IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-7238

	BETWEEN	MAREK ONDRA Plaintiff
	AND	IMMIGRATION NEW ZEALAND Defendant

Hearing: 17 November 2009

Counsel: M Ryan for Plaintiff
M A Woolford for Defendant

Judgment: 17 November 2009

(ORAL) JUDGMENT OF HEATH J

Solicitors:
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Counsel
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The application

[1] Mr Ondra has sought judicial review of a decision by the Immigration Service to execute a removal order served on him.

[2] On 5 November 2009, on an oral application, Potter J ordered that the Immigration Service ought not to remove Mr Ondra for a period of seven working days. Within that time a formal application for judicial review, any supporting affidavits and an undertaking as to damages were to be filed. Pending further order of the Court, Mr Ondra was to be held in custody.

[3] Judicial review proceedings were filed on 13 November 2009. They came before me yesterday, when a Statement of Defence and affidavit in opposition were filed. I continued Potter J's order, pending an urgent hearing on an application for interim relief this morning. The Immigration Service had indicated that it would deport Mr Ondra, if an interim order did not continue in place.

Background

[4] Mr Ondra came to New Zealand on 10 September 2005 on a working permit obtained under the Czech Working Holiday scheme. Prior to coming to New Zealand, Mr Ondra was a resident of the Czech Republic.

[5] The permit was for one year and expired on 10 September 2006. Since that time, Mr Ondra has remained in New Zealand illegally. Steps were taken, at various times, to extend the permit or to obtain some other form of authorisation to remain in this country. Those attempts were unsuccessful.

[6] In mid 2007, Mr Ondra entered into a relationship with Ms Tasker, whom I understand to be a New Zealand citizen. They began to live together in a *de facto* relationship. During that time, Mr Ondra instructed a lawyer to make another application to provide permission to live and work in New Zealand.

[7] On 26 June 2008, Mr Ondra was arrested. He was charged with cultivating cannabis and possession of cannabis for the purpose of supply. While in custody, on 26 June 2008, he was served with a removal order issued under s 54 of the Immigration Act 1987. The following day, he was released on bail on the drug charges that he faced.

[8] On 26 May 2009, Mr Ondra pleaded guilty to the charge of cultivating cannabis. Subsequently, he was discharged on the separate charge of possessing cannabis for supply.

[9] He was sentenced, on the cultivation charge, to a term of imprisonment of 16 months. He appealed against that sentence and, in a judgment given on 20 October 2009, the Court of Appeal allowed the appeal, quashed the sentence of imprisonment as from 9am on 22 October 2009 and imposed a sentence of six months home detention with effect from that time. The sentence of home detention was coupled with a requirement for Mr Ondra to undertake 100 hours community work: see *R v Ondra* [2009] NZCA 489.

[10] After discharge on the possession of cannabis for supply charge in the District Court at Auckland on 5 November 2009, Mr Ondra was met by an immigration officer who exercised his discretion to enforce the removal order. That step led to the oral application with which Potter J dealt on that day.

Grounds for review

[11] Mr Ryan, on behalf of Mr Ondra, put forward two distinct grounds for judicial review, in his initial submissions. Those have been refined today and reliance is placed primarily on the first.

[12] The main grounds to support the application is that the Immigration Service either made an error of law or exercised its discretion inappropriately by seeking to remove Mr Ondra while he continued to be subject to a sentence of home detention. Mr Ryan reminds me of the decision of the Court of Appeal in *R v D* [2008] NZCA 267 in which, at para [65], the Court held that home detention was a "hybrid"

sentence characterised neither as custodial nor community-based in the Sentencing Act 2002.

[13] The second ground is one based on humanitarian considerations. That ground stems from the fact that Ms Tasker fell pregnant to Mr Ondra. Initially she suffered a miscarriage. However, since that time she has become pregnant again. The pregnancy and the distress that Ms Tasker is said to suffer at the present time was brought to the attention of the immigration officer at a humanitarian interview on 5 November 2009.

Submissions

[14] Mr Ryan's argument is that the Immigration Service cannot remove Mr Ondra from New Zealand until he has completed his term of home detention. He accepts that, on completion of that sentence, Mr Ondra would be subject to removal, subject to the humanitarian consideration.

[15] Mr Woolford, for the Immigration Service, opposes the application. He submits there is no fetter on the Immigration Service's ability to execute a removal order where the subject is serving a sentence of home detention. He contrasts the position with regard to home detention from that pertaining to a sentence of imprisonment. The latter is expressly addressed by s 61 of the Immigration Act which provides:

> **61 Release from prison into immigration detention**
>
> If a person who has been served with a removal order—
>
> (a) Is held in a prison undergoing imprisonment; and
>
> (b) Is due to be released from that imprisonment,—
>
> then, on the request of any member of the Police who indicates an intention to execute the removal order under section 59, the person responsible for the person's detention must, at the time the release is due, release the person into the custody of the member of the Police, and section 59 then applies.

[16] On the humanitarian ground, Mr Woolford submits that the threshold required by the Supreme Court in *Ye v Minister of Immigration* [2009] NZSC 76 has

not been met. The humanitarian ground for declining removal is set out in s 47(3) of the Act as follows:

> **47 Appeal against requirement to leave New Zealand**
>
> ...
>
> (3) An appeal may be brought only on the grounds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.
>
> ....

The statutory scheme and purpose of s 47(3) were discussed in the joint judgment of Blanchard, Tipping, McGrath and Anderson JJ, in *Ye*, at paras [33]-[36].

Analysis

[17] I deal first with Mr Ryan's primary point. Essentially it is a question of law. However, Mr Ryan urges me to approach the case on the basis that it is a novel argument requiring detailed consideration by the Court.

[18] On that basis, he submits that this is not a case in which the Court should seek to answer the legal point on an interim application. Rather, he submits that, in terms of Hammond J's decision in *Esekielu v Attorney-General* (1993) 6 PRNZ 309 (HC), there is a real contest between the parties on the point and Mr Ondra has a respectable chance of succeeding.

[19] Mr Ryan referred me to *R v Topliss* [2007] NZCA 327, in which the Court of Appeal held that home detention was a custodial sentence for the purpose of an application for bail pending appeal. That decision was reached in the context of the statutory provisions dealing with home detention prior to amendments to the Sentencing Act in 2007, which created home detention as a discrete sentencing option. Prior to 1 October 2007, the sentence imposed was one of imprisonment and the Court retained a gate-keeping role in determining whether an application could be made to the Parole Board for leave to serve the sentence while detained at home.

The nature of home detention, at that time, is sufficient to differentiate it from the type of sentence now available. With respect, I do not find the observations of the Court of Appeal in *Topliss* of assistance in the present case. Nor are they directly relevant to the point at issue.

[20] The difficulty for Mr Ondra is that s 61 creates a situation in which, while a person is held in prison, removal cannot take place. Only when a person is due to be released from prison will a member of the Police have the ability to arrange for the prisoner to be released into the custody of the Police to effect removal. That will be the case irrespective of whether there remains some of the sentence to be served and the prisoner is on parole until the sentence is completed.

[21] There is no equivalent provision relating to home detention. The fact that Parliament elected not to amend s 61 when the sentence of home detention was created, militates against interpretation of s 61 to include home detention. Further, the use of the terms "prison" and "imprisonment" in s 61 differentiate a person subject to that sentence from one subject to home detention.

[22] With respect to Mr Ryan, I do not see that there is any arguable proposition that home detention is a sentence that must be completed before the offender may be put into the custody of the Police for the purpose of removal. Some support for that view is also found in the judgment of the Court of Appeal on Mr Ondra's appeal against sentence. Observations made by Fogarty J, in delivering the judgment of the Court (at paras [7], [13], [14] and [19]) suggest that the Court of Appeal approached the case on the basis that it was open to Immigration authorities to seek enforcement of the removal order prior to the sentence being completed.

[23] I hold that there is no respectable argument in relation to this point which would justify an interim order being continued.

[24] The humanitarian point can be dealt with briefly. Applying the principles set out in *Ye*, I do not consider that Mr Ondra meets the necessary threshold. To rely on the pregnancy of his partner as a sole ground to avoid removal would create an

undesirable precedent, as it would give an incentive to any over-stayer to avoid removal by that expedient.

[25] The reality is that Mr Ondra knew he did not have a right to remain in New Zealand legally once his permit expired in September 2006. Since that time he has committed a criminal offence, which has resulted in a sentence of home detention. He was served with the removal order when arrested on 26 June 2008. Although on bail for almost one year until the plea of guilty was entered to the cultivation charge, no steps were taken to challenge that order.

[26] I hold that no error was made by the immigration Service in exercising its discretion to execute the removal order. No humanitarian reason is present sufficient to prevent removal.

[27] If Ms Tasker wishes to remain with Mr Ondra, she has the option of joining him in the Czech Republic or such other country as they may legitimately choose to live.

Result

[28] Because the threshold test set out in *Esekielu* has not been met, I am not prepared to continue the interim order made by Potter J on 5 November 2009 and continued by me yesterday. That order is discharged, with immediate effect.

[29] The application is dismissed for interim relief.

Addendum

[30] Unless the proceeding is discontinued before 25 November 2009, the Registrar shall fix a date for a case management conference. On the basis of this decision, I would imagine that discontinuance is inevitable.

P R Heath J