NZLR
15/3

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1505/95

BETWEEN

FILI

Applicants

AND

THE MINISTER OF IMMIGRATION

Respondent

NOT RECOMMENDED

Hearing: 14 February 1996

Counsel: *Panama Le'au'anae* for Applicants
Brian Dickey for Respondent

Judgment: 14 February 1996

ORAL JUDGMENT OF TOMPKINS J

Solicitors:
Panama Le'au'anae, Auckland for Applicants
Meredith Connell and Co, Auckland for Respondent

The applicants have applied by way of an application to review, for a declaration that the decision of the respondent, the Minister, contained in his letter of 28 August 1995 was invalid and should be quashed.

Background

The applicants are Western Samoan. They are husband and wife. Mr Fili arrived in New Zealand on 5 October 1988. He was granted a temporary permit until 5 October 1989. No further permits have been granted. Mrs Fili arrived in New Zealand on 26 December 1988. A temporary permit was granted to 25 December 1989. No further permits have been granted. Therefore, since the expiry of the temporary permits they have both been overstayers.

The applicants commenced living together in a de facto relationship about June 1990. They married on 12 June 1992. They have a child born in New Zealand on 27 October 1992.

On 4 February 1993 Mr Fili and on 2 March 1993 Mrs Fili, were served with removal orders. They filed an appeal under s 33(2) of the Immigration Act 1991. By order dated 13 August 1993 the Auckland branch office of the Immigration Service provisionally declined the application. That office prepared a synopsis for the Minister. By letter dated 17 February 1994 the Minister declined the applicants' application under s 33(2). Further submissions were made to the Minister who, on 28 August 1995, declined the applicants' request for reconsideration of his decision of 17 February 1994.

The basis of the application

It is common ground that the Minister has issued criteria to be applied by him when considering s 33(2) applications. One is the "well settled" criteria. There are three criteria under that heading. The applicants do not apply under the first two. At issue is the third criteria which provides:

> "• they have their complete immediate family* in New Zealand before 18 November 1991 (whether lawfully or not) or they have all their dependants in New Zealand before 18 November 1991 (whether lawfully or not); and
> • they have not been in receipt of any welfare benefits for any significant period of time since their arrival in New Zealand; and
> • have made their own provisions to satisfy their long-term housing needs

* For these purposes "immediate family" means any lice spouse, parent, sibling, or child."

The factual synopsis that was prepared by the Auckland office for the Minister contained error in stating that the applicants were not living in a de facto relationship before 18 November 1991. The relevance of that date is that this is the date upon which the 1991 amendment came into force. However, the Minister in his letter of 28 August 1995 has acknowledged that the applicants were improperly considered not to be a de facto couple when their initial application was assessed.

But the Minister nevertheless submitted that the applicants did not come within any of the three criteria in the "well settled" category and in particular, not the third. This is the Minister found that they did not have "their complete immediate family" in New Zealand. The phrase "immediate family" is defined for the purposes of that criterion as meaning "any live spouse, parent, sibling or child". The Minister found, and this is accepted as correct, that both Mrs Fili's parents and her two siblings were living in Western Samoa and both Mr Fili's parents and his siblings, except one half sister who lives in New Zealand, were in Western Samoa.

The submission of the applicants

On behalf of the applicants, Mr Le'au'anae submitted that the Minister's decision was erroneous in law or unreasonable in two respects. First, he submitted that with both applicants and their New Zealand born child in New Zealand, the Minister should have found that their "complete immediate family" was in New Zealand. Secondly, he submits that the Minister's decision does not accord with other decisions that the Minister has made under the "well settled" policy.

As to the first two, I cannot accept that submission. The criterion expressly defines the "immediate family" as including parents and siblings and the use of the word "complete" before the phrase "immediate family" clearly envisages that all the members of the immediate family as defined must be in New Zealand. If they are not, that paragraph in the "well settled" criterion does not apply.

As to the second ground, there is no evidence before the court on what the Minister may have done in other cases. Mr Le'au'anae sought an adjournment in order to provide an affidavit setting out those earlier instances. I declined that application. I cannot see that the fact that the Minister may have exercised his discretion under s 33(2) in other cases in a manner that does not exactly comply with the criterion has any relevance to this application. The issue this court has to decide is whether the decision with which the court is concerned is erroneous in law or was so unreasonable that the Minister could not have arrived at it. If the decision the Minister reached accords with the "well settled" criterion, that decision cannot be held to be erroneous in law or unreasonable. That he may for some reason have reached some different conclusion in some other case in different circumstances cannot affect that conclusion.

For these reasons the applications to review are dismissed. The respondent is entitled to costs on the applications which I fix at $500.

I record Mr Le'au'anae's undertaking to pay the outstanding hearing fee of $530.