

**IN THE HIGH COURT OF NEW ZEALAND  
HAMILTON REGISTRY**

**CRI 2008-019-9503**

IN THE MATTER OF     the Sentencing Act 2002, s 80F(1)(c)

AND

IN THE MATTER OF     an application by John Michael Davis of  
Hamilton, Probation Officer, for  
cancellation of the sentence of Home  
Detention imposed on Tupou Tuimoana  
VAILEA

Hearing:     22 April 2009

Appearances: Jacinda Foster for Crown  
Russell Boot for Mr Vailea

Judgment:   22 April 2009

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**JUDGMENT OF HARRISON J**

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**SOLICITORS**

Almao Douch (Hamilton) for Crown  
Gavin Boot Law (Hamilton) for Mr Vailea

[1] The Probation Service in Hamilton has applied for an order cancelling a sentence of home detention imposed by Cooper J on Mr Tupou Vailea on 3 March 2009 following his conviction on a charge of knowingly permitting premises to be used cannabis offending: s 80F(1)(c) Sentencing Act 2002.

[2] Mr Vailea, who is represented by Mr Boot, opposes the application.

[3] The grounds of the application are as follows:

- (1) On 19 March 2009 Mr Vailea's wife, Mrs Ngaire Vailea, was convicted of two charges of selling or dealing in cannabis and was remanded to the home detention address at Spencer Road, Hamilton for sentencing on 11 June 2009;
- (2) On 27 March 2009 the Probation Service advised Mr Vailea that his residential address was unsuitable due to the presence there of other family members facing active criminal charges;
- (3) On 31 March 2009 Mr Vailea advised the Probation Service that he was unable to find an alternative address;
- (4) Mr Vailea's risk of re-offending is assessed as high and cannot be managed by the restrictions of a sentence of home detention given his residence with co-offenders.

[4] However, as Mr Boot points out, Cooper J was fully aware of the living circumstances at the proposed address in Spencer Road when he sentenced Mr Vailea on 3 March. In particular, Appendix 1 of the report prepared by the Department of Corrections in accordance with the Sentencing Act on the suitability of the home detention address for Mr Vailea noted his wife's previous convictions for dishonesty related offending and the active charge or charges to which she was subject and has since pleaded guilty. The report writer also noted that others living at the address had associations with those with criminal records. Nevertheless, Cooper J was satisfied that Mr Vailea was a suitable candidate for an electronically

monitored sentence of home detention at the Spencer Road address and imposed a sentence accordingly.

[5] It is apparent from reading Cooper J's notes that he would have sentenced Mr Vailea to a term of imprisonment in the vicinity of two years but for his poor medical condition. He accepted a submission from Mr Boot that a sentence of imprisonment would be disproportionately severe. He carefully weighed up all the options before imposing a term of 11 months home detention to be served at the Spencer Road address.

[6] I am not satisfied that there are any grounds for cancelling the sentence imposed by Cooper J six weeks ago. There has been no material change in circumstances since then rendering the home detention address unsuitable: s 80F(1)(c). There is no suggestion that Mr Vailea has re-offended while he has been living at the home detention address or that he has breached the conditions imposed. Accordingly the application is dismissed, subject to the additional condition, however, that Mr Dean Karaitiana is not to live at or visit the address during the term of Mr Vailea's home detention.

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Rhys Harrison J