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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

Special Considerat

813

Appeal
struck out:
(1988) 2
N2LR

A.No. 878/83

IN THE MATTER

of the Judicature
Amendment Act 1972

BETWEEN

J. BENIPAL

APPLICANT

A N D

THE MINISTER OF FOREIGN AFFAIRS

FIRST RESPONDENT

A N D

THE MINISTER OF IMMIGRATION

SECOND RESPONDENT

A.No. 993/83

IN THE MATTER

of the Judicature
Amendment Act 1972

BETWEEN

J. BENIPAL of
Auckland, Student

APPLICANT

A N D

THE REGISTRAR District
Court at Auckland

FIRST RESPONDENT

A N D

THE ATTORNEY-GENERAL sued
in respect of the New
Zealand Police

SECOND RESPONDENT

A.No. 1016/83

IN THE MATTER

of Rules 466 & 466A of
the Code of Civil
Procedure

2.

BETWEEN

J/ BENIPAL of
Auckland, Student

APPLICANT

A N D

THE MINISTER OF FOREIGN
AFFAIRS

FIRST RESPONDENT

A N D

THE MINISTER OF IMMIGRATION

SECOND RESPONDENT

A N D

THE INTERDEPARTMENTAL
COMMITTEE ON REFUGEES

THIRD RESPONDENT

Hearing : 12th, 13th, 14th, 17th, 18th, 20th, 21st,
27th, 28th October, 1983
1st, 2nd, 3rd, 7th, 8th, 9th, February,
19th, 20th, 21st, 22nd, 23rd, 26th, 27th,
March, 1984.

Counsel :

Judgment : 29th June 1984

INTERIM JUDGMENT OF CHILWELL J.
ON HABEAS CORPUS APPLICATION

The three actions described in the intituling were heard together by consent. They include applications for review and for the issue of the prerogative writs of certiorari, prohibition and mandamus. The hearing on the substantive issues commenced on 12th October 1983. The hearing proceeded intermittently over the ensuing months.

The case was closed on 27th March 1984 subject to the determination by the Court of Appeal of a question relating to the granting of immunity from disclosure of certain evidence tendered on behalf of the applicant. That matter was opened before the Court of Appeal on 9th December 1983. The hearing was adjourned on certain terms.

On 5th April 1984 I heard a motion on behalf of the respondents for various orders including leave to adduce further evidence. In a reserved judgment delivered on 2nd May 1984 I dismissed the motion. A fixture was then obtained for completion of the hearing of the disclosure question before the Court of Appeal. That Court sat on 21st and 22nd May 1984. Decision was reserved. No decision has, as yet, been given by the Court of Appeal.

This is my last working day before taking leave. Although I am not due to leave New Zealand until 7th July it would be impossible for me to deliver a judgment on all issues in a week even if the Court of Appeal's decision were immediately made known. My estimate of time for preparing judgment is 20 working days.

By way of separate application under A.No. 878/83 the applicant applied for an order that a writ of habeas corpus do issue directed to the Superintendent of Mt. Eden Prison where the applicant was detained in custody. Action No. 878/83 and the independent application for a writ of habeas corpus were filed on 29th August 1983. They came before me as a matter of urgency on that day. Having heard

substantial arguments from counsel for all parties I
minuted the file as follows :-

"Writ to issue returnable at 10 a.m. on
30th August 1983 at the High Court Auckland.
Question of bail reserved. In view of the
fact that the applicant has been detained
without any form of trial since 16th May
1983 I am minded to grant bail provided
suitable sureties are available and provided
suitable terms can be imposed."

The minute refers to certain procedural matters.

The applicant was brought before the Court on
30th August 1983. The return of the writ, filed on behalf
of the Superintendent of Mt. Eden Prison, certified that
the applicant had been detained pursuant to a warrant
issued out of the District Court at Auckland. A copy of
the warrant was annexed. It is in the form prescribed by
the Third Schedule to the Immigration Act 1964 (the Act).
It states :-

" WARRANT FOR DETENTION

To : Superintendent
MT. EDEN PRISON

Whereas J: BENIPAL, being a person
detained under Section 14(1A) of the Immigration
Act 1964, is likely to be detained for a period
exceeding 24 hours, this is to authorise you to
receive the abovenamed and detail him under the
terms of Section 14 A of the Act.

Registrar 'A.J. McGuffog'

Date : 16 May 1983 "

The warrant was signed by the Registrar of the District
Court at Auckland.

The statutory authority relied upon for the detention of the applicant stems from the following provisions of the Act :-

Section 14(1A) :

"Where an application for a temporary permit is refused, the person concerned may be detained by any member of the Police pending that person's departure from New Zealand on the first available ship or aircraft."

Section 14A. Detention of persons awaiting departure from New Zealand -

"(1) Notwithstanding anything in section 14 (1A) of this Act, where a person to whom that subsection applies is to be detained for more than 24 hours, a member of the Police shall apply to the Registrar (or, in his absence, the Deputy Registrar) of a District Court for a warrant authorising the detention of that person in a prison, and the Registrar (or Deputy Registrar) shall issue such a warrant in the form set out in the Third Schedule to this Act.

(2) Every such warrant shall authorise the Superintendent of the prison to detain the person named in it until he is required by a member of the Police to deliver up that person in accordance with subsection (4) of this section.

(3) Every person detained in a prison pursuant to a warrant issued under this section shall be treated for the purposes of the Penal Institutions Act 1954 as if he were an inmate awaiting trial.

(4) As soon as a ship or aircraft becomes available to take the person from New Zealand, a member of the Police shall require the Superintendent, in writing, to deliver the person into the custody of the member, who shall escort the person or arrange for him to be escorted to the seaport or airport and detained there until the ship or aircraft leaves New Zealand."

I have given anxious consideration to the propriety of delivering an interim judgment while the issue before the

Court of Appeal remains unresolved. That issue has marginal relevance, if any, to the lawfulness or otherwise of the applicant's detention. Weighing that factor against the delay now inevitably involved before I can give final judgment requires, in the interests of the administration of justice, that this interim decision be delivered. The delay period will be substantial because I will be unable to give any attention whatever to the case until February 1985. Having said that, it would be wrong for me to traverse the facts in detail or to deal with all the submissions. However, I am satisfied, on evidence which is not capable of dispute, that the applicant is entitled to be released from detention.

When I deliver my final judgment I will deal with every aspect of the evidence and the submissions of counsel and every ground advanced for and against his release from detention. It suffices for the purpose of this interim judgment to recount a few undisputed facts. They are :-

The applicant arrived at Mangere International airport from : by air early on 1983. He presented to an immigration officer a Dutch passport in the name of Mr. Den Ouden. The immigration officer, in the exercise of ministerial discretion delegated to him, granted a temporary entry permit by affixing the permit, in the form of a stamp, to the passport. It was stated to be valid from 15th May 1983 until 15th November 1983. It was described as a visitor permit and endorsed "employment prohibited". During the ensuing customs clearing procedure

it was decided thoroughly to search the applicant's effects and his person. The process took some considerable time. In the course of this process it was discovered that he was not Mr. Den Ouden but the applicant and that, by some means, the applicant's photograph had replaced that of Mr. Den Ouden. At 2.15 p.m. the applicant was interviewed by a senior customs officer and extensively questioned concerning his background, his movements, his intentions and the method by which he obtained the passport. The police were called. In particular Detective Sergeant Hanna arrived at 6.15 p.m. After a lengthy interview he took the applicant from the airport to the Auckland Central police station. At 9 p.m. he sought instructions from a Mr. Lee of the Immigration Division of the Department of Labour. The instructions he received were to arrest the applicant for committing an offence against Section 16(1)(c) of the Act. That section makes it an offence for any person to utter, produce or make use of any document knowing that it is not genuine for the purpose of obtaining an entry permit. Detective Sergeant Hanna arranged for Mr. Lee to handle the prosecution in the Auckland District Court on the following day. The applicant was arrested and charged at 10 p.m. on

Some time between the applicant's arrest and his potential appearance in the Court the following day, Detective Sergeant Hanna was instructed by the Immigration Division of the Department of Labour not to proceed with the charge upon which the applicant had been arrested but, instead, to make application to the Registrar for the applicant's detention in terms of Section 14A(1) of the Act.

This was duly done. Unfortunately, the District Court file has been lost. The Registrar thought that he attended to the application between 11.30 a.m. and 1 p.m. on 16th May 1983 when he read an affidavit made by Detective Sergeant Hanna who had appeared in support of the application. The Registrar issued the detention warrant.

If the prosecution of the offence for which the applicant had been arrested had been proceeded with, then, under Section 316(5) of the Crimes Act 1961, he had a statutory right to be brought before a Court as soon as possible to be dealt with according to law. But when officialdom decided to abandon that procedure and to substitute in its place the detention procedure the applicant's detention was not the result of any Court appearance or Court order but the result of an administrative act of the Registrar.

The applicant was removed from the custody of the Police and placed in the custody of the Superintendent of Mt. Eden Prison as a detained person to be treated as an inmate awaiting the trial of a domestic crime. No member of the Police ever required the Superintendent to deliver the applicant into the custody of the Police for the purpose of escorting him to a seaport or airport so that he could be removed from the Country. There are reasons for that which will be referred to in my final judgment.

Whatever view might be taken of this matter,

whatever the morals of the situation may be, the bald fact is that a human being was held in custody from the moment of his arrival in New Zealand on 15th May 1983 without being brought before any Court until I released him on bail on 6th September 1983. He has been on bail ever since. Bail is a form of custody: at the least a substantial interference with liberty.

I am satisfied that this case was not governed by Section 14(1A) at the time application was made to the Registrar under Section 14A(1). In consequence the Registrar had no lawful authority either to consider the application or to issue the warrant.

The formal order of the Court is that the applicant be immediately discharged from detention and, it follows, from the conditions of his bail. The sureties are likewise discharged. As a further order I forbid the removal of the applicant from New Zealand pending the determination of all remaining issues in the three actions.

All questions of costs are reserved.

CONFIRMATION OF ORDERS MADE ON
THE APPLICATION FOR JUDICIAL
REVIEW A. 878/83

The formal orders of the Court under seal dated

29th August 1983 are to remain in force in accordance with the terms thereof.

A handwritten signature in cursive script, appearing to read "M. J. Crimmins", with a horizontal line underneath the name.

29th June 1984.

Solicitors :

Applicant : John E. Long, Auckland
Respondents : Crown Solicitor, Auckland