Federal Court of Australia

Read v Namoa (No 2) [2021] FCA 1565

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **BURLEY J** |
|  |  |
| Date of judgment: | 2 December 2021 |
|  |  |
| Catchwords: | **CRIMINAL LAW** – control orders – application for confirmation of interim control order pursuant to s 104.14(7)(c) of the *Criminal Code* in the Schedule to the *Criminal Code Act 1995* (Cth) – where respondent and her legal representatives appeared at the hearing and did not oppose the making of confirmation order – where statutory preconditions for confirmation of control order met – control order confirmed without variation |
|  |  |
| Legislation: | *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*) ss 104.4, 104.12 and 104.14 |
|  |  |
| Cases cited: | *Read v Namoa* [2021] FCA 1486  *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 13 |
|  |  |
| Date of hearing: | 2 December 2021 |
|  |  |
| Counsel for the Applicant: | Mr P Melican |
|  |  |
| Solicitor for the Applicant: | Australian Government Solicitor |
|  |  |
| Counsel for the Respondent: | Ms N S Carroll |
|  |  |
| Solicitor for the Respondent: | Gilead Lawyers |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 1195 of 2021 |
|  | | |
| BETWEEN: | NICHOLAS READ  Applicant | |
| AND: | ALO-BRIDGET NAMOA  Respondent | |

|  |  |
| --- | --- |
| order made by: | BURLEY J |
| DATE OF ORDER: | 2 December 2021 |

## THE COURT ORDERS THAT:

1. Pursuant to s 104.14(7)(c) of the ***Criminal Code*** the interim control order made in relation to the respondent on 24 November 2021 be confirmed without variation in the terms set out in the Annexure to these Orders.
2. This confirmed control order be in force until and including 23 November 2022.
3. The respondent’s lawyer may attend the AFP Sydney office at 110 Goulburn St, Sydney NSW between 9 am to 4 pm, Monday to Friday in order to obtain a copy of these Orders.

## THE COURT NOTES THAT:

1. This confirmed control order relates to the Respondent, Alo-Bridget Namoa.
2. It is satisfied on the balance of probabilities that the Respondent has been convicted in Australia of an offence relating to terrorism or a terrorist act (s 104.4(1)(c)(iv) of the *Criminal Code* (Cth)).
3. It is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the Respondent by the order is reasonably necessary, and reasonably appropriate and adapted, for the purposes of:
   1. protecting the public from a terrorist act (s 104.4(1)(d)(i) of the *Criminal Code*); and
   2. preventing the provision of support for or the facilitation of a terrorist act (s 104.4(1)(d)(ii) of the *Criminal Code*).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# Annexure

## Control 1

* 1. You are prohibited from residing at premises other than:

1. [Address] (the **specified premises**); or
2. such other premises notified by you to the AFP Superintendent in accordance with Control 1.2.
   1. If you decide to permanently leave the specified premises, or stay at any premises other than the specified premises for more than 21 consecutive days, you must notify the AFP Superintendent of your new address or the address you will be staying at in writing three business days prior to departing the specified premises. If at the time of leaving the specified premises you did not foresee that you would be staying at any premises other than the specified premises for more than 21 consecutive days and did not notify the AFP Superintendent that you would be doing so, you are required to notify the AFP Superintendent as soon as you become aware that you will be staying at any premises other than the specified premises for more than 21 consecutive days.
   2. For abundant clarity, you are permitted to stay at any premises other than the specified premises for up to 21 consecutive days, but no more than this, without having to notify the AFP Superintendent.
   3. The prohibition in Control 1.1 and the requirement in Control 1.2 do not apply during any period in which you are admitted to hospital.

## Control 2

* 1. You are prohibited from carrying out the following specified activities (including in respect of your work or occupation), namely:

1. accessing, viewing, acquiring, possessing or storing documents (including documents in electronic form) or electronic media which relate to any of the following:
2. explosives, explosive devices, initiation systems or firing devices;
3. firearms, ammunition or knives;
4. anti-surveillance or counter surveillance;

unless that material is:

1. published by a ‘constituent body’ of the Australian Press Council;
2. broadcast on Australian free to air television;
3. broadcast on Australian pay television;
4. shown in a commercial movie cinema;
5. broadcast on a free to air or paid streaming service; or
6. served on you or your legal representatives by or on behalf of a senior AFP member in the Federal Court proceeding relating to this interim control order, including any appeal from such proceeding, and is accessed, possessed, and stored solely for the purposes of proceedings in the Federal Court relating to this interim control order, including any appeal from such proceeding.
7. accessing, viewing, acquiring, possessing or storing documents (including documents in electronic form) or electronic media which depict or describe any:
8. execution;
9. beheading;
10. suicide attack
11. bombing;
12. terrorist attack;
13. propaganda or promotional material for a terrorist organisation within the meaning of s 102.1(1) of the *Criminal Code* (Cth); and
14. activities of, or associated with, any terrorist organisation within the meaning of s 102.1(1) of the *Criminal Code* (Cth),

unless that material is:

1. published by a ‘constituent body’ of the Australian Press Council;
2. broadcast on Australian free to air television;
3. broadcast on Australian pay television;
4. shown in a commercial movie cinema;
5. broadcast on a free to air or paid streaming service; or
6. served on you or your legal representatives by or on behalf of a senior AFP member in the Federal Court proceeding relating to this interim control order, including any appeal from such proceeding, and is accessed, possessed, and stored solely for the purposes of proceedings in the Federal Court relating to this interim control order, including any appeal from such proceeding.

## Control 3

* 1. You are prohibited from carrying out the following specified activities (including in respect of your work or occupation), namely:

1. collating, editing, copying, recording, producing or distributing documents (including documents in electronic form) or electronic media, or directing any person to collate, edit, copy, record, produce or distribute documents (including documents in electronic form) or electronic media, relating to:
2. explosives, explosive devices, initiation systems or firing devices;
3. firearms, ammunition or knives;
4. anti-surveillance or counter surveillance;
5. execution;
6. beheading;
7. suicide attack;
8. bombing;
9. terrorist attack;
10. propaganda and promotional material for a ‘terrorist organisation’ within the meaning of s 102.1(1) of the *Criminal Code* (Cth); and
11. activities of, or associated with, a ‘terrorist organisation’ within the meaning of s 102.1(1) of the Schedule to the *Criminal Code* (Cth).

## Control 4

* 1. You are prohibited from possessing or using, or causing any person to act on your behalf to possess or use, any of these specified articles or substances, namely:

1. firearms, firearm parts or ammunition within the meaning of s 4 of the *Firearms Act 1996* (NSW);
2. a ‘prohibited weapon’ within the meaning of s 4 of the *Weapons Prohibition Act 1998* (NSW);
3. any quantity of petrol exceeding 4 litres except petrol contained in the petrol tank of a vehicle;
4. any quantity of any chemical which is not consistent with reasonable domestic use;
5. an article or device, not being a firearm, capable of discharging by any means any irritant matter in liquid, powder, gas, chemical form, dense smoke or substance, which is intended by the person having possession of the article or device to injure or menace a person;
6. a detonator;
7. a fuse capable of use with an explosive or a detonator;
8. a knife, in a public place, without reasonable excuse; and
9. anything intended, by the person having custody of the thing, to be used to injure or menace a person or damage property.

## Control 5

* 1. You are prohibited from communicating or voluntarily associating with:

1. any person incarcerated in any correctional facility, except:
2. [Name]; and
3. Eliesa KAFOVALU (19/10/1989), but only so as to permit you to communicate with KAFOVALU in writing;
4. any person known to you to be convicted of, or currently charged with, a ‘terrorism offence’ within the meaning of s 3(1) of the *Crimes Act 1914* (Cth);
5. any of the following specified individuals:
6. Amnah RIMA (nee HAMZE) (date of birth: 08/09/1975)
7. Bassam HAMZY (date of birth: 03/01/1979);
8. Rose Honor KARROUM (date of birth: 29/06/1990);
9. Siaunofilalao KEPU (date of birth: 11/11/1998);
10. Abir BAYDA (approximate date of birth: 14/11/1978).

## Control 6

* 1. You are prohibited from accessing or using any mobile telephone device and SIM card other than a single mobile telephone device and SIM card provided by the AFP (the **permitted mobile phone**).
  2. Your access or use of the permitted mobile phone is subject to the following conditions:

1. prior to using the permitted mobile phone an AFP Superintendent will provide you with the following information in writing:
2. the International Mobile Equipment Identity number for the permitted mobile phone;
3. the Integrated Circuit Card Identifier for the SIM card you will use with the permitted mobile phone;
4. the telecommunication service provider which you will use with the permitted mobile phone;
5. the password for the permitted mobile phone; and
6. the phone number to which the permitted mobile phone will be connected;
7. at any time an AFP Superintendent (or a police officer specified in writing by an AFP Superintendent) requests, you must present the permitted mobile phone for inspection and open any applications the AFP Superintendent or police officer directs you to open;
8. you must not change, remove, modify or disconnect or cause any other person to change, remove, modify or disconnect on your behalf (including any employee or person acting on behalf of a telecommunications service provider) the SIM card provided by the AFP, the telecommunication service provider or the phone number connected to the permitted mobile phone; and
9. if you change the password for the permitted mobile phone, you must provide the new password to an AFP Superintendent, or a police officer acting under an AFP Superintendent’s direction, if you are requested to do so by an AFP Superintendent or that police officer.
   1. For abundant clarity, Control 6.1 does not prohibit you from being present whilst other persons communicate using the ‘speaker’ function on another phone so long as:
10. you do not participate in the communication; and
11. you do not cause any person to participate in the communication on your behalf.

## Control 7

* 1. You are required to consider in good faith participating in counselling or education relating to your spiritual, emotional and physical wellbeing, with a suitably qualified professional counsellor or publicly recognised religious leader, for at least 60 minutes per week.
  2. If you agree to participate in such counselling or education you must advise an AFP Superintendent in writing that you have commenced the counselling or education and provide an AFP Superintendent the name and qualifications of the professional you have engaged.

## Exemptions requested by you

* 1. You may request that the AFP Superintendent approve an exemption to the obligations, requirements or prohibitions specified in Controls 1-7 above.
  2. To request an exemption, you must:

1. submit a written request to the AFP Superintendent which:
2. explains the extent to which you seek to be exempted from the Control, and
3. explains your reason(s) for seeking the exemption; and
4. provide any other information requested by, or on behalf of, the AFP Superintendent for the purposes of determining whether to approve the exemption.
   1. The AFP Superintendent may grant an exemption subject to conditions specified in writing.
   2. You must comply with all of the conditions specified in writing by the AFP Superintendent. If you do not comply with a condition to an exemption, the exemption is (and will be taken to have been for all purposes) of no effect.
   3. A request for an exemption must be made before the material time and date.
   4. If the AFP Superintendent has not approved an exemption by the material time and date, the request is deemed to have been refused.

## Exemption granted by the AFP with or without a request from you

* 1. An AFP Superintendent may grant an exemption to the requirements or prohibitions specified in the Controls with your consent.
  2. The AFP Superintendent may grant an exemption subject to reasonable conditions specified in writing provided on reasonable notice to you and to which you consent in writing.
  3. You must comply with all the conditions specified in writing by the AFP Superintendent. If you do not comply with a condition to an exemption, the exemption is (and will be taken to have been for all purposes) of no effect.

## Application of controls while in custody

* 1. Controls 1-7 do not apply during any period in which you are held by or on behalf of any officer in a prison or remand centre of the Commonwealth, a State or a Territory.
  2. Controls 1-7 resume their application at the conclusion of any period referred to in Control 10.1.

## Interpretation

* 1. In this Interim Control Order:

1. ***AFP Superintendent*** means a member of the Australian Federal Police performing the duties of a Superintendent within the Counter-Terrorism portfolio.
2. ***material time and date*** means:
3. in relation to a request for an exemption to a Control that requires you to do an act – the time and date that you are required to do that act and propose not to do it;
4. in relation to a request for an exemption to a Control that prohibits you from doing an act – the time and date that you propose to do that act;
5. in relation to a request for an exemption to a Control that requires you to be present at an area or place – the time and date that you are required to be present at that area or place and propose not to be;
6. in relation to a request for an exemption to a Control that prohibits you from being present at an area or place – the time and date that you propose to be present at that area or place.
7. ***password*** includes but is not limited to any passcode, swipe pattern or any information or function necessary to facilitate access to the applicable device.
8. ***police officer*** means a ‘member’ or ‘special member’ of the Australian Federal Police, as defined by the *Australian Federal Police Act 1979* (Cth), or a ‘police officer’ within the meaning of the *Police Act 1990* (NSW)*.*

REASONS FOR JUDGMENT

(REVISED FROM THE TRANSCRIPT)

BURLEY J:

1. On 24 November 2021, I made an interim control order against the respondent, Alo-Bridget Namoa, under s 104.4 of the *Criminal* ***Code***(contained in the Schedule to the *Criminal Code Act 1995* (Cth)), giving ex tempore reasons that were later published as *Read v Namoa* [2021] FCA 1486 (***Read v Namoa (No 1)***). The control order regime is described in those reasons. The applicant, Superintendent Nicholas Read of the Australian Federal Police (**AFP**), has elected to seek to confirm the interim control order. A hearing for that purpose took place today, 2 December 2021.
2. Ms Namoa does not oppose the order and appeared at the application represented by a legal advisor.
3. Section 104.14 of the Code governs the confirmation of an interim control order. That section only applies if, in accordance with s 104.14(1A):

(a) an interim control order is made in relation to a person; and

(b) an election is made under section 104.12A to confirm the order; and

(c) the issuing court is satisfied on the balance of probabilities that section 104.12 and subsection 104.12A(2) have been complied with in relation to the order.

1. An affidavit of service, affirmed by Senior Constable Aydin Ozden and dated 1 December 2021, was read in court. It sets out the steps that have been taken to serve Ms Namoa with copies of documents relevant to the present application and to explain those documents to her.
2. I am satisfied by the contents of Mr Ozden’s affidavit that the requirements of s 104.12 of the Code have been met, which requires the interim control order to be personally served on the respondent by a member of the AFP who must provide an explanation as to the effect of the interim control order, and to inform the respondent of related information as required by s 104.12(1)(b). I am also satisfied by the affidavit evidence before me, which includes the affidavit of Superintendent Read sworn on 12 November 2021 and read during the interim control order application and again during this application, that the applicant has elected to confirm the interim control order and given written notification to this Court of that election, and that a member of the AFP has personally served upon the respondent a copy of that election notification and related documents in accordance with s 104.12A(2)(a)(i)-(iii).
3. Although Ms Namoa was entitled to produce evidence and make submissions at the confirmation hearing in accordance with s 104.14(1)(c), she has elected not to do so, other than to confirm that she does not oppose the making of the order.
4. Section 104.14(7)(c) gives the Court the power to confirm an interim control order without variation. Two conditions must be met. Both are set out in s 104.4(1) of the Code. The first is that the Court must be satisfied on the balance of probabilities that one of seven alternatives is met, including relevantly “(iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation…or a terrorist act” (s 104.1(1)(c)(iv)). The second condition is that “the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of: (i) protecting the public from a terrorist act; or (ii) preventing the provision of support for or the facilitation of a terrorist act” (s 104.4(1)(d)(i)-(ii)): see also *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307 at [480] (Hayne J). I concluded at the interim control order hearing that both of these conditions were met at that time.
5. As noted above, in addition to the affidavit of Senior Constable Ozden, the same materials are before me as were on 24 November 2021 when I made the interim control order.
6. I remain satisfied that both of the conditions for the exercise of the power to confirm the interim control order identified above have been met. Specifically, as I noted in *Read v Namoa (No 1)*, I am satisfied that the respondent has been convicted in Australia of an offence relating to terrorism, meeting the criterion in s 104.4(1)(c)(iv). I am also satisfied that each of the prohibitions and restrictions imposed upon the respondent by the interim control order meet the requirements of s 104.4(1)(d) because they are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act, or preventing the provision of support for the facilitation of a terrorist act: see *Read v Namoa (No 1)* at[14]-[25].
7. I am therefore able to confirm the ICO.
8. In reaching that conclusion I am required to consider the original interim control order request and the evidence and submissions made at the confirmation hearing, including taking judicial notice of the fact that the original request was made in particular terms. I note that I may only take action on evidence adduced and submissions made at the confirmation hearing, which is what I have done: see s 104.14(3) and (3A) of the Code.
9. It is important to observe, for completeness, that a confirmation hearing, unlike an interim control order hearing, is not interlocutory. The maximum duration for which a confirmed control order may be made is 12 months from the day upon which the interim control order is made which means that the confirmed control order will expire on 23 November 2022.
10. I will therefore make orders in accordance with the draft orders that have been submitted to the Court prior to the hearing today.

|  |
| --- |
| I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Burley. |

Associate:

Dated: 13 December 2021