IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-911

BETWEEN	KAMAL CHOPRA First Plaintiff
AND	KERRE CHOPRA Second Plaintiff
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF LABOUR Defendant

Hearing: 25 June 2009

Counsel: F Deliu for Plaintiffs
V Casey for Defendant

Judgment: 30 June 2009 at 5:00pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 30 June 2009 at 5.00 p.m.
Pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date:

Solicitors: Alastair McClymont, P O Box 8272, Auckland 1150 for Plaintiffs
Crown Law, P O Box 2858, Wellington 6140 for Defendant

[1] The issue in this case can be shortly stated – is a visa officer, acting under s 14C(2) of the Immigration Act 1987 ("the Act"), required to issue a returning resident's visa to an applicant if that applicant is the holder of a valid residence permit?

[2] While the answer to this question might appear at first blush to be simple, the answer has potentially significant consequences in terms of the deportation and "prohibited persons" provisions contained in the Act. This becomes clear from the background to this case.

Background

[3] In April 2006 Mr Chopra was granted permanent residence in New Zealand.

[4] On 30 October 2007 Mr Chopra was convicted of a third or subsequent offence of driving with excess breath alcohol, under s 56(1) of the Land Transport Act 1998. He was sentenced to two months imprisonment and was disqualified from driving indefinitely. As a result, he became liable for deportation under s 91(1)(a) of the Act.

[5] On 13 February 2008 the Minister of Immigration issued a deportation order against Mr Chopra. Before the order was made, Mr Chopra was interviewed. He made submissions and he was represented by counsel. The deportation order was served on Mr Chopra on 29 February 2008.

[6] On 18 March 2008 Mr Chopra lodged an appeal, under s 104 of the Act, against the issue of the deportation order. The appeal was lodged with the Deportation Review Tribunal.

[7] On 10 April 2008 Mr Chopra, via his solicitor, applied under s 14C of the Act for an indefinite returning resident's visa to allow him to depart from and return to New Zealand. The application did not declare the existence of the deportation order.

This was contrary to s 34G of the Act. Nevertheless, the returning resident's visa was issued on 28 April 2008.

[8] On 5 May 2008, while the deportation order was in force, Mr Chopra left New Zealand. His departure had various consequences under the Act. First, under s 2(4), Mr Chopra was deemed to be deported from this country. The deportation order ceased to be in force – s 95. Under s 111 and s 14C(5), Mr Chopra's residence permit and returning resident's visa were deemed to be cancelled. Further, and more significantly, Mr Chopra became what Ms Casey referred to as a "prohibited person" under s 7(1)(d) of the Act. I note that the Act does not use this term. Rather it states that, except in certain limited circumstances, no exemption applies, and no permit shall be granted, to a person who has been deported. In context and in effect, no further residence permit could be issued to Mr Chopra without a special direction of the Minister.

[9] On 16 May 2008 Mr Chopra returned to New Zealand. His returning resident's visa had been deemed to be cancelled, but this was not appreciated, and on his arrival he was issued with a residence permit under s 18. This was contrary to s 7 of the Act.

[10] On 12 June 2008 Mr Chopra again departed from New Zealand. Under s 41 the residence permit, which he had been granted on 16 May 2008, expired on his departure.

[11] On 3 July 2008 Mr Chopra returned to New Zealand, and on his arrival he was again incorrectly issued with a residence permit. Again, this was contrary to s 7.

[12] In October 2008 the Deportation Review Tribunal invited submissions from Mr Chopra on whether it had jurisdiction to hear his appeal against the issue of the deportation order, given that the order had ceased to have effect. An extension of time was requested. It was granted but, in the event, no submissions were made on Mr Chopra's behalf.

[13] On 23 October 2008 Mr Chopra departed again from New Zealand. Again, under s 41, the residence permit he then held was deemed to expire.

[14] On 24 October 2008 the Deportation Review Tribunal issued a decision to the effect that it had no jurisdiction to hear Mr Chopra's appeal. Mr Chopra was advised of his right to appeal this decision to the High Court. No appeal was filed.

[15] On 8 November 2008 Mr Chopra returned to New Zealand, and again was incorrectly issued with a residence permit. Again, the issue of a residence permit was contrary to s 7.

[16] On 11 November 2008 Mr Chopra was advised:

a) That his returning resident's visa and residence permit had been cancelled when he left New Zealand on 5 May 2008 (or in effect deported himself) and that subsequent residence permits had been granted as a result of administrative error.

b) That a submission to the Minister to revoke his then current residence permit would be prepared by the Department.

c) That Mr Chopra and his wife could comment on and were invited to attend an interview before the submission was finalised.

d) That should Mr Chopra leave New Zealand again, his current residence status would be cancelled and he would have no right of return to this country.

[17] Neither Mr Chopra, nor his solicitor, contacted Immigration New Zealand in response to the invitation to attend an interview and Mr Chopra did not make submissions in relation to the proposed revocation of his residence permit.

[18] On 13 November 2008 Mr Chopra's indefinite returning resident's visa was "deactivated" under s 14C(5).

[19] On 14 November 2008 Mr Chopra, via his solicitor, lodged an application for a further returning resident's visa. In the accompanying letter dated 12 November 2008, it was acknowledged that pursuant to s 111, the indefinite returning resident's visa was deemed to have been cancelled.

[20] On 24 November 2008 Mr and Mrs Chopra met with a Mr Willson of Immigration New Zealand. Mr Chopra was again advised that if he left New Zealand, he would not be able to return but that if he stayed in New Zealand, he would retain his various rights, including the appeal rights in relation to the residence permit revocation process.

[21] By telephone on 24 November, and then by letter dated 25 November, Mr Chopra was advised that his application for a further returning resident's visa was declined. It is this decision which is under review in these proceedings.

[22] On 3 December 2008 Mr Chopra left New Zealand. Under s 41 his then current residence permit was deemed to have expired, and the revocation process in train in relation to that permit ceased.

[23] By letter dated 23 December 2008 Mr Chopra requested the opportunity to be involved in the submissions to the Minister regarding the proposed revocation of the residence permit.

[24] By reply dated 21 January 2009 Mr Chopra was advised that as he had left New Zealand on 3 December 2008, the revocation process had ceased, as there was no longer a residence permit to revoke.

The pleadings

[25] The pleadings filed on Mr Chopra's behalf in this proceeding are far from clear. They are under the Judicature Amendment Act 1972 and they comprise a potpourri of alleged administrative law errors. The prayer for relief seeks a direction that Immigration New Zealand reconsider the decision to decline the returning resident's visa, and a declaration that Mr Chopra is entitled to a returning resident's

visa. The various administrative law allegations are run together with assertions of breach of statutory duty, breach of the New Zealand Bill of Rights Act, unlawful interference with contractual relations, and tortious breach of statutory duty. In respect of some of these, damages are claimed.

[26] The judicial review part of the proceedings and the damages claim are being dealt with separately pursuant to an earlier order of the Court.

[27] It is possible to discern from the pleadings that Mr Chopra's base complaint is that the immigration officer considering the matter should have issued him with a returning resident's visa because, at the time of application, he was the holder of a residence permit. The pleadings, however, are at best rough and ready. They do not deal with the base allegations in any particularly coherent way. The Judicature Amendment Act 1972 details the procedure to be followed when an application for review is made – s 9. The Courts are properly critical of proceedings which raise a "barrage of allegations" in a "scatter-gun approach" (to adopt the language of Gendall J in *Walsh v Pharmaceutical Management Agency* HC WN CIV 2007-485-1386 3 April 2008). The judicial review proceedings in the present case can properly be described in those terms.

[28] The plaintiffs' affidavits are even more unsatisfactory. They comprise a mixture of the inadmissible and the irrelevant. Inexplicably, the affidavits do not even exhibit the decision made on 25 November 2008 which is the subject of the application for review. Were it not for the fact that a comprehensive affidavit has been filed on behalf of the defendant, that decision would not be before the Court. Indeed, the only coherent record of what occurred is that contained in Mr Willson's affidavit.

[29] Counsel for the plaintiff sought to avoid responsibility for the affidavits by asserting that his client had filed them directly. That assertion is, at least in part, patently incorrect. Two of the affidavits are filed by a barrister who shares chambers with the plaintiffs' counsel. Moreover, counsel are responsible for the papers filed in Court and, frankly, the Court is entitled to expect that papers filed will comply with the relevant rules, and the Evidence Act, and that they will fully and fairly inform the

Court and the defendant about what allegations are being made and why. If counsel do not fulfil their responsibilities, then they must expect either that their pleadings will be struck out, or that they will be required to provide further and better particulars, and/or that such affidavits as are filed will not be read. There is also a strong possibility of costs.

[30] Ms Casey charitably elected not to take issue with the pleadings or the affidavits so I will take the matters I have raised no further in this case.

Submissions

[31] Despite the plaintiffs' counsel's determined endeavours to obfuscate matters, in essence, the plaintiffs' case was remarkably simple. It is said that Mr Chopra had a residence permit granted to him on 8 November 2008. That residence permit had not been revoked by the Minister as at the 25 November 2008 and Mr Willson, as the visa officer dealing with Mr Chopra's application for a returning resident's visa, was obliged, under s 14C(2) of the Act, to issue Mr Chopra with a returning resident's visa.

[32] Ms Casey for the defendant was prepared to accept that s 14C(2) in its terms is mandatory, and that at the time of application Mr Chopra held a valid residence permit. She submitted, however, that s 14C is clearly subject to the overriding prohibition contained in s 7 against the issue of permits to *inter alia* persons who have been deported, unless there is a special direction from the Minister. She also referred to s 14A which sets out the meaning and effect of a visa, and submitted that the combined effect of s 7 and s 14A is that a visa officer, who is aware that the issue of a residence permit would be prohibited under s 7, is not able to issue a visa. She submitted that any interpretation to the contrary would defeat the purpose and scheme of the deportation provisions contained in the Act.

Analysis

[33] Relevantly, s 14C provides as follows:

Returning residents' visas

(1) The holder of a residence permit who intends to leave New Zealand temporarily may, before leaving, apply in the prescribed manner for a returning residence visa.

(2) A visa officer shall, on being satisfied that an applicant under subsection (1) of this section is the holder of a residence permit, issue to that person a returning residence visa.

…

(4) A person who holds a returning residence visa and who returns to New Zealand during the currency of that visa is entitled, upon application under section 18 of this Act, to the grant of a further residence permit

[34] Section 14C(2) is expressed in mandatory terms but on analysis, I am not satisfied that "shall" means "must always".

[35] The Act draws a distinction between a visa and a permit. The meaning and effect of a visa is discussed in s 14A(1). It provides as follows:

Meaning and effect of visa

For the purposes of this Act, a visa is an endorsement by a visa officer in a passport or certificate of identity, or, in the case of a visa issued electronically, an entry made and retained in the records of the Department of Labour in accordance with section 35AB, and indicates that the visa officer, at the time of issuing the visa, knows of no reason why the holder of the passport or certificate of identity should not—

…

(b) Be entitled to the grant of another residence permit, where the visa is a returning residence visa; or

[36] Here no residence permit could be granted to Mr Chopra under s 18 of the Act when he returned to New Zealand, because he was deemed to have been deported when he left New Zealand on 5 May 2008, and thereafter s 7(1)(d) prohibited the issue of a further permit to him. Mr Willson, as the visa officer dealing with the application made by Mr Chopra under s 14C, could not issue him with a returning resident's visa because he knew of good reason why Mr Chopra would not be entitled to the grant of another residence permit when he returned. At the time he made his decision in November 2008, Mr Willson was aware that

Mr Chopra had been subject to a deportation order, that he had left the country and effectively "self deported" himself on 5 May 2008. Mr Chopra's immigration status had been updated and placed on alert on the Department's computer base.

[37] In my view, Mr Willson's decision on 25 November 2008 was made lawfully, and he did not fail to comply with s 14C(2) of the Act. He could not properly issue a returning resident's visa saying that he knew of no reason why Mr Chopra should not be entitled to the grant of another residence permit when he came back into this country, because in fact he was aware that Mr Chopra would not get that permit, and could not get it unless there was a special direction from the Minister.

[38] I am satisfied that this interpretation is consistent with the scheme of the Immigration Act.

[39] First, it would be anomalous if the Act permits a person who can not obtain a permit, to be issued with a visa entitling him or her to a permit by a visa-issuing officer, even though the issue of a permit to that person requires ministerial direction. If the visa has to be issued, it would become the basis for the issue of a permit by operation of s 18. This would override the clear intention of the prohibition in s 7, and result in a visa officer essentially approving a permit that requires ministerial special direction. This is not contemplated by the Act, for obvious reasons.

[40] Secondly, s 14A expressly refers to returning residents' visas, and if such visas could not be denied simply because an applicant already holds a residence permit, then the introductory words in s 14A(1) and the wording in s 14A(1)(b) would be otiose.

[41] Thirdly, if the right to a residence permit could be established in the way suggested by counsel for Mr Chopra, then a deported person could avoid the effect of a deportation order, and regain a right to permanent residence in New Zealand, even though the Minister of Immigration had ordered their deportation. In effect, counsel's submission would allow a visa officer to overturn a deportation order.

[42] Finally, the interpretation preferred by me is also supported by reference to s 20A(1)(a) and s 19(4)(b). Under s 20A(1)(a), the Minister may revoke a returning residence visa on the ground *inter alia* that a visa was granted as a result of administrative error. "Administrative error" is defined by reference to s 19(4)(b), which states that it is an administrative error if a permit is granted to a person to whom s 7 applies. In other words, the Minister can revoke a returning resident's visa if it is granted to a person to whom s 7 applies. To my mind, it is a nonsense to suggest that a visa officer is obliged to issue a returning resident's visa to a person to whom s 7 applies, simply because that person happens to hold a residence permit, if the officer knows that s 7 applies to that person, and the likely consequence would be immediate or swift revocation by the Minister.

[43] Here Mr Chopra was the subject of a deportation order. He had the opportunity to appeal that order on humanitarian grounds, but defeated that process by voluntarily leaving New Zealand. He had no right to return, but was by error let back into this country, and granted a succession of further residence permits. This gave him the further right to challenge his immigration status when the revocation of one of those permits was sought. However, he again brought this process to an end by his voluntary and informed departure. In my view, he was not entitled to a returning resident's visa as at 25 November 2008 because he would not have been entitled to a residence permit when he returned to this country. The residence permit he held has now expired by operation of s 41. It follows that Mr Chopra's immigration status in New Zealand is now at an end.

Relief

[44] I also record that, in any event, I would not have been prepared to grant to Mr Chopra the relief sought on his behalf. He was seeking, in effect, an order that Immigration New Zealand grant him a returning resident's visa. Such an order would have the effect of placing Mr Chopra in a stronger position than he could possibly be entitled to. His indefinite returning resident's visa was cancelled by operation of the Act on 5 May 2008. If the Court were to now order the issue of a returning resident's visa, then Mr Chopra would be entitled under s 18 to a residence

permit on his return in this country, subject only to s 7. While s 7(3)(a)(i) is on its face discretionary, it must be doubtful whether Immigration New Zealand would refuse to issue a permit under s 18 when the High Court had ordered the issue of the visa upon which the permit would be based. Mr Chopra would thus be entitled to a residence permit issued on the basis of a Court ordered visa. Revocation of either the permit, or the visa would not be available under s 20 or 20A of the Act because none of the specified grounds would be available. In effect, the order sought would have the effect of overturning the deportation order made by the Minister, and conferring on Mr Chopra the right to remain in New Zealand despite the deportation order made against him.

[45] Therefore, even if I had been inclined to find in Mr Chopra's favour on the substantive issue (and I am not), I would not have given him the relief sought.

[46] Mr Chopra's application for judicial review is declined.

Costs

[47] The defendant is entitled to costs. Any application for costs is to be filed within five working days of the date of this judgment. Any response on Mr Chopra's behalf is to be filed within a further five working days. I will then deal with the issue on the papers, unless I require the assistance of counsel.

Wylie J