Mrs Latu
DPP

IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY

AC 4 2020
[CR 52 of 2020]

BETWEEN:

'ANISI KULUFEINGA BLOOMFIELD Appellant

-and-

REX Respondent

Application for leave to appeal

REASONS FOR DECISION

Before:	President Whitten QC LCJ
Counsel:	Mr S. Fili for the Appellant
	The Attorney General, Mrs L. Folaumoetu'i, for the Respondent
Date of hearing:	28 August 2020
Date of decision:	28 August 2020

Introduction

1. The appellant, Mr. Bloomfield, has been charged by the Attorney General of Fiji with offences concerning general dishonesty and theft alleged to have been committed in Fiji between 2011 and 2014. The Attorney General of Fiji has sought the extradition of Mr. Bloomfield to Fiji to stand trial on those charges.

2. This appeal concerns the operation of the *Extradition Act*.

3. Cases and curial decisions concerning the Act have been few and far between in Tonga. The procedures under the Act provide for a combination of rulings by the court and discretions exercisable by the Prime Minister. The latter lies at the heart of this appeal.

4. At the conclusion of the hearing, given the proximity to the upcoming Court of Appeal session commencing on 21 September 2020, I delivered an ex tempore

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ruling. The transcript of that ruling has been edited herein as to form but not substance.

Background

5. On 30 October 2019, the Prime Minister issued an 'authority to proceed' with the extradition proceedings in accordance with s.7 of the Act.

6. On 22 November 2019, Mr. Bloomfield was arrested pursuant to a warrant issued by the Chief Magistrate.

7. On 17 February 2020, the Principal Magistrate decided that Mr. Bloomfield was to be returned to Fiji to stand trial only on the charge of theft and that the charge of general dishonesty could not be proceeded with because the alleged offence was committed during a period in which Mr. Bloomfield was accorded diplomatic immunity by the Government of Fiji.

8. On 9 March 2020, the Attorney General filed a notice of appeal against the Principal Magistrate's decision refusing Mr. Bloomfield's extradition on the general dishonesty offence. Mr. Bloomfield effectively cross-appealed by filing an application for a writ of habeas corpus so that he be released from the order of the Magistrates Court to be committed for extradition to Fiji on the theft charge.

9. On 9 June 2020, Justice Niu upheld the Crown's appeal and dismissed Mr. Bloomfield's application for habeas corpus. His Honour ordered that Mr. Bloomfield be committed to be returned to Fiji to be tried on both offences.

10. On 15 July 2020, Justice Niu granted Mr. Bloomfield bail on the same terms and conditions granted to him on 5 March 2020 although altered in relation toreporting requirements.

The Notice of Appeal

11. On 22 July 2020, Mr. Bloomfield filed the notice of appeal in this proceeding against the decision of Justice Niu. The appeal is stated to be brought pursuant to s.16 of the *Court of Appeal Act* and Order 10 rule 2(1) and (5) of the Supreme Court Rules.

12. Section 16 of the *Court of Appeal Act* provides that:

> A person convicted on a trial held before the Supreme Court may appeal under this part of this Act to the Court of Appeal –
>
> (a) against his conviction on any ground of appeal which involves a question of law alone;
>
> (b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal; and
>
> (c) with the leave of the Court of Appeal, against the sentence passed on his conviction unless the sentence is one fixed by law.

13. It may be observed, at the outset, that Mr. Bloomfield was not a person convicted on a trial held before the Supreme Court. Therefore, s.16 has no application.

14. Order 10 rule 2(1) and (5) of the Supreme Court Rules do not in fact exist. Order 10 of those Rules is concerned with third party proceedings. It is therefore assumed that reference was intended to be made to the Court of Appeal Rules. There, Order 10 rule 2(1) provides that an appeal to the court in its criminal jurisdiction must be commenced by lodging with the Registrar a notice of appeal together with the prescribed fee. There is no sub-rule (5).

15. Mr Bloomfield relies on the following grounds of appeal:

    (a) he seeks to rely on a motion to adduce fresh evidence that the parties could not adduce during the time of trial on 9 June 2020;

    (b) the fresh evidence is a recent letter from the Honorable Prime Minister of Tonga dated 1 July 2020 revoking his earlier order of 30 October 2019 to proceed with the extradition of Mr Bloomfield to Fiji;

    (c) the second paragraph of the letter stated:

> *"This notice of revocation shall give Mr. Bloomfield his right as a Tongan subject to remain in Tonga and not to be extradited to Fiji and I have order* [sic]*";*

(d) s.7(1) of the *Extradition Act* states that subject to the provisions of the Act in relation to provisional warrants, a person shall not be dealt with thereunder except pursuant to an order of the Prime Minister (in this Act referred as to as an 'authority to proceed') issued pursuant to a request made to the Prime Minister by or on behalf of the government of the designated country or by the government of the dependency of the designated country in which the person to be returned is accused or was convicted;

(e) whether or not to proceed with the extradition is solely in the discretion of the Prime Minister;

(f) if the fresh evidence was provided during the trial, Niu J's decision would have been different; and

(g) "it is an order by the rightful authority identified and established irrevocably in the law to end any further actions relating to the said appellant'.

16. The notice of appeal also contains a request that the appeal be determined without a hearing in open court in accordance with s.24 of the *Court of Appeal Act*.

17. The appeal is therefore based solely on the Prime Minister's letter of 1 July 2020 purportedly revoking his earlier authority to proceed. The notice of appeal does not allege any error by Niu J in his determination of the appeal or application on the material then before him.

Mention on 5 August 2020

18. The matter was mentioned on 5 August 2020. On that occasion Mr. Fili, who appears for Mr. Bloomfield, indicated that he sought to have the appeal heard and determined in the upcoming second session of the Court of Appeal commencing 21 September 2020. In that regard, on 29 July 2020, the Acting Registrar issued directions for all the appeals to be heard at the next session which included appellants' submissions to be filed by 10 August 2020 and respondents' submissions to be filed by 24 August 2020. Time therefore was of the essence.

19. Ms. Macomber, who appeared for the Crown, indicated that the Crown opposes the appeal and the application to adduce fresh evidence. However, she added that on 20 July 2020 the Prime Minister issued a separate letter to the Attorney General in which he effectively revoked his letter of 1 July 2020 upon which the appellant relies in this appeal. The letter was not produced that day. Ms. Macomber contended that the effect of the Prime Minister's second letter is that his original authority to proceed remains in force. She also stated that on 24 July 2020, the Attorney General's office provided a copy of the PM's second letter to Mr. Fili and invited him to attend a meeting. That meeting occurred on 29 July 2020.

20. Mr. Fili described the second letter as "suspicious" and that he intended to challenge its authenticity or validity on the basis that it was not given by the Prime Minister "of his own free will", meaning that he was under some sort of duress. Mr. Fili also mentioned intended reliance on principles of estoppel. However, he required time to consider those matters further.

21. Ms. Macomber stated that the Crown was not challenging the authenticity or validity of either letter. The Crown intended to rely on the Prime Minister's most recent letter also as fresh evidence on the appeal.

22. After further discussion with counsel, and considering the relative novelty of the case, directions were made requiring submissions to be filed on a number of preliminary issues, namely:

    (a) whether the appeal and/or any cross-appeal require leave to appeal;

    (b) whether leave is required for either party to rely on any fresh evidence having regard to the exception in Order 8 rule 1(3) of the Court of Appeal Rules concerning "matters which have occurred since the trial in the lower court";

    (c) whether, having regard to s.10(5) of the Act, the proceeding before Justice Niu has been concluded or is otherwise pending;

    (d) whether s.19 of the Act allows for an effective revocation of a revocation of the Prime Minister's original order or authority to proceed under s.7;

(e) whether s.19 can apply after Justice Niu's decision below;

(f) whether the Prime Minister's second letter is authentic or valid or whether for some other reason it is vitiated or is otherwise of no legal force or effect;

(g) whether the Court of Appeal is to determine any disputed issue of authenticity or validity in relation to the Prime Minister's second letter and, if so, how;

(h) whether on any substantive appeal, the Court of Appeal will be asked to determine the legal effect of either or both of the letters if found to be authentic; and

(i) whether, if the letters are received as fresh evidence on the appeal, and if the appeal is upheld, the matter should be remitted to Justice Niu for further consideration.

23. The directions also noted that given the extraordinary circumstances of this case and the Prime Minister's two letters, consideration ought be given to one or both parties obtaining and filing an affidavit from the Prime Minister for the resolution of any one or more of the preliminary issues.

Appellant's submissions

24. On 14 August 2020, the appellant filed his submissions in response to each of the preliminary issues, which I will set out in accordance with the above numbering and without repeating each issue:

(a) The appellant again referred to s.16 of the *Court of Appeal Act*, this time specifically sub-section (b). As indicated above, the chapeau to s.16 makes clear that it is predicated upon a conviction at trial before the Supreme Court, which has not occurred in this case. The submission continued that under the Court of Appeal Rules leave is required pursuant to Order 10 rule 1(1) which actually provides that where leave to appeal is required, application for such leave must be made within 42 days after the date of the decision appealed. Sub-rule (2) provides that application for leave to appeal or leave to appeal out of time may be made ex-parte, supported by affidavit.

Rule 2 was also referenced but has no direct application here. The submission concluded that in accordance with those sections "*it is true that there is a need for leave of the court except granted on special grounds*". Reference were also made to Order 8 rule 1(3) but without further submission as to its application. For completeness, that rule is concerned with the manner in which the Court of Appeal is to hear any appeal by way of rehearing on the documents and whether any further evidence on questions of fact is to be considered in any such appeal. I will turn to that rule further on the question of fresh evidence.

(b) On the question of fresh evidence, Order 8 rule 1(3) provides that "(t)he Court shall not receive further evidence on questions of fact (other than as to matters which have occurred since the trial in the lower court) without leave which shall only be granted on special grounds". The rule makes clear that both letters of the Prime Minister of 1 July and 20 July 2020 are matters which have occurred since the trial in the lower court. The exception then to the usual rule of leave being required to rely upon any fresh evidence means that both parties are entitled to rely upon the letters for the purposes of this appeal and that leave is not required.

(c) Section 10(5) of the Extradition Act provides:

> For the purposes of this section, proceedings on an application for habeas corpus shall be treated as pending until any appeal in those proceedings is disposed of; and an appeal shall be treated as disposed of at the expiration of the time within which the appeal may be brought or, where leave to appeal is required, within which the application for leave may be made, if the appeal is not brought or the application made within that time.

The Appellant therefore submitted that the proceeding before Niu J is still pending the outcome of this appeal. For reasons which will become clear in due course nothing turns on this issue for present purposes.

(d) The power to revoke as provided for in s.19 of the Act and s. 17 of the *Interpretation Act* allows for an effective revocation of the Prime Minister's order he made under s.7 of the Act.

Section 19 provides:

> Any power to make an Order under this Act includes power to revoke or vary such an Order by a subsequent Order.

It may be noted that the authority to proceed under s.7 is referred to therein as an Order.

Section 17 of the *Interpretation Act* provides:

> Whenever by any Act a power is conferred or a duty imposed, then unless the contrary appears to be intended the power may be exercised and the duty shall be performed from time to time as occasion requires.

Reference was also made to s.11(1) of the *Extradition Act* which provides, in terms, that where a person is committed to await his return and is not discharged by Order of the Supreme Court, the Prime Minister retains a discretion whether to issue a warrant for the person to be returned to the country seeking extradition.

(e) In relation to whether s.19 can still apply after Justice Niu's decision below, it was submitted that in light of sections 7, 11 and 19, the Prime Minister has the authority to revoke an Order to proceed which is what has occurred. It is unreasonable for the Prime Minister to revoke the proceedings during the time the court was dealing with the case. When Justice Niu made his final ruling on 9 June 2020, the Supreme Court had "done its job to finish with the ruling". The Prime Minister still has a discretion under s.11 not to issue a warrant for Mr. Bloomfield's return. The Prime Minister's letter of revocation date 1 July 2020 was effectively him exercising his discretion under s.11 not to return to Mr Boolmfield.

I pause there to observe that the Prime Minister's letter of 1 July 2020 makes no reference to s.11 or him making any decision pursuant to that provision. It stated nothing further than that he revoked the authority to proceed that he gave on 30 October 2019. In my view, it does not have the effect of a decision having been made under s.11.

(f) In his second letter of 20 July 2020, the Prime Minister wrote:

> *" I, Dr. Pohiva Tu'ionetoa the Prime Minister of Tonga declare in this notice that I have revoked my letter of revocation dated 1 July 2020 pursuant the revocation of "authority to proceed with the order" under s.7(1) of the Extradition Act executed on 30 October 2019".*

The Appellant submits that the Prime Minister's second letter "is a suspicious letter with mode of undue influence and duress" and is "invalid because it is contrary to ss 7, 11 and 19 of the Act". All the sections refer to Orders whereas the second letter "is only a mere notice and not an Order therefore it is invalid and has no legal effect".

(g) Pursuant to ss 17 and 18 of the *Court of Appeal Act*, this Court has jurisdiction to determine any appeal from the Supreme Court which includes whether the second letter of 20 July 2020 is 'only a notice' as expressed in the previous submission and has no legal effect.

(h) In further reliance upon s.16 of the *Court of Appeal Act*, the Appellant submitted that on any substantive appeal, the Court of Appeal would be asked to determine the legal effect of either or both of the letters if found to be authentic and valid. To that end, Mr Fili submitted that the first letter of 1 July 2020 was obtained by the appellant after the Supreme Court ruling when Mr Bloomfield requested the Prime Minister's assistance. The Prime Minister voluntarily provided that first letter as an Order. I will address this emphasis by the appellant on the distinction between an Order under the Extradition Act and a notice.

(i) Finally, the appellant submitted that if the appeal is upheld, the matter should not remitted back to the judge below because "the Prime Minister revoked his Order of the 30 October 2019 by his Order of 1 July 2020 and therefore the matter being settled and no return to the Accused."

Crown's submissions and the Prime Minister's affidavit

25. On 21 August 2020, the Crown filed submissions in response together with an affidavit by the Prime Minister sworn 21 August 2020.

26. The relevant facts from the Prime Minister's affidavit may be sumarised as follows:

(a) He set out the background and circumstances by which the he initially issued his authority to proceed on this matter.

(b) He recounted how on 9 June 2020, the date of Justice Niu's decision, Mr Bloomfield approached the Prime Minister requesting his assistance because he had health problems and did not want to return to Fiji for trial. The Prime Minister felt heavily troubled by the fact that as Prime Minister he was the one who was authorized to "sign off the life of this individual who is a Tongan to the mercy of the government of Fiji". He thought the court would make the decision whether to extradite and not the Executive branch of government.

(c) On 25 June 2020, the Prime Minister emailed the Attorney General seeking clarification on the extradition process. He met with the Attorney General that day. During her briefing, she reminded the Prime Minister of the order to proceed signed by him and subsequent emails between them regarding the extradition process. He recalled that on that day, the Attorney General provided him with the request letter from Fiji.

(d) On 1 July 2020, after considering the appellant's request, the Prime Minister wrote to the Attorney General revoking his earlier authority to proceed order.

(e) On 9 July 2020, the Attorney General responded and explained that the extradition process had not yet been completed as the appeal period in respect of Justice Niu's decision would not expire until 22 July 2020. She added that if the appellant succeeded on any appeal, the matter would end there; but that if he did not appeal or the Court of Appeal upholds Niu J's decision, then the case would be referred back to the Prime Minister for his decision whether to issue a warrant of return order for the appellant pursuant to s.11 of the Act.

(f) On 10 July 2020, the Prime Minister requested a further meeting with the Attorney General to discuss the matter. He met with her and the Solicitor

General that same day. They reiterated that the final decision in relation to an order for the appellant's return lies with the Prime Minister. He requested that the matter be left with him for further consideration.

(g) On 20 July 2020, he forwarded his second letter to the Attorney General containing his revocation of the earlier revocation on 1 July 2020. He made that decision based on his understanding that the extradition process has not being completed and that he has another opportunity pursuant to s.11 of the Act to decide whether to issue a warrant of return order for the appellant to Fiji.

27. The Crown's submissions on each preliminary issue may be summarized as follows:

(a) On the first issue, the Crown also referred to s.16(b) of the *Court of Appeal Act*. It further submitted, however, that Order 8 rule 1(3) meant that the Crown did not require leave to adduce fresh evidence in the form of the Prime Minister's second letter or his affidavit.

With respect, the submissions elide the two distinct issues of leave to appeal and leave to rely upon fresh evidence. The appeal here is not being made pursuant to Order 8, nor can it be. That Order concerns how the Court of Appeal is to deal with any appeal by way of re-hearing on the documents.

(b) By reason of s.10(5) of the *Extradition Act*, the proceedings before Niu J, insofar as they relate to the application for habeas corpus, are still pending until any appeal in relation to those proceedings is determined.

(c) Section 19 of the Act provides the power to revoke an Order under the Act by a subsequent Order. The authority to proceed issued by the Prime Minister was an Order under s.7 of the Act. The revocation letters of 1 July and 20 July 2020 by the Prime Minister are both consistent with s.19. The effect therefore is that the authority to proceed remains in force. Reference was also to s.17 of the *Interpretation Act* as support for the proposition that the power conferred on the Prime Minister by s.19 the Act does not contain

any limit on the number of times revocation could happen in given circumstances.

(d) On whether s.19 of the Act can apply after Justice Niu's decision below, the Crown submitted that the revocation by the Prime Minister on 1 July 2020 had no legal effect on the decision below because that case had been completed, subject to appeal proceedings.

(e) By reference to the Prime Minister's affidavit, his second letter of 20 July 2020 is authentic and valid.

(f) Any issues as to the legal effect of either or both letters do not need to be addressed by the Court of Appeal because, at paragraph 10 of affidavit his affidavit, the Prime Minister has clearly stated that he now understands that the legal process has not been completed and he still has the opportunity to decide whether to issue a warrant of return order under s.11 of the Act.

(g) If any appeal by this Court is upheld, the matter should be remitted to Niu J for further consideration. It was further submitted, however, that leave should not be granted to the appellant to rely on the letter of 1 July 2020 because the appeal has no prospects of success. The letter of 20 July has overtaken the letter of 1 July and expresses the latest intention and instructions from the Prime Minister that he wants the order to proceed to continue until the legal proceedings are completed, whereupon his discretion under s.11 of the Act will be invoked.

Consideration

28. At the hearing of the matter, Mr Fili and the Attorney General spoke to their respective written submissions.

29. Exchanges with both counsel resulted in identification of the following principal issues for determination:

(a) whether the parties should be permitted to rely upon the fresh evidence being the two letters of the Prime Minister and the Prime Minister's affidavit (which also exhibited the letters);

(b) whether leave to appeal is required; and

(c) if so, whether leave should be granted.

Leave is not required to rely on the fresh evidence

30. Both letters by the Prime Minister and his more recent affidavit are matters of fact, or contain matters of fact, which have occurred since the proceeding below. As mentioned above, the exemption in Order 8 rule 1(3) of the Court of Appeal Rules makes clear that leave to rely on that fresh evidence is not required.

31. The fresh evidence directly informs the more important questions in this case in relation to leave to appeal.

Leave to appeal is required

32. Section 74 of the *Magistrates Court Act* provides that:

> **Right of appeal**
>
> (1) In every civil case and in every criminal case any party shall have a right of appeal to the Supreme Court from the judgment sentence or order of a Magistrate.
>
> (2) Any party to an appeal under sub-section shall have a further right of appeal on a point of law to the court of appeal with the leave of the Supreme Court or the Court of Appeal.
>
> [emphasis added]

33. This case commenced in the Magistrates Court. The decision of Niu J was a decision on an appeal from the Magistrates Court in one respect but also in respect of an application for habeas corpus by the appellant. To the extent that the proceeding below was an appeal from the Magistrate's decision, s.74(2) applies and leave to appeal is required.

34. I have already indicated that s.16 of the *Court of Appeal Act* does not apply here. No other provision was referred to by the parties on the question of whether leave to appeal is required. However, s.17C of the *Court of Appeal Act* provides, relevantly:

> **Appeal after interlocutory judgment or order**
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> (1) Any party to proceedings to which this part applies may appeal to the Court of Appeal against an interlocutory judgment or order given or made in the proceeding –
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> (a) if the judge of first instance certifies that the judgment or order is a proper one for determination on appeal; or
>
> (b) if the Court of Appeal gives leave to appeal.
>
> (2) An appeal under this section shall, unless the Court of Appeal gives leave to adduce fresh, additional or substituted evidence, be determined on the evidence (if any) given in the proceeding to which the appeal relates.
>
> ...
>
> (5) A notice of appeal or notice of application for leave to appeal under this section shall be given within 10 days of the date of the interlocutory judgment or order from which appeal is made.

35. Neither party addressed the issue of whether Niu J's decision is a final judgment or an interlocutory order. Section 10(5) of the *Extradition Act* provides that proceedings for habeas corpus under that Act remain pending until any appeal is determined or appeal period has expired. There is also the question of whether Niu J's orders finally determined Mr. Bloomfield's rights under the Act on whether he is to be returned to Fiji or whether they still rest in the discretion of the Prime Minister under s.11. I was not referred to, nor am I aware of, any decision in Tonga which elucidates the distinction between interlocutory and final orders in the present context. However, for reasons which will become apparent, it is perhaps unnecessary to determine that issue on this occasion.

36. For present purposes, I incline to the view, in which both parties appeared to have concurred during argument, that leave to appeal is required in this case.

Should leave be granted?

37. One of the primary considerations on any application for leave to appeal is the prospects of success of the appeal. In this case, the appeal rests solely on the fresh evidence. That evidence provides the relevant factual basis for the appeal. In that regard, no real issue has been raised by the appellant with the facts now presented by the two letters and the Prime Minister's affidavit. While Mr. Fili initially said during oral submissions that he did not accept the Prime Minister's

affidavit, he was unable to identify any particular part of the affidavit or basis for for his stated position. Similarly, there has been no indication on behalf of the appellant that any challenge is intended to be made to the Prime Minister's veracity in respect of any matter to which he has sworn in his affidavit, or that contradictory evidence might be adduced either within any appeal or, if the matter is remitted, within any rehearing.

38. Therefore, for the purpose of assessing prospects, I proceed on the basis that the relevant facts are that the Prime Minister initially revoked his authority to proceed under s.7, subsequently sought to rescind that revocation (arguably pursuant to s.19) and has most recently deposed to the effect that he does not revoke his original authority to proceed and that his powers under s.11 are reserved.

39. The question then posed is what, if any, question of law arises on the appeal.

40. In light of the somewhat extraordinary and presumably unique factual circumstances, there is no issue of general public importance, nor any question on the proper interpretation of the Act. However, it may be interpolated from Mr. Fili's submissions that the highest the question could be answered is whether, having regard to s.19, the Prime Minister's second letter validly revoked his earlier revocation with the legal effect of reinstating the authority to proceed under s.7. No other question of law has been identified.

41. During oral submissions, Mr. Fili sought to develop his written contention that as the second letter is not expressed as an 'Order' as provided for by s.19, it is only a 'notice' and therefore cannot have the effect of revoking the first letter.

42. As recited above, s.19 provides that any power to make an Order under the Act includes power to revoke or vary such an Order by a subsequent Order.

43. In my view, and for the reasons which follow, the proper interpretation of s.19, having regard to its text, its context and the purpose of the Act, leads to the conclusion that the second letter was a valid revocation of the first revocation of the authority to proceed.

44. Firstly, there is no definition within the Act of an "Order" or a "notice".

45. Secondly, there is no prescribed form within the Act (nor are there any Regulations) as to the content or wording required to constitute an Order.

46. Thirdly, apart from s.19 itself, there is no provision within the Act for any subsequent 'orders' or 'Orders' in relation to the same subject matter or decision.

47. Fourthly, on a literal interpretation, s.19 may not appear to contemplate the circumstances of this case for it only refers to the power to revoke or vary an Order in the singular, i.e. by *a* subsequent Order. However, in my view, s.19 could hardly have been intended to limit the Prime Minister to only one revocation, again as unusual that might be. A closer examination of the text reveals that once 'a subsequent Order' is issued revoking 'an Order' previously made, that subsequent Order itself becomes 'an Order' which is susceptible to being revoked by yet a further 'subsequent Order'. In an extreme case, involving multiple revocations, such a linguistic abstraction could, of course, lead to uncertainty. But in the absence of any express limitation on the number of revocations, it is doubtful Parliament intended for a case such as the present (two revocations) to be struck down by s.19. That interpretation is also supported by s.17 of the *Interpretation Act* such that the power conferred on the Prime Minister here may be exercised 'from time to time as occasion requires'.

48. Fifthly, regard must be had to the actual wording of both letters. Mr Fili submitted that the Prime Minister voluntarily issued his first letter as an Order. However, the relevant words in that letter are in the second paragraph where the Prime Minister stated:

> *"This notice of revocation shall give Mr. Bloomfield his right as a Tongan subject to remain in Tonga and not to be extradited to Fiji and I have order."*
> [emphasis added]

49. The text does not support the submission. It is perhaps another illustration of where either the Prime Minister had not been advised or was not cognizant of any special language being required to expressly frame either letter as an Order pursuant to the Act.

50. Sixthly, it is not at all clear that the different use of the words 'order' and 'Order' throughout the Act are intended to be consistent or different. For instance, throughout the Act, the term 'Order' appears in ss 4, 7, 10, 11, 12, 15 and, of course, 19. However, a number of those sections or subsections also interchangeably use the word 'order'. For example, whereas s.7(1) refers to a person not being dealt with under the Act except in pursuance of an 'Order' of the Prime Minister, ss(5) provides that on a receipt of a request, the Prime Minster may issue an authority to proceed unless it appears to him that an 'order' for the return of the person concerned could not lawfully be made or would not in fact be made in accordance with the provisions of the Act. Similarly, s.15(1) refers to any warrant or 'order' to be issued or made by the Prime Minister under the Act. Subsection (2) provides that the Prime Minister may by 'Order' prescribe the form of any warrant or 'order' to be issued or made under the Act.

51. That survey suggests that Parliament did not intend any meaningful distinction between an 'Order' and an 'order' as those terms are used in the Act. Therefore, the word is to be interpreted according to its natural english meaning.

52. Seventhly, it follows that s.19 is not limited in its application only to documents or decisions either stated as being 'Orders' or even bearing the word 'order'. The Prime Minister's affidavit makes clear that as at 1 July 2020, he wished to revoke the authority to proceed, but that by 20 July, he had reconsidered the matter and wished thereby to revoke the earlier order. A commonsense approach to the interpretation of the provision ought include the 20 July 2020 letter as a subsequent order revoking his first order revoking the authority to proceed.

53. Accordingly, in my opinion, both letters constitute an Order for the purposes of s.19, whether or not they actually used the word 'order' or 'Order' in their texts.

54. A further consideration on the question of leave to appeal, is that Mr. Bloomfield's ultimate fate has not been determined by Niu J's decision and that it in fact depends on the Prime Minister's exercise of discretion under s. 11 of the Act. There is no indication in his affidavit that the Prime Minister has yet made that decision or when he is likely to do so.

55. For those reasons, in my opinion, the prospects of success of the appeal are insufficient to warrant leave being granted.

56. The application for leave to appeal is therefore refused.

Result

57. Pursuant to order 8 rule 1(3) of the Court of Appeal Rules:

    (a) the appellant is permitted to rely upon the letter of the Prime Minister dated 1 July 2020 (a copy of which is annexed to the Notice of Appeal and appears as exhibit B to the Prime Minister's affidavit); and

    (b) the respondent is permitted to rely upon the further letter from the Prime Minister dated 20 July 2020 (exhibit C to the Prime Minister's affidavit) and the affidavit of the Prime Minister sworn 21 August 2020.

58. Leave to appeal is refused.

59. No order as to costs.

SUPREME COURT TONGA

NUKU'ALOFA
2 September 2020

M.H. Whitten QC LCJ
PRESIDENT