IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

1917

M.1126/91

IN THE MATTER of the Judicature Amendment Act 1972 ("The Act")

A N D

IN THE MATTER of an application for review of an exercise or purported exercise of a statutory power by the Minister of Immigration

MEDIUM PRIORITY

BETWEEN FISIPUNA TAUFA

Applicant

1301

A N D THE MINISTER OF IMMIGRATION

Respondent

Hearing: 11 July 1991

Counsel: Mr C. Edwards for Applicant
Ms Shaw for Respondent

Judgment: 11 July 1991

(ORAL) JUDGMENT OF HILLYER J.

This is an application for an interim order restraining the police and/or immigration officers from forcibly removing the applicant from New Zealand, and other collateral orders.

The applicant is a Tongan national having been born in Tonga on 7 September 1941 so he is nearly 50 years of

age. He is married. His wife is still in Tonga and at least three of his dependent children are there with her. The applicant came to New Zealand on 9 January 1987 and was issued with a temporary permit. It was extended from time to time until it finally expired on 31 August 1987.

On 1 November 1987 he and his daughter, Maliasia Aisake, who was with him, both applied for permanent residence. The applicant's application was declined and that of his daughter was approved. An appeal was lodged seeking a review of the decision to decline permanent residence to the applicant and on 26 July 1989, the Minister of Immigration refused the application for review. The applicant's residence permit had by now expired but he stayed on in New Zealand.

About 1 October 1990 the District Court at Lower Hutt issued a removal warrant against him. On 15 October 1990, he lodged an appeal under s.63(3) of the Immigration Act 1987 which provides as follows:-

> "63(1) Any person on whom a removal warrant is served may, within 21 days after the date of service, appeal to the Minister to cancel the warrant ....
>
> (3) On any appeal made within the period prescribed by subsection (1) of this section, the Minister may cancel the removal warrant, or may reduce the period during which the removal warrant would otherwise remain in force following the appellant's removal from New Zealand, if the Minister is satisfied that -
>
> (a) Because of exceptional circumstances of a humanitarian nature, it would be unjust or unduly harsh for the appeallant to be removed from New Zealand, or for the removal warrant to remain in force for the full period of 5 years following the appellant's removal from New Zealand; and

> (b) It would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand or (as the case may require) to reduce the period during which the removal warrant would otherwise remain in force following the appellant's removal from New Zealand ..."

On 3 December 1990 the general manager of the New Zealand Immigration Service wrote, on behalf of the Associate Minister of Immigration, to the solicitors for the applicant regarding the applicant's appeal against his removal from New Zealand. The letter said that an examination of the information provided in both the appeal and the Immigration Service files revealed that there was information which was potentially prejudicial to Mr Taufa's appeal, namely that he was working in New Zealand without the appropriate authority to do so and secondly, that his brother, Sione Mafi Taufa, declared a further brother who was not declared by the applicant. This brother was named Semi Taufa.

The purpose of the letter, it said, was to give the applicant a reasonable opportunity to provide the Associate Minister with comments on the potentially prejudicial information listed above before the Minister made a decision on the appeal. The letter went on:-

> "Mr Taufa's comments are expected to be received in this office within 21 days of the date of this letter. If a reply is not received within the specified time, the Associate Minister may make a decision on Mr Taufa's appeal on the basis of the information currently available to him."

On 14 June 1991 the Minister declined the applicant's appeal under s.63(3) of the Immigration Act 1987. Pursuant to that decision the applicant is to be deported tomorrow, he not having left the country voluntarily.

On his behalf Mr Edwards now puts forward evidence to the effect that the brother, Semi Taufa, died on or about the month of October 1974. His name appeared on the form completed by the applicant's brother, such form being completed in August 1974 when Semi was still alive. It therefore appears that the applicant did not give incorrect details when he filled out the form giving details of his family.

It does appear, however, that the applicant was working in New Zealand without the appropriate authority and, indeed, had been doing so substantially since his arrival here. Had a letter been sent in reply to that of 3 December, such information would have had to be given to the Minister.

Mr Edwards submits that under the Immigration Act 1987, there are no penal provisions against an immigrant on a visitor's permit obtaining employment in New Zealand. There are only, he said, penal provisions against an employer employing an immigrant on a visitor's permit. But the sanction on somebody who, being here on a visitor's permit, works, is that the visitor's permit may forthwith be cancelled and the visitor deported. Mr Edwards pointed out that in the period from April 1988 to 31 March 1989, people here as visitors or without work permits were granted permanent residence if they had employment and that overstayers who had employment, according to the Minister, could be considered for residence. He submitted that the Minister was acting inconsistently in dealing with the question of employment in respect of people who were not residents of New Zealand and who did not have work permits.

The appeal, however, to the Minister to cancel the warrant is said to be based on humanitarian grounds. The wording is "exceptional circumstances of a humanitarian nature"

which would make it unjust or unduly harsh for the applicant to be removed from New Zealand. That sort of humanitarian provision is commonly applied where an applicant has a wife and children in New Zealand who need looking after by him. Here, however, the applicant's wife and dependent children are in Tonga. Mr Edwards has very properly warned me - and I remind myself - that I am not here to determine whether the Minister's decision is a proper one or not. I am required to determine whether he took into consideration matters which he should not have taken into consideration which could have affected his decision. The well known principles are expressed in Associated Picture Houses Ltd v. Wednesbury Corporation (1948) KB 223 and, in particular, a passage from the judgment of Lord Greene at p.229:-

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting "unreasonably."

Miss Shaw advised me that the letter of 3 December 1990 is an example of a routine procedure gone through by the office of the Minister before any decision is made to draw the attention of any applicant to the matters which he might want to explain. But the matters that have been referred to in that letter could not, in my view, have affected the decision whether there were humanitarian grounds on which the applicant should be permitted to stay in New Zealand. If the applicant has failed to reply to the letter or his solicitors have not done so, he should

not get an advantage from that unless it is clear that the prejudicial matters referred to in the letter are matters which could go to the humanitarian nature of the grounds on which the appeal is alleged. That is not the case.

This application has been brought in Auckland at the very last minute when it should have been brought in Wellington and it has been necessary for me to give this decision without delay. Nevertheless, I am of the view that clearly the motion for review of the Minister's decision could not succeed on the basis of the grounds that have been put before me. I am therefore refusing the application for the interim injunction and similar orders.

The application is dismissed. There will be an order for costs against the applicant in the sum of $700.

....
P.G. Hillyer J

Solicitors:
Clive Edwards & Co., Auckland, for Applicant;
Crown Solicitor, Auckland, for Respondent.