



IN THE SUPREME COURT OF NAURU  
AT YAREN CRIMINAL JURISDICTION

MISCELLANEOUS CAUSE NO. 8 OF 2021

IN THE MATTER for an Order to further  
detain the respondent pursuant to Article 5  
(1)(c) and Article 5(3) of the Constitution of  
the Republic of Nauru

BETWEEN

THE REPUBLIC

Applicant

AND

JACKSON PICKERING

Respondent

Before: Khan, J  
Date of Hearing: 27 September 2021 and 1 October 2021  
Date of Ruling: 14 October 2021

*Case to be known as: The Republic v Pickering*

**CATCHWORDS:** Article 5(3) of the Constitution – Whether an application for an extension of time for further detention is by way of constitutional redress application – Pursuant to Part 7 of the Supreme Court Act 2018 – Whether the application for extension can be made by way of a motion and affidavit – Whether explanatory notes of Bills introduced in Parliament can be referred to for interpretation of statutes.

**APPEARANCES:**

Counsel for the Applicant: F Puleiwai  
Counsels for the Respondent: R Tangivakatini and T Lee

## REASONS FOR EX-TEMPORE RULING

### INTRODUCTION

1. On 27 September 2021 I heard an application under Article 5(3) of the Constitution for further detention of the respondent which was made by way of Notice of Motion supported by an affidavit by Sgt Sareima Aremwa.
2. The respondent was alleged to have committed an offence of indecent act and being found in a place without lawful authority contrary to ss. 106 and 164 respectively of the Crimes Act 2016.
3. In my ex-tempore ruling, the respondent was detained in the Nauru Correctional Centre for a period of 7 days to allow the police to complete their investigations against him. I invited the prosecution to file written submissions as to whether the application under Article 5(3) should be by way of Constitutional Redress application as provided for in ss. 28 and 29 of the Supreme Court 2018 or whether an application by way of a motion and affidavit.
4. Although I detained the defendant for 7 days, I adjourned this matter to 1 October 2021 to see the progress of the police investigation and on 1 October 2021 I further detained the defendant until 4 October 2021.
5. On 4 October 2021 I was advised by Miss Puleiwai that the respondent was charged with one count of indecent act and one count of being found in a place without lawful authority and he was produced before the District Court and the matter was adjourned to 8 October 2021 and that it will be tried by the District Court.
6. On 4 October 2021 Mr Tangivakatini, the Public Legal Defender, appeared for the respondent and stated that he would also file written submissions as to whether Article 5(3) involves Constitutional Redress or whether the application can be made by way of a motion and affidavit. He was granted time until 8 October 2012 to file his submissions.

### WRITTEN SUBMISSIONS

7. Miss Puleiwai filed written submissions on 4 October 2021 in which she submitted that an application under Article 5(3) only seeks an extension of time for a person who has been arrested or detained and has not been released shall be brought before the Court within 24 hours and that it does not involve any interpretation of the Constitution and therefore the extension can be sought by filing a motion and affidavit. She concedes that an application under Articles 14 and 54 of the Constitution has to follow the procedures set out in Part 7 of the Supreme Court Act under sections 28 and 29 as it is a Constitutional Redress application.
8. On 8 October 2021 Mr T Lee appeared for the respondent and advised the Court that the Public Legal Defender had perused Miss Puleiwai's written submissions and agrees with it in its entirety and has nothing further to add.

9. Miss Puleiwai in her written submissions discussed the case of *R v Jeshua Agege*<sup>1</sup> in which Fatiaki CJ stated that Article 5(3) would have to comply with the requirements of Part 7 of the Supreme Court Act. He stated at [10], [11], [12] and [13] as follows:

[10] It is clear from the above Articles 54 & 14 that the enforcement of the rights and freedoms contained in Part II of the Constitution is by way of a “*suit*” of an interested person filed in the Supreme Court. The nature and contents of the “*suit*” is clarified further in the following provisions of the Supreme Court Act 2018 which reads:

***PART 7 – CONSTITUTIONAL APPLICATION, INTERPRETATION, EFFECT  
AND REDRESS***

28 ***Exercise of jurisdiction***

*The jurisdiction and powers conferred to the Supreme Court under Articles 14, 54 and any other Articles of the Constitution may be exercised by a single Judge.*

29 ***Application***

(1) *An application to the Supreme Court for redress shall be made by:*

*(a) an originating summons; and*

*(b) a supporting affidavit.*

(2) *The originating summons shall provide:*

*(a) a concise nature of the claim;*

*(b) a concise declaration of relief sought;*

*(c) such other order as may be appropriate; and*

*(d) the relevant provision of the Constitution.*

(3) *Where a constitutional redress application is filed, whether or not the Republic is a party, the Secretary for Justice shall be served with a copy of the originating summons and supporting affidavit within 14 days of the filing of the application.*

(4) *Where necessary, the Secretary for Justice shall enter an appearance to assist the Supreme Court in the interpretation or application of the Constitution.*

[11] Plainly an unnotified oral application and counsel’s unsworn statements about any evidence in support thereof uttered across the bar table are non-compliant and irregular. Furthermore, such utterances do not provide adequate notice and proper information to a detainee or his counsel in a timely manner, so as to enable a proper objection or opposition to the application for further detention, to be prepared.

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<sup>1</sup> [2021] Miscellaneous Case No. 1 of 2021 (24 January 2021) Fatiaki CJ

- [12] I accept that exigencies or circumstances may necessitate an urgent oral application with little prior notice, but, that must be the exception and cannot be allowed to become the rule or a common “*practice*”. Needless to say, circumstances can change rapidly within 7 or 14 days including the state of completeness of a police investigation and such change(s) should properly be included in a fresh affidavit deposed by the investigating officer.
- [13] DPP submits that following the process set out in the Supreme Court Act 2018 would be cumbersome and highly inconvenient, but, I make no apologies for requiring substantial compliance with the law however inconvenient it may be. It must be remembered that the Court is dealing with the fundamental right to the protection of personal liberty, of which the Constitution itself, permits, a brief curtailment for a period of not more than “...24 hours after arrest or detention” and, beyond such time limit, a judicial order is required.

### CONSIDERATION

10. Under Part 7 of the Supreme Court Act, in addition to ss. 28 and 29, s.30 provides for the subordinate Court to refer cases for Constitutional interpretation and on questions of law. S.30 states:

Reference by the subordinate court by way of case stated on the Constitution or an important question of law

- (1) A question referred to the Supreme Court pursuant to any written law by a subordinate court for the interpretation and effect of the provisions of the Constitution or an important question or interpretation of a law shall be by way of a case stated in a pending case before the subordinate court.
- (2) The case stated in subsection (1) shall be referred to the Supreme Court within 14 days of the decision of the subordinate court to refer the question.
- (3) The case shall:
  - (a) set out the facts which have been established by evidence or admitted;
  - (b) set out the concise constitutional question which is referred to the Supreme Court for its determination; and
  - (c) be transmitted by the subordinate court referring the constitutional question to the Registrar who shall list it before a Judge.
- (4) The Registrar shall notify:
  - (a) the party, if any, on whose request the case was stated;
  - (b) other parties to the proceedings;
  - (c) the Secretary for Justice in all matters; and
  - (d) in a criminal cause or matter, the Director of Public Prosecutions unless the Director of Public Prosecutions is already representing the Republic in the

criminal matter.

- (5) The Secretary for Justice and the Director of Public Prosecutions under subsection (4), shall be entitled to appear and be heard in the determination of the constitutional question before the Supreme Court.
  - (6) The Registrar shall notify the subordinate court by which the constitutional question was referred of the decision of the Supreme Court.
11. Under s.30 of the Supreme Court Act, the District Court apart from referring an important question or interpretation of a law is also required to refer any interpretation or effect of a provision of the Constitution, however, the District Court is not precluded from applying the articles of the Constitution where the interpretation is not in question. It has the powers to apply the Constitution to a given set of facts in any case.
  12. I refer to the explanatory memorandum of the Supreme Court Bill 2018 where it is stated at clause 30 (s.30 of the Act) as follows:

“Clause 30 provides that the case stated is limited to the interpretation and effect of the Constitution only. What is left out is the application of the Articles of the Constitution because if the interpretation is not in question, the application is not an issue for the Court to apply the Constitution to a given set of facts in a case.”

CAN EXPLANATORY NOTES BE REFERRED TO FOR INTERPRETATION OF STATUTES?

13. In *Westminster City Council v National Asylum Support Service*<sup>2</sup> Lord Steyn stated at [5] as follows:

[5] The question is whether in aid of the interpretation of a statute the court may take into account the Explanatory Notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. In regard to contractual interpretation this was made clear by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384-1386, and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 995-996. Moreover, in his important judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913, Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction. In *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763, Lord Blackburn explained the position as follows:

"I shall . . . state, as precisely as I can, what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in

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<sup>2</sup> [2002] UKHL 38 (17 October 2002) (House of Lords)

writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used."

Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. **After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible:** see Cross, *Statutory Interpretation*, 3rd ed (1995), pp 160-161. If used for this purpose the recent reservations in dicta in the House of Lords about the use of Hansard materials in aid of construction are not engaged: see *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 407; *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, *The Times*, 26 July 2002, in particular per Lord Hoffmann, at paragraph 40. On this basis the constitutional arguments which I put forward extra-judicially are also not engaged: "Pepper v Hart: A Re-examination" (2001) 21 *Oxford Journal of Legal Studies* 59.

(Emphasis added)

14. In clause 30 of the Explanatory Notes, it is stated: "What is left out is the application of the Articles of the Constitution because if the interpretation is not in question, **the application is not an issue for the Court to apply the Constitution to a given set of facts in a case.**" What this means is that the District Court is allowed to apply the articles of the Constitution when interpretation is not in question, for example, if the District Court is conducting a voir dire for the admissibility of a confession, it can apply Article 5(3) to ascertain as to whether an accused was brought to the Court within 24 hours, and if not, then it can make a finding that his detention was unlawful and consequently make a finding that any confession made as a result of the unlawful detention is inadmissible.
15. I agree with Miss Puleiwai that Article 5(3) only deals with its application for extension and does not involve its interpretation so there is no need for an application to be made by way of a Constitutional Redress.

## CONCLUSION

16. In the circumstances I with respect differ from the observations made in the case of *R v Joshua Agege* and conclude that any application for extension of time for a person arrested or detained by the police can be made by way of a motion and affidavit which can be dealt

with by the Resident Magistrate who is a judicial officer within the provision of Article 56 or a judge in his absence.

DATED this 14 day of October 2021



Mohammed Shafiullah Khan  
Judge

