IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. M.572/83

reports ~~NZAD~~ NZAR?

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BETWEEN V MOHU

Appellant

A N D THE DEPARTMENT OF LABOUR

Respondent

Hearing: 1 February 1984

Counsel: M.J. Knowles for Appellant
B.M. Stanaway for Respondent

Judgment: 13 Feb 1984

JUDGMENT OF COOK J.

The appellant was convicted in the District Court on a charge brought under Sections 14 and 20 of the Immigration Act 1964 and worded as follows:-

> "Being a person to whom the Immigration Act 1964 applies and to whom a temporary permit to enter New Zealand was granted, who having been granted an extension of that period remained in New Zealand after the expiry of the extended period."

In the District Court it had been submitted that the information should be dismissed as it had not been proved that the defendant was a person to whom a temporary permit had been granted, but this was rejected by the Judge. In this Court it was first submitted by Mr Knowles, for the appellant, that in a prosecution for overstaying the informant must prove the existence of a valid permit under the Immigration Act 1964. He cited Ngata v. Department of Labour (1980) 1 N.Z.L.R. 130 n, where the point taken, and upheld, was that the form of the stamp in the passport was not valid in that regulations under the Immigration Act purported to empower the Minister to approve the form of entry permit, which would then be deemed to be a

prescribed form, whereas the power to prescribe forms was given by the Act to the Governor-General; consequently, the charge of overstaying after the expiry of a temporary permit must fail.

It was further submitted that there are two methods of proving the existence of a permit:-

(a) By adducing admissible evidence in the ordinary way;

(b) by the production of a certificate pursuant to the provisions of Section 34(2) of the Immigration Act.

As to the first, it was urged that it could not be achieved by production of the permit itself, as such evidence is hearsay, and, as to the second, that a certificate under Section 34 must comply precisely with that Section.

The relevant evidence before the District Court may be summarised as follows:-

(1) A Tongan passport was produced which the appellant had handed to the Immigration Officer who laid the information. It contained a temporary entry permit stamped on page 9 in the form prescribed by the Immigration (Permits) Regulations 1979 and initialled (or signed) by an immigration officer. On the following page the validity of the permit is stated to be extended by the Department of Labour.

(2) Two certificates under Section 34(2) of the Immigration Act were produced, by the informant and the Senior Immigration Officer at Christchurch respectively, each stating that the appellant is not a New Zealand citizen, that he entered New Zealand on 1982 and is, or was, the holder of a temporary permit which has expired.

(3) Apart from that, there is evidence by the informant, Mr Lester, and Mr Lewis, the Senior Immigration Officer at Christchurch, in respect of their contacts with the appellant and their knowledge of him. While the evidence of the latter in particular covers the fact of Mohu having lived in Tonga and come from there to New Zealand and reference is made to him having a temporary permit, there is certainly nothing standing alone which can constitute adequate proof of the fact that a temporary permit under Section 14 was duly issued to the appellant and

that it had expired.

As to the certificates, it was submitted that those received by the Judge were deficient in that neither referred to a permit granted under a particular section of the Act, Section 14 or Section 14B as the case might be; that there was no authority for accepting as evidence a statement in the certificate that the appellant "was the holder of a temporary permit" without reference to the section under which it was granted.

Section 34(2) contains the following:-

> "(2) In any proceedings for an offence against section 5 of this Act or against any provision of Part II of this Act, a certificate signed by a Collector of Customs or by a person employed in the Department of Labour authorised by the Secretary of Labour, if it contains a statement, in relation to the defendant in the proceedings, that -
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> (a) He is not a New Zealand citizen; or
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> (b) He entered New Zealand before, on, or after a specified date; or
>
> (c) .....
>
> (d) .....
>
> (da) He was the holder of a permit granted under section 14 or section 14B of this Act that has expired or has been revoked; or
>
> (e) .....
>
> (f) .....
>
> shall, in the absence of proof to the contrary, be deemed to be proof of that statement."

Each of the sections mentioned, i.e. 14 and 14B, provides for the issue of temporary permits. In the case of Section 14 a person, not being a prohibited immigrant, who lands in New Zealand without a permit but proves to the satisfaction of the Minister that he desires to enter New Zealand as a visitor only for purposes of business, employment, study, training, instruction, pleasure or health may be granted a temporary permit in the prescribed form for a limited period. 14B empowers the issue of a temporary permit in other

circumstances; where the entry has been made pursuant to a permit granted under Section 14 which for one reason or another has been found to be invalid; where a person has lawfully entered without a permit being entitled so to do by reason of some exception or exemption, but has ceased to be a person to whom that exception or exemption continues to apply; also, to anyone to whom Part II of the Act applied, but who entered New Zealand without a permit under Section 14 or 15 otherwise than in a way that constituted an offence and the saving provisions had ceased to apply to him.

From a practical point of view there is little distinction between a permit issued under Section 14 and one issued under Section 14B. There are, however, separate sections and each creates an offence of overstaying; whether such offence is under Section 14 or, alternatively, under Section 14B, depending upon the section under which the temporary permit was issued. It follows that it must be proved that a temporary permit was granted pursuant to the particular section under which the charge is laid.

A certificate which complies with Section 34(2), and to the extent to which it complies, is proof of the facts it contains in the absence of proof to the contrary. The first question is whether the statement in either one or other of the certificates which were produced does comply. The fact that two certificates were produced, one signed by the immigration officer who first gave evidence and the second by the senior officer, appears to have arisen from the fact that Mr Knowles objected to the admission of the first certificate. There is no material difference between them, however, and the wording of either may be taken. As to a temporary permit, each states that the appellant "is (or was) the holder of a temporary permit which has expired".

The District Court Judge rejected the submission that this wording was not enough. He noted that both sections use the expression "temporary permit" and he then said:-

> ".... it is my opinion that when the Act is looked at as a whole the words 'temporary

> permit' in Section 14(5) and in the certificate produced are synonymous with the expression 'permit granted under Section 14 or Section 14B of this Act' as used in Section 34(da)."

With respect, I do not think that is the point. It seems to me that, in order to comply with Section 34(2), a certificate must state under which section the permit was granted, 14 or 14B as the case may be. That is what has to be proved before the Court can be satisfied that an offence against the section under which the charge has been laid has been committed. I note that, prior to the amendment which introduced Section 14B and the present form of 34(2)(da), when the only authority for the granting of temporary permits was Section 14, the equivalent clause merely said:-

> "(d) He was the holder of a temporary entry permit that has expired or has been cancelled; .."

The Judge further found that, in any event, there was other evidence which was acceptable. He said:-

> "Secondly, if I am wrong in that view then it is my opinion that Mr Lewis' evidence including the document produced, Application for Extension of Temporary Permit, signed by defendant in Mr Lewis' Office is sufficient evidence that defendant was the holder of a temporary permit within the meaning of those words in Section 14(5). Independently of the certificate it is my view that there is sufficient evidence in this case to satisfy the Court that defendant was a person to whom a temporary permit was granted."

It was submitted by Mr Knowles that such an application for an extension of a permit signed by the appellant was evidence only of the fact of application and such evidence could not prove existence of a permit in the prescribed form, a submission which I did not understand to be opposed by Mr Stanaway. It was made on the basis of a judgment of the Chief Justice which went to the Court of Appeal, but not on that aspect; Fiefia v. Ministry of Labour (C.A. 99/83 26th October 1983). There the certificate under Section 34(2) tendered as evidence was not adequate and the prosecution had relied on admissions by the accused. As stated in the Court of Appeal judgment:-

> "So it was necessary for the Crown to establish that ingredient of the offence charged. It relied upon an oral admission made by the defendant to the immigration officer and on a stamp contained in the defendant's passport which had come into the possession of the prosecution. Referring to what the defendant had told him, the immigration officer said: 'He said that he was born in Tonga on the 12th of September 1958. He said that he arrived in New Zealand on the 22nd of August 1981 and that his permit had expired on the 22nd of November 1981. He said that he knew he was an overstayer and that overstaying was an offence.'
>
> The Chief Justice observed in his judgment dismissing the appeal against the conviction entered in the District Court that the simple admission 'that his permit had expired on the 22nd of November 1981' was not proof that the defendant had previously been granted a temporary permit within the meaning of s 14. And we pause to add that s 13 requires that permits be in the prescribed forms which, in the case of temporary permits under s 14, are provided for in the Immigration (Permits) Regulations 1979."

I note that that decision was given after the decision of the District Court Judge in this case and was therefore not available to him. I accept for the same reasons that the application form produced is not sufficient to establish that the appellant had previously been granted a temporary permit within the meaning of Section 14; indeed, there is no reference to Section 14 in the application form even should it otherwise provide proof.

The next question is whether reliance may be placed on the page of the passport itself which contains the temporary permit. The same question came before the Court of Appeal in Fiefia's case. There, the District Court Judge had considered he was entitled to have regard to the passport and its contents and proceeded to do so. In the High Court, the Chief Justice concluded that, although hearsay, the information as to the permit was admissible under Section 3(1) of the Evidence Amendment Act (No. 2) 1980. Under that subsection one of the alternatives which open the door to the acceptance of a document as evidence, is that:-

> "(b) The document is a business record, and the person who supplied the information for the

composition of the record -

(i) Cannot with reasonable diligence be identified; or

(ii) Is unavailable to give evidence; or

(iii) Cannot reasonably be expected (having regard to the time that has elapsed since he supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he supplied;...."

While the Chief Justice found that the officer could not reasonably be expected to remember date-stamping and initialling the permit in that particular passport, the Court of Appeal accepted a submission that there must be a sufficient factual foundation in the evidence for establishing that condition (i), (ii) or (iii) of admissibility specified in Section 3(1)(b) is met before the documentary material may be admitted; that it cannot be predicated without any evidential foundation that a person concerned cannot reasonably be expected to recollect matters dealt with in the information supplied.

Mr Stanaway, however, submitted that the existence of a valid permit can be proved by the production of the permit itself in a passport and that the informant was not obliged to produce the person who placed the stamp there before the existence of the permit could be proved. He pointed out that the form of permit is prescribed by regulations made pursuant to Section 38 of the Immigration Act and that comparison could be made between the two, that is,the former permit prescribed and the entry stamp in the passport. Further, that it was a situation coming within Section 27 of the Evidence Act 1908 which reads:-

"Judicial notice of official seals, etc. - Where by any Act any seal or stamp is authorised to be used by any Court, officer, body corporate, or any other person, judicial notice shall be taken of the impression of such seal or stamp without evidence of the same having been impressed or any other evidence relating thereto."

I cannot see, however, that the rubber stamp by which the form

of permit is reproduced on a page of the passport can possibly be said to be an official seal or stamp. Nothing was put before me to suggest that a permit may not be produced in any manner, whether by stamp or otherwise. For its validity, it depends on the signature, or initials, of the immigration officer who is authorised to grant it and decides so to do.

Basically, the permit itself is hearsay evidence and, in the light of the decision in Fiefia and in the absence of evidence which might satisfy the Court that the provisions of Section 3(1) of the Evidence Amendment Act (No. 2) 1980 may be invoked, I am unable to see that the prosecution could rely on production of the passport containing the permit stamp.

There does not appear to be anything else in the evidence which is adequate to fill the gap left by the certificate. Accordingly, the appeal must be allowed and the conviction quashed. In my view, however, with Morgan v. Ministry of Transport (1980) 1 N.Z.L.R. 432 in mind, it is a proper case to be remitted to the District Court for a rehearing and I so direct.

Solicitors:

M.J. Knowles, Christchurch, for Appellant
Crown Solicitor's Office, Christchurch, for Respondent.