IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-002277

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a decision of the Minister of Immigration dated 12 March 2009
BETWEEN	YIBO WANG Plaintiff
AND	MINISTER OF IMMIGRATION First Defendant
AND	ATTORNEY-GENERAL OF NEW ZEALAND Second Defendant

Hearing: 27 April 2009

Appearances: T-C Wu for Plaintiff
M Harborow for Defendants

Judgment: 30 April 2009 at 11:45am

(RESERVED) JUDGMENT OF ANDREWS J
[Application for interim orders]

This judgment is delivered by me on the 30th day of April 2009 at 11:45am pursuant to r 11.5 of the High Court Rules.

....
Registrar / Deputy Registrar

Solicitors: Marshall Bird & Curtis, PO Box 105-045, Auckland
Meredith Connell, PO Box 2213, Auckland 1140

Introduction

[1] Mr Wang came to New Zealand on 9 November 2000 on a student visa. He was granted a student permit on arrival, valid until 28 February 2001. He was subsequently granted a further student permit, valid until 14 June 2003. He has been an overstayer, unlawfully in New Zealand, since 14 June 2003.

[2] Mr Wang has made requests for further student or work permits. On 16 September 2004 he made a request for a student permit under s 35A of the Immigration Act 1987 (Immigration Act). Immigration New Zealand (Immigration) declined to consider that request on 1 October 2004. Mr Wang sought a special direction from the Minister of Immigration (the Minister) to grant him a visitor's permit, on 31 August 2005. The Minister refused to intervene. Mr Wang made a further request for a Ministerial direction on 2 March 2006. That was also declined.

[3] Mr Wang made a further s 35A request, for a work permit, on 31 August 2007. Immigration declined that request on 17 December 2007. He again sought a direction from the Minister, on 5 December 2008. That was declined on 12 March 2009. No steps have been taken by Immigration to remove Mr Wang from New Zealand.

[4] Judicial review proceedings were issued by Mr Wang on 22 April 2009, against The Minister and the Attorney-General (although not stated, the Attorney-General is presumably sued on behalf of Immigration). Mr Wang also seeks interim orders under s 8 of the Judicature Amendment Act 1972, that the Minister "ceases and desist taking any steps at removing" Mr Wang until the judicial review proceeding is determined, or a full and proper reconsideration has been conducted by Immigration.

[5] The application for interim orders is opposed.

Application for interim relief

[6] Section 8 of the Judicature Amendment Act 1972 gives the court power to make interim orders prohibiting a respondent from taking any further action that is or would be consequential on the exercise of the statutory power which is under challenge. An interim order may be made if in the court's opinion:

> ... it is necessary to do so for the purpose of preserving the position of the applicant.

[7] In his judgment in *Esekielu v Attorney-General*[1], Hammond J discussed the approach to be taken to applications for interim orders in an Immigration case and observed, at 313:

> In general terms, from the point of view of the State, it has a significant interest in protecting its borders and services of various kinds against utilisation by persons who are not entitled to the protection and support of that State. From the point of view of the affected individual, the question of whether that individual is entitled to that protection and those services is a very significant one. If the threshold test is set too low – as merely raising a question which is not trivial (which is what the House of Lords meant by 'serious') - interlocutory relief would be gained on just about every application. And it must be borne in mind that the processes under the immigration legislation in New Zealand themselves involve a serious vetting exercise, culminating in certain appeal procedures which can (and routinely do) reach as high as The Minister of Immigration.
>
> It seems to me therefore, that whilst the individual applicant should not be required to demonstrate a very strong probability of success on the merits, the kind of matters that that individual must establish in support of a claim to interlocutory relief must be more than showing that the question is not merely trivial. I would have thought both that there must be a real contest between the parties, and that the applicant has a respectable chance of succeeding in that contest.
>
> ...
>
> Once the appropriate threshold test on an application has been met, with respect, I would adopt the view ... that a relatively wide ranging inquiry is then necessary.
>
> Apart from the issue of the likelihood of the plaintiff succeeding on the merits, there will be questions about whether usual procedures were followed; whether there has been undue delay; whether there have been holdings out or expectations of some kind created in the plaintiff which might give rise in equity and good conscience to some kind of estoppel; the

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[1] *Esekielu v Attorney-General* (1993) 6 PRNZ 309

conduct of the plaintiffs themselves and their forthrightness in dealing with the authorities on immigration questions, their punctiliousness and due observance of the procedures involved in these matters; and doubtless other factors.

Statutory context – The Immigration Act

[8] As noted above, Mr Wang has been in New Zealand without a permit since 14 June 2003. Accordingly, pursuant to s 4(2) of the Immigration Act, he is deemed to be in New Zealand unlawfully, and pursuant to s 45(1) he has an obligation to leave New Zealand unless subsequently granted a permit.

[9] Section 35A of the Immigration Act allows the Minister to grant a permit to a person who is in New Zealand, is required to hold a permit, and does not hold a permit:

> **35A Grant of permit in special case**
>
> (1) The Minister may at any time, of the Minister's own volition, grant a permit of any type to a person who—
>
> (a) Is in New Zealand; and
>
> (b) Is required under this Act to hold a permit to be in New Zealand; and
>
> [[(ba) Does not hold a permit to be in New Zealand; and]]
>
> (c) Is not a person in respect of whom a deportation order is in force; and
>
> (d) Is not a person in respect of whom a removal order is in force.
>
> (2) Nothing in subsection (1) of this section confers on any person the right to apply to the Minister for a permit, and where any person purports to apply for a permit under this section,—
>
> (a) The Minister is under no obligation to consider the application; and
>
> (b) Whether the Minister considers the application or not,—
>
> (i) The Minister is not obliged to give reasons for any decision relating to the application, other than the reason that this subsection applies; and

(ii) Section 36 of this Act and section 23 of the Official Information Act 1982 shall not apply in respect of the application.]

[10] Section 130(1)(a) of the Immigration Act provides that the Minister may give a "special direction" in relation to "any person, permit, visa, or document". Section 130(6) is in similar terms to s 35A(2), and provides:

> **130 Special directions**
>
> ...
>
> (6) Nothing in this section, or in any other provision of this Act that refers to or confers a power to make any special direction, gives any person a right to apply for a special direction, or for any visa or permit in circumstances where the issue or grant of the visa or permit would be dependent on the giving of a special direction, and where any person purports to make any such application—
>
> (a) The Minister or appropriate visa officer or immigration officer is under no obligation to consider the application; and
>
> (b) Whether the application is considered or not,—
>
> (i) The Minister or appropriate officer is not obliged to give reasons for any decision relating to the application, other than the reason that this subsection applies; and
>
> (ii) Section 36 of this Act and section 23 of the Official Information Act 1982 shall not apply in respect of the application.

Submissions

Plaintiff

[11] On behalf of Mr Wang, Mr Wu submitted that the focus of the judicial review proceeding is on Immigration's declining the s 35A request on 17 December 2007 and the Minister's declining to give a special direction on 12 March 2009.

[12] Mr Wu submitted that the genuineness of Mr Wang's qualifications and study records had first been questioned by Immigration in 2005, when Mr Wang first sought a special direction from the Minister. He submitted that the Immigration file

records that “Mr Wang has a questionable study record. It is unclear how much of his time in New Zealand on student permits has been spent studying”.

[13] Mr Wu then referred to Immigration’s response to Mr Wang’s application for a work permit under s 35A of the Immigration Act, in its letter of 17 December 2007. That letter was not exhibited to Mr Wang’s application for interim orders, but Mr Wu submitted that the letter first stated:

> The fact is there is no evidence of the client studying for NZ Diploma in Business from Queens Academic Group from AMS. The attached certificate mentions date of completion of course as June 2007. However, the client has not been on a valid permit since June 2003 so how could he complete a course in June 2007. The origin of the document seems doubtful.

[14] That statement, Mr Wu submitted, was incorrect as Immigration had copies of an academic transcript for Mr Wang, showing study during the period from 25 October 2004 to 29 June 2007 towards a New Zealand Diploma in Business, and that he had completed the qualification of Diploma in Business.

[15] Mr Wu submitted that the 17 December 2007 letter then stated that Mr Wang’s application for a work permit was declined. The letter then went on to state, Mr Wu submitted:

> Also faxed the copy of the diploma to the concerned school and they confirmed that the document was authentic.

[16] Mr Wu submitted that the order of statements in the letter showed that Immigration had declined the request for a permit *before* confirming the genuineness of Mr Wang’s qualifications, *then* found that the documents provided were authentic. He submitted that had the genuineness of the study records been investigated *before* the decision to decline the s 35A application, and careful consideration given to the application, Mr Wang may have been granted a permit, thus regularising his immigration status.

[17] Mr Wu acknowledged during the hearing that if the order of the paragaphs in the 17 December 2007 letter had been different – that is, if the order had been the concern as to genuineness, then the report confirming authenticity, then the decline – he could not have argued any error of process.

[18] Turning then to the Minister's declining to give a special direction on 12 March 2009, Mr Wu submitted that had the Minister fully considered the process that led to declining the s 35A application on 12 December 2007, she would have realised the "inconsistencies" and this might have led to a different conclusion as to whether to give a special direction.

[19] Thus, he submitted, the judicial review proceeding is based on Immigration's decision to decline the s 35A request on 17 December 2007, in particular on the order of paragraphs in Immigration's letter of 17 December 2007.

[20] In relation to other matters required to be considered in relation to an application for interim orders, Mr Wu submitted that if interim orders are not granted, Mr Wang's right to pursue judicial review proceedings will be rendered nugatory if he is removed to China, as he would be unable to pursue proceedings, and unable to return to New Zealand. He also submitted that removal would result in Mr Wang being separated from his partner of five years, a student who expects to complete a Bachelor of Hospitality course in 2009.

Defendants

[21] On behalf of the defendants, Mr Harborow first submitted that the application for relief is premature. As he pointed out, there is no removal order in place. He submitted that it is extremely unusual for interim relief to be sought when no removal order is in place. However, he did not submit that this court did not have jurisdiction to consider the application.

[22] Mr Harborow's submissions then addressed the application on two bases, first that it is Immigration's letter of 17 December 2007 that is challenged in the judicial review proceedings, and secondly, that it is the Minister's decision to decline to give a special direction on 12 March 2009 that is under challenge.

[23] With respect to Immigration's letter of 17 December 2007, Mr Harborow's submission was, effectively, that Mr Wang has no prospect of succeeding in judicial review proceedings. First, he referred to s 146A of the Immigration Act, which

provides that any review proceedings in respect of a statutory power of decision arising under the Act must be commenced within three months after the date of the decision, unless the High Court decides that, by reason of special circumstances, further time should be allowed. Clearly, he submitted, judicial review proceedings in respect of the 17 December 2007 letter are well out of time, and nothing has been put before the court that would constitute special circumstances.

[24] Secondly, Mr Harborow submitted that it is clear on the authorities that the ability to review a decision on a request made under s 35A of the Immigration Act is extremely limited. The decision is highly discretionary, in that s 35A does not confer any right to apply for a permit, there is no obligation to consider the application, and there is no obligation to give reasons for any decision relating to the application.

[25] In relation to the Minister's decision not to give a special direction on 12 March 2009, Mr Harborow again submitted that Mr Wang's judicial review proceedings have little prospect of success. He noted the wide discretion conferred by s 130 of the Immigration Act, and the provisions of s 130(6), which are in almost the same terms as those of s 35A(2).

[26] Mr Harborow also referred to s 7(4) of the Immigration Act, which provides that no one has the right to apply for a special direction and that where application is made for a special direction, the Minister is under no obligation to consider it. Mr Harborow referred to judgments where these principles have been outlined, namely *Yure v Bentley*[2], *T and S v Minister of Immigration*[3] and *Kesonsung & Anor v Minister of Immigration*[4].

[27] It can be taken from these judgments, that as a matter of immigration law, judicial review of a Minister's decision under s 130 faces considerable difficulties. As Stevens J said in *Kesonsung*, at [26]:

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[2] *Yure v Bentley* HC AK M1530-PL 01 8 November 2001, Chambers J

[3] *T and S v Minister of Immigration* HC AK CIV 2004-404-348 29 January 2004, Rodney Hansen J

[4] *Kesonsung & Anor v Minister of Immigration* HC AK CIV 2006-404-1597 9 November 2006, Stevens J

> Therefore, a court should be reluctant to intervene in respect of a Ministerial decision under s 130 unless compelling grounds exist for doing so, or unless there is clear and cogent evidence which establishes that the decision was unlawful. ... I accept that any decision by a Minister in respect of a special direction, be it to grant or decline such a direction, is a matter with high policy content and one in respect of which the court should not willingly intervene.

[28] Turning, then, to the merits of Mr Wang's judicial review proceeding, Mr Harborow submitted that what is important is not the order of the paragraphs in the letter, but the fact that as at that date, Immigration was aware that Mr Wu's study records were authentic. Notwithstanding that, the s 35A application was declined. He submitted that the order of the paragraphs in the letter is of no significance.

[29] Further, he submitted that at the time the application for a Minister's direction was considered, the Minister was aware that the study records were authentic.

[30] He submitted that there was no overlooking or misunderstanding of Mr Wang's study, but that what Immigration, then the Minister, made of Mr Wang's applications was a matter for them.

[31] Mr Harborow then noted that Mr Wang had not applied any urgency to regularising his immigration status. He submitted that that is not acceptable in the immigration context: there is an obligation to regularise one's status quickly and to undertake any challenges quickly. Mr Wang had done neither. Mr Harborow submitted that there had been no irregular procedure, there had been no delay on the part of Immigration (whereas Mr Wang, himself, had delayed inordinately) and there had been no "holding out" by Immigration.

Discussion

[32] In this case, I am not satisfied that Mr Wang has demonstrated that there is a "real contest" between Mr Wang and the defendants, or that Mr Wang has a "respectable chance of succeeding" in his judicial review proceedings. I accept Mr Harborow's submission that Mr Wang has little, if any, chance of success.

[33] Accordingly, I am not satisfied that the appropriate threshold test has been met, so it is not necessary to go on to any “wide-ranging inquiry”.

[34] The application for interim orders is dismissed.

[35] Counsel did not address me as to costs. If costs are an issue, then memoranda may be filed: that for the defendants within 14 days of today’s date, and that for Mr Wang within a further 14 days. Counsel are to indicate in any memoranda filed whether a hearing is sought or whether the matter can be determined on the papers.

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Andrews J