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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP184/94

UNDER The Immigration Act 1987

IN THE MATTER of a determination made by the Deportation Review Tribunal

BETWEEN TONGA SOANE

Appellant

A N D THE MINISTER OF IMMIGRATION

Respondent

Hearing: 18 June 1997

Counsel: F. Tuiasau for Appellant
I.C. Carter for Respondent

Judgment: 20 June 1997

JUDGMENT OF ELLIS J.

Solicitors:
F. Tuiasau, Solicitor, Wellington for Appellant
Crown Law Office, Wellington for Respondent

This is an appeal under s117 of the Immigration Act 1987 against the decision of the Deportation Review Tribunal dated 15 June 1994. The Tribunal rejected the appellant's application to quash a Deportation Order made against him on 15 December 1993. Such an appeal is limited to questions of law. After much time involving indulgence by the Court and the respondent, the appellant has formulated two claims, first that the Tribunal misconceived the burden of proof, and second that it failed to give proper effect to our international obligations under the Convention on the Rights of the Child 1989.

There is no room for doubt that the burden on the appellant before the Tribunal was to satisfy it that it would be unjust or unduly harsh to deport him and that it would not be contrary to the public interest to allow him to stay here. Section 105 so provides. However, at the end of its Decision the Tribunal, referring to the appellant's conviction for rape, said:

> "It is a matter of social concern which includes, but is by no means limited to, immigrants from Pacific Island countries. This offending, as for any serious crime, must be emphasised to those who are settling or intending to settle in New Zealand as inimical to continued residence unless the substantial onus of injustice or undue hardship can be demonstrated."

The use of the word "substantial" is not part of the statutory requirement and has been criticised by Anderson J in *Faavae v Minister of Immigration* [1996] 2NZLR 243. It was also addressed by Fisher J in the sequel to that case (Unreported, Auckland Registry, M1434/96, 9 May 1997) who disapproved of the use of the word too and stated his view that reference to the civil standard of proof, on the balance of probabilities, was acceptable when discussing what was required to "satisfy" the Tribunal. I have no trouble with that either. However, the use of the word "substantial" by the Tribunal must be seen in the context of the case. It involved serious offending by the appellant in 1989 when he was sentenced to 5½ years imprisonment for rape. Plainly the appellant had to overcome this to satisfy the Tribunal that it would be unjust or unduly harsh to deport him or that it would not be contrary to the public interest to let him stay. Any reading of the whole judgment will show that the word "substantial" was used simply to draw attention to this obstacle in the way of the appellant. I agree that use of such a word should be avoided, but in this case I am satisfied that the Tribunal considered the facts and applied the statutory test on the correct basis. I accordingly reject the appellant's first contention.

The appellant presented before the Tribunal as a married man with one child. He married his wife in Western Samoa in 1985 and they came to New Zealand in 1987. He was granted a Residence Permit and she was granted New Zealand citizenship in 1989. In August 1989 he committed rape. On 16 December 1989 their son was born. He was served with the Deportation Order in January 1994 while in prison, from which he was released on parole on 9 March 1994.

The Tribunal was bound to consider the interests of the appellant's family as well as any other relevant matters; s108(2)(g) and (h). The Tribunal must, in so doing, have regard to our obligations under the Convention. That has been recognised by this Court and the Court of Appeal since *Tavita v Minister of Immigration* [1994] NZAR116, and reference need only be made to one of the latest cases: *Mil Mohamed Mohamud v Minister of Immigration* [1997] NZAR223. The relevant Articles are Articles 3 and 9:

> "*Article 3*
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> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. ..."

"*Article 9*

1. States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present Article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent members(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submissions of such a request shall of itself entail no adverse consequences for the person(s) concerned."

New Zealand is a party to the Convention, but with the reservations of which one is:

> "Nothing in this Convention shall affect the right of the Government of New Zealand to continue to distinguish as it considers appropriate in its law and practice between persons according to the nature of their authority to be in New Zealand including but not limited to their entitlement to benefits and other protections described in the Convention, and the Government of New Zealand reserves the right to interpret and apply the Convention accordingly."

The balance between the best interests of a child and the public interest protected by the Immigration Act must be considered by the Minister and the Tribunal when faced with such a situation as this. In this case the best interests of the child is to be living in a family unit with his father and mother in New Zealand rather than Western Samoa or Tonga. On the other hand, it is now accepted that the appellant considered by himself has lost his right to sat here and it is in the public interest that he should go. In *Puli'uvea v Removal Review Authority* (CA236/96, Unreported, 24 May 1996, but see the report of the Application for Leave to Appeal to the Privy Council [1996] 3NZLR 538), the Court said at page 9 that the starting point must be the position of the person who is being deprived of residency rights. Whatever the starting point, it is a matter of

balancing the competing interests as was recognised in *Tavita*. It will be seen that Article 9(4) expressly recognises the deportation situation. Here too the Tribunal held that there would be nothing to stop the wife and child from going with the appellant, and so the Deportation Order was not separating the child from his mother. It carefully assessed the factual possibilities in Western Samoa and Tonga from the point of view of the family. Further, the best interests of the child is to be considered in terms of Article 3 as a primary consideration, not the only one. That was expressly stated by Temm J. in the High Court in *Puli'uvea*.

Not only is the Tribunal in question a very experienced and expert one, but on the same day as it released the decision under appeal it released its decision in *Etuati v Minister of Immigration* where it discussed the Convention exhaustively in the context of the facts of that case and this. It is in my opinion beyond doubt that the Tribunal correctly considered the Convention and the public and private interests involved in the present appeal. The treatment of them is extensive and can be read as part of my decision if need be. There is no error of law demonstrated on this second point and it too must be rejected.

Finally I would like to express my thanks to both counsel for their precise submissions, and to Mr Carter for preparing the appeal papers for

hearing. To say the least, this case has tarried inordinately in its passage through this Court.

The appeal is accordingly dismissed. I am disinclined to award costs in a case such as this, but in accordance with Mr Carter's request, they are expressly reserved.