Nauru, in the manner described in the record, the attempt to stretch the Act and Regulations to impose on the appellant a form of extra-curial imprisonment at the discretion of the PIO should be rejected.

106 The closely settled character of Nauru and the difficulty of allowing the appellant and other "rescuees" to enjoy there the right to personal liberty is not an answer to the appellant's argument[75]. The duty of a court is to apply the law.

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74 The Regulations, reg 13(1).

75 cf joint reasons at [24]-[26] citing Supreme Court reasons.

The Government of Nauru ought to have considered this possibility before agreeing to receive the appellant and other arrivals on the conditions agreed including the assumption that they would be subjected to long-term detention. Alternatively, the Government may have been entitled to seek specific legislation to provide clearly for the long-term detention of persons such as the appellant. What could not lawfully happen was what occurred: the unique reception of a large number of persons who did not wish to be in Nauru and the use of a general immigration statute to impose upon them conditions depriving them of liberty but without express authority from the Parliament of Nauru to permit that course.

107 *Strictness in conditions for detention*: In so far as the Parliament of Nauru has spoken on the detention of non-citizens in Nauru, it has done so in strictly limited terms. They are carefully expressed. Possibly this was intended to take into account the guarantee of individual liberty in s 5 of the Constitution. Thus, s 11 of the Act provides for a removal order to be made in specified circumstances. Section 11(4) authorises the person against whom such a removal order is in force to be held in custody "before he leaves Nauru and while being conveyed to the place of his departure". Clearly, all that was contemplated by such provisions was a very short-term detention.

108 Long-term and repeatedly renewed detention under visas issued by an officer of the Executive of Nauru, subject to the restraint condition, contrary to the wishes of the persons affected, falls outside the Act and Regulations. This is an unsurprising conclusion. It is another way of saying that the Act and Regulations were not intended to apply to the peculiar situation brought about in Nauru as a consequence of the inter-governmental arrangements contained in the MoU.

The supposed conundrum does not apply

109 It was suggested that the appellant faced a conundrum in advancing his objection to the lawfulness of his detention and, by inference, that of the other involuntary arrivals in Nauru. This was said to be that, under s 5(2) of the Act, if the visas were invalid, he would be liable to punishment under s 13(1) of the Act; to removal under s 11(1); and to detention pending removal under s 11(4)[76].

110 There is no substance in this argument. If, because of the uniqueness of the circumstances in which the appellant and other arrivals were involuntarily brought to Nauru by the action of the Government, the Act and Regulations are inapplicable to those persons, no conundrum arises. The Government of Nauru is simply faced with the awkward, and urgent, obligation to set those persons at liberty; to arrange with Australia for their removal; or to secure the passage of

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76 See joint reasons at [37].

legislation, if compatible with the Nauruan Constitution, apt to their detention and special circumstances which effectively turned Nauru into a place of prolonged detention of many for another country.

111 If, contrary to my view, the Act and Regulations applied to the appellant and the other "rescuees" on their arrival in Nauru, there is also no conundrum. The regime of prolonged detention, with its objectionable burden on personal liberty and on the physical and mental wellbeing of so many persons, is unlawful. Unless valid and immediate corrective legislation could be enacted to cure the legal defects, Nauru would have to face the necessity to remove the appellant and those like him from the country.

112 There is, in any case, a question whether, if the Act applies, the appellant and those in the same position would be subject to the offences for which s 13(1) provides. Could it really be said that he had "unlawfully enter[ed]" or "is unlawfully in Nauru" when he was actually brought there with the express agreement of the Government of Nauru[77], for the purposes of Nauru itself, including financial gain for an economy "reaching crisis point"[78]?

113 Assuming, however, that a prosecution of persons such as the appellant occurred, and that they were detained pending removal, the loss of liberty could be no worse than it otherwise was. Its duration would at least be more definite, purposeful and defined. And, as a practical matter, because in the MoU Nauru had agreed not to remove persons such as the appellant to the country of feared persecution, the process of considering the appellant's claim for refugee or humanitarian relief would be likely to be expedited. Four years loss of liberty may seem reasonable and acceptable to some. To those in detention who have lost their liberty it will appear intolerable. And that is how the law of Nauru views it.

The availability of *habeas corpus*

114 For the reasons given by Connell CJ in the Supreme Court, there is no difficulty in concluding that the appellant, and those with him, were in a custodial situation[79]. There was no reason to take a narrow view of the

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77 The Act, s 13(1)(l).

78 MoU, Schedule, cited these reasons at [50].

79 Supreme Court reasons at [27]. See above these reasons at [61]-[62].

availability of the Great Writ. There was every reason to reach the opposite conclusion[80].

115 In any case, the parties agreed that, were the appellant to succeed, there was a need for further evidence in relation to the current position of the appellant, making it necessary to return the case to the Supreme Court of Nauru for the making of appropriate orders to carry into effect the conclusion of this Court. As those orders might include general declarations of legal right, of relevance to other continuing detainees, and the provision of costs orders in the proceedings in the Supreme Court favourable to the appellant, that is the course that I would favour.

Conclusion and orders

116 For the reasons stated by me in *Ruhani v Director of Police*, the proceedings before this Court are a true appeal. Accordingly, the remedies and orders applicable to their disposition are those appropriate to an appeal. They are not those appropriate to an invocation of the original jurisdiction of this Court[81].

117 The appellant, as this Court has now been informed, has left Nauru. This fact now makes *habeas corpus* unavailable and its immediate issue inappropriate. However, having regard to the conclusions that I have reached and having regard to the common position of the parties in the event of conclusions favouring the appellant, the orders that I would favour are that the appeal be allowed with costs. The judgment of the Supreme Court of Nauru (Connell CJ) should be set aside. The proceedings should be remitted to the Supreme Court of Nauru to make any orders that are necessary and appropriate to give effect to these reasons in the events that have now occurred.

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80 Clark and McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth*, (2000) at 194-201.

81 *Ruhani v Director of Police* [2005] HCA 42 at [148]-[205].