LOWAI & LOWAI ATTORNEYS

SCXXXX

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SC APP. NO 17 OF 2016

BETWEEN

APPLICATION BY BEHROUZ BOOCHANI & 730 ORS
Applicants

AND

THE INDEPENENT STATE OF PAPUA NEW GUINEA
First Respondent

AND

HON. RIMBINK PATO, MINISTER FOR FOREIGN AFFAIRS & IMMIGRATION
Second Respondent

Waigani: Kirriwom, Hartshorn & Makail JJ
2017: 26th April, 31st October, 21st November & 15th December

SUPREME COURT – Application to enforce constitutional rights – Alleged breaches of constitutional rights – Application to dismiss proceedings – Failure to give notice of intention to made a claim within six months of the occurrence of the alleged breach – Requirement to give notice mandatory – Consideration of occurrence out of which claim arose – Claims By and Against the State Act, 1996 – Section 5

Cases cited:

Belden Namah v. Rimbink Pato & Ors (2016) SC1497
Application by Francis Gem to enforce Constitutional Rights (2010) SC1065
Paul Tohian v. Tau Liu (1998) SC566

Counsel:

Mr. B. Lomai, for the Applicants
Mr. T. Tanuwasa, for the First Respondent
Mr. I. Molloy with Mr. R. Bradshaw, for the Second Respondent

RULING

15th December, 2017

1. **KIRRIWOM J:** I have read the draft judgment produced by Makail, J and I agree with the conclusion he reached for the reasons he gave as they are consistent with my own views and on the evidence presented and found by Higgins J sitting as single judge of the Supreme Court. I have nothing further to add.

2. **HARTSHORN J:** As Makail J. has set out the background to this application it is not necessary for me to do so.

3. I agree with Makail J. that it is not clear when the applicants' detention ceased. Therefore the date upon which the occurrence out of which their claim arose is not clear.

4. Given this, and taking into account the submissions of the second respondent, with which the first respondent agreed, that if the findings of Higgins J. are accepted, and there was no submission before us that those findings should not be accepted, it is difficult not to conclude that the applicants' detention ceased on 12th May 2016, I am satisfied that the application of the first respondent should be dismissed.

5. **MAKAIL J:** Pursuant to an agreement between the Governments of Papua New Guinea and Australia the applicants who sought asylum in Australia were transferred and detained on Manus Island Processing Centre (MIPC) in Papua New Guinea pending processing of their asylum claims.

6. The then Leader of the Opposition Hon. Belden Namah filed a Reference in the Supreme Court to challenge the lawfulness of the applicants' detention. On 26th April 2016 the Supreme Court in the case of *Belden Namah v. Rimbink*

Pato & Ors (2016) SC1497 held that the applicants' detention was unconstitutional and unlawful. Following this decision, they were to be released.

7. On 4th November 2016 they gave notice of their intention to make a claim against the State pursuant to s. 5 of the *Claims By and Against the State Act,* 1996 (*"CB & AS Act"*).

8. Three days later, on 7th November 2016 they commenced these proceedings in the Supreme Court to seek enforcement of constitutional rights pursuant to s. 57 of the *Constitution.* They alleged the following constitutional rights were breached by the respondents:

- s. 37 (full protection of law) and
- s. 42 (deprivation of liberty).

9. They also seek compensation and exemplary damages under s. 58 of the *Constitution.* They named the second respondent as the public official responsible for the breaches and the first respondent as being vicariously liable for his actions and/or omissions.

10. On 2nd December 2016 the first respondent filed an application seeking an order to dismiss the proceedings for failing to give notice of intention to make a claim within six months after the occurrence out of which the claim arose under s. 5 of the *CB & AS Act.*

11. The requirement to give notice is prescribed by s. 5 of the *CB & AS Act.* The relevant parts read:

> *"5. Notice of claims against the State.*
>
> *(1) No action to enforce any claim against the State lies against the State unless notice in writing of intention to make a claim is given in accordance with this Section by the claimant to—*
>
> *(a) the Departmental Head of the Department responsible for justice matters; or*

(b) the Solicitor-General.

(2) A notice under this Section shall be given—

(a) within a period of six months after the occurrence out of which the claim arose; or

(b) where the claim is for breach of a contract, within a period of six months after the claimant became aware of the alleged breach; or

(c) within such further period as—

(i) the Principal Legal Adviser; or

(ii) the court before which the action is instituted,

on sufficient cause being shown, allows.

(3) ……."

12. It has been held that the requirement to comply with s. 5 of the *CB & AS Act* is a condition precedent to any action to enforce a claim against the State: *Paul Tohian v. Tau Liu* (1998) SC566. It would follow that the requirement to give notice within a period of six months from the occurrence out of which the claim arose is mandatory.

13. But it is not absolute. The time may be extended by either the Principal Legal Advisor or the Court "on sufficient cause being shown": s. 5 (2) (c) (i) & (ii) of the *CB & AS Act.*

14. At the hearing of the first respondent's application to dismiss on 26th April 2017 the respondents contended that the occurrence of the cause of action arose on 26th April 2016 when the Supreme Court handed down its decision in the *Namah* case.

15. And it was no consequence if the applicants' detention ceased and they were released on a later date. In any case, they were given free movement around the compounds while undergoing a review assessment and if an

applicant received a positive outcome, he or she was moved to another compound called the RPC East.

16. Further, as they were residing at Lombrum Naval Base which was a restricted area, they were not permitted to travel by foot out of the base except by bus. They were PNG Defence Force security rules which were to be observed by all applicants. However, it should in no way be considered as a restriction on their freedom of movement.

17. The applicants contended otherwise, that it was on 12th May 2016 when the gates of the MIPC were opened and they were permitted to leave the MIPC on their own free will. That was when the occurrence of the cause of action arose.

18. As there was conflict in relation to when the occurrence of the cause of action arose, that is whether it arose from the date of the Supreme Court decision or when the applicants' detention ceased and they were released, based on the decision in the *Application by Francis Gem to enforce Constitutional Rights* (2010) SC1065, the Court referred it to the Chief Justice to appoint a single Judge of the Supreme Court to determine the relevant facts to assist the Court determine it.

19. Higgins J was assigned the task and delivered his report on 28th September 2017. The relevant parts of the report by his Honour are reproduced below:

> *" 3. The respondents contend that date was 21st April 2016, being the date upon which bus service was instituted for the use of detainees to travel from the Lombrum Naval Base, within which the Manus Island Refugee Processing Centre (MRPC) was located to Lorengau. The MRPC was a secure series of compounds housing persons who had lawfully entered PNG on visas granted for the purpose of ascertaining their status as refugees but not subject to any conditions that restricted their rights as lawful residents of PNG. They were detained pursuant to an agreement with the Government of Australia. The import of that agreement was that PNG would detain all such transferees until their refugee status was determined. Those found to be refugees would then be free to settle in PNG or any other country that would take them. Australia announced that it would not take any of them.*

4 *There were therefore three classes of detainees. Those whose status was yet to be determined, those who were deemed not to be refugees and those who had been accepted as refugees. By its decisions of 26 July, 2016, Namah v. Pato & Ors – SCA No. 84 of 2013 [2016] PGSC13, the Supreme Court found that the detention of the applicants was unlawful.*

5 *On 4 November 2016, the applicants gave notice of intention to commence proceedings pursuant to s.5 of the Claims By and Against the State Act, 1996.*

6 *That notice is required to be given within a period of six months from the occurrence out of which the claim arose.*

7 *The bar so created is not absolute. It may be extended by the court seized of the matter "on sufficient cause being shown".*

8 *However the State contends that "the occurrence" ceased on 27 July 2016, in that the State, on that day, caused the detainees to be informed of the Court's decision and provided a bus service to allow detainees to travel to Lorengau if they so chose.*

9 *The proposal for and the scheduling of that bus service predated the Court decision. The final documentation for it was dated 25 April, 2016. It was put into effect the day following the Court's decision.*

10 *Mr Dennis Badi, Operational Manager of the Manus Regional Processing Centre deposed that both before and after the Court decision movement within the detention compounds and between them was available to detainees.*

11 *However, he did acknowledge that the location of the Centre within the Naval Base created restriction on the freedom of movement of detainees into and out of the Centre.*

12 *The applicants and respondents each filed and tendered affidavits. Neither side sought to cross-examine the others deponents. I therefore accept the factual statements so made as truthful and accurate. The area of disputation relates to the interpretation to be placed upon those facts.*

13 *The respondents rely primarily on affidavits of Mr Badi of 11 September, 2017 and 13 December, 2017.*

14 *Before addressing those substantive affidavits I note the affidavit of Chief Inspector David Yapu, Manus Police Commander (11/09/17). He deposed that when he took command, the movement of all detainees at the MRPC was monitored. Since the Supreme Court decision he observed certain of them bussing into Lorengau going to and from the Centre on such buses. I note that his statement that this movement was therefore 'free" is a matter of opinion. It does mean that the detainees were subject to physical restraint only if subjected to a lawful arrest as some were.*

15 *The affidavit of Gideon Joe, Senior Detentions Officer at MRPC confirmed that the bus service was service was to be "messaged" to detainees on 25 April, 2017 (sic). It was in fact "messaged" on 27 April 2017 (sic).*

16 *Both he and Mr Badi exhibit the document so "messaged". The features of that "messaging" were:*

- *The bus service was available to East Lorengau Refugees Transit Centre for "refugees and those who have received a positive initial or review assessment":*

- *A place on the bus had to be sought by means of a request form.*

- *It was stated "if you miss the last bus back to Lombrum, you will be required to stay at the transit centre until you can return to the RPC the following day".*

- *Further "You will not be allowed back on the bus if you are intoxicated or under the influence of any drugs "and" will be required to stay at the transit centre". (emphasis added)*

- *"Contraband restrictions will continue to apply and You will consent to being searched before you are allowed to enter the transit centre or upon return to the RPC" "Contraband" at that time included mobile phones. (emphasis added)*

17 *There were additional "Q & As" advised to detainees. Relevant to freedom of movement they included the following:*

- *Question: Am I allowed to walk into town/return to RPC by foot?*

- *Answer: No. the Lombrum Naval Base is a restricted area and the PNG Defence Force will not permit you to travel to the base by foot. You can only travel by bus.*

18 *Of course, the decision to locate the RPC within Lombrum was that of the State and engaged not only the rules of the Centre that restricted freedom of movement also those of the Defence Force.*

19 *A Documentation Guide of 25 April, 2017(sic) advised:*

- *"In the coming weeks, Mike and Echo compounds will merge into one compounded (sic) call 'RPC West'. This will mean free movement between the compounds"...*

- *"If you are going through a review assessment and receive a positive outcome, you will be moved to RPC East – Delta and Oscar compound. If you receive a negative review assessment or [are] determined to be a non-refugee, you will remain in RPC West"*

20 *No objection was taken to any of these affidavits and no cross-examination of any of the deponents was sought. Consequently they are unchallenged in so far they depose to matters of fact rather than express matters of opinion.*

21 *Mr Boochani, an Iranian national and a Journalist by profession, was detained involuntarily on Manus Island at the RPC as from the 28 August 2017. He was granted refugee status on 5 July 2016, notwithstanding that he had not applied for it.*

22 *On the day the decision in Namah v. Pato was handed down (26 April, 2016) the news was quickly shared amongst detainees.*

23 *The next day, Mr Boochani acknowledged, PNG and Australian officials, informed them that the case had determined that they were illegally detained but that "The government", "...needs some time to comprehend the final details of the court ruling before deciding on its response".*

24 *After the officials left a detainee took out a mobile phone, an item defined as contraband, and began using it. Others did likewise.*

25 Instead of confiscating the items, the guards, though apparently upset, did not react otherwise than to say that mobile phones were contraband and their usage banned.

26 The guards did remind the detainees that they were on CCTV and further action might be taken. They requested the detainees not to take photographs with their phones. Detainees did not obey.

27 Later that day Mr Boochani received a request to be interviewed by an ABC journalist, Mr Eric Volzek. The latter was refused entry to the compound and Mr Boochani was refused permission to exit the Centre to talk to him. He did speak to Mr Volzek via mobile phone. The gate to the Centre remained locked preventing entry and egress.

28 The next move was for detainees to attempt to gain free access between the four compounds. Detainees forced entry past guards when the gates were temporarily unlocked.

29 Again, the guards did not enforce compliance but did re-lock the gates. A few days later, free access was allowed between compounds provided detainees surrendered their identity cards at the entrance to the compound they were going to. They were returned to exit from the compound so visited.

30 Around the same time, buses began turning up at the front gates of the Centre. Mr Boochani and others were informed that the detainees could use the bus service if a written application to do so had been approved.

31 This usually took three days.

32 In addition, detainees were subjected to body and bag searches on leaving and return. Items of contraband, food, waters and mobile phones were not permitted to pass.

33 The front gates remained locked.

34 On 30 April 2016, it was announced that PNG and Australian officials would meet at Port Moresby to consider options.

35 On 9 May 2016, some detainees staged a protest at the lack of progress as they saw it. Then on 11 May 2016 Ms Esther Gaegaming, a PNG official, announced that the main gates were open, refugees

and asylum seekers were no longer detained and could take buses to Lorengau and stay overnight at the ELTC as they wished.

36 The next day, 12 May 2016, the gates were in fact opened; the persons in detention were no longer detained. It is accepted that the normal security of the Naval Base still has to be respected otherwise.

37 The affidavits of Adbul Aziz Muhamat and Amir Mostame each of 6 September 2017 are to the same effect as that of Mr Boochani. The assertions of fact in those affidavits are not challenged.

38 The issue then is whether on those facts detention ceased on or shortly after 26 April 2016 when detainees were informed of the Court's decision that they were being illegally detained and a bus service implemented or whether it was on 12 May 2016 when detainees were freed to come and go as they pleased, subject only to respecting the security of the Naval Base.

39 That is not a fact in itself but an inference to be drawn from the facts as I have set them out above."

20. On 31st October 2017 the matter returned to Court for mention and was adjourned to 21st November 2017 for parties to make further submissions on the issues based on the report.

21. After considering the report, the applicants maintain that the date of cessation of their detention was 12th May 2016. This was when they were freed to come and go from the detention centre as they pleased, subject to respecting the security of the Naval Base.

22. The time limitation of six months ran from that date and expired on 12th November 2016. They gave notice on 4th November 2016 which was within time.

23. The second respondent does not seriously contest the applicants' submission but contend that it is still open to this Court to find otherwise. To some extent the first respondent supports the submission of the second respondent but seems to further argue that the date of cessation of the detention was 26th April 2016 when the Supreme Court handed down its decision.

24. The question of whether the notice was given within the period of six months from the occurrence out of which the claim arose is dependent on the question of when the period of six months starts to run.

25. The applicants seek to enforce constitutional rights under ss. 37 and 42 of the *Constitution* which they allege were breached by the respondents as a result of their detention. The question of lawfulness of their detention was not determined until the Supreme Court's decision on 26th April 2016.

26. By virtue of that decision, it was declared that their detention was unconstitutional and unlawful. It follows that they were to be released from detention. In my view, subject to the applicants being informed of the decision, their release was to be immediate.

27. As to when they were informed of the decision, from the facts as identified by Higgins J at para. 23 of his report, I accept that the applicants were informed of the decision on 27th April 2016. Then they were supposed to be released. As to whether they were released has been blurred by subsequent events.

28. It could be argued that as from 27th April 2016 all the applicants were released from the detention centre. However, it is not known where they would go and where to reside outside the detention centre. This uncertainty was compounded by the fact that they were still residing at the detention centre after that date.

29. The relaxation of the restriction such as the applicants not prevented from using contraband items such as mobile phones and free movement between compounds does not make it a clear case of cessation of detention. It was further blurred by the applicants not being permitted to leave the detention centre and even the review assessment was still being conducted despite the unlawfulness of the applicants' detention.

30. Given that it is not a clear cut case of when the detention ceased and applicants' released, it may be fair to say that the applicants' application to enforce constitutional rights comprises of two components; first, the pre-judgment claim, that is, claim based on breaches from the date of detention to

the date of notice of 27th April 2016. Second, a post-judgment claim, that is, claim from date of notice of the Supreme Court decision to date of cessation of detention and release.

31. As to the first, the unlawfulness of the detention and the occurrence of the alleged breaches of the applicants' constitutional rights would have been on the date of notification of the Supreme Court decision if the applicants were seeking to enforce constitutional rights predating that decision.

32. In that case, the period of six months would run from the date of notification of the Supreme Court decision. That date is 27th April 2016 and the six months would have expired on 27th October 2016. If the application to enforce constitutional rights predates the Supreme Court decision, the notice would be given out of time and would support the respondents' submission to have the proceedings dismissed.

33. But that is not all. In relation to the post-judgment breaches, if the applicants were not released from detention after they were informed of the Supreme Court decision, it may be argued that their detention after the Court decision would be and is unlawful and they would be entitled to seek enforcement of their constitutional rights from the date of notification to the date of cessation from detention and release. The six months period would run from the date of cessation from detention and their release.

34. As to when the detention ceased and the applicants were released is not contested by the second respondent but as noted, is not clear cut. As the applicants were detained at the detention centre, it was not feasible in practical terms to comply with the Supreme Court decision immediately. Arrangements must be made to move them out of the detention centre and relocate them.

35. Equally, the applicants were entitled to be released. The difficulty was, if they were released, where would they go and were they free to choose where to go and reside outside the detention centre? Further, were they free from reporting to anyone, except those charged with criminal offences?

36. In my view, the relaxation of the restriction such as the applicants not prevented from using contraband items such as mobile phones and free

movement between compounds does nothing more than to support the applicants' submission that they were detained and the detention did not ceased after being notified of the Court decision.

37. It is further supported by the applicants not being permitted to leave the detention centre and even the review assessment was still being conducted despite the unlawfulness of the applicants' detention.

38. It was not until 12th May 2016 that the applicants were free to come and go from the detention centre subject to respecting the rules of the Naval Base. It is for these reasons that I accept 12th May 2016 as the date when the detention ceased and the applicants were released.

39. From that date, the period of six months would have expired on 12th November 2016. The notice was given on 4th November 2016. It was given within time. It would follow that the application to enforce constitutional rights post Supreme Court decision is competent and should be allowed to progress to trial.

40. As to the enforcement of constitutional rights for alleged breaches occurring prior to the Supreme Court decision, given that on 12th May 2016 the detention ceased and the applicants were released, I am of the view that the six months period ran from 12th May 2016. This is because the alleged breaches prior to the Supreme Court decision and after the applicants were notified of the Supreme Court decision continued until 12th May 2016.

41. For these reasons, the first respondent's application to dismiss these proceedings is refused.

42. The costs of the application shall be in cause.

Ruling and orders accordingly.

Lomai & Lomai Attorneys:	*Lawyers for Applicants*
Solicitor-General:	*Lawyers for First Respondent*
Bradshaw Lawyers	*Lawyers for Second Respondent*