IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-008143

UNDER	The Judicature Amendment Act 1972 (Part 1)
IN THE MATTER OF	the Immigration Act 1987
BETWEEN	MK Plaintiff
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF LABOUR OF WELLINGTON First Defendant
AND	THE MINISTER OF IMMIGRATION Second Defendant

Hearing: 13 February 2009

Appearances: D Ryken for Plaintiff
V Casey for Defendants

Judgment: 26 February 2009 at 10:30 am

JUDGMENT OF ASHER J

This judgment was delivered by me on 26 February 2009 at 10:30 am pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

……..
Date

Solicitors:
Ryken and Associates, PO Box 501, Auckland
V Casey, Crown Law, PO Box 2858, Wellington 6140

Introduction

[1] This is a judicial review proceeding filed in Auckland. The Minister has applied for an order that the proceeding be transferred to the Wellington Registry. MK has permanent residence in New Zealand, and is in prison having been convicted of the crimes of threatening to kill, causing grievous bodily harm, and wounding with intent to cause grievous bodily harm. He was sentenced to seven years' imprisonment. The plaintiff, MK, seeks an order declaring that a decision of the Minister of Immigration ("the Minister") to issue a deportation order was unlawful.

Background

[2] A deportation order is made under s 91 of the Immigration Act 1987. The Act makes specific provision for appeals against such orders to the Deportation Review Tribunal (s 104). There is a further right of appeal to the High Court on questions of law (s 117). However, the Act does not prevent the filing of judicial review proceedings, although it does specify that such proceedings should be filed within three months (s 146A).

[3] This being an application for review, the Judicature Amendment Act 1972 applies. Section 9(7) of that Act provides:

> **9 Procedure**
>
> …
>
> (7) Subject to this Part of this Act, the procedure in respect of any application for review shall be *in accordance with rules of Court.*
>
> (emphasis added)

Section 10(1) and (2)(g) provides:

> **10 Powers of Judge to call conference and give directions**
>
> (1) For the purpose of ensuring that any application or intended application for review may be determined in a convenient and expeditious manner, and that all matters in dispute may be

> effectively and completely determined, a Judge may at any time, either on the application of any party or intended party or without any such application, and on such terms as he thinks fit, direct the holding of a conference of parties or intended parties or their counsel presided over by a Judge.
>
> (2) At any such conference the Judge presiding may—
>
> …
>
> (g) Fix a time *and place* for the hearing of the application for review.
>
> (emphasis added)

[4] Thus, while s 10(2)(g) gives an absolute discretion to the Court to fix a place for a hearing of the application for review, s 9(7) states that subject to that part of the Act (and therefore s 10(2)(g)) the procedure in respect of any application shall be in accordance with the High Court Rules.

[5] The High Court Rules contain a specific provision relating to the filing of causes of action. Rule 5.1(1)(c) provides:

> **5.1 Identification of proper registry**
>
> (1) The proper registry of the court, for the purposes of rules 5.25 and 19.7, is,—
>
> …
>
> (c) when the Crown is a defendant, the registry nearest to the place where the cause of action or a material part of it arose:

[6] The requirement of s 9(7) that the procedure shall be in accordance with rules of Court, requires the Court to treat r 5.1(1)(c) as a guideline which is to be taken into account when the Court exercises its open discretion under s 10(2)(g) of the Judicature Amendment Act 1972. It is not determinative as to the place of filing in a judicial review application where there may be particular circumstances that warrant a departure from the rule.

[7] The relationship was considered by Thorp J in *Auckland Harbour Board v Belgrave* HC AK CP423/87 14 August 1987, where he stated at p 10:

> I am inclined to the view that the power given in Section 10(2)(g) to determine the place for hearing of an application for review was intended to recognise the shortcomings of Rule 107 [r 5.1] as a basis for determining the appropriate place of hearing of review applications, and to permit the Court to take a somewhat broader approach to that issue than that historically made in respect of inter-party disputes determined pursuant to the other jurisdictions of the Court.

[8] A similar view was reached by Randerson J in *New Zealand Association for Migration and Investment v Attorney-General* HC AK M1700/02 3 March 2003 at [17], where he observed that as a general rule the High Court Rule was a guide but must give way to the general statutory objective set out in s 10(1) of the Judicature Amendment Act 1972.

[9] The special circumstances that might warrant a departure from r 5.1(1)(c) could include particular regional public interest in the subject matter of the judicial review application (*Auckland Harbour Board v Belgrave* HC AK CP423/87 14 August 1987 Thorp J, p 10). So too might a delay in obtaining a hearing date in the registry of filing, which would not meet the object of s 10(1) to determine applications in a convenient and expeditious manner.

[10] With these principles in mind it is necessary to turn to this specific claim and the causes of action.

The claim

[11] The statement of claim referred to the background factual matters that lead to the deportation order. The grant of refugee status itself took place in Auckland. So did the underlying offences of MK which led to him being vulnerable to deportation. Various interviews took place in Auckland following MK's conviction. The consideration process took place in Wellington. The advice was given to the Minister in Wellington, and the decision of the Minister was given in Wellington. The deportation order and letter signed by the Minister were served by an officer of the Department of Labour on MK at Auckland Central Prison.

[12] It can be seen, then, that many of the background factors leading up to the decision took place in Auckland, and that the service of the order took place in

Auckland. However, the specific target of the statement of claim is the Minister's actual decision. Thus the first cause of action is an allegation of an error of law by the Minister as to what amounts to a "particularly serious" crime under Article 33(2) of what is referred to as the "Refugee Convention". As a second and alternative cause of action it is asserted that the decision of the Minister was unfair and unreasonable, and that the Minister was not properly advised as to the correct meaning of "particularly serious" or "a danger to the community" within the Convention. These two causes of action focus, then, on a decision made in Wellington.

[13] The third cause of action reads as follows:

> **Third cause of action: unfairness or unreasonableness arising out of the "limbo" letter of 22 September 008**
>
> 16. The decision to issue a deportation notice but to keep the plaintiff in "limbo" on the grounds that the second defendant would stay his or her hands until the circumstances in Sri Lanka permitted, is unlawful, it is unreasonable, and/or contrary to the rules of fairness and natural justice.

There are two relevant particulars to paragraph 16:

> (ii) The plaintiff is expected to live in the knowledge that, at any moment, should the first defendant determine that circumstances in Sri Lanka had changed, to then face sudden deportation.
>
> (iii) The period of time during which the plaintiff would have to live with this fear of possible deportation would be for an indeterminate time.

Submissions

[14] Mr Ryken for MK argues that the arrival in New Zealand, the commission of the crimes, the investigation and interviews all having occurred in Auckland, and the decision being delivered to MK in Auckland, mean that a material part of the cause of action arose in Auckland. He also submits that the third cause of action involves the evaluation of a situation in Auckland.

[15] Ms Casey for the Minister submits that the three causes of action all relate to the Minister's decision-making process. She submits that it is not asserted that there

was any reviewable error in the lead up to the decision, and that it would be wrong if challenges to deportation decisions could be filed in the Registry closest to the plaintiff's place of residence at the plaintiff's option, simply because the plaintiff had been interviewed and served with an order at that place. She contends that the Act contemplates that where an appeal and a judicial review proceeding are both filed in relation to a deportation decision, they should be heard together if possible (Immigration Act s 146A(2)), and that it would not be consistent with the scheme of the Immigration Act or sensible to have judicial review proceedings in Auckland when appeals must be filed in Wellington. She submits that if it became a rule that judicial review applications relating to deportation decisions are filed and heard in the plaintiff's place of residence, that given that the Minister and Crown Law are in Wellington there would be an unnecessary increase to the overall cost to the public of defending the claims.

Did a material part of the cause of action arise in Auckland?

[16] If a material part of the cause of action arose in Auckland, that is an important factor in favour of a refusal of the application to transfer.

[17] The concept of "part of the cause of action" is difficult to define with precision. Clearly, as Lord Esher in *Read v Brown* (1888) 22 QBD 128, 131 (CA) stated, it is:

> every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

[18] The concept was considered by McGechan J in *National Bank of New Zealand Limited v Glennie* (1992) 6 PRNZ 292 at 294:

> A cause of action is an assembly of facts which entitles a plaintiff to relief (including discretionary relief). The meaning of "part" of a cause of action is self-evident accordingly. However, the mere circumstance of being "part" of a cause of action will not suffice in itself. The policy in r 107 is to exclude merely trivial parts, conferring rights only where the part cause of action concerned is "material". The distinction is one of degree, looking to relative significance in the context of the particular claim. In a r 107 context, the assessment is to be made on the basis of the statement of claim, as filed. One

> looks to the allegations, in so far as components of the cause of action, as so made, to determine such "materiality".

I accept the often quoted statement of Quilliam J in *Colman v Attorney-General* (1978) 3 PRNZ 577 in a similar context of "material" being "pertinent, germane or essential to".

[19] Materiality is considered on the basis of the allegations in the statement of claim: *National Bank of NZ Ltd v Glennie* (1992) 6 PRNZ 292, 294. It is irrelevant that a particular part of the cause of action may turn out to be uncontested: *Krone (NZ) Technique Ltd v Connector Systems Ltd* (1988) 2 PRNZ 627 at 629. However, a minor background aspect of the cause of action will not be enough. The line between background facts and those sufficiently germane is ultimately imprecise, and turns on the Court's perception of relevance.

[20] In *Auckland Harbour Board v Belgrave* there was an application under the Judicature Amendment Act relating to a decision of the Controller of Customs to initiate and continue an investigation relating to the acceptance of a tender for a new tug from an Australian company, and the possibility that a levy should be imposed under the Customs Act 1966. It was held that the fact that the importation of the Australian tug into New Zealand occurred at Auckland would be sufficient to establish within the terms of r 107(2) that some material part of the cause of action arose there. The conclusion ultimately was obiter, but demonstrates that the key facts relevant to an administrative decision may be part of the cause of action.

[21] In *New Zealand Association for Migration and Investment v Attorney-General*, it was held that as there was a cause of action based on a failure to consult with the plaintiff who was in Auckland, that a material part of the cause of action arose outside of Wellington. In *Beaton v Institute of Chartered Accountants of New Zealand* (2005) 17 PRNZ 700, it was held in relation to a complaint before the Professional Conduct Committee of the Institute of Chartered Accountants, that the fact that an investigative step in the inquiry took place in Auckland was sufficient for it to be concluded that a material part of the cause of action arose out of Wellington. On the other hand, in *Apple Fields Limited v New Zealand Apple and Pear Board* (1993) 7 PRNZ 184, Fraser J, a different result was reached. This was not an

application for review but a claim that a defendant had used its dominant position in the market to suppress competition and thereby reduced its payments to the plaintiff. The plaintiff wished to have it heard in Christchurch and contended that part of the cause of action arose in Christchurch because it had received payments from the defendant in Christchurch. Decisions as to payments to the plaintiff were made in Wellington. The allegation was that competition was lessened throughout New Zealand, including Christchurch. It was held that it could not be said that part of the cause of action arose near the Christchurch Registry. The proceedings were transferred to Wellington.

[22] In judicial review the focus is on the procedures of the decision-maker and the lawfulness of the decision itself. Here the causes of action do not focus on the lead-up procedures, but rather on the lawfulness of the Minister's decision. Indeed, the procedures leading up to that decision are not criticised, and there is no criticism of any step taken in Auckland. Therefore, no step or circumstance in Auckland will be of key pertinence in considering the first two causes of action. If there were only the two causes of action, it would be difficult to say that a material part of them arose in Auckland, although it is not necessary for me to express a firm conclusion on this point.

[23] In the third cause of action the plaintiff's position in Auckland, confined as he is alleged to be in prison for an "indeterminate time", is central to the allegation of unfairness. For reasons that I will now set out, the Court will be obliged to consider those Auckland circumstances in determining that third cause of action. The residence in a prison in Auckland is, therefore, in terms of Lord Esher's definition in *Read v Brown*, an important fact which it will be necessary for the plaintiff to prove to establish the cause of action. The fact it may not be controversial is irrelevant. That matter of residence in Auckland for an indeterminate time is an essential element of the cause of action, and not just a background fact. It is, to use the phrase in the judgment in *Colman v Attorney-General*, pertinent and germane. The position is different from that which arose in the *Apple Fields* case, where the activities in question were New Zealand-wide, and not confined to Christchurch. There was no particular Christchurch factor, in geographic terms, in that case.

[24] It is useful to consider materiality decisions in other areas of law. Material parts of a cause of action for breach of contract are not limited to the place where the contract was breached: *Anderson v Tuapeka County Council* (1899) 18 NZLR 509, 510, *Scoula Co. Ltd v Hall* [1930] NZLR 434, *Tag Corp v Paper Sales (NZ) Ltd* (1990) 2 PRNZ 440. So too in a Fair Trading Act claim, the place where the plaintiffs were misled or deceived may be a material part of the cause of action, as well as the place where the deceptive conduct occurred: *McArdle v BNZ Finance Ltd* (1990) 4 PRNZ 653, 654, Master Hansen. So here, the material parts of judicial review causes of action are not necessarily limited to the place of the decision under review. When a finding of fairness or lawfulness in judicial review involves evaluation of a significant issue of fact which arose or arises in a certain registry area, a material part of the cause of action can be said to arise in that area.

[25] I consider that MK's detention in Auckland is a material part of the third cause of action. For this reason I consider that in terms of r 5.1(1)(c) the proceeding was properly filed in Auckland.

Other matters

[26] Rule 5.1(5) provides:

> **5.1 Identification of proper registry**
>
> (1) The proper registry of the court, for the purposes of rules 5.25 and 19.7, is,—
>
> …
>
> (5) If it appears to a Judge, on application made, that a different registry of the court *would be more convenient* to the parties, he or she may direct that the statement of claim or all documents be transferred to that registry and that registry becomes the proper registry.
>
> (emphasis added)

In addition to the discretion in r 5.1(5), the broad discretion in s 10(2)(g) can obviously be invoked by a defendant or plaintiff. The question is, therefore, whether there are any matters of convenience or indeed public interest that should lead to an order that the proceeding be filed in Wellington. Both parties made submissions on

the issue of convenience and practice. Mr Ryken in his submissions referred to 32 decisions where application for review proceedings in an immigration context had been filed in Auckland. He submitted that there was clearly a practice of accepting Auckland as a venue in immigration judicial review cases involving a decision in Wellington, where the plaintiff resided in Auckland. However, Ms Casey advised that her office had over 50 immigration cases, and that it would be wrong to discern any practice from the anecdotal evidence provided. Many of the proceedings filed in Auckland would have arisen from very different factual circumstances, or involve agreement as to the appropriate registry.

[27] I conclude that it would be wrong to place any weight on a practice in relation to review proceedings. Equally, however, I do not accept the Crown's contention that there would necessarily be an increased overall cost to the public in defending immigration claims, if they were all heard at the plaintiff's place of residence. A large number of immigration cases are of course funded by the public purse through legal aid, and Crown Law, who is briefed in this matter for the Minister, has competent agents in Auckland. It is not possible to conclude that the net cost of proceedings if they are filed in Auckland would be more than if they were filed in Wellington.

[28] In terms of the personal convenience to the parties in this case, with one counsel in Wellington and the other in Auckland, and one party in Wellington and the other in Auckland, there is also no matter of convenience that would warrant the invocation of r 5.1(5). There is nothing to indicate that evidence will be given by any deponent. As is usual in administrative law cases, it is only affidavit evidence that will be considered. Indeed neither party sought to argue any advantage of convenience on the particular facts of the case.

[29] I conclude that there is no factor of convenience which should lead to an order directing that the proceeding be filed in Wellington.

[30] I do not consider that the provisions of s 146A of the Immigration Act 1987 and the possibility of proceedings being heard together is a material factor in this

application. There is no Deportation Review Tribunal decision or appeal from that decision.

Conclusion

[31] I conclude that a material part of the cause of action in this case arose in Auckland because the third cause of action relating to the effects of the Minister's decision involves a consideration of MK's present and future residence in Auckland. For that reason I determine that the proceedings were correctly filed in Auckland, and there are no other factors of convenience, or the interests of justice or the public interest that warrant a different conclusion under r 5.1(5) or s 10(2)(g).

Result

[32] The application to transfer the proceedings to Wellington is refused.

Costs

[33] I understand that the plaintiff is on legal aid. If the parties wish to make any submissions on costs they should do so in writing within seven days.

…….

Asher J