IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)

M NO 409/82

WELLINGTON REGISTRY

8/3

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IN THE MATTER of a Case Stated pursuant to Section 22E of the Immigration Act 1964

AND

IN THE MATTER of an Appeal by C WESSELING

Hearing: 26 October 1983

Counsel: J R Wild for Amicus Curiae
C T Young for Tribunal

Judgment: 5 March 1984

JUDGMENT OF JEFFRIES J

This case stated concerns the powers of the Deportation Review Tribunal established pursuant to s 22(B) of the Immigration Act 1964 to strike out an appeal which has not been proceeded with. The case is stated pursuant to s 22(E) of that Act.

The facts are these. On the 19th day of June 1980 the then Minister of Immigration signed an order pursuant to s 22(1)(a) of the Act ordering that Cornelius Antonius Wesseling (hereafter called the appellant) to leave New Zealand. On 3 August 1980 appellant's solicitor apparently filed with the Deportation Review Tribunal on behalf of appellant a notice of appeal signed by the solicitor. A hearing date was set for 8 October 1980 on which date appellant's solicitor advised the Tribunal that he had no knowledge of whether the appellant had been advised of the hearing. The solicitor acknowledged to the Tribunal he had

received notice of the hearing but did not know the whereabouts of the appellant so he was unable to inform him. On that occasion the hearing was adjourned sine die. Copies of the notice of a further hearing were released to the Department of Labour for service on the appellant but apparently he was not served as no one knew his whereabouts and he did not appear at the new hearing date on 15 February 1982 on which date the appeal was again adjourned sine die.

Subsequently an application was made on behalf of the Department of Labour to strike out the notice of appeal that had been filed by appellant's solicitors on his behalf on the basis that some 18 months had elapsed since the appellant's papers were first lodged and the solicitors originally instructed by appellant had had no further communication from him. When this application came before the Tribunal it declined to make the order, it being of the view that in the absence of proof of service of the hearing date on appellant himself the Tribunal had no power to determine the case in his absence. The Tribunal was apparently guided by clause 5(3) of the Fifth Schedule of the Act which provides as follows:-

> "If the appellant or the Minister or both fail to appear before the Tribunal at the time and place appointed, the Tribunal may nevertheless, upon proof of service of the notice of hearing, proceed to determine the appeal."

See also clause 10(1) of the Fourth Schedule of the Immigration Act which provides as follows:-

> "The procedure of the Tribunal shall, subject to this Act and to any Regulations made under this Act, be such as the Tribunal thinks fit."

The Tribunal felt that an order as to substituted service could not be made as such an order would be in conflict with the specific provision of the Fifth Schedule reproduced above which allowed the Tribunal in cases where the appellant or a representative of the Minister did not appear upon proof of service of notice of the hearing to proceed to determine the appeal. The Tribunal doubted whether a general power to regulate its own procedures enabled the Tribunal to make substantive rules which in effect would be in apparent conflict with other provisions of the Act.

On application of counsel for the Minister of Immigration, the Deportation Review Tribunal determined to reserve for the opinion of this court the following questions of law:-

1. Does the Deportation Review Tribunal have jurisdiction to order substituted service of notices of hearing?

2. Does the Deportation Review Tribunal have jurisdiction to strike out this particular appeal for want of prosecution if it is satisfied that reasonable enquiries have been made as to the whereabouts of the appellant?

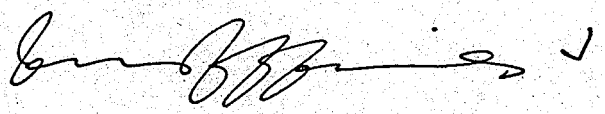
As to question 1. The Tribunal is explicitly required "to serve a notice on" the appellant. It seems therefore the Tribunal must do just that and there is therefore no power to order a substituted service which falls short of that requirement. The answer to question 1. is "no".

Question 2 seems to be based on the assumption that there was in fact no service on the appellant of a hearing date because he could not be found. The Tribunal's powers are subject to the Act. Clause 5(3) of the Fifth Schedule confers the power to determine an appeal only upon proof of service when the parties are not heard. The making of reasonable enquiries does not constitute service. An inferior Tribunal such as the Deportation Review Tribunal has no inherent jurisdiction which can be relied upon to supplement its powers. However, the court declines to go so far as to say an appellant who himself properly signs an appeal and then disappears without trace cannot have the appeal decided in his absence. In any event as the question is framed so as to refer to "this particular appeal" it is answered by what follows.

On the facts of this case this court has reached the view that there has in fact been good service. Clause 5 of the Fifth Schedule uses the words "service on" the appellant. There is judicial authority holding that the words "service on" do not necessitate personal service. See Ex parte Portingell [1892] 1 Q.B. 15 and R v Deputies of the Freemen of Leicester 15 Q.B. 671. Where service does not have to be personal service upon the person's solicitor has been held good if the solicitor is at the time engaged by that person. See Re Salaman (An Infant) [1923] NZLR 50; Evans v Robertson Orr and Another [1923] NZLR 769. In the present case the notice of appeal was signed for the appellant, by his solicitor and agent. The only address for the appellant given on the notice was "Auckland" but the notice was accompanied by a compliments slip from appellant's solicitors. The notice of hearing was admittedly served on appellant's solicitor who was left by the appellant

without any contact address or other instructions. In the circumstances of this case service on the appellant's solicitors constitutes good service as they were engaged by appellant and their place of business constituted the appellant's fixed address. If that was effective service, which the court holds, the Tribunal has power to strike out the notice. Clause 5(3) of the Fifth Schedule to the Act contemplates the Tribunal proceeding to determine an appeal in the absence of the appellant. As the Tribunal has power to proceed in the absence of the appellant one of the options is to dismiss the appeal for want of prosecution.

The case therefore is returned to the Tribunal to implement the direction given.



Solicitor for Amicus Curiae: J R Wild, Esq.

Solicitors for Tribunal: Crown Law Office, Wellington