SC1497

[IN THE SUPREME COURT OF JUSTICE]

SCA. NO. 84 OF 2013

BETWEEN:

BELDEN NORMAN NAMAH, MP Leader of the Opposition
Applicant

AND:

HON. RIMBINK PATO, MINISTER FOR FOREIGN AFFAIRS & IMMIGRATIONS
First Respondent

AND:

NATIONAL EXECUTIVE COUNCIL
Second Respondent

AND:

THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Respondent

WAIGANI: Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ

2015: 26th October
2016: 26th April

CONSTITUTIONAL LAW – Interpretation and application of Constitutional Law – Amendment to the Constitution affecting personal liberty of a person – Section 38 qualifications and requirements – Amendments failing to meet requirements – Effect of – Amendments invalid.

CONSTITUTIONAL RIGHTS – Liberty of a person s.42 - Exceptions - Persons forcefully brought into Papua New Guinea and held against their will – Administrative arrangements between two sovereign countries – Arrangements in breach of Constitutional guarantee of liberty of all persons – Arrangements unconstitutional – Subsequent

constitutional amendments invalid – Effect of – Arrangements declared unconstitutional and illegal.

MIGRATION LAW – Detention of persons seeking asylum – Need to determine refugee status first – Essential elements entry and remaining in the country without a permit and or an exemption – Persons lawfully in the country but brought in against their will and detained – Lack of proper guidelines for the treatment of asylum or refugee claims which have due regard to human rights of persons guaranteed by the Constitution –Conditions at detention centre failing to meet UNHCR guidelines – Effect of – Breach of constitutional rights and Migration Act – Detention unconstitutional and illegal.

PRACTICE & PROCEDURE – Constitutional reference – Establishment of relevant facts – Disputed facts and undisputed facts - Dispute must be with good reason - Court orders and directions for parties to discuss and settle – One party failing to comply, failing to seek extension of time and take steps to comply and objecting to statement of facts filed - Objection overruled – Effect of – Facts in statement of facts stand admitted or uncontested -- No need for any trial to find the relevant facts – Trial should be reserved for cases in which there is genuine dispute with good reason – Lack of – Court to proceed summarily

COSTS – Rule of the thumb – Discretion of the Court to award costs - Successful party gets costs – Applications under s. 18 and 19 – Costs ordered in favour of successful party.

Papua New Guinea Cases Cited:

Application by Francis Gem (2010) SC 1065.
Reference by the East Sepik Provincial Executive (2011) SC1154.
Korak Yasona v. Casten Maibawa and The Electoral Commissioner of Papua New Guinea (1998) SC589.
Belden Norman Namah MP v. Rimbink Pato MP (2013) N4990.
The State v. Songke Mai and Gai Avi [1988] PNGLR 56.
Re Application of Lou Bei v Dominic Ampao'i (2010) N3826.
The State v. Enni Mathew & Ors (No 2) (2003) N2563.
Re Village Courts Act (Ch44) [1988–89] PNGLR 491.
Re Yongo Mondo (1989) N707.
Premdas v. Independent State of Papua New Guinea [1979] PNGLR 329.
Application of Ireeuw [1985] PNGLR 430.
Kaseng v. Namaliu [1995] PNGLR 481.
The State v. NTN Pty Ltd and NBN Ltd [1992] PNGLR 1.
Don Pomb Pullie Polye v. Jimson Sauk and Electoral Commission (1999) SC651.

William Moses v. Otto Benal Magiten (2006) SC875.
Air Traffic Controllers Association v. Civil Aviation Authority (2009) SC1031.
Reference by the Morobe Provincial Executive (2012) SC1202

Overseas Cases Cited:
Maneka Gandhi v. Union of India (1978) 2 SCR 621.
Guzzardi v. Italy 3 EHRR 333
Plaintiff S4/2014 v. Minister for Immigration & Border Protection [2014] 253 CLR 219

Legislation and other material cited:
Constitution Amendment (No. 37) (Citizenship) Law 2014
Constitution of the Independent State of Papua New Guinea
Migration Act (Chp.16)
United Nations Convention Relating to the Status of Refugees 1951
UNHCR Detention Guidelines
Quarantine Act (Chp.234)
Migration (Amendment) Act No.10 of 1989.

Counsel:
J. Griffin QC and L. Henao, for the Applicant
P. Kuman, for the Respondents

26th April 2016

1. **Salika DCJ**:I read the draft judgments of Kandakasi and Higgins JJ and I agree with them on their conclusions and the proposed orders. I have nothing further to add.

2. **Sakora J**: I had the benefit of pursuing the drafts circulated by my brothers Justices Kandakasi and Higgins and I am in full agreement with the conclusions to the issues raised and the reasons for these. Thus, I am in the happy situation of not needing to add anything else. Similarly the orders proposed by my brother Justice Kandakasi.

3. **Kandakasi J:** I had the privilege of reading the draft judgment of my learned brother Higgins J. I am in agreement with His Honour, both with his reasoning and his proposed outcome of this application. At the same time, however, I would like to express my reasons in my own words.

4. **Sawong J**: I read in draft the reasons, conclusions and proposed orders by my brothers Kandakasi and Higgins JJ. I concur entirely with their reasons, conclusions and proposed orders. I have therefore nothing further to add.

Introduction

5. This is an application pursuant to s.18 (1) *Constitution*. It concerns people of different nationalities who sought asylum (asylum seekers) in Australia but got transferred and held against their will on Papua New Guinea's Manus Island Processing Centre (MIPC) pending a processing of their asylum claims. This was under an arrangement between the Australian and Papua New Guinean (PNG) governments in the form of Memorandum of Understandings (MOU) signed on 08th September 2012 (1st MOU) and a new one signed on 05th and 06th August 2013 (2nd MOU). Later the two governments sought to validate the arrangements by an amendment to s.42 of the PNG *Constitution* and before that took a number of administrative measures under the *Migration Act* (Chp.16). The application seeks the following declaratory orders:

> "(i) That transferees brought to Papua New Guinea by the Australian Government and detained at the relocation centre on Manus Island is contrary to the constitutional rights of the transferees to personal liberty guaranteed by Section 42 of the Constitution.
>
> (ii) That Section 42 (1)(g) of the Constitution does not apply to the transferees [asylum seekers] under the Memorandum of Understanding (MOU) signed on 08th September 2012 and the new MOU signed on 05 and 06 August 2013...
>
> (iii) ... That Section 1 of the Constitution Amendment (No 37) (Citizenship) Law is unconstitutional and invalid."

6. The Foreign Affairs Minister (the Minister), the National Executive Council and the State (collectively "the Respondents") oppose the application and claim that all of the steps they have taken are valid and are in order. Accordingly they argue for a dismissal of the application.

Relevant Issues

7. Clearly the issues for us to consider and determine are:

> (1) Whether the bringing into PNG by the Australian Government and detaining the asylum seekers at MIPC is contrary to their constitutional rights of personal liberty guaranteed by s.42 of the *Constitution*?

(2) Is s.1 of the *Constitution Amendment (No 37) (Citizenship) Law 2014* (2014 Amendment) unconstitutional and thus invalid?

(3) Subject to an answer to question (2) does s.42 (1) (g) and or s. 42 (1) (ga) of the *Constitution* apply to the asylum seekers under the 1st and the 2nd MOUs?

Relevant Background and Facts

(1) Preliminary Issue

8. In order to properly understanding how these questions have arisen and their answers, it is necessary to set out the relevant background facts. Before getting into the facts themselves, I note that the accepted practice for applications under ss. 18 and 19 of the *Constitution* is this. Where the facts are in dispute a single Judge of the Supreme Court, other than any of the Judges constituting the bench that is dealing with the substantive matter, would be appointed to conduct a trial and make a finding of the relevant facts. Once the facts are established in that way, the full Supreme Court would hear the Application. In the *Application by Francis Gem*,[1] this Court established this practice. Recently, the Supreme Court in Reference by the East Sepik Provincial Executive,[2] endorsed and followed that practice.

9. The above practice is sound. This should be the case in cases where there are meritorious disputes on the relevant facts. By meritorious dispute, I mean there must be a real or genuine dispute with good reason which are beyond the parties' ability to resolve through their frank, fair and open discussions through a proper consideration and understanding of the relevant chain of events surrounding and leading to the cause in Court. In the circumstances, it must be clearly established to the Court's satisfaction as to how and why the case is one in which a judicial determination is required. Whether or not there is a meritorious dispute on the facts in each case is a position that can be ascertained at the directions hearing stage. That can be done with appropriate directions requiring the parties to discuss and arrive at a draft statement of agreed and disputed facts. The draft should then be the subject of due consideration by the directions Judge who should then be able to get into a consideration of the reasons for any dispute and why the parties have not been able to discuss and resolve the dispute themselves. If after that process, the directions Judge is satisfied that there is a meritorious dispute, the disputed facts alone should then be directed to go to a hearing before a single Judge of the Supreme Court.

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[1] *(2010) SC 1065.*
[2] (2011) SC1154.

10. It should follow logically therefore that, where there is a lack of a meritorious dispute on the facts, the parties should be able to agree on the relevant facts either through their own direct discussions or with the involvement of the directions Judge. Upon reaching that point, the matter should be listed for a hearing of the substantive matter without further delay.

11. Lawyers and their respective clients are always under an obligation to take all steps they need to take promptly to avoid unnecessary delays in an expedited prosecution and disposal of cases. If indeed there is a meritorious dispute on the relevant facts, they need to be brought out promptly through the filing and serving of a draft statement of agreed and disputed facts with the cooperation and agreement of all the parties. Then as I suggested above, the disputed facts should be discussed with the Judge conducting the directions hearing who should be able to decide which of disputed the facts have merit and which of them are without merit. After that, the Judge conducting the directions should be able to issue an order that finally determines which of the dispute facts should remain disputed facts and which of them become agreed or uncontested facts. This process of determining which of facts are disputed and which of them are agreed, is necessary and important. Its importance and necessity is dictated by the fact that, more and more pressure is in the formal courts to dispose of cases both quantitatively and qualitatively in a timely manner. These is also the factor of the Court's customers and other stakeholders demand for the Courts to minimise costs and avoid unnecessary delays in litigation.

12. In view of the foregoing, where a party fails to cooperate and fails to promptly bring out any meritorious dispute on the facts as well as the law in the same way that can only mean one thing. There is no serious issue on the facts and or the law. This would in turn invite the court to dispose of the matter summarily either by a dismissal or judgment, whichever is applicable. No court should be forced or required to unnecessarily go through the motion of a trial when there is no good reason or basis for any claim or a defence or an argument against a claim. The tax payers' money could be better applied only to resolving through the trial process matters that have real and serious disputes over the facts or the relevant and applicable.

Present Case

13. In the present case, the Respondents through their lawyer, Mr. Kuman, raised as a preliminary point at the commencement of the hearing, objections to certain of the facts stated in a Statement of Facts,[3] which was filed at the direction and order of the Court made on 20th October 2014. The Respondents

[3] Document No. 55 appearing at pp. 422 – 427 of the Application Book.

failed to comply with those orders and directions, they failed to cooperate with the Applicant's lawyers to have the Statement of Facts settled and have the matter prosecuted without unnecessary delay. We overruled the objections and decided to proceed on the basis of the Statement filed by the Respondents. In so doing, we had regard to the position the Courts have taken against parties or lawyers failing to comply with court orders and directions. There are many cases on point, but, I refer only to the decision of the Supreme Court in *Korak Yasona v. Casten Maibawa and The Electoral Commissioner of Papua New Guinea.*[4]

14. In the above case, Mr Yasona failed to comply with National Court orders and directions requiring him to file and serve his witnesses evidence in affidavit form by a certain time in an election petition case. He left it until the last day of the time stipulated for compliance to attempt to file a number of affidavits but failed to serve them within the time required. Service was effected 2 days late. The National Court after hearing the parties decided to dismiss the petition for failure by the petitioner to comply with the Court's orders and directions. The Court reasoned:

> "The evidence is quite clear. The petitioner has simply not complied with the orders and directions of the court. The petitioner had more than ample opportunity to comply with the directions, but instead he chose to wait until the last day, that is 9 June 1998 to file the various affidavits. The orders of the court were to file and serve those affidavits by 9 June 1998. The affidavits were served by a circuitous means on the respondents some two days later. Clearly on the fact of the evidence the petitioner has not complied with the orders and directions of this court. In my view this is a serious matter. It is not a simple technical matter as submitted by Mr Karu. In my view disobeying a court order is not a simple technical matter, because in not obeying and complying with the order a party is in effect expressing or displaying a contemptuous attitude or behaviour to the court. Such a behaviour cannot and will not be tolerated, particularly where litigants are represented by lawyers.
>
> The court's orders must mean something and if a party fails to comply with the court's orders then he or she does so on his or her own peril."
>
> (Underlining supplied)

15. In dismissing a review sought against the decision, the Supreme Court reasoned:

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[4] (1998) SC589.

"... when the court makes an order requiring the attendance of parties at a pre-trial conference or for filing and service of affidavits or witnesses' statements prior to the hearing date, the court expects total compliance with that order. If a party is facing difficulties in fully complying with the order, he should request a further pre-trial conference and seek an extension or variation of that order; not simply turn up on the trial date and expect the Court to be engaged in another series of pre-trial conferences."

16. In this case, by order of this Court on 20th October 2014, the Respondents were ordered to "discuss and settled a Statement of Agreed Facts" following which the Applicant was to have it filed and served by Friday 31st October 2014. The Applicant came up with a draft statement of the agreed facts, which the Respondents failed to discussed and settled. This led the Applicant to file a Statement of Facts on 26th November 2014. At the hearing before us, the Respondents failed to provide any reasonable explanation for their failure. Further and before that, they failed to seek an extension of time and seek to comply with the orders, if time was a problem. Without taking any of these steps, learned counsel for the Respondents sought to raise objections he should have raised and have them resolved at the directions hearing stage well before a listing of the substantive matter for hearing.

17. Obviously, the Respondents and their lawyers failed for no good a reason to discharge their obligation to take all steps they needed to take promptly to avoid unnecessary delays in an expedited prosecution and disposal of this case, which was filed on 1st August 2013. If indeed there were serious disputes on the relevant facts or on the law for very good reason, that fact and the reasons needed to be brought out promptly through the filing and serving of a statement of agreed and disputed facts and legal issues for trial with the cooperation and agreement of the parties. That could have enabled the parties and the Court to see which of the facts are disputed with the reasons for the dispute and which of the facts were not in dispute. Then in respect of any facts seriously in dispute, the parties could have easily agreed to such disputes existing and list the relevant disputed facts with the reasons of the dispute succinctly stated. The directions hearing Judge could have then inquired into the reasons for the disputed facts and determine which of them become agreed facts and which of them should remain contested with the reasons for the contest clearly stated. That could have then led to a prompt but a shorter trial specifically on the facts in dispute rather than an unnecessary lengthy trial. The Respondents failed in all these respects. That meant only one thing. There was no serious issue on the facts. This clearly invited the court to dispose of the matter summarily.

18. The Respondents did not offer any justifiable reason to effectively, have the hearing of the substantive application vacated to allow for a trial on the facts

on their belated claims of disputes on certain of the facts. I note in any event that, the Respondents dispute over certain of the facts are without merit or good reason. The facts they disputed were in fact facts borne out against them by the material filed in support of the substantive application. Repeating what I have already said, the tax payers' money could be better applied only to resolving matters that have real and serious dispute over the facts or law through the usual process of trial. Such disputes should be for very good reason which are beyond the ability of the parties to resolve perhaps due to there being no case precedent or clear legislative provision providing guidance for a resolution of the dispute or issue. Such is not the case here, not only by reason of the Respondents failure to act promptly but also when cross checked against the evidence before the Court.

19. In cases like the present, which involves the liberty of persons or other rights and freedom of human beings, prompt action is required. Unnecessary delay and lawyering should be avoided to avoid any further harm or damage to persons whose right or freedom is at stake. The same would go for the cases that concern public interest in the management and application of public funds, the administration and running of the affairs of the country, public health and safety and other cases that concern the security and interest of the nation.

(2) Relevant Facts

20. As a consequence of the above ruling, the relevant facts in this case became uncontested. Those facts start with the well-known international problem of a large number of people seeking refugee status for various reasons. A large number of people have over the years tried to enter Australia claiming asylum, with some succeeding. In a bid to control or otherwise overcome that problem, the Australian government decided to implement certain strategies. One strategy was to relocate their asylum claims processing centres outside Australia. The governments of PNG and the small island country of Nauru decided in favour of accommodating Australia's wish in exchange for certain monetary and other considerations. Following the decision to so accommodate, the PNG government entered into the two MOUs referred to above under which the asylum seekers who were seeking asylum in Australia were forcefully brought into PNG. A number of people in PNG and more so the Applicant in this case, took serious issue with the two governments arrangements claiming a violation of the asylum seekers fundamental human rights and in particular their liberty guaranteed under s. 42 of the *Constitution*. Despite the opposition, the two governments proceeded to bring in the asylum seekers who consist of men, women and children, under Australia Federal Police escort and have them held at the MIPC against their will. The MIPC is enclosed with razor wire and manned by security officers to prevent the asylum seekers from leaving the centre. All costs are paid for by the Australian government.

21. For the purpose of the arrangement between the two governments, the Foreign Minister in PNG granted approval under s. 20 of the *Migration Act* for the asylum seekers to be in PNG, albeit under detention. Some of the asylum claims have been processed and others are waiting for theirs to be also processed. It is understood that those who fail to have their asylum claims determined in their favour, will be kept in detention until their deportation.

22. In a bid to overcome the challenges or issues raised in opposition to the arrangements, the PNG government through the First and Second Respondents, rushed through Parliament a Constitutional amendment to s. 42 of the *Constitution* and introduced s.42 (1)(ga). Parliament did not pass any Act of Parliament to give effect to the provisions of s.42 (1)(ga). The only Act that would be relevant is the *Migration Act*.

23. By notice published in the National Gazette on 5th September 2012, the Minister exempted all transferees (asylum seekers) who travelled to PNG pursuant to the 1st MOU from ss. 3 and 7 of the *Migration Act* which concern entry permits and unlawful presence in PNG. By notice published in the National Gazette on 28th November 2012, the Minister declared the MIPC as a Regional Processing Centre for the temporary residence of asylum seekers pending the determination of their refugee status. By another notice also published in the National Gazette on 5th September 2013, the Minister directed all persons permitted to enter and reside in PNG under the 1st MOU with Australia to temporarily reside at the MIPC.

24. By the time the amendments took effect, a good number of asylum seekers were detained and continue to remain detained at the MIPC. In respect of the conditions of their detention, Cannings J., found in his decision in *Belden Norman Namah MP v. Rimbink Pato MP*[5]:

> "... the asylum seekers have been "detained" but they have not been accorded their five rights as detained persons under Section 42(2) of the Constitution. In particular they have not been permitted to communicate without delay and in private with a lawyer of their choice. They have not been given adequate opportunity to give instructions to a lawyer of their choice in the place in which they are detained."

25. It was incumbent upon learned counsel for the Respondents to draw the Courts attention to the above finding of facts and inform the Court what has become of that finding. My own research fails to reveal any variation or reversal

[5] *(2013) N4990.*

of that finding. In the absence of any evidence to the contrary, I am prepared to also accept these facts as uncontested facts.

26. Both Australia and PNG are signatories to the United Nations 1951 *Convention Relating to the Status of Refugees* and its 1967 *Protocol.*[6] PNG's signing is however with 7 reservations. The reservations are in respect of Article 17 (1) (wage earning employment); Article 21 (housing); Article 22(1) (public education); Article 26 (freedom of movement); Article 31 (non-penalisation of refugees for illegal entry or stay); Article 32 (expulsion) and Article 34 (naturalization).

27. There is in existence a publication by the United Nations High Commission on Refugees (UNHCR) headed *Detention Guidelines, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention.*[7] On 4th February 2013, the UNHCR's, Refugee Agency, published a detailed report on the MIPC headed "*UNHCR Mission to Manus Island, Papua New Guinea*, 15-17 January 2013.[8] The report highlighted a need for PNG to revisit its reservation on the *Convention on Refugees* and other areas that needs improvement to improve PNG's position on refugees. The report then ultimately concluded:

> "Assessed as a whole, UNHCR is of the view that the facilities on Manus Island lack some of the basic conditions and standards required. In particular, the closed detention setting and the lack of freedom of movement, along with the absence of an appropriate legal framework and capacitated system to assess refugee claims, are particularly concerning."

Constitutionality - Asylum seekers transfer and holding them (first issue).

28. With the above facts in mind, I turn then to deal with the first question before the Court. I take it that the question concerns the constitutionality of the two governments' actions prior to the amendment to s. 42 (1) resulting in the addition of the new provision, s. 42 (1) (ga). Prior to the 2014 amendment, s. 42(1) read as follows:

> "42. Liberty of the person.
> (1) No person shall be deprived of his personal liberty except—
> (a) in consequence of his unfitness to plead to a criminal charge; or

[6] Copy of these documents in one appearing at page 428 – 479 of the Application Book.
[7] Copy appearing at page 501 – 562 of the Application Book.
[8] Copy appearing at page 563 - 585 of the Application Book.

(b) in the execution of the sentence or order of a court in respect of an offence of which he has been found guilty, or in the execution of the order of a court of record punishing him for contempt of itself or another court or tribunal; or

(c) by reason of his failure to comply with the order of a court made to secure the fulfilment of an obligation (other than a contractual obligation) imposed upon him by law; or

(d) upon reasonable suspicion of his having committed, or being about to commit, an offence; or

(e) for the purpose of bringing him before a court in execution of the order of a court; or

(f) for the purpose of preventing the introduction or spread of a disease or suspected disease, whether of humans, animals or plants, or for normal purposes of quarantine; or

(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; or

(h) in the case of a person who is, or is reasonably suspected of being of unsound mind, or addicted to drugs or alcohol, or a vagrant, for the purposes of—

(i) his care or treatment or the protection of the community, under an order of a court; or

(ii) taking prompt legal proceedings to obtain an order of a court of a type referred to in Subparagraph (i);

(i) in the case of a person who has not attained the age of 18 years, for the purpose of his education or welfare under the order of a court or with the consent of his guardian."

29. As can be seen, prior to the 2014 amendment, the *Constitution* guaranteed a person's liberty. In other words, 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 s.42(1) (a) to (i). A number of judgments[9] in PNG provide examples of when persons can be constitutionally and hence lawfully detained or held against their will and when or in what circumstances any detention would be unconstitutional. Most

[9] See for examples: *The State v. Songke Mai and Gai Avi [1988] PNGLR 56* (what amounts to deprivation of ones liberty); *Re Application of Lou Bei v. Dominic Ampao'i (2010) N3826* (detention of a person unlawfully entering PNG) *The State v Enni Mathew & Ors (No 2) (2003) N2563* (unlawfully depriving a person of his liberty); SCR No 2 of 1989; *Re Village Courts Act (Ch44) [1988–89] PNGLR 491* and *Re Yongo Mondo (1989) N707* (imprisonment to enforce compensation payment not permitted);

notably, the Supreme Court in *The State v. Songke Mai and Gai Avi*,[10] clarified what amounts to a deprivation of a person's liberty within the meaning of s.42(1).

30. Kidu CJ,[11] in that case referred to and noted what a number of learned authors, such as the well-known Englishman, Blackstone, as well as Sir Ivor Jennings in his work, "*The Law and the Constitution*", had to say on the subject in the context of English constitutional law. His Honour also noted that the Supreme Court of India interpreted the phrase "person liberty" widely in the case of *Maneka Gandhi v. Union of India*.[12] He then said "... it is very clear from the exceptions enumerated in s 42 (1) that the provision relates to deprivation of the liberty of what Raine Dep CJ called "...the body of a man" in *Premdas v. Independent State of Papua New Guinea*.[13] He then went on to consider what Cory J, said in *Application of Ireeuw*.[14] There Cory J., noted that s. 42(1) of the PNG *Constitution* was in terms similar to the provisions of Article 5 of the *European Convention on Human Rights* as interpreted by European Union Court in *Guzzardi v. Italy*[15] and concluded at the end:

> "I should mention also, in support of what I consider 'personal liberty' means in s 42 (1), that the whole of s 42 makes it absolutely clear.
> From the foregoing it is my view that the terms 'arrested' and 'detained' (or 'arrest' and 'detain') in s 42 (2), (3), (5) and (6) mean total deprivation of personal liberty — they are two different forms of deprivation of personal liberty. And the deprivation must be legal. There cannot be any legal deprivation of personal liberty outside s 42 (1).

31. The learned Chief Justice went on to note that s. 42 (2) uses two terms:

> "(a) 'Arrest' only for criminal purposes, and
> (b) 'Detain' both for criminal and non-criminal purposes [and said]
> Under s 42 a person may be detained (ie, deprived totally of his personal liberty) without being arrested."

32. Apart from legislation such as the *Criminal Code* which provide for arrest and detention of persons by reason of committing a criminal offence, the learned Chief Justice, discussed a number of legislative provisions in PNG which provide for the deprivation of a person's liberty. This included the

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[10] *[1988] PNGLR 56.*
[11] The other Judges, Kapi DCJ, Amet, Los and Cory JJ, expressed their own opinions in terms similar to the Chief Justice.
[12] *(1978) 2 SCR 621* (Indian Supreme Court).
[13] *[1979] PNGLR 329 at 347.*
[14] *[1985] PNGLR 430.*
[15] 3 EHRR 333

Quarantine Act (Chp. 234) for the prevention of the spread of disease to humans, plants or animal which is sanctioned by s 42 (1) (f) of the *Constitution.* Also included in his consideration was s.13 of the *Migration Act.* That provision empowers the Minister for Foreign Affairs to order that a person who is in the country unlawfully be detained until he leaves the country. In the process of going through a similar examination of legislation on point, the learned Chief Justice highlighted the need for specific Acts of Parliament to provide for each of the exceptions under s. 42 (1) of the *Constitution.* He then concluded:

> "The view that exceptions to the right guaranteed by s 42 (1) must be implemented by Acts of Parliament finds support in the Constitution, s 52, and the Constitutional Planning Committee Report..."

33. Based on the foregoing discussions, it is clear to me that s.42 (1) of the *Constitution* says no person's liberty, meaning of a person's physical body or person can be deprived or restrained, except only in the circumstances enumerated in s. 42 (1). The listing of these circumstances are not complete. They are subject to Acts of Parliament which must give meaning and effect to each of the exceptions, as outlined by Kidu CJ., in *The State v. Songke Mai and Gai Avi* (supra). It should follow therefore that any detention or arrest outside that which is authorized by s.42 (1), as elaborated upon and provided for by a specific legislation, would be unconstitutional and therefore illegal.

34. The present case concerns migration. The relevant exception is under s. 42 (1) (g). That provision reads:

> "(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"

35. As noted the *Migration Act* gives legal meaning and framework for the purposes of s. 42 (1) (g) of the *Constitution.* Section 13 of the *Act* stipulates in material respects:

> **"13. Power to detain and remove persons from country.**
> (1) The Minister may order that a person against whom a removal order has been made be detained in custody until arrangements can be made for his removal from the country.
> (2) A person against whom a removal order has been made may—
> (a) if he has not removed himself from the country within the period stated in the order; or
> (b) if he is being detained in accordance with an order made under Subsection (1),

be placed on board a suitable conveyance by an officer, and may be detained in that conveyance until it leaves the country."

(Underling added)

36. The rest of the provisions of the *Act* provide details around how an order for removal and detention can be arrived at. According to s. 3 and 7 of the *Act*, these are directed against persons who enter PNG and or remain in PNG without a proper entry permit or exemption, which renders their presence in the country illegal.[16] These provisions read:

> "3. Prohibition on entry without entry permit.
> No person, other than a citizen, shall enter the country unless—
> (a) he is the holder of an entry permit; or
> (b) he is a person, or a member of a class or description of persons, exempted by the Minister under Section 20 from the requirement to hold an entry permit."
> ....
> "7. Unlawful presence in country.
> (1) Subject to Subsection (2), the presence of a person, other than a citizen, in the country, is unlawful if—
> (a) he is not the holder of an entry permit; or
> (b) he evaded an officer for the purposes of entering the country.
> (2) The presence of a person in the country is not unlawful if he is leaving the country in accordance with Section 9(3)."

37. Where a situation under s. 3 and 7 has arisen, s.10 empowers a migration officer to prevent entry or obtain a removal order to remove persons who enter PNG or are in the country illegally. Sections 11 and 12 then provide for the interrogation of such person and the process for the issue of a removal order.

38. The power to detain and therefore deprive a person's liberty pursuant to s. 42 (1) (g) legally and constitutionally is only in accordance with that provision and the relevant provisions of the *Migration* Act. That is available only against persons who have entered and or remain in the country without a valid entry permit or an exemption. Any deprivation of a person's liberty outside what is provided for will undoubtedly be unconstitutional and illegal.

39. In the present case, the undisputed facts clearly reveal that the asylum seekers had no intention of entering and remaining in PNG. Their destination was and continues to be Australia. They did not enter PNG and do not remain in PNG on their own accord. This is confirmed by the very fact of their forceful transfer and continued detention on MIPC by the PNG and Australian

[16] See ss. 3 and 7 of the Act.

governments. It was the joint efforts of the Australian and PNG governments that has seen the asylum seekers brought into PNG and kept at the MIPC against their will. This arrangements were outside the Constitutional and legal framework in PNG. The governments of PNG and Australia therefore took steps to regularise the forceful transfer and detention of the asylum seekers. Toward that end, PNG's Foreign Affairs Minister, Honourable Rimbink Pato issued permits under s. 20 of the *Migration Act* for each of the asylum seekers to enter PNG. Clearly the requirements under ss.3 and 7 of the *Act* of entering the country without a permit or an exemption and or remaining without either of them do not exist in this case. That means, no situation has arisen for the purposes of s. 13 of the *Act* or s. 42 (1) (g) of the *Constitution* to warrant, the asylum seekers' detention. Naturally, it follows that, the forceful bringing into and detention of the asylum seekers on MIPC is unconstitutional and is therefore illegal.

40. The question then in the light of the amendments to s. 42 (1) and introducing s.42 (1)(ga) of the *Constitution* is: did the amendment render the unconstitutional and illegal act described above constitutional and legal? An answer to that question is dependent on the question of whether the amendment is valid. These two questions are the subject of the second and third main questions for us to resolve in this case. I will deal with the technical question of the validity of the amendment first.

Is s.1 of the Constitution Amendment (No 37) (Citizenship) Law unconstitutional and thus invalid?

41. Section 1 of *Constitution Amendment (No.37) (Citizenship) Law 2014* (the 2014 Amendment) adds after s.42 (g) paragraph (ga) in the following terms:

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

42. The stated purpose of the amendment was:

> "... to amend the Constitution by amending the provisions in relation to Citizenship, and for related purposes."

43. Part IV, ss. 64 to 81 of the *Constitution* deal with all questions regarding citizenship from qualifications for citizenship to losing citizenship. The main provisions of the amendment deal with allowing a person to hold dual citizenship of PNG with another prescribed country at the discretion of the

Minister. Certainly, this expands the rights and liberties of PNG citizens who are authorised to be citizens of other prescribed country or countries.

44. A separate and bigger part of the *Constitution*, Part III, provides for the basic and fundamental human rights and freedoms for all people. That is in Division 3, ss. 32 to 49. Then ss. 50 to 56 provides for rights only of citizens. This are within the context of "Basic Principles of Government". Clearly, the question of citizenship and rights and freedoms of people are different important subjects which need to be separately dealt with but within the "Basic Principles of Government". The only exception there would be rights or freedoms of citizens which are available only to citizens which could be dealt together with a law dealing with citizenship.

45. The Respondents put forward two arguments in support of their contention that the amendments are valid. This they have done after abandoning their assertion that the presence of the asylum seekers in detention on MIPC was not proved. Their first argument is that s. 42 (g) covers and permits a law to authorise the detention of the asylum seekers pending a processing of their asylum claims and thereafter their resettlement or deportation. Secondly, as an alternative to the first argument, s.42 (ga) has that effect and that s.42 (ga) is a valid amendment to the *Constitution*.

46. Section 13 of the *Constitution* provides for amendments to the *Constitution*. It stipulates:

> "This Constitution may be altered only by law made by the Parliament that –
> (a) is expressed to be a law to alter this Constitution; and
> (b) is made and certified in accordance with Section 14 (making of alterations to the Constitution and Organic Laws)."

47. Section 14 calls for a passage of any Constitutional law amending legislation by two thirds absolute majority vote[17] twice in separate meetings or sittings of Parliament. This has to proceed with an "opportunity for debate on the merits". As was held in *Kaseng v. Namaliu*,[18] the quality or extent of the debate is non-justiciable. However, the compliance or noncompliance with the mandatory requirements as to form, process and content is justiciable.

48. Where an amendment concerns any of provisions dealing with the rights and freedoms of persons, s. 38 (1) is also relevant. This provision allows for the making of any law that:

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[17] See s. 17 of the *Constitution* which provides for this kind of vote.
[18] *[1995] PNGLR 481* (decision by the majority of Amet CJ, Hinchcliffe & Andrew JJ).

"(a) regulates or restricts the exercise of a right or freedom ... to the extent that the regulation or restriction is necessary—

(i) taking account of the National Goals and Directive Principles and the Basic Social Obligations, for the purpose of giving effect to the public interest in—

(A) defence; or
(B) public safety; or
(C) public order; or
(D) public welfare; or
(E) public health (including animal and plant health); or
(F) the protection of children and persons under disability (whether legal or practical); or
(G) the development of under-privileged or less advanced groups or areas; or

(ii) in order to protect the exercise of the rights and freedoms of others; or

(b) makes reasonable provision for cases where the exercise of one such right may conflict with the exercise of another,

to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind."

(Underlining added)

49. Subsection (2) then provides that:

"For the purposes of Subsection (1), a law must—

(a) be expressed to be a law that is made for that purpose; and
(b) specify the right or freedom that it regulates or restricts; and
(c) be made, and certified by the Speaker in his certificate under Section 110 (certification as to making of laws) to have been made, by an absolute majority.

(3) The burden of showing that a law is a law that complies with the requirements of Subsection (1) is on the party relying on its validity."

(Underlining added)

50. Section 39 (1) provides that the question of whether a law that seeks to regulate or restrict the exercise of a right or freedom is a law that is "reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind ... is to be determined in the light of the circumstances obtaining at the time when the decision on the question is made." Section 39 (3) additionally stipulates that in order to properly determine that question, the court must also have regard to the following additional matters:

"(a) the provisions of this Constitution generally, and especially the National Goals and Directive Principles and the Basic Social Obligations; and
(b) the Charter of the United Nations; and
(c) the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; and
(d) the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declarations concerning human rights and fundamental freedoms; and
(e) judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms; and
(f) previous laws, practices and judicial decisions and opinions in the country; and
(g) laws, practices and judicial decisions and opinions in other countries; and
(h) the Final Report of the pre-Independence Constitutional Planning Committee dated 13 August 1974 and presented to the pre-Independence House of Assembly on 16 August 1974, as affected by decisions of that House on the report and by decisions of the Constituent Assembly on the draft of this Constitution; and
(i) declarations by the International Commission of Jurists and other similar organizations; and
(j) any other material that the court considers relevant."

51. It is now an established principle of law[19] that, a law made in accordance with the requirements of s. 38 of the *Constitution* must comply with the formal and substantive requirements prescribed by the provision that declares the qualified right and s. 38. Hence, in my humble view, in order that the law is valid and hence, Constitutional, the law must:

(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;

[19] For cases on point see *Enforcement of Rights Pursuant Constitution S57; Application by Karingu* [1988–89] PNGLR 276; *SCR No 4 of 2001; Re Validity of National Capital District Commission Amendment Acts* (2001) SC678; *SCR No 1 of 1986; Re Vagrancy Act (Ch268)* [1988] PNGLR 1.

(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*.

52. It is also settled law that, it is not sufficient to simply say the law is to regulate or restrict a right or freedom. Instead, it must meet all of the above requirements, which goes into the formal parts of the law and in substance. Of these requirements, I am of the view that, the need to demonstrate that the law is one which is "reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind" is most important. The reasons for that importance is simple. Although all humans are born with all of their rights and freedoms, some suppressive regimes and or governments deny the people of their rights or freedoms over the years, until they got restored as nations evolved from their stone ages to more modern democracies. Some of the rights and freedoms came through a lot of sacrifices made by many people, such as Martin Luther King in the United States in the recent past and many more. Hence, the imperative is there to protect the rights and freedoms of persons under the various international law conventions and protocols and many domestic laws, such as the PNG *Constitution*. In that regard, provisions such as those of s. 38 of the *Constitution* exist to obligate our law makers to ensure that any proposal they come up with that has the effect of regulating or restricting a person's rights or freedoms, is necessary and justified in all of the circumstances, having regard to reasons for the proposed restrictions and having due regard to the matters listed under s. 39 (3). Given this position, the *Constitution* rightly requires a party who claims a law is valid to prove that fact.[20] That onus can only be discharged by demonstrating to the satisfaction of the Court that the requirements listed in the preceding paragraph are fully and satisfactorily met.

53. In the present case, it is clear that the law under consideration was passed by Parliament with the requisite majority of votes on two separate sittings, though without much of a debate. It is also clear that, the law was certified by the Speaker of Parliament on 11th March 2014. Unfortunately, the law does not specify the purpose of the amendment or the right or rights which it purports to

[20] See for example of an authority on point *The State v. NTN Pty Ltd and NBN Ltd* [1992] PNGLR 1, per Kapi DCJ as he then was and s. 38(2) of the *Constitution*.

regulate or restrict. Additionally, the amendment does not say the regulation or restrictions is "reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind." Further, it is not clear how the provision on personal liberty logically fits in with a law intended to cover for dual citizenship and hence the rights of citizens only. In the absence of any evidence to the contrary, it is clear the 2014 Amendment was inserted without any proper consideration or thought.

54. Going by the provisions of s. 38 (3) of the *Constitution*, the Respondents had the burden to demonstrate to the satisfaction of this Court that the amendment makes sense and that more importantly it is valid. That they had to do by demonstrating as a matter of fact that it is in the correct amending law. But more importantly, they had the burden of demonstrating to the satisfaction of the Court that the amendment is "reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind" … "in the light of circumstances obtaining when the decision on the question is made," having regard to the matters listed in s. 39 (3) of the *Constitution*. This the Respondents also failed to do. On these bases alone the amendment is unconstitutional and is therefore invalid by reason of which it has no force and effect.

55. The foregoing considerations would render a consideration of the third and remaining question unnecessary. However, given that the 2014 Amendment was for the purposes of covering the asylum seekers detained at MIPC, it is necessary that the remaining question must be considered and determined. Accordingly, I now turn to that question.

Does s.42 (1) (ga) of the Constitution apply to the asylum seekers?

56. The 2014 amendments do not say anything about the manner and form of detention. The human rights and dignity of the detainees or the asylum seekers which are guaranteed by the relevant provisions of the *Constitution* need to be respected. The amendment does not specifically say and does not in fact qualify any asylum seekers rights. An Act of Parliament would have to elaborate on what is provided for in s. 42 (1)(ga), and provide for the manner and form of detention, its purpose and make enough provisions to render the detentions "reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind." Learned counsel for the Respondents with respect has not assisted the Court with any evidence or submission disclosing any corresponding amendments to the *Migration Act* to provide for the legal framework to give effect to the provisions of s. 42(1)(ga) or another Act of Parliament enacted for that purpose. Clearly, the Respondents who argue for the validity of the amendment have failed to discharge their burden under s. 38 (3) of the *Constitution*. This provides additional strong reason to declare the

amendment unconstitutional or if it is Constitutional, ineffective for lack of an appropriate enabling legislation.

57. Of course, in arriving at the above view, I am mindful of the fact that we have the *Migration Act* as it was at the time of the 2014 Amendments. As already noted, s. 3 of the *Act* prohibits the entry into PNG of a person without an entry permit, unless a person is exempted under s.20 of the *Act* from the requirement to hold a permit. Section 20 is in these terms:

> "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."

58. In this case, as noted in the outline of the relevant facts, the Minister exempted the asylum seekers from ss.3 and 7 of the *Migration Act* and had them transferred to PNG by Australia pursuant to the 1st and 2nd MOUs with PNG. Hence, for all practical purposes and more so for the purposes of the *Migration Act*, the asylum seekers are lawfully in PNG by reason of the exemption granted by the Minister. Clearly, therefore, they could not be detained or they could not be deprived of their personal liberty or any of their other rights and freedoms, such as the freedom of movement, freedom of employment and so on unless they have committed a crime in PNG or otherwise subject to lawful detention or restriction. There is no evidence or claim by the Respondents that the asylum seekers have committed any crime in PNG, warranting their detention under the *Migration Act* or indeed any other legislation.

59. The only reason why the asylum seekers are detained at the MIPC is for the purposes of processing their asylum claims. There is no specific provision in the *Migration Act* covering this situation. However, the Minister has used s.15C of the *Act* to issue the following direction on 5th September 2012 in an attempt to make the arrangement legal:

> "I, Rimbink Pato, Minister for Foreign Affairs and Immigration, by virtue of the powers conferred by Section 15C of the Migration Act 1978, and all other powers me enabling, hereby direct all persons seeking international refugee protection and who are permitted to enter and reside in Papua New Guinea under the terms of the Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia Relating To The Transfer to and Assessment of Persons in Papua New Guinea and Related Issues, signed in Port Moresby on 19th August 2011 to temporarily reside

at the relocation centre located at the Papua New Guinea naval base in Lombrum, Manus Province for the purpose of the determination of their refugee status under international law."

60. The above direction was revoked and re-issued following the 2nd MOU, in the same terms. There are a number of problems with the Minister's direction which becomes apparent when one carefully reads and understands the provisions of s. 15C and its proper context. Section 15C reads:

> "5C. Direction to reside in relocation centre.
> (1) The Minister may, by instrument in writing, direct a refugee or class of refugees or non-citizen claiming to be a refugee to reside in a relocation centre.
> (2) A direction under Subsection (1) is sufficient authority for a police officer to detain and take into custody the refugee or class of refugees or non-citizen claiming to be a refugee specified in the order for the purpose of taking that refugee or class of refugees or non-citizen claiming to be a refugee to a relocation centre and keeping that refugee or class of refugees or non-citizen claiming to be a refugee in that relocation centre.
> (3) A police officer acting under a direction under Subsection (1) may use such force as is reasonably necessary for the purpose of taking a person to a relocation centre."

61. It is apparent that, the provision applies to a refugee or class of refugees or a "non-citizen claiming to be a refugee". Section 15A provides that the Minister "may determine a non-citizen to be a refugee for the purposes of this Act." The next provision, s. 15B allows for the Minister to declare a place to be a relocation centre for the accommodation of a refugee or a non-citizen who claims to be a refugee."

62. Before turning to the direction itself, I note firstly that, the *Act* does not provide any guidance on how the Minister is to determine who is a refugee for the purposes of the *Act*. In the absence of anything to the contrary, I am of the view that the requirements for entering and being in the country illegally still apply before any claim for refugee status can be subjected to ss.15A-15D. Secondly, I note that the provisions of ss.15A -15D where introduced by the *Migration (Amendment) Act 1989 No. 10 of 1989*. That was long before the events giving rise to the 2014 Amendments to s. 42 (1) of the *Constitution*. It should follow therefore that these provisions did not contemplate and cover for the kind of circumstances giving rise to the 2014 Amendments.

63. Now, turning specifically to the direction, I see two problems. First, it does not state that the persons referred to in the direction are refugees or persons claiming to be refugees for the purposes of and within the meaning of the

Migration Act. Secondly, the direction says nothing about the detention of asylum seekers within the relocation centre and only requires them to "reside" there. Arguably, one might argue that, s.15C (2) covers the issue of detention well. The provision in question once again reads:

> "A direction under subsection (1) is sufficient authority for a police officer to detain and take into custody the refugee or class of refugees or non-citizen claiming to be a refugee specified in the order for the purpose of taking that refugee or class of refugees or non-citizen claiming to be a refugee to a relocation centre and keeping that refugee or class of refugees or non-citizen claiming to be a refugee in that relocation centre."

64. The *Act* and the Minister's directions are silent on the rights and freedoms of a person taken to and required to reside at a relocation centre. The closest we could come to is s. 15D which places the control and management of such a centre in an "Administrator" appointed by the Minister. Then according to s. 23 of the *Migration Act*, regulations promulgated under the *Act* may provide for rules and procedures for a proper management and operation of relocation centres. Such may be issued by the Administrator in writing. Of course, any such regulation would have to have due regard to the rights and freedoms of the asylum seekers, especially for those who have entered and remain in the country legally. Any such legislation would have to be carefully arrived at so as to ensure the rights and freedoms of the asylum seekers are not adversely and unnecessarily affected. There is no evidence of any regulation being made pursuant to those powers.

65. In the absence of any other law restricting or qualifying the rights of a person lawfully in the country, the rights and freedoms guaranteed by the *Constitution* must be respected, I repeat. This means for example that the asylum seekers freedom of movement under s.32 of the *Constitution* should not be curtailed except only in accordance with a written law that meets the requirements of s. 38 as discussed above. Again, there is no indication that there is a law which otherwise regulates and restricts the rights and freedoms of asylum seekers generally. If there was such a law, the Respondents had the burden under s. 38 (3) of the *Constitution* to demonstrate to the satisfaction of this Court that such regulations and restrictions are "necessary" to "give effect to the public interest". Not only that, a necessary part of that burden was to also establish to the Court's satisfaction that the objective of such a law "*is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind*" by reference to the matters set out in s. 39 (3) of the *Constitution*. The Respondents also failed to discharge that burden.

66. In this regard, I note that, according to the undisputed facts, the United Nations Refugee Agency, the UNHCR has published *Detention Guidelines,*

Guidelines on the Applicable Criteria and Standards relating to the detention of Asylum Seekers and Alternatives to Detention. The MIPC does not meet the UNHCR guidelines. The guidelines published by the UNHCR are only guidelines. It is open for PNG to make and enforce laws with its own set of guidelines under an appropriate legal framework that has due regard to the international and Constitutional guarantees and protection for human beings rights and freedoms with capacity to properly treat refugees and assess their refugee claims.

67. As noted in the relevant facts, both Australia and PNG are signatories to the United Nations 1951 *Convention Relating to the Status of Refugees* and its 1967 *Protocol*. Again, as noted already, PNG's signing of the *Convention* is with seven reservations. Those reservations are in respect of Article 17 (1) (wage earning employment); Article 21 (housing); Article 22(1) (public education); Article 26 (freedom of movement); Article 31 (non-penalisation of refugees for illegal entry or stay); Article 32 (expulsion) and Article 34 (naturalization). These reservations do not in my humble view, excuse PNG from its international obligations especially with the kind of provisions the country has under its own *Constitution* to enact and have in place appropriate legislative and administrative guidelines for refugees or persons claiming to be refugees.

68. I remind myself again, on 4th February 2013, the UNHCR published a detailed report on the MIPC and concluded overall:

> "Assessed as a whole, UNHCR is of the view that the facilities on Manus Island lack some of the basic conditions and standards required. In particular, the closed detention setting and the lack of freedom of movement, along with the absence of an appropriate legal framework and capacitated system to assess refugee claims, are particularly concerning."

69. In the circumstances, I agree with the contention of the Applicant that treating those required to remain in the relocation centre as prisoners irrespective of their circumstances or their status save only as asylum seekers, is to offend against their rights and freedoms as guaranteed by the various conventions on human rights at international law and under the PNG *Constitution*. This position is aggravated by the lack of any Act of Parliament or a regulation promulgated under s. 23 of the *Migration Act* or any other law made for that purpose clearly specifying how the asylum seekers are to be treated, whilst having due regard to their rights and freedoms as guaranteed under the various international conventions and more so under the PNG *Constitution*. The lack of clarity is worse, given that the asylum seekers were brought into PNG against their will but otherwise have entered and remain lawfully in the country. That being the case, I reiterate my view that the 2014

Amendment is ineffective even if it passed the other tests for validity. As such it does not and cannot apply to the asylum seekers at the MIPC.

Costs of the Application

70. Before getting to the final declaration and orders, I now turn to the question of costs. It is trite law that, the Supreme Court is a superior court of record which has the necessary power under the underlying law and s. 155(4) of the *Constitution* to award costs. But whether or not costs should be awarded in any case is always at the discretion of the Court having regard to the nature of the case before it and any argument for or against the award of any costs.[21] This includes Special References under s. 19 of the Constitution or like the one before us. The 2010 amendments to the *Supreme Court Rules*, formally introduced a new Order 12 on costs to regulate the exercise of the power to order costs. This was only a formalization of a power that was inherent and always existed and remain with the Court to award costs as part of exercise of the Court's judicial powers and functions.

71. The Supreme Court has already determined the question of the appropriateness of making costs orders in respect of s.19 References. In Supreme *Court Reference No 1 of 2000; Re Validity of Value Added Tax Act (2002) SC693* the successful referrer, the Morobe Provincial Executive, was awarded the costs of the reference. Similarly in *Supreme Court Reference No 3 of 2006; Reference by Fly River Provincial Executive (2007) SC918* the court awarded costs to the successful mover of an application seeking to strike out a Reference on grounds of non-compliance with the Supreme Court Rules. Later, in the *Reference by the Attorney-General and Principal Legal Adviser to the National Executive (2010) SC1078* the Court, upon upholding an objection by an intervener to the competency of the Reference on grounds of abuse of process, ordered the referrer to pay all of the intervener's costs. This trend was followed in *Reference by the Morobe Provincial Executive.*[22]

72. In all of these cases, the Court has allowed itself to be guided by the usual rule of thumb on the question of costs of proceedings. The rule is costs follow the event. That is to say, the successful party gets his costs paid on a party-party basis. In the last case referred to above, *Reference by the Morobe Provincial Executive*, the Court elaborated on the principle in these terms:

> "In applying the rule of thumb that costs follow the event, we consider that the Court should identify the party or parties primarily responsible

[21] See: *Don Pomb Pullie Polye v. Jimson Sauk and Electoral Commission (1999) SC651, William Moses v. Otto Benal Magiten (2006) SC875, Air Traffic Controllers Association v. Civil Aviation Authority (2009) SC1031.*
[22] Ibid

for 'the event' and the party or parties primarily responsible for opposing it; and then award costs to the former against the latter, subject to taking into account any special considerations that would warrant a departure from the general rule. It might be the case, for example, that a party to the reference has made a significant contribution to the proper determination of the reference (even though its submissions may not have ultimately been upheld). Or a party might have been declared by the Court to have acted unconstitutionally. Any party guilty of an abuse of process would not normally be expected to obtain the benefit of a costs order."

73. In the present case, the First Respondent in his position as the Minister responsible and the Second Respondent as the Executive in charge of the affairs of the country at the relevant time, for the benefit of the Third Respondent acted through the Parliament to introduce the 2014 Amendment, now found to be unconstitutional and therefore invalid. The First Respondent and the Second Respondent with the assistance of the Australian government are responsible for all of the decisions and actions that have led to the transfer and detention of asylum seekers or transferees. Logically therefore, all the Respondents should be responsible for the costs of this successful application of the Applicant. Accordingly, I would order costs against each of the Respondents jointly and severally. I would also order that the Applicant's costs be inclusive of any overseas counsel's costs appropriately certified with all costs to be agreed upon within 14 days and failing that taxation to follow.

74. In the end, I would ultimately declare and order as follows:

(1) The asylum seekers or transferees brought to Papua New Guinea by the Australian Government and detained at the relocation centre on Manus Island by the Respondents is contrary to their Constitutional right of personal liberty guaranteed by s. 42 of the *Constitution* and also ultra vires the powers available under the *Migration Act*.

(2) The detention and the way in which the asylum seekers are treated at the Manus Island Relocation or Processing Centre in so far as they affect their other constitutional rights and freedoms such as the right to freedom under s.32 of the *Constitution* are unconstitutional and are also ultra vires the powers available under the *Migration Act*;

(3) Section 1 of the *Constitution Amendment (No 37) (Citizenship) Law* 2014 is unconstitutional and thus invalid with no force and effect.

(4) The detention of the asylum seekers on Manus Island in Papua New Guinea, purportedly pursuant to the purported amendment to the provisions of s.42 of the *Constitution* by s.1 of the *Constitutional*

Amendment (No.37) (Citizenship) Law 2014 (now declared unconstitutional and invalid) and the *Migration Act (Chp. 16)* is unconstitutional and illegal.

(5) Even if s.1 of the *Constitution Amendment (No 37) (Citizenship) Law 2014* was *Constitutional* and thus valid which I conclude is not, it is ineffective as there is no enabling Act of Parliament, by reason of which it does not apply to and cover the asylum seekers or transferees brought to Papua New Guinea by the Australian Government and detained at the relocation centre on Manus Island.

(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.

(7) The Respondents shall pay the Applicant's costs, which costs shall be agreed within 14 days and if not taxed.

75. **Higgins J**: This is an application made pursuant to *s.18(1) Constitution* seeking a ruling as to the validity of the detention of certain persons (asylum seekers) on Manus Island. The reception and detention of those persons is purportedly in pursuance of an agreement between the governments of Australia and Papua New Guinea and authorised by a constitutional amendment to *s.42* of the *Constitution* and authorised by a constitutional amendment to *s.42* of the Constitution.

76. It is plain that a Memorandum of Understanding between the respective governments could not effect a diminution of any rights conferred upon asylum seekers by reason of their presence in PNG. It did, however, cause the Minister for Immigration to authorise their presence in PNG and to direct that they reside in Manus Island Relocation Centre at Lorengau.

77. It is not contended that those persons are being held pending deportation under the *Migration Act 1978*. It is contemplated that persons not found to be genuine refugees may well be deported and held in migration detention pending that deportation pursuant to that Act.

78. The issue in the present matter centres on *s.42 Constitution*. That provides, substantively:

"(1) No person shall be deprived of his personal liberty ..."

79. There are then various exceptions to that grant. Relevantly;

> *"(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."*

80. It is, therefore, clear that the persons being asylum seekers resident on Manus Island have been deprived of the exercise of their personal liberty otherwise than for the purposes authorised by *s.42 Constitution*. It adds nothing to that proposition but confirmation of it to consider the UN Guidelines for detention (AB VI, 52). Such detention should also be subject to judicial review (*see Plaintiff S4/2014 v. Minister for Immigration & Border Protection* [2014] 253 CLR 219).

81. In that decision, at [26] French CJ, Hayne, Crennan, Keifel & Keane JJ held that mandatory detention was lawful pursuant to the Australian Constitution if "limited to what was reasonably capable of being seen as necessary and incidental to the exercise of [powers under the *Migration Act 1958* (Cth)], if the detention which those laws required and authorised was limited to what was reasonably capable of being seen as necessary for the purposes of deportation or to enable an application for permission to enter and remain in Australia to be made and considered. It follows that detention under and for the purpose of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the detention. Lawfully, that purpose can only be one of three purposes : the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia, or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa."

89. Those statements of principle are equally applicable to determining the rights conferred upon asylum seekers transferred to Manus Island by virtue of an agreement with the Australian Government Only those purposes authorised by *s.42(9)* can be called in aid of any restriction imposed on the liberty of those persons in PNG.

90. No doubt for that reason the Government of PNG proposed an amendment to *s.42* by *Constitution Amendment (No.37) (Citizenship) Law 2014*. The stated purpose of the Act was:

"... to amend the Constitution by amending the provisions in relation to Citizenship, and for related purposes."

91, The main provisions of the Act deal with allowing a person to hold dual citizenship of PNG with another prescribed country at the discretion of the Minister. Clearly, that expands the rights and liberties of any subject of PNG. The first section, however, adds after *s.42(g)*, *s.42(ga)* in the following terms:

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

92. The respondents put forward two contentions, having abandoned the assertion that the presence of asylum seekers in detention on Manus Island was not proved. The first is that *s.42(g)* covers and permits a law to authorise the detention of asylum seekers pending their resettlement or deportation. The alternative was that *s.42(ga)* had that effect and that *s.42(ga)* was a valid amendment to the Constitution.

93. It is convenient first to consider the amendment. Section 13 of the Constitution refers to its amendment. It provides:

"This Constitution maybe altered only by law made by the Parliament that –

(c) is expressed to be a law to alter this Constitution; and
(d) is made and certified in accordance with Section 14 (making of alterations to the Constitution and Organic Laws)."

94. Section 14 requires the passage of an amendment by the relevant majority twice in separate meetings of the Parliament "after opportunity for debate on the merits".

95. In *Kaseng v. Namaliu*,[23] the majority, Amet CJ, Hinchcliffe & Andrew JJ held that the quality or extent of the debate is non-justiciable albeit that compliance with the manner and form provisions is mandatory.

96. The other characteristic of the amendment is that it qualifies a right provided for in the Constitution and, hence, attracts the requirement also of *s.38*. That is, whether or not the detention of asylum seekers could be in the public interest and reasonably justifiable in a democratic society. Subsection *38(2)*

[23] [1995] PNGLR 481.

requires that any law including a law to amend the Constitution regulating or restricting the right in question must:-

> *"(a) be expressed to be a law that is made for that purpose; and*
> *(b) Specify the right or freedom that it regulates or restricts."*

97. It is clear that the subject law, though passed by Parliament with the requisite majority on two occasions, each being a different session, did not specify the purpose of the amendment or the right which it purported to limit. On that ground alone, the amendment is invalid and should be declared so.

98. Even if the amendment was made validly, it does no more than authorise the making of a law which allows asylum seekers on Manus Island to be 'held' there. It says nothing about the manner and form of that detention. The human rights and dignity of detainees must still be respected (see *s.36*). That right is not qualified by *s.42(ga)*.

99. A further point is that of entry permits. There is no evidence that any of the detainees have sought permits to be and remain in PNG. The *Migration Act 1978*, *s.3* prohibits entry of a person without an entry permit, unless he or she is exempted under *s.20* from the requirement to hold one.

100. Section 20 permits the Minister to:

> *"... by instrument under his hand, exempt*
>
> *(a) a person or a class or a description of persons*
>
> *... either absolutely or conditionally, from all or any of the provisions of this Act."*

101. By notice dated 28 November 2012, the Minister, under the *Migration Act*, exempted the asylum seekers transferred to PNG by Australia pursuant to the MOU with PNG from *ss.3 & 7* of the *Act*.

102. He issued a 'Direction' in the following terms on 5 September 2012:

> "I, Rimbink Pato, Minister for Foreign Affairs and Immigration, by virtue of the powers conferred by Section 15C of the Migration Act 1978, and all other powers me enabling, hereby direct all persons seeking international refugee protection and who are permitted to enter and reside in Papua New Guinea under the terms of the Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia Relating To The

Transfer to and Assessment of Persons in Papua New Guinea and Related Issues, signed in Port Moresby on 19th August 2011 to temporarily reside at the relocation centre located at the Papua New Guinea naval base in Lombrum, Manus Province for the purpose of the determination of their refugee status under international law."

103. The exemption from *s.3* and *s.7* of the *Act* was re-published on 28 November 2012. The above Direction was revoked but re-issued in respect of the further MOU signed 8 September 2012.

104. It should be noted that the 'Direction' says nothing about the detention of such persons within the relocation centre. It does require they 'reside' there.

105. It is noted that the UNHCR (United Nations High Commissioner for Refugees) has issued "Detention Guidelines" for dealing with the custody and management of Asylum Seekers and those found to be refugees. These, of course, do not supersede or qualify the domestic law of this country with respect to the treatment of and rights to be accorded to such persons under the laws of PNG.

106. The *Migration Act 1978* is a law enabling the Minister to deal with the entry and presence of non-citizens to and in PNG. How the Minister exercises those powers is a matter of administrative discretion.[24]

107. There is no reason why the Minister cannot choose to exercise those powers, so far as they are lawfully conferred upon him in accordance with the MOU or, indeed, the UNHCR Guidelines.

108. Thus the Minister has, in my view, validly exempted the asylum seekers referred to in his Gazette Notices from compliance with *ss.3 & 7* of the *Migration Act* under *s.20* of that *Act*. It is relevantly within the Minister's power to make that exemption conditional although the Gazette Notices do not purport to do so.

109. The Direction is more problematical. It does not state that the persons referred to have been determined by the Minister to be refugees within the meaning of the *Act*.

110. Certainly, Section 15C applies not merely to persons so found to be refugees but also to a "non-citizen claiming to be a refugee". Such persons may

[24] See *Premdas v. The Independent State of Papua New Guinea* [1979] PNGLR 329.

be directed to reside in a "relocation centre" being a place so designated by the Minister.

111. Subsection 15c(2) then provides:

> "A direction under subsection (1) is sufficient authority for a police officer to detain and take into custody the refugee or class of refugees or non-citizen claiming to be a refugee specified in the order for the purpose of taking that refugee or class of refugees or non-citizen claiming to be a refugee to a relocation centre and keeping that refugee or class of refugees or non-citizen claiming to be a refugee in that relocation centre."

112. The Act is silent upon the issue of the rights of a person taken to and required to reside at a relocation centre. The control and management of such a centre is by *s.15D* vested in an 'Administrator' of the centre appointed by the Minister.

113. Regulations are empowered under *s.23* of the *Act* to be made prescribing:

> *"(e) rules and procedures for the proper management and operation of relocation centres; and*
> *(f) authority to an Administrator to issue written instructions concerning procedures in a relocation centre."*

114. It does not appear that regulations have been made pursuant to those powers.

115. In the absence of any other law restricting or qualifying the rights of a person lawfully in this country, those rights and liberties granted by the Constitution must be respected. Those rights include *s.32* (right to freedom). That right is itself "based on law". Hence, as has been noted, it is no derogation of that right to proscribe criminal conduct and arrest and detain offenders or those accused. Insofar as the *Migration Act* restricts rights, the preamble to it complies with *s.38(2) Constitution.*

116. There is no indication that there is any law which otherwise restricts the rights and freedom of asylum seekers generally, indeed the power of Parliament to restrict rights and freedoms is itself limited by *s.38* to such restrictions or regulation as are "necessary" to "give effect to the public interest" in one or more of the specified objectives and then only:

> "To the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind."

117. The contention of the referrers is that to treat those required to remain in the relocation centre as prisoners irrespective of their circumstances or their status save as asylum seekers, is to offend that qualification and hence the Minister's powers and by extension those of the Administrator do not extend to the imposition of mandatory detention irrespective of flight risk or other relevant considerations which might justify detention.

118. It adds to that consideration if the conditions of detention are such as to damage the rights and dignity of the detainees or, worse, causes physical or mental suffering. I agree with that contention.

119. It suffices for present purposes to declare that the purported amendment to the provisions of *s.42* of the *Constitution* by *s.1* of the *Constitutional Amendment (No.37) (Citizenship) Law 2014* is invalid and therefore of no force or effect.

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