CASE NOTE

Namah v Pato [2016] PGSC 13; SC1497 (26 April 2016): UNCONSTITUTIONALITY OF TRANSFER AND DETENTION OF ASYLUM SEEKERS FROM AUSTRALIA TO PAPUA NEW GUINEA

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On 26 April 2016, the Supreme Court of Justice of Papua New Guinea (PNG) delivered a unanimous decision in the case of *Namah v Pato*[2], ruling that the forcible transfer and detention of asylum seekers at the Manus Island Processing Center (Manus Detention Centre) in PNG was unconstitutional. This case is notable because it is probably the first judicial ruling against the highly controversial offshore asylum processing operation pursued by the Australian government in cooperation with two South Pacific island states, PNG and Nauru.[3]

Background

The facts of the case, as noted by the court, "start with the well-known international problem of a large number of people seeking refugee status for various reasons" (para 20). Seeking to deter asylum seekers from arriving at Australian shores, the Australian government implemented the

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[2] [2016] PGSC 13; SC1497 (26 April 2016)

[3] For example, the Australian High Court ruled against a challenge to the unconstitutionality of the offshore processing system in Feb 2016, see eg Daniel Hurst and Ben Doherty "High Court Upholds Australia's Right to Detain Asylum Seekers Offshore" (2 Feb 2016), available at: <https://www.theguardian.com/australia-news/2016/feb/03/high-court-upholds-australias-right-to-detain-asylum-seekers-offshore>.

"Pacific Solution", a policy which allowed Australia to transfer asylum seekers attempting to reach Australia by sea to offshore processing centers in PNG and Nauru, while their asylum claim was assessed.[4] The "Pacific Solution" was initially implemented from 2001 to 2007 and was largely dismantled by the Kevin Rudd government in 2008.[5] In August 2012, the Julia Gillard government reintroduced a similar policy and reopened the offshore processing centres in PNG and Nauru.[6] The PNG government signed two Memorandum of Understanding (MOU) with Australia on 8 September 2012 and on 5 and 6 August 2013 respectively (para 5), under which it agreed to let Australia transfer asylum seekers to the Manus Detention Centre. In return, Australia agreed to provide monetary and other considerations (para 20). Following such arrangements, the PNG Minister for Foreign Affairs and Immigration issued permits under s 20 of the PNG Migration Act for the transferees to enter PNG (para 39).[7] The PNG government rushed through Parliament the Constitutional Amendment (No 37) (Citizenship) Law 2014 (the Amendment). Section 1 of the Amendment inserted after s 42(1) (g) of the Constitution a new paragraph s 42(1) (ga) (para 41) which reads:

> (1) No person shall be deprived of his personal liberty except -
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> …

[4] Janet Phillips (Parliament of Australia) "The 'Pacific Solution' Revisited: A Statistical Guide to the Asylum Seeker Caseloads on Nauru and Manus Island" (4 Sep 2012), available at: <http://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/2012-2013/pacificsolution>.

[5] Ibid.

[6] Adam Gartrell "Govt Embraces Pacific Solution Measures" (13 Aug 2012), <http://www.theaustralian.com.au/news/latest-news/labor-considers-reopening-nauru/story-fn3dxiwe-1226448896536>.

[7] Section 20 of the Migration Act provides that: "20. Exemptions
The Minister may, by instrument under his hand, exempt-
(a) a person or a class or description of persons; or
(b) a conveyance or class or description of conveyance,
either absolutely or conditionally, from all or any of the provisions of this Act".

(g) for the purpose of preventing the *unlawful entry* of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes. (emphasis added)

(ga) for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country or with an international organization that the Minister responsible for immigration matters, in his absolute discretion, approves.

Starting November 2012,[8] asylum seekers were taken to PNG by Australia Federal Police and held at the Manus Detention Centre against their will (para 20). The Manus Detention Centre was enclosed with razor wire and guarded by security officers sent by the Australian company Broadspectrum (Australia) Pty Ltd to prevent the asylum seekers from leaving the Manus Detention Centre (para 20). The conditions at the Manus Detention Centre had been criticized as "harsh" by the United Nations High Commissioner for Refugees (UNHCR) and human rights groups.[9] There had been many reports of violent abuses against the asylum seekers.[10] The Centre had also been controversial with local Manusian residents, and had led to confrontations between local residents and the asylum seekers.[11] In June 2013, 302 asylum seekers were held at the Manus Detention Center.[12] By April 2016, the number had increased to about 850.[13]

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[8] The Kaldor Centre for International Refugee Law "Offshore Processing: Conditions" (7 Apr 2015), available at: <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-conditions>.

[9] Eg Adrian Edwards and Leo Dobbs "UNHCR Reports Harsh Conditions and Legal Shortcomings at Pacific Island Asylum Centres" (26 Nov 2013), available at: <http://www.unhcr.org/news/latest/2013/11/52947ac86/unhcr-reports-harsh-conditions-legal-shortcomings-pacific-island-asylum.html>; The Kaldor Centre for International Refugee Law, above n 8; Amnesty International *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (2013), available at: <https://www.amnesty.org/en/documents/ASA12/002/2013/en/>.

[10] Amnesty International, above n 9, at 7; Madeline Gleeson "PNG Court Decision Forces Australia to Act on Manus Island Detainees" (Apr 27, 2016), <https://theconversation.com/png-court-decision-forces-australia-to-act-on-manus-island-detainees-58439>.

[11] John Lehmann "Tensions Erupt on Manus Island as Locals Threaten to Sabotage 'PNG Solution' Detention Centre" (2 Sep 2013), available at: <http://www.dailytelegraph.com.au/news/nsw/tensions-erupt-on-manus-island-as-locals-threaten-to-sabotage-8216png-solution8217-detention-centre/story-fni0cx12-1226708621968>.

[12] The Kaldor Centre for International Refugee Law, above n 8.

[13] BBC "What Next for Manus Island Asylum Seekers?" (17 August 2016), available at: <http://www.bbc.com/news/world-australia-36150758>.

The Parties, Claims, and Procedural History

The proceedings were commenced by Belden Namah MP, then leader of the opposition party in PNG, in 2013 against Rimbink Pato (Minister for Foreign Affairs & Immigration), the PNG National Executive Council, and the state of PNG. Namah sought declaratory orders on the following matters: (1) the transfer and detention of the asylum seekers is unconstitutional; (2) s 42(1)(g) of the Constitution does not apply to the asylum seekers; (3) s 1 of the Amendment is unconstitutional and invalid (para 5). The respondents argued for a dismissal of the application, denying that any of the steps they took were unconstitutional (para 6).

The applicant applied for two interlocutory orders following the commencement of the proceedings: (1) an interim injunction that, pending determination of the substantive proceedings, the defendants be restrained from receiving or transferring any further asylum seekers from Australia; (2) an order that the plaintiff's lawyers be granted access to the processing centre to get statements and affidavits from some of the persons.[14] The second order was granted. But the first was not granted. The PNG National Court of Justice found that two of the five considerations did not favor the granting of the injunction: (1) the balance of convenience does not favour granting an injunction in the terms sought; (2) the interests of justice do not require that the injunction be granted.[15]

In 2014, the PNG Supreme Court of Justice declared that Namah had standing under s 18 of the Constitution, under which the case was brought.[16] The Supreme Court Rules 2012 require that

[14] *Norman v Pato* [2013] PGNC 17; N4990 (14 February 2013).
[15] Ibid. The other three considerations are: (1) an undertaking as to damages has been given; (2) damages would be an inadequate remedy; (3) there are serious questions to be tried and the plaintiff has a serious not merely speculative case, however the prospects of ultimate success are tempered by question marks.
[16] *Namah v Pato* [2014] PGSC 1; SC1304 (29 January 2014).

before an application under s 18(1) of the Constitution can be heard, the court should declare that the applicant has standing. An applicant has a standing if they: (1) has a sufficient interest in the matter; (2) raise significant (not trivial, vexatious, hypothetical or irrelevant) constitutional issues; (3) are not a mere busybody meddling in other people's affairs and are not engaged in litigation for some improper motive.[17] A person should not be denied standing merely because there are other ways of having the constitutional issues determined by the Supreme Court.[18] The court found that the applicant in this case met the above requirements and therefore had standing even though there were at least three other ways of having the issues determined by the courts.[19]

The PNG Supreme Court Decision

The court considered three issues in the following order: first, whether the transfer and detention of the asylum seekers at the Manus Detention Centre is contrary to their rights of personal liberty guaranteed by s 42 of the PNG Constitution; second, whether s 1 of the Amendment is unconstitutional and invalid; third, whether s 42(1) (g) and/or s 42(1) (ga) of the Constitution apply to asylum seekers.

The court's analysis of the first issue revolves around the original provisions of s 42(1) of the Constitution prior to the Amendment (para 28). Section 42(1) states that "no person shall be deprived of his personal liberty" subject only to the exceptions provided in s 42(1)(a) to (i) (para 28). The court interpreted s 42(1) as "no person within PNG's territorial jurisdiction could be detained or held against his or her will, by anybody, not even the police or any other law enforcement agency, except only for the reasons or circumstances and in the manner set out under

[17] Ibid.
[18] Ibid.
[19] Ibid.

s.42(1) (a) to (i)" (para 29). In accordance with this interpretation, s 42(1) would apply to PNG citizens and foreign nationals within PNG's territorial jurisdiction on an equal footing. The asylum seekers at the Manus Detention Centre, who were in PNG territories, would therefore be entitled to personal liberty guaranteed by s 42(1) of the Constitution, which means they should not have been detained or held against their will except for the reasons or circumstances and in the manner set out under s 42(1) (a) to (i).

The court further noted that the meaning and effect of each of the exceptions set out under s 42(1) (a) to (i) must be given by Acts of Parliament (para 33) and that the PNG "Migration Act gives legal meaning and framework for the purposes of s. 42(1) (g)" which is relevant to the case before the court (para 35). Therefore, the power to detain and thus deprive a person of their personal liberty under s 42(1) (g) of the Constitution must be exercised in accordance with the relevant provisions of the Migration Act (para 38).

Having considered the relevant provisions of the Migration Act (para 35-37), the court found that the power to detain a person pursuant to s 42(1) (g) of the Constitution was only available against persons who had entered and/or remained in the country without a valid entry permit or exemption (para 38). Since the PNG Minister for Foreign Affairs and Immigration issued permits under s 20 of the Migration Act for the asylum seekers to enter PNG, they entered the country with a valid permit or exemption (para 39). No situation had arisen in the case of the asylum seekers to warrant detention pursuant to s 42(1) (g) (para 39). Therefore, the court found the forcible transfer and detention of the asylum seekers unconstitutional and illegal (para 39).

The court then considered whether the Amendment, which *inter alia* inserted s 42(1) (ga) into the Constitution, was valid (para 40). According to the court, a valid amendment to the Constitution must meet the following requirements (para 51):

(1) be expressed to be a law that is made for the specified purpose;

(2) specify the right or freedom that it regulates or restricts;

(3) be passed by two thirds absolute majority;

(4) be certified by the Speaker in his certificate under Section 110 (certification as to making of laws) to have been made, by absolute majority; and

(5) be reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind in the light:

(a) of circumstances obtaining when the decision on the question is made; and

(b) having regard to the matters set out in s.39 (3) of the Constitution.

The court pointed out that it was most important to demonstrate that the amendment was "reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind" (para 52). The Amendment was passed by the PNG Parliament with the requisite majority of votes (para 53); it was also certified by the Speaker of Parliament in 2014 (ibid). However, the court noted that the following factors clearly showed that the Amendment was created without proper consideration or thought: first, the Amendment does not specify the rights which it purports to restrict (ibid);[20] second, the Amendment "does not say the regulation or restriction is 'reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind'" (para 53); third, as the Amendment was intended to deal with dual citizenship and citizen rights, logically a provision on personal liberty (s 42(1) (ga)) does not fit in well with the Amendment (ibid).

The court also noted that it was for the party who claimed a law was valid to prove that fact (para 52). The respondents, namely Rimbink Pato (Minister for Foreign Affairs and Immigration), the PNG National Executive Council, and the state of PNG, failed to demonstrate to the satisfaction

[20] The stated purposes of the Amendment was: "to amend the Constitution by amending the provisions in relation to Citizenship, and for related purposes".

of the court that the Amendment fully met the five requirements mentioned above (para 54). The court concluded that the Amendment was unconstitutional and invalid (para 54).

Noting that the invalidity of the Amendment would render it unnecessary to consider the third issue, namely whether s 42(1) (ga), inserted in the Constitution by means of the Amendment, applied to the asylum seekers (para 55), the court nevertheless decided that it would consider the question as if s 42(1) (ga) was validly inserted (which it was not) (ibid). It found that, even if s 42(1) (ga) was validly inserted, it would be ineffective because no Act of Parliament had given effect to it (para 74(5)) and therefore could not be applied to the asylum seekers.

The court declared and ordered, *inter alia*, the following (para 74):

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> (6) Both the Australian and Papua New Guinea governments shall forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees Constitutional and human rights. …

Response from Governments

The PNG Prime Minister, Peter O'Neill, said shortly after the ruling that the Manus Detention Centre would be closed and that his government would "immediately ask" Australia to make alternative arrangements for the asylum seekers held at the Manus Detention Centre.[21] In August 2016, the two countries agreed to close the Manus Detention Centre, but Australia's Minister for

[21] Stephanie Anderson "Manus Island Detention Centre to Be Shut, Papua New Guinea Prime Minister Peter O'Neill Says" (28 Apr 2016), available at: <http://www.abc.net.au/news/2016-04-27/png-pm-oneill-to-shut-manus-island-detention-centre/7364414>.

Immigration, Peter Dutton, stressed that the decision will not alter Australia's offshore asylum processing policy and the asylum seekers would not be resettled in Australia.[22]

Of the 850 asylum seekers held at the Manus Detention Centre at the time of the Supreme Court decision, more than 100 men have been moved to the East Lorengau Refugee Transit Centre, nearer to Manus's main town, Lorengau.[23] As of October 2016, no specific resettlement plan for these asylum seekers has been agreed upon.

Commentary

(1) The court's order No. (6)

The court ordered, *inter alia*, that both the PNG government and Australian government shall "take all steps necessary to cease and prevent" unconstitutional detention and violation of human rights (para 74(6)). This order raises a couple questions. First, the applicant of the case was only seeking *declaratory* orders on the constitutionality of the Amendment and the transfer and detention of the asylum seekers and the inapplicability of s 42(1) (ga) to the asylum seekers (para 5); he did not seem to have sought a judicial order which requires actions from the PNG government or the Australian government. The court appears to have ordered what the applicant did not seek.

Second, the Australia government was not a party to the case. The Australian government is the government of a sovereign state. It is customary international law that a sovereign state and its government are entitled to immunity from the jurisdiction of a foreign state,[24] which is known as

[22] AAP "Manus Island Detention Centre 'Set to Close'" (17 Aug 2016), available at: <http://www.theaustralian.com.au/national-affairs/manus-island-detention-centre-set-to-close/news-story/7782f0b8ed5987a06a878476e7cf0132>.

[23] The Australian "PNG Minister Says 'Refugee Transit Centre' on Manus Island Will Remain Open" (5 Oct 2016), available at: <http://www.abc.net.au/news/2016-10-04/png-to-keep-refugee-facility-on-manus-island-open/7903020>.

[24] United Nations International Law Commission Report of the International Law Commission on the work of its thirty-second session (5 May-25 July 1980), A/35/10, Yearbook of the International Law Commission1980, vol II pt II, at 149.

the rule of state immunity. Put simply, as a general principle, a sovereign state cannot be sued without its consent. The rule was recognized as international customary law by the United Nations International Law Commission in 1980,[25] and affirmed by the International Court of Justice (ICJ) in *Germany v. Italy: Greece intervening* in 2012.[26] In that case, Germany complained that Italy failed to respect Germany's jurisdictional immunity "by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War".[27] Affirming that a state has "a right to immunity [from foreign jurisdictions] under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity",[28] the ICJ further found and that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law".[29] In light of this finding, it would appear that a state also should not be deprived of immunity on the ground that it is accused of violation of another country's human rights law or constitutional law.

In the case of *Namah v Pato*, there is no statement in the Supreme Court's decision that Australia violated international human rights law or PNG Constitutional or human rights law. Even if the court found that Australia did violate international human rights law or PNG national law, Australian is likely to be able to argue that it is not deprived of immunity on the ground of such violations.

[25] Ibid.
[26] International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Summary of the Judgment of 3 Feb 2012.
[27] Ibid, at 1.
[28] Ibid, at 3.
[29] Ibid, at 6.

The ICJ also noted that there were exceptions to the rule of state immunity and that such exceptions, in state practice, included circumstances involving torts occasioning death, personal injury or damage to property occurring on the territory of the forum State.[30] It seems that the ICJ has not had the chance to answer the question of what exceptions to the rule of state immunity existed in customary international law.[31]

Proceedings in which a state cannot invoke immunity can be found in Part III of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UN Immunity Convention) as follows:[32] (1) commercial transactions with natural or legal persons (art 10); (2) contracts of employment with individuals (art 11); (3) personal injuries and damage to property (art 12); (4) ownership, possession and use of property (art 13); (5) intellectual and industrial property (art 14); (6) participation in companies or other collective bodies (art 15); (7) ships owned or operated by a State (art 16); and (8) effect of an arbitration agreement (art 17). However, since neither PNG nor Australia has signed the Convention and it is not yet in force, the Convention can only serves as a point of reference. It appears that none of these circumstances had arisen in *Namah v Pato*. The nexus between Australia and the case is the arrangements between the PNG government and the Australia government regarding the transfer and detention of the asylum seekers, which the applicant claimed unconstitutional under the PNG Constitution. Such arrangements can hardly be considered as commercial transactions or contracts of employment with individuals. The proceedings of the case did not concern personal injuries or damages to property either.

[30] Ibid, at 5.
[31] In *Germany v. Italy: Greece intervening*, ICJ did not resolve, because it did not consider it was called on to resolve that question. Ibid, at 4.
[32] Adopted on 2 Dec 2004, not yet in force.

It is interesting to note that PNG was a defendant in the Fijian case of *Reddy v Ambassador of the Independent State of Papua New Guinea*,[33] where the High Court of Fiji accorded state immunity to PNG. The case involved a building contract entered into by PNG (executed by the PNG Ambassador to Fiji) for the plaintiff, a Fijian construction company, to renovate the PNG Head of Mission's official residence. Noting that Fiji did not have any relevant legislation on this subject, the court turned to "the common law to ascertain the nature and extent of the widely-held doctrine of international law".[34] The court noted that there were two schools of views on state immunity: the older school favoring absolute immunity and the more recent school favoring a more restrictive approach.[35] According to the restrictive view, a state cannot claim immunity in respect of actions of a private nature, although it is often difficult to distinguish private actions conducted by a state from sovereign actions.[36] The court concluded that "the contract between the parties is not so clearly and exclusively a private or commercial transaction that the restrictive view should inevitably prevail".[37] This conclusion was considered by an author as "Fatiaki-speak" for the court's preference for the absolute immunity of PNG from the jurisdiction of the Fijian courts.[38] It appears that there is no relevant legislation on the subject of exceptions to state immunity in PNG. If the building contract between the PNG government and a building company in *Reddy* was not considered exclusively a private/commercial transaction to deprive PNG's state immunity from the jurisdiction of the Fijian courts, arguably the transfer and detention arrangements between the

[33] *Reddy v Ambassador of the Independent State of Papua New Guinea* [1999] 45 FLR 142; [1999] FJHC 75.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Yoli Tom'tavala "Beware of the Contracting Diplomat: A Review of *Reddy V Ambassador of the Independent State of Papua New Guinea* [1999] 45 FLR 142; [1999] FJHC 75" (1999) 11(2) JSPL 218 at 222, available at: <http://www.paclii.org/journals/fJSPL/vol11no2/pdf/tomtavala2.pdf>.

PNG and Australia governments does not deprive Australia's immunity from the jurisdiction of the PNG courts.

Finally, a state may, of course, voluntarily submitting itself to the jurisdiction of a foreign state and waive its immunity by giving express consent, participating in the proceedings, or making a counterclaim.[39] Since Australia was not a party of *Namah v Pato* and did not agree to subject itself to the jurisdiction of the PNG courts, it has not waived its immunity in the case.

In light of the above, Australia appears to have a strong case of claiming immunity from the jurisdiction of the PNG courts in *Namah v Pato*. It follows naturally that the Australian government cannot be brought into the case by way of orders of the PNG Supreme Court. It is likely to be able to argue strongly that it is not legally bound by the Supreme Court's decision. However, the PNG government is bound by the decision and must not continue the transfer and detention of asylum seekers unless, in the unlikely case (see below), a new law is passed to legalize such acts. Without PNG's cooperation, it would be impossible for Australia to continue the offshore procession operation in PNG.

(2) Implications for Australia's offshore asylum processing

Following the court's ruling that the transfer of asylum seekers from Australia to PNG under the current legislation framework is unconstitutional, and PNG cannot legally take more asylum seekers under the two MOUs between PNG and Australia, unless new law is passed to validly amend the Constitution. The PNG Prime Mister has expressed the government's willingness to follow the judgment and ordered the closure of the Manus Detention Centre following the Supreme Court decision.[40] Earlier in March 2016, he called the Manus Detention Centre a "problem" that

[39] UN Immunity Convention, arts 7-9.
[40] Anderson, above n 21.

had damaged PNG international reputation.[41] The Centre has also been controversial with local Manusian residents, who have lamented the trouble it has brought to their province.[42] In light of the above, it is likely that the PNG government will not seek to amend the Constitution to legalize the transfer. As a consequence, it is likely that Australia will have to end its offshore asylum processing operation in PNG.

Last but not least, the decision, although it cannot be relied upon directly to challenge the legality of Australia's offshore asylum processing operation in Nauru, offers an excellent example, if lawyers are going to challenge the legality of the detention of asylum seekers in Nauru, especially given that the Nauru Constitution, like the PNG Constitution, also guarantees the right to personal liberty.[43] It probably also serves as a reminder to governments, which have been or may be approached by Australia for establishing offshore processing centers, that they must consider very carefully whether the arrangements are in accordance with relevant provisions of domestic and international law.

[41] Nicole Hasham "PNG Prime Minister Peter O'Neill Calls Manus Island Refugee Centre A "Problem" That Should End" (4 Mar 2016), available at: <http://www.smh.com.au/federal-politics/political-news/png-prime-minister-peter-oneill-calls-manus-island-refugee-centre-a-problem-that-should-end-20160303-gn9l1n.html>.

[42] Gleeson, above n 10.

[43] Section 5 of the Constitution of Nauru provides that: "No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases: …", available at: <http://www.naurugov.nr/parliament-of-nauru/constitution-of-nauru.aspx>.