IN THE SUPREME COURT OF NEW ZEALAND
AUCKLAND REGISTRY A.293/79

Special Consideration

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IN THE MATTER of the Judicature Amendment Act 1972

A N D

IN THE MATTER of the Immigration Act 1964

BETWEEN SIONE VAVE FALEAFA and MELAIA LOTOMOUA FALEAFA
Applicants

A N D THE MINISTER OF IMMIGRATION
Respondent

Hearing : 18th September 1979

Counsel : W.C. Edwards for applicants
M.J. Ruffin for respondent

Judgment : 18th September 1979

(ORAL) JUDGMENT OF BARKER, J.

This is an application for review under the Judicature Amendment Act 1972. The decision under review is that of the Minister of Immigration, made on or about 14th March 1979 wherein he declined to consider an application by the applicants under Section 20A of the Immigration Act 1964 on the grounds that their applications were not received in time.

On 13th September 1979, I made interim orders under Section 8(2))a) of the Judicature Amendment Act 1972 declaring that the Crown ought not to take any further action that is or would be consequential on the exercise of the Minister' statutory power and in particular, that the Crown ought not to take steps to place the applicants on an aircraft to leave New Zealand pending further order of the Court. Those interim orders were made because it appeared that time would be available to me

this week to deal with the substantive application for review; after discussion with counsel in Chambers and perusal of the file it appeared that the Minister had not turned his mind to the merits of the applicants' application under Section 20A of the Act but had taken the view that he had no jurisdiction.

Section 20A of the Act reads as follows:

> "20A. (1) Where any person is convicted of any offence referred to in section 20(1) of this Act, except an offence against subsection (5) of section 22 of this Act, he may, within 14 days after the date on which the conviction is entered, request the Minister in writing, setting out the full circumstances on which the request is based, to make an order that the offender be not deported from New Zealand.
>
> (2) On any such request, the Minister may make such an order, in the prescribed form, if he is satisfied that, because of exceptional circumstances of a humanitarian nature, it would be unduly harsh or unjust to deport the offender from New Zealand.
>
> (3) The Minister shall cause to be filed a copy of the order in the Registry of the Court in which the conviction was entered, and the Court shall -
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> (a) Order the immediate release of the offender, if he is then detained in a penal institution, unless he is undergoing a sentence of detention in respect of the offence or of some other offence; or
>
> (b) Discharge the offender from all obligations under any bail bond entered into by him to secure his release from detention.
>
> (4) On making an order under this section, the Minister shall cause to be issued to the offender a permit under this Act."

The applicants were convicted in the Auckland Magistrates' Court on 8th ~~December 1978~~ February 1979 on charges of overstaying their entry permits which had expired on 15th September 1978. They were ordered to be deported. On 21st February 1979, their solicitors wrote to the Minister of Immigration in Wellington seeking the exercise in their favour by him, of his discretion under Section 20A. It is not necessary to go into the details of the grounds of their application, although I note one factor

which takes the male applicant out of the ordinary run of persons in a similar situation who have been dealt with by the Courts in recent times; he served this country in the armed forces during the Second World War.

It appears from an affidavit from the Minister's private secretary that the application was not received in the Minister's office in Wellington until 23rd February 1979. However, by the same post, the applicants' solicitor forwarded a copy of the application to the Minister under Section 20A to the District Superintendent of the Labour Department at Auckland; this copy letter was headed "District Superintendent, copy for your information". This copy letter was received in the Auckland office of the Labour Department on 22nd February 197 i.e. within the 14 day time limit referred to in the statute.

I held in Tongia v. Bolger (Judgment 2nd July 1979, A.655/79, Auckland Registry) that an application under Section 20A received by the Minister after the expiry of the 14 day time limit was of no effect and that the Minister had no jurisdiction to consider such an application. The principal authority relied on for that conclusion was a decision of the Court of Appeal in Reckit & Colman Ltd. v. Commissioner of Inland Revenue, (1966) N.Z.L.R. 1032. In the Tongia case, the letter to the Minister was forwarded on the last day of the 14 day period; it could not, even in the ordinary course of post, have reached either his office in Wellington or the Labour Department office in Auckland within the 14 days provided by the statute. Despite Mr Edwards' arguments today, I see no reason for coming to a contrary conclusion to that expressed by me in the Tongia case. However, the situation in the present case is somewhat different in that a copy of the application under Section 20A was received by the District Superintendent of the Labour Department at Auckland within the 14 day period referred to in Section 20A(1).

Looking at that subsection, it appears that the Minister has two duties thereunder; the first is to receive the application provided it is filed within time and the second and more important, but dependant on the first, is to make a decision according to law on an application made in time. This second duty cast on the Minister by the legislation is obviously of considerable importance in that it affects the life of the person making the application; in the absence of any power of delegation, one would imagine that it is a power that is so important that it should be exercised only by the Minister. See R v. Chiswick, Police Station Superintendent, ex parte Sacksteder, (1918) 1 K.B. 578, where Pickford, L.J. said at page 585, 586:

> "When power is given to a dignified high officer to restrict that person's liberty, I am inclined to think - it is not necessary to decide it - that it must be done by that high officer himself; that he cannot make a general order without considering the circumstances of each case, but that he must examine and see whether the particular person ought to be detained in custody."

That common law decision relating to serious duties such as making a decision under Section 20A, may well have been modified by Statute in that Section 39 of the Act refers to the power of the Minister to delegate all or any of his powers to any Immigration Officer; the term "Immigration officer" is defined in the definition section of the Act. An affidavit sworn by an official of the Department of Labour, Mr Flude, states:

> "No Immigration Officer at the Department of Labour at Auckland is or has been authorised pursuant to Section 39 of the Immigration Act 1964 to exercise or perform any of the powers or functions of the Minister of Immigration set out in Section 20A of the Immigration Act 1964."

Mr Ruffin stated from the Bar that a Mr Malcolm,

M.P. holds the office of Under Secretary for Immigration. I cannot see how he comes within the definition of Immigration officer in Section 2 of the Act. In that definition section, "Minister" means "the Minister of Immigration; and includes any person for the time being authorised to exercise or perform any of the Minister's powers or functions". There could be the operation of Section 17 of the Civil List Act 1950. However, it is not necessary for the purposes of this case to decide whether the Minister's power of decision under Section 20A is or is not validly exerciseable by Mr Malcolm.

Authorities, such as Wade, Administrative Law, (4th Edition) 1977, p.315 and De Smith, Judicial Review of Administrative Action, (3rd Edition) p.222, draw the distinction between matters of grave importance which should be decided by the Minister and situations where the power of the Minister "devolves" onto responsible officials of his Department. The principle of devolution (to use the term of Brightman, J. in Re Golden Chemical Products, (1976) 1 Ch. 300, 307) is enunciated best in the well-known decision of the English Court of Appeal in Carltona Ltd. v. Commissioner of Works, (1943) 2 All E.R. 560, 563 where Lord Greene, M.R. said:

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he

> selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

The decision of the same Court in Lewisham Metropolitan Borough and Town Clerk v. Roberts, (1949) 2 K.B. 608 is also in point. There, an official of the Minister of Health purported to exercise certain powers; the Court took the same view as it did in the Carltona case. Bucknill, L.J. said at p.618:

> "It is true that there is no evidence that the Minister of Health personally told Mr O'Gara to act on his behalf in matters of this kind. Such a suggestion seems to be unreasonable."

Denning, L.J. (as he then was) said at p.621:

> "The Minister is not bound to give his mind to the matter personally. That is implicit in the modern machinery of government; see Carltona Ltd. v. Commissioner of Works, and an article by Professor Willis in 21, Canadian Bar Review, at p.257. When, therefore, a government department requisitions property itself under reg. 51(1), it is not necessary for the minister himself to consider the matter. It is sufficient if one of the officials of that department brings his mind to bear on the propriety of it."

Jenkins, J. (as he then was) said at p.629:

> "A Minister must perforce, from the necessity of the case, act through his departmental officials, and where as in the Defence Regulations now under consideration functions are expressed to be committed to a minister, those functions must, as a matter of necessary implication, be exerciseable by the minister either personally or through his departmental officials; and acts done in exercise of those functions are equally acts of the Minister whether they are done by him personally, or through his departmental officials, as in practice, except in matters of the very first importance, they almost invariably would be done. No question of agency or delegation as between the Minister and Mr O'Gara seems to me to arise at all."

That last quotation neatly emphasises the distinctic between matters of the "very first importance" where the Minister himself must act and matters of bureaucratic convenience (for want of a better term) when the Minister can act through his officials.

This principle appears to have been accepted in New Zealand. See statements in the judgment of Richmond, J. (as he then was) in Attorney-General v. Cooper, (1974) 2 N.Z.L.R. 713, 722, and the judgment of the Court of Appeal in Smith v. Collison (C.A. 176/76, judgment 8th July 1977).

de Smith, (op. cit.) at p.286, sets out criteria for deciding whether there has been an implied delegation; he speaks of looking at the amplitude of the power and the efficient transaction of public business by informal delegation of responsibility, together with the degree of control maintained by the delegating authority.

I consider in this case that the function of the Minister to receive requests or applications under Section 20A(1) but not to decide applications, could devolve upon his administrative officers. This decision accords with the Carltona principle as adopted in the cases mentioned. It is, in my view, (as I held in Tongia) unrealistic to expect that the Minister personally has to be served with each application; it is not logical that the application has to be made to the Minister's office in Wellington and not to other offices of his Department.

Mr Ruffin submitted that it is pertinent to consider that no delegation of powers of the Minister under Section 20A has been made under Section 39. In my view, the statutory power under Section 39 was inserted to get around any possible argument that matters which, at first sight, may seem to be of great importance, were being exercised, not by the Minister but by some officer in his Department; provided that the Minister

complies with the conditions of Section 39, then he may delegate certain powers, other than those excepted in Section 39(1), to Immigration officers.

The statutory definition of "Minister" seems to be no more than declaratory of the common law position relating to devolved powers. The cases make it quite clear that in many instances, the person exercising the power in the name of the Minister may do so without any actual knowledge on the part of the Minister that the power is being exercised.

I am further strengthened in that view I have taken by a consideration of Section 20A. It is indeed unfortunat that those drafting this Act did not take the same care as the draftsmen of the Immigration Amendment Act 1978. Section 22C and the 5th Schedule to the Amendment Act set out in some particularity the mode by which an appeal under Section 22C of the Act is to be made. There is a requirement that the appeal be made on a form provided by the Secretary for Justice and be filed in the office of the Tribunals Division in Wellington. There is no such direction in Section 20A. Nor is there any provision as is found, for example in Section 152 of the Property Law Act 1952 or Section 174 of the Town and Country Planning Act 1977 (analagous because it deals, inter alia, with applications to Tribunals) to the effect that an application, notice or document is deemed to have been received when it would have been received in the ordinary course of post.

I look at the fact that there is very limited time (i.e. 14 days) under Section 20A within which to apply; within that limited time, the applicant has the clear burden of satisfying the Minister that there are "exceptional circumstances of a humanitarian nature" which would render it unduly harsh or unjust to deport him. I cannot imagine that the Legislature could have intended to discriminate in favour of applicants living in Wellington who would be able to file an application

direct in the Minister's office in that city.

I think that I am justified in ascribing to the Legislature the knowledge that the Department of Labour (which services the Minister of Immigration) has offices in most principal centres in New Zealand and the intention that an application sent to a responsible officer in charge of a Labour Department office, within the 14 day period, (as I have said - a limited period) would be sufficient. In other words, the Legislature could not possibly have intended applicants for the exercise of an ameliorating power as found in Section 20A should be dependant on the vagaries of the postal system for having their applications considered.

I am not, of course, saying that the Minister is under any obligation to decide upon an application within the 14 day period. That would be quite ridiculous. The Minister himself may be out of the country, unwell and unavailable. Once an application is made, then I have no doubt, in accordance with the normal Departmental practice, the local office of the Department would prepare a report and recommendation for the Minister's attention. Indeed, I am advised by Mr Edwards, who has had considerable experience in these matters, that part of his reason in sending a copy of the letter to the Minister to the Auckland office, is that the Auckland office holds the file of the deportee if he is in Auckland. The Minister usually needs to confirm particulars from that office.

It is clear that the Minister has not turned his mind to the application; and Mr Ruffin was disposed to agree that, if I should be minded to grant the application, then the proper order to make would be a direction under Section 4(5) of the Judicature Amendment Act 1972 directing the Minister to consider the application to him under Section 20A of the Immigration Act 1964 according to law on the grounds that the

application was filed in time and the Minister has jurisdiction to consider it.

It is not, of course, proper for me to give any direction to the Minister as to the matters that he should take into account when considering that application. The affidavit from Mr Flude states that the Departmental files do not reveal any of the enclosures referred to in the additional application; it may well be that if these additional matters came to light now, then they could be treated in the manner of "further particulars" since the substantive application was made in time. However, that again would be a matter for the Minister and his officers.

Under Section 4(5A) of the Judicature Amendment Act 1972, if the Court gives direction under Section 4(5), it may make an order by way of an interim order under Section 8; that section is to apply accordingly mutatis mutandis. It seems proper that I should make the interim order preserving the position of the applicants.

The male applicant has been apprehended pursuant to Section 20(4) of the Act and is in custody for a maximum period of 14 days with a view to being placed on an aircraft on Saturday of this week. I think that it is proper, in this case, to make an interim order which will have the effect of allowing the applicants to stay in New Zealand until the Minister has ruled on their application under Section 20A notwithstanding the decision of the Court of Appeal in Movick v. Attorney-General, (1978) 2 N.Z.L.R. 545.

In Movick's case, the Court of Appeal held that the appellant there had no right to be in this country and that his presence in New Zealand was not necessary in terms of Section 8 to justify interim orders sought to "preserve his

position". Although there is a similarity between the present applicants and the appellant in Movick's case, in that technically neither has the right to be in New Zealand, the applicants are in a different situation in that they have now established their right to ask the Minister to exercise his power under Section 20A notwithstanding their conviction and the normal consequences of conviction, a deportation order.

Should they be deported now, then they would become "prohibited immigrants"; if they were deported now and the Minister were subsequently to find in their favour, they would then face the unnecessary expense of having to pay their fares to New Zealand again. This creates a different situation from the Movick one; I am not bound in the circumstances of this case to follow Movick.

I note that I applied Movick to a Section 20A situation in the case of Akauola and Others v. Minister of Immigration on 9th April 1979; all I say in respect of that case is:

(a) The matter was not as fully argued before me as was this present case; and

(b) The situation was completely different; it appeared very clear in the Akauola case that there was very little ground for having the Minister exercise his discretion under Section 20A(1).

Accordingly, it seems proper that I should make interim orders under Section 4(5A) and Section 8 which will have the effect of releasing the male applicant from his present custody where he is serving the 14 days empowered by Section 20(4 these orders will have the effect of directing the Crown not to take any steps towards the deportation of the applicants unless and until the Minister has decided unfavourably in their application under Section 20A.

Accordingly, the formal orders I make are:

(a) Under Section 4(5) of the Judicature Amendment Act 1972, I direct that the Minister of Immigration deal according to law with the application dated 21st February 1979 made by the applicants' solicitors to him under Section 20A of the Act;

(b) As an interim order pending the final decision of the Minister under Section 20A:

(i) The Crown ought not to take any further action that is or would be consequential on the exercise of the Minister's statutory power; and

(ii) The Crown ought not to continue with any criminal proceedings in connection with any matter to which the application relates.

In practical terms this means:

(a) That the Crown should not deport the applicants until and unless the decision of the Minister is given unfavourably to them; and

(b) That the male applicant should be released from custody forthwith.

It is not entirely clear from the Act whether this latter power is exerciseable in terms of the Judicature Amendment Act. However, as an alternative basis for exercising the power, I do so under the inherent jurisdiction of the Court on a basis equivalent to habeas corpus.

R. D. Barker J.

Solicitors:

Messrs Edwards, Fuimaono & Co., Auckland, for applicants.

Crown Solicitor, Auckland, for respondent.