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IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

M.518/84

1244

IN THE MATTER of the Immigration Act  
1964

BETWEEN SULIANA MALIATONGA MAFI  
Tongan, born 9 July 1959  
Appellant

AND PHILIP MARTIN MACKENZIE  
Immigration Officer in  
the Department of Labour,  
Wellington  
Respondent

Hearing 13 September 1984  
Counsel P B Taylor for appellant  
D P H Jones for respondent  
Judgment 17 September 1984

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JUDGMENT OF DAVISON C.J.

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Suliana Maliatonga Mafi was charged in the District Court on 9 February 1984 that she, being a person to whom the Immigration Act 1964 applies and to whom a temporary permit to enter New Zealand was granted, did remain in New Zealand after the expiry of the period for which the permit was granted.

On 22 March 1984 she was convicted and ordered to be deported pursuant to s 20 of that Act. She has appealed to this Court.

THE FACTS

The facts are not in dispute. They are these:

28 September 1978 The validity of the form of temporary permits being issued in New Zealand was challenged in the High Court in Ngata v Department of Labour [1980] 1 NZLR 130 and decision reserved.

7 October 1978 The appellant arrived in New Zealand and was issued with what purported to be a temporary permit expiring on 7 November 1978.

19 October 1978

The Immigration Amendment Act (No 2) 1978, which anticipated a decision in Ngata's case being given holding the temporary permits in the form as issued to be invalid, came into effect.

It provided:

"(1) Notwithstanding anything in the principal Act or in the Immigration Restriction Regulations 1930, every entry permit granted or issued for the purposes of the principal Act before the commencement of this Act shall be deemed for all purposes to have been validly granted or issued if it was granted or issued in a form for the time being approved by the Minister. "

7 November 1978

Appellant's temporary permit expired.

8 November 1978

As from this date the appellant overstayed her temporary permit.

20 November 1978

Decision of High Court in Ngata's case given holding temporary permits to be invalid.

5 November 1980

Section 43B of the Criminal Justice Act 1954 - as inserted by s 22 of the Criminal Justice Amendment Act 1980 - became law. It provided:

"(1) Notwithstanding any other enactment or rule of law to the contrary, no person shall be liable in any criminal proceedings in respect of any act or omission by him if, at the time of the act or omission, the act or omission by him did not constitute an offence. "

29 April 1982

Department of Labour v Latailakepa  
/[1982] 1 NZLR 632 decided as to the effect of s 438 Criminal Justice Act 1954.

APPELLANT'S CASE

The appellant's case may be briefly stated as follows.

On 7 October 1978 the appellant was issued with a permit which was subsequently held to be invalid. It is accepted that s 2 of the Immigration/<sup>Amendment</sup> Act 1978 validated the permit and that it is deemed as from the date of issue to be a valid permit.

However, s 43B of the Criminal Justice Act 1954 as inserted in 1980 prevents the permit being validated retrospectively by s 2 of the Immigration Amendment Act 1978 so as to enable any prosecution for an offence to be founded on it. So that although the appellant overstayed the term of her temporary permit which expired on 7 November 1978 by remaining in New Zealand on 8 November 1978, no prosecution for an offence of overstaying under s 14(5) of the Immigration Act 1964 can be founded upon it.

CROWN CASE

The Crown case was:

It was conceded that as a result of the Ngata decision the appellant's temporary permit, although granted before that decision was delivered, was in an invalid form. That permit was, however, on 19 October 1978 validated for all purposes by s 2 of the Immigration Amendment Act 1978 and is to be deemed to have been validly issued.

The appellant's temporary permit was therefore valid at the date of its expiration on 7 November 1978 and when the appellant remained in New Zealand on 8 November 1978 she overstayed a valid temporary permit and committed an offence under s 14(5) of the Immigration Act 1964. Section 43B of the Criminal Justice Act 1954 as amended in 1980 has no application to the case and does not prevent the conviction of the appellant because at the time of the over-staying - which is the relevant act referred to in s 43B - the act did constitute an offence.

DECISION

The elements of a prosecution under s 14(5) of the Immigration Act 1964 are:

- (a) That the person was granted a valid temporary permit:
- (b) That that permit has expired:
- (c) That the person remained in New Zealand after the expiry of that permit:
- (d) That the person is not a New Zealand citizen.

It was common ground between counsel that the permit when issued to the appellant on 7 October 1978 was invalid for the reasons stated subsequently in Ngata's case. It was accepted, however, that that permit is to be deemed for all purposes to have been validly issued by reason of the provision of s 2 of the Immigration Amendment Act 1978 which came into force on 19 October 1978. It therefore follows that up until its expiry on 7 November 1978 the appellant was in New Zealand under a valid temporary permit. The appellant remained in New Zealand after that permit expired and on the following day - 8 November 1978 - she committed the offence of overstaying. She is not a New Zealand citizen.

All the elements necessary to sustain a conviction are established.

However, Mr Taylor for the appellant submitted that the conviction of the appellant for the offence is prohibited by s 43B of the Criminal Justice Act 1954 which applies "notwithstanding any other enactment or rule of law to the contrary". His argument on that point was that the appellant, prior to the coming into force of s 2 of the Immigration Amendment Act 1978, was not issued with a valid permit. She could not therefore have been charged with overstaying a valid permit and could never have been so charged. Section 2 of the Act in validating the permit had the effect of making the appellant liable for prosecution if she

subsequently overstayed the permit whereas until that section was passed she could not have been so liable. Such retrospective legislation, he said, was struck down by s 43B. He referred in support of his submission to a passage from the judgment of Richardson J. in Latailakepa (ante) at p 636:

" In my view there is no difference in principle between the retrospective creation of a new offence and a provision retrospectively applying an already existing offence to a class of persons not previously within its terms. "

The effect of s 2 was, Mr Taylor said, to apply to the appellant an already existing offence which could not previously have been applied to her.

At first sight that passage might appear to support Mr Taylor's argument but it is taken out of context. The passage fails to indicate that the learned Judge was there referring to conduct which was not criminal in character at the time it occurred being retrospectively made criminal in character.

Section 2 of the 1978 amendment in no way made criminal any conduct of the appellant at all. It merely validated her permit. She was responsible for no act or conduct prior to s 2 coming into force which could amount to a criminal offence. Section 2 then did not in the words of s 43B purport to make the appellant liable in any criminal proceedings in respect of any act or omission which at the time of that act or omission did not constitute an offence.

It was not until 8 November 1978 that the appellant committed the act constituting the offence - overstaying her temporary permit - and by that time she had a valid permit and her act in overstaying it did constitute an offence.

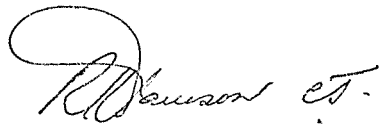
The purpose and intent of s 43B is to prevent an act or omission which has already been committed and which does not constitute an offence being subsequently made an offence by any enactment or rule of law: see Latailakepa (ante) per Woodhouse P. p.633; and per Richardson J. at p.636.

The applicability of s 43B is determined by whether or not the act or omission was an offence at the time it was committed or as expressed by Richardson at p.636:

" The yardstick to be applied is whether what he did constituted an offence by him at that time. "

At the time that the appellant overstayed on 8 November 1978 what she did was an offence under s 14(5) of the Immigration Act 1964 because she overstayed a valid permit. But the decision was hers whether she committed it or not. She could have left New Zealand before the temporary permit expired and so committed no offence. She elected not to do so. The position may well have been different had the appellant been issued with a Ngata type permit which expired before 19 October 1978 when s 2 of the Immigration Act 1978 came into force because then she would have committed the act of overstaying an invalid permit which would have been purportedly validated retrospectively by s 2. That, however, is not this case.

In my judgment she was rightly convicted of that offence by the District Court Judge. The appeal is dismissed.



Solicitors for the appellant

Clive Edwards & Co  
(Auckland)

Solicitors for the respondent

Crown Solicitor  
(Auckland)