IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY AP 17/98

IN THE MATTER	of the Immigration Act 1987
AND	
IN THE MATTER	of an appeal against a decision of the Removal Review Authority pursuant to s 115A of the Immigration Act 1987
BETWEEN	BIJAY PRAKASH HULLIA and SARITA DEVI HULLIA of Wellington
	Appellants
AND	CHIEF EXECUTIVE, Department of Labour, Wellington
	Respondent

Hearing: 1 March 1999

Counsel: J S Petris for the Appellant
M Hodgen and J Foster for the Respondent

Judgment: 1 March 1999

ORAL JUDGMENT OF WILD J

Introduction

The appellants are Fijian Indians who entered New Zealand on 28 September 1996 on five week visitors' visas, which expired on 2 November 1996. In the meantime, they had applied, unsuccessfully, for further visitors' visas. When they did not leave the country, removal orders were served on them on 15 April 1997. On 14 May 1997 they appealed against the orders to the Removal Review Authority, which dismissed their appeals in a decision delivered on 24 December 1997. On 21 January 1998 they appealed to this Court from the Authority's decision. The appeal was set down for hearing on 12 October 1998.

The appeal is pursuant to s 115A of the Immigration Act 1987, which limits the appeal to error in point of law on the Authority's part.

When the appellant Sarita Hullia arrived in New Zealand she was pregnant with the child born six months later on 31 March 1997. The Authority's decision records that the New Zealand High Commission in Fiji claimed it would not have granted visitors' visas to the appellants had it known that Mrs Hullia was pregnant, rather suggesting that she had misled the Commission. In its decision, the Authority gave her the benefit of the doubt on that point.

First ground of appeal

The first ground of appeal is that the Authority did not properly understand or carry out the balancing exercise envisaged in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

The relevant part of the Authority's decision is:

> *"This brings me to the argument based upon the appellants' New Zealand-born child. It is true, as the appellants submit, that the Authority must take into account the relevant provisions of the Convention on the Rights of the Child 1989. That this Convention, and also the relevant provisions of the International Covenant on Civil and Political Rights 1966, should be taken into account has not been in doubt since the decision of the Court of Appeal in* **Tavita v Minister of Immigration** *[1994] 2 NZLR 257. I accept the submission that the best interests of the child must be given real and effective consideration and not superficial or peripheral consideration only. I have considered the helpful submissions based on an article by Philip Alston entitled "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" (unfortunately the citation was not provided). And I also bear in mind the comments of the Court of Appeal in* **Puli'uvea v Removal Review Authority** *14 FRNZ 322; [1996] BIR Digest A.4.2) that "... under Part 3 of the Convention, the best interests of the child is a (not the) primary (and not paramount) consideration" and that "In the immigration context, the starting point must be the position of the person who is unlawfully in the country ..." (p 329)."*

The Authority's decision then turns to review the evidence about the child's health and progress, finds that it is good, and continues:

> *"The issue therefore comes down to whether, by virtue of being a New Zealand citizen by birth, the child is entitled to have not only the benefit of a life in New Zealand but to do so with her parents. In my opinion a New Zealand-born child's inability to remain in New Zealand with its parents because of the latters' lack of entitlement to do so does not of itself satisfy the statutory test. In the present case I am particularly influenced by the fact that the child is only a baby and therefore has not yet got used to living in New Zealand in the same way as, say, a 10 year old might. I see no reason why the child cannot be brought up in Fiji just as well as it can be brought up in New Zealand. There is no medical reason for the baby to remain in New Zealand. There is no evidence that the parents will be unable to provide the child with an adequate standard of living in Fiji. I note that the appellants' parents and siblings all live in Fiji. there is no suggestion that they face any hardship. The appellants are of course free to leave the child in New Zealand or to send her back to New Zealand at any time. This approach does not contravene New Zealand's international obligations. The Court of Appeal said in Puli'uvea in relation to article 9 of the Convention on the Rights of the Child:*
>
> > *"[It] requires that the separation of the child from his or her parents must occur against the will of the parents. There is no question of that here. The New Zealand born children can, so far as the New Zealand authorities are concerned, stay in New Zealand or return to [the appellant's home country]." "*

I consider this to be precisely the sort of balancing exercise contemplated in *Tavita*, but which it was conceded had not at all been carried out in *Tavita.*

Mr Petris called in aid of this argument the following powerful statements by the Australian Human Rights Commission in its Report No. 10 of January 1985 entitled "The Human Rights of Australian-born Children: A Report on the Complaint of Mr and Mrs R C Au Yeung":

> *"To deport families where the parents are prohibited non-citizens, along with their Australian born children, is to deal with an admitted problem at the wrong end. The evil is in allowing prohibited non-citizens to stay for months and years beyond the time when they should have left Australia. If by default a person or a family is allowed to remain long enough within Australia almost to qualify for citizenship had that residence been lawful, and in many cases to integrate, then it is highly doubtful whether it is then appropriate on any count for that person or family to be deported...."*

That report relates to another case, in another country, which occurred over 14 years ago. Mr Petris also relied upon statements in other cases, including *Beldjoudi v France* (1992) 14 EHRR 801; *R v Secretary of State for the Home Department ex parte Brind*

[1991] 1 AC 696 (HL) (both cited in *Tavita*) and *Fajujonu v The Minister for Justice, Ireland and The Attorney-General* 2 IR 151 (HC and SC). Statements in other cases about the required balancing exercise (also referred to as the proportionality principle), cannot helpfully be divorced from the facts of the case in which they are made. To suggest, as did the Australian Human Rights Commission of the Australian Immigration Service in relation to the Au Yeung case, that the New Zealand Immigration Service, in this case, dealt with an admitted problem at the wrong end, would be as inaccurate as it would be unfair. As I have pointed out, the appellants arrived in New Zealand on five week visitor's visas and stayed on after they had expired illegally. Even before their visas expired their applications for further visas had been declined, so they knew they could not stay on. They were served with removal orders about five and a half months after their visas had expired. The Authority appeared to have no evidence as to the difficulties, if any, locating the appellants in the interim.

In *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510, after referring to Articles 23 and 24 of the International Covenant on Civil and Political Rights and Articles 8 and 9 of the Convention on the Rights of the Child, both binding upon New Zealand, the Court of Appeal said at p 517:

> *"The other two provisions of the Convention do not appear to help the appellant's case. No argument was in essence based on art 8(1). And art 9 requires that the separation of the child from his or her parents must occur against the will of the parents. There is no question of that here. The New Zealand-born children can, so far as the New Zealand authorities are concerned, stay in New Zealand or return to Tonga. In the latter event the New Zealand authorities will meet their fare, and indeed the fare of their mother and their Tongan-born brother as well."*

And at p 522 added this:

> *"Throughout the process in February 1995, the Immigration Service, as required by the directives given in November of the previous year in response to the* Tavita *judgment, did address those issues which the Convention and Covenant require to be addressed. No doubt, as the argument in this case and the affidavit from the psychologist show, different views will be held about the balance to be struck between the various considerations. That is not however a matter for us. The question which we have to address is whether there is any reviewable error of law in the decisions that have been taken or one of the decisions is so unreasonable that no reasonable immigration officer could have come to it.*

> *The record does not demonstrate any error of law in the sense of failure to give consideration to the relevant requirements of the international texts. In particular the immigration officers did have regard to the position of the children, especially the New Zealand born children, as a primary consideration."*

In my view, what the Court of Appeal said in the latter passage could equally be applied to the Authority's decision in this case.

A similar statement appears in the judgment of the full High Court in *Schier v Removal Review Authority* [1998] NZAR 230 at 239:

> *"There is no decision to remove the children from New Zealand giving rise to any breach of s 3 of the Act. There is nothing in the International Covenant or Convention which entitles the children to have their parents remain in New Zealand when their parents can be lawfully deported. The effort by the appellants to distinguish* ***Elika*** *sand* ***Puli-uvea*** *upon the grounds that in those cases there were choices open to the parents in respect of the children which are not open in the present case does not bear analysis. The children remain citizens of New Zealand. They retain all the rights given to them by the relevant statutes. No action is being taken by the State to remove the children from New Zealand or to separate them from their parents. The parents in the present case make their own choice to retain their family unit and take the children with them if they leave New Zealand. That is their election and not the State's. The State will not interfere with the parents' rights to keep a united family. Nevertheless, should the parents consider that the children's presence in New Zealand is of more importance to the children than the unity of their family, they have the right to make a decision to that effect."*

An appeal from that judgment was dismissed by the Court of Appeal in its judgment delivered on 7 December 1998 in *Schier v The Removal Review Authority* CA123/98.

Mr Petris focused, as being erroneous in law, upon the Authority's conclusion, toward the end of the passage I have set out above:

> *"This approach does not contravene New Zealand's international obligations..."*

In the face of the Court of Appeal's statement in *Puli-uvea* and the full High Court's reiteration of it in *Schier,* the Authority's statement seems to me to be entirely correct in law.

The first ground of appeal cannot succeed.

Second ground of appeal

The second appeal ground is that the Authority did not properly consider the matter of the reduction of the term for which the removal order is to remain in force.

Both appellants ticked the box on their appeal forms indicating that they sought a reduction in the period during which the removal order remained in force.

In his written submissions, Mr Petris conceded that "in the appellants' submissions the matter of the reduction of the term for which the removal order shall remain in force is generally overlooked".

In the course of argument, I suggested to Mr Petris that this concession could be viewed as something of an understatement, because the appellants' submissions to the Authority, contained in a letter from their solicitor dated 12 May 1997, are totally silent as to the reduction of the period. Significantly, the letter of submission begins:

> *"We have received instructions to lodge an appeal under s 63B of the Immigration Act seeking a cancellation of the removal order served on our clients Mr and Mrs Hullia."*

And the submission concludes:

> *"Having regard to all the circumstances of the case, it is submitted that the removal order should be cancelled."*

The Authority, in my view, was thus entitled to treat the appeal as confined to one seeking cancellation of the removal order pursuant to s 63B(1)(a).

Mr Petris relied on an oral judgment of Morris J in *Lekasa v New Zealand Immigration Service* 7 November 1997, High Court Auckland, HC116/97. There, His Honour held

that the Authority is bound to consider both s 63B(1)(a) and (b), where the appeal requires it to do so, and found that the Authority was so required, but had applied its mind only to the issue of cancellation of the removal order. Here, although the Authority commences its decision by referring to the appeals as "in respect of the cancellation of a removal order", I am quite satisfied that, later in its decision, it turned its mind fully to the issue of the duration of the removal order. That appears from the following passage:

> *"Standing back and looking at the present appeals in the round, I am satisfied that there are no exceptional circumstances of a humanitarian nature such that it would be unjust or unduly harsh for the appellants to be removed from New Zealand or for the removal orders to remain in force for the full period of five years. This is simply a case where the appellants came to New Zealand for the express purpose of visiting, fully aware that they would have to return in due course, and overstayed their visit. There was no unfairness on the part of the NZIS in refusing them an extension of their permits. There is nothing else in their circumstances which assists them."*

I accept Mr Hodgen's submission that, if an appellant cannot meet the test in s 63B(2) (exceptional circumstances of an humanitarian nature, and not contrary to the public interest to allow the person to remain in New Zealand), then an appeal under s 63B(1)(b) requires little or no additional consideration. This submission gains support from the decision of the Chief Justice in *Patel v Removal Review Authority* [1994] NZAR 419 at 426:

> *"A subsidiary argument under this heading was that the Authority had not dealt with the second leg of s 63B(2)(a), that is, that if it was not appropriate to cancel the removal order it might be appropriate to reduce the period for which it shall remain in force, having regard to the age of Mr Patel's parents. However, in the absence of exceptional circumstances such an argument could not get off the ground, and did not require to be addressed separately. Further I note that the appeal form submitted to the Authority sought only the cancellation of the removal order."*

I accept that, in a particular case, there may be circumstances that do require additional consideration of an appeal under s 63B(1)(b). One such circumstance is where other family live in New Zealand. See, in that respect, *Sooa v Chief Executive, Department of Labour* 28 October 1998, Doogue J, High Court Wellington AP59/98.

However, earlier in its decision here, the Authority had noted that "the appellants' parents and siblings all lived in Fiji".

Brief consideration is not synonymous with inadequate consideration, particularly where, as here, there was nothing more to be said. The appellants cannot say nothing about a point before the Authority, and subsequently complain on appeal that the Authority erred in law not to do more than briefly consider and dismiss the point about which they had said nothing to the Authority.

I find no error of law on the Authority's part in the manner in which it dealt with the term of the removal order.

Ground of appeal three

This ground is that the Authority mis-interpreted and mis-applied ss 63D(2)(a) and (4)(a). These provisions state:

> *"(2) On any such appeal -*
>
> *(a) It is the responsibility of the appellant to ensure that all information, evidence, and submissions that the appellant wishes to have considered in support of the appeal are received by the Authority within the period of 42 days specified in section 63B(1) of this Act; ...*
>
> .....
>
> *(4) Subject to subsection (5) of this section, the Authority, in determining the appeal,-*
>
> *(a) May seek and receive such information as it thinks fit, and consider information from any source; ..."*

The Authority stated:

> *"Section 63D(2)(a) clearly places the onus on the appellant to provide evidence in support of the grounds of appeal."*

The appellants submit that this is erroneous in law, and that there was no such onus on them. For the reasons I have very recently given in *Bajao v The Chief Executive of the*

Department of Labour 24.2.99 HC Wellington AP148/98, and therefore need not restate here (especially since Mr Petris was also counsel for the appellant in *Bajao*), I reject this submission. I hold the view that the scheme of ss 63-63D places an evidentiary onus or responsibility squarely on the appellants to the Review Appeal Authority.

The second aspect of this ground is that the Authority erred in its interpretation (perhaps more strictly its application) of s 63D(4)(a). The Authority dealt with the appellants' request to the Authority for an enquiry in the following part of its decision.

> *"The absence of any substantial judicial guidance, and the lack of any legal submissions by the parties to the present appeals, makes me reluctant to do more than concentrate on whether, on the present facts, the Authority should accept the appellants invitation to conduct its own enquiry. In my opinion an appellant must meet a certain threshold before the Authority would be justified in conducting its own enquiry. The appellant must produce some evidence in support of the allegation which forms the basis of his request for an enquiry. There must be a prima facie case. This is consistent with the views of the Chief Justice in Patel (supra) as appears from the passage from his judgment which I have quoted above, in particular where he says " ... there is no evidence sufficient to raise any such argument ...". In the present appeals there is likewise no such evidence. There is simply a bare allegation of unfair conduct on the part of NZIS, unsupported by an evidence. Further, to the extent that the allegations might have substance, the only evidence is evidence which rebuts the allegation, and that is the letter from the General Manager of NZIS to which I have already referred. The General Manager states that there are no instructions which prescribe the result of applications for permits based on a persons race, and that in the case of the present appellants' applications for an extension of their permits, the applications were dealt with on their merits uninfluenced by the fact that the appellants were Fiji Indians."*

I consider that an impeccably correct approach, consistent with my own view, just expressed, as to where the evidentiary onus lies. In short, I consider an appellant inviting the Authority to exercise its s 63D(4)(a) power to enquire further, or to seek further information, must show that there are relevant matters or concerns warranting such a course. The request cannot be made in a vacuum, or at least not with any validity.

I find no error in law in the way in which the Authority has interpreted or applied s 63D(2)(a) and 4(a).

Result

The appeal is dismissed.

As the appellants are legally aided, there will be no order as to costs.

J. R. Cooke J.

Solicitors

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Crown Law Office, Wellington for Respondent