A. Kefu
31/10/14

IN THE COURT OF APPEAL OF TONGA

CIVIL & CRIMINAL JURISDICTION AC 26 of 2014

NUKU'ALOFA REGISTRY [CV 36 of 2014 & CR 36/2014]

BETWEEN : ANTONE THOMAS PEDRAS

- Appellant

AND : 1. PRIME MINISTER

2. DEPUTY PRIME MINISTER

3. PRINCIPAL IMMIGRATION OFFICER

- Respondents

Coram : Salmon J

Handley J

Hansen J

Tupou J

Counsel : Mr. Niu, SC for the Appellant

Mr Kefu, A/AG for the Respondents

Date of Hearing : 21 October, 2014

Date of Judgment: 31October, 2014

JUDGMENT OF THE COURT

[1] The appellant, a citizen of the United States who is married to a Tongan, has appealed from the decision of the Lord Chief Justice, seeking to prevent his deportation to the United States to face charges of wire fraud in the United States District Court for the Central District of California.

[2] He arrived in Tonga with his family from New Zealand on 16th January, 2014 and was granted the usual one month's permit on arrival. He later applied for Tongan citizenship and as part of that process on 15th April the Principal Immigration Officer issued him with a 2 year permit. A corresponding visa was entered in his United States passport held by that office in connection with his citizenship application, as required, it would seem, by s.9(2) of the Immigration Act.

[3] On 2nd May the Ministry for Foreign Affairs received a formal request from the United States Embassy in Suva for the deportation of the appellant to the United States to stand trial on the charge of wire fraud. On the same day the Senior Immigration

Officer and the Deputy Police Commissioner met the Deputy Prime Minister and briefed him on this request.

[4] On 5th May the Director of Public Prosecutions and the Deputy Police Commissioner again met the Deputy Prime Minister and tendered formal written advice from the Director. A copy of this advice was annexure A to the affidavit of Mr Fa'aoa, the Deputy Police Commissioner, of 19th May, 2014.

[5] The Deputy Prime Minister, acting in the office pursuant to s.24(a) of the Interpretation Act, in the absence of the Prime Minister from the Kingdom, made a declaration under s.8(2)(g) of the Immigration Act declaring that the appellant was "an undesirable immigrant".

[6] Section 8 relevantly provides:

> *"(1) Any person who –*
>
> *(a) is not entitled to enter the Kingdom without a permit ...; and*
>
> *(b) is a member of any of the prohibited classes as defined in subsection (2) of this section,*
>
> *shall be a prohibited immigrant and ... his presence in the Kingdom shall be unlawful.*

(2) *The following persons are members of the prohibited classes –*

...

(f) a person who has been convicted by a court in any Country outside the Kingdom for an offence which –

(i) is punishable by ... imprisonment for a term of not less than 2 years ...

(g) any person who, in consequence of information received from any source deemed by the Prime Minister to be reliable, or from any Government through official or diplomatic channels, is deemed by the Prime Minister to be an undesirable immigrant;

..."

[7] Thereupon the Principal Immigration Officer made a removal order purporting to act under s.21 of the Act. It was common ground before the Chief Justice and this Court that this was an obvious typographical mistake, that the section intended was s.23, and the order should be read in that way.

[8] Section 23(1) relevantly provides:

"Where the presence of any person in the Kingdom is unlawful by reason of the provisions of section 12 such person shall ... be liable to removal from the Kingdom by order of the Principal Immigration Officer"

[9] The appellant was taken into custody pursuant to this removal order on 5th May.

[10] On 6th May the appellant commenced Habeas Corpus proceedings in the Supreme Court to secure his release, and at an urgent interlocutory hearing on 7 May, before the Chief Justice, an order was made staying the removal order. The appellant was granted bail on 19th May.

[11] On 21st May the appellant purported to appeal to the Prime Minister under s.23(2) from the removal order of 5th May. The notice of appeal was a three and a half page document prepared and signed by Mr Niu. Section 23(2) provides:

> *"(2) Any person in respect of whom an order of removal has been made under the provisions of subsection (1) may appeal to the Prime Minister in such manner and within such time as may be prescribed."*

It was common ground that relevant regulations had not been made. On 23rd May the Prime Minister, then back in the Kingdom, dismissed the appeal.

[12] The Prime Minister's reasons for dismissing the appeal referred to a briefing he had received from the Principal Immigration Officer on 21st May, and written legal advice he had received from the Attorney General's Office on 22nd May. The contents of the briefing from the Principal Immigration Officer, whose decision was challenged by the appeal, and the written legal advice from the Attorney General's office, were not disclosed to the appellant or to Mr Niu before the appeal was dismissed.

[13] On 26th May the appellant filed a statement of claim in the Supreme Court seeking judicial review of the order for his removal and on the same day he applied ex-parte for leave to bring such proceedings, and for an injunction to prevent his removal from the Kingdom.

[14] Leave to apply for judicial review was granted by consent on 22 July and the proceedings were heard by the Chief Justice on 29 July. The principal relief sought was a declaration that the removal order of 5th May was void, and that a writ of certiorari might issue to quash that order.

[15] Relief was not expressly claimed in respect of the decision of the Acting Prime Minister of 5th May declaring the appellant an undesirable immigrant, or in respect of the order of the Prime Minister of 23rd May dismissing his appeal, but the statement of claim alleged that the appellant should have been given an opportunity to be heard before the declaration was made under s.8(2)(g), before the order for his removal was made under s.23, and before his appeal to the Prime Minister under s.23(2) was dismissed.

[16] The Chief Justice gave judgment on 14th August, 2014 dismissing the proceedings. The appellant appealed to this Court and has been on bail in the meantime.

[17] The Chief Justice was not informed by the Crown that the Principal Immigration Officer had issued a two year permit for the appellant to remain in the Kingdom presumably under s.9 of the Act. The appellant was not aware of this either as he had lodged his United States passport with the Immigration Department, and had not collected it before he was detained.

[18] Unaware of this significant fact, the Chief Justice inferred that the normal one month's permit granted to the appellant on his arrival in Tonga had expired in March without being renewed. The result was that at common law the appellant was in the Kingdom unlawfully. He noted that the Crown "exercising it's royal prerogative, has the right to expel an alien", and for this purpose can arrest and detain him, and put him on board a ship or aircraft bound for his own Country.

[19] The Chief Justice rejected Mr Niu's argument that the power in s.8(2)(g) was not available because of s.8(2)(f) and because the appellant had not been convicted of the offence with which he was charged.

[20] He also rejected Mr Niu's argument that the appellant should have been given a hearing before the Deputy Prime Minister decided to declare him an undesirable immigrant and his further argument that the power in s.23 was not available in this case.

[21] On the latter point the Chief Justice said: "while close examination of the provisions of the Act suggests that Mr Niu may have a point. I am satisfied that it cannot avail the Plaintiff."

[22] Section 12(1) of the Act relevantly provides:

> *"A person shall not remain in the Kingdom after the cancellation of any permit, or after the making of any declaration under the provisions of subsection(3) of section 11..."*

[23] Section 11 relevantly provides:

> *"(2) Where at any time, during the period of validity of a permit, the Principal Immigration Officer is satisfied that the holder of such permit is a prohibited immigrant, the Principal Officer shall cancel such permit.*
>
> *(3) Where any person has entered the Kingdom by virtue of a permit, and the Principal Immigration Officer is satisfied;*
>
> *(a) ...*
>
> *(b) that such person is a prohibited immigrant the Principal Immigration Officer may declare ... that the presence of such person in the Kingdom is unlawful.*
>
> *(4) On making any cancellation under ... subsection (2) or on making any declaration under subsection (3) ... the Principal Immigration Officer shall by notification ... inform the person affected thereby of the grounds on which such cancellation or declaration has been made and such person may appeal against such cancellation or declaration ... within such time and in such manner as*

may be prescribed, to the Prime Minister whose decision shall be final".

[24] The appellant's two year permit, valid until 16th February 2016, was not cancelled by the Principal Immigration Officer under s.11(2) although the Acting Prime Minister's decision deeming the appellant, pursuant to sec 8(2)(g), to be an undesirable immigrant, if valid, made him a prohibited immigrant under s.8(1)(b).

[25] The Chief Justice concluded that the power to revoke a permit in s.11(2) did not have to be exercised because the appellant's permit had expired before 5th May and that s.12 did not exclude the common law rule that an alien whose presence is not authorized by a permit to remain is here unlawfully, and can be detained and deported.

[26] He also rejected Mr Niu's arguments that the appellant was entitled to an oral hearing of his appeal to the Prime Minister, and that the removal order was invalid because it amounted to extradition without complying with the safeguards in the Extradition Act.

[27] The Principal Immigration Officer did not exercise the power under s.11(3)(b) to declare the presence of the appellant in the Kingdom to be unlawful. Since neither s.11(2) nor (3) were activated the power in s.12(1) was not available, and therefore the power in s.23(1) was not available.

[28] There was, therefore, no statutory basis which could support the order for the removal of the appellant made by the Principal Immigration Officer on 5th May, 2014.

[29] The appellant challenged the validity of the declaration by the Acting Prime Minister of 5th May that he was an undesirable immigrant, on both formal and procedural grounds. The respondents for their part claimed that the appellant's permit was revoked by operation of law when his United States passport was cancelled on 5th May, 2014, and that the order for removal of the appellant could be supported at common law under the Royal Prerogative.

[30] Mr Kefu was unable to point to any provision in the Act which provides that the cancellation of the passport of a resident alien revoked any permit which may have been granted to him and we

do not think such a provision can be implied. The requirement in s.9(2) for an applicant to produce his passport to enable a visa to be issued to correspond with his permit assumes that the permit exists independently of the passport.

[31] The appellant submitted that the power in s.8(2)(g) to declare him to be an undesirable immigrant could not be activated by information that he had been charged with a criminal offence punishable on conviction by imprisonment for not less than two years because para (f) provided that a person convicted of such an offence was a prohibited immigrant. If a relevant conviction had this result, how, Mr Niu SC submitted, could a mere charge, without conviction, have the same result.

[32] There is a short answer to this submission. In our judgment, in agreement with the Chief Justice, each paragraph in s.8(2) provides an independent basis for the person concerned being or becoming a prohibited immigrant. The fact that a person does not fall within one or more of those grounds provides no foundation for a conclusion that he or she cannot come within another. A person is a prohibited immigrant if he or she falls within any one of the specified grounds.

[33] Mr Niu's second point on s.8(2)(g) is that the procedures followed in this case culminating in the declaration of the Acting Prime Minister that the appellant was an undesirable immigrant denied him procedural fairness, and that declaration should be quashed on judicial review.

[34] On the basis of new evidence, not before the Chief Justice, it has become clear that the appellant has an unrevoked permit to remain in the Kingdom for nearly two years, and the order for his removal under s.23(1) was invalid and void because the necessary statutory conditions had not been satisfied.

[35] The position at common law was clear. The Crown had a prerogative power to deny entry to an alien and, subject to any permit, to expel an alien, or deport him to the Country from which he had come and for this purpose to arrest and detain him: *Attorney General for Canada v Cain* [1906] AC 542; *R v Governor of Brixton Prison ex-parte Soblen* [1963] 2 QB 243, 300 CA.

[36] However these powers, forming part of the Royal Prerogative, ceased to be available when the subject matter was dealt with by

statute. As Lord Denning MR said in *Soblen's* case (above at p.301)

> *"... it is quite plain that the Royal Prerogative is now supplanted and replaced by the Aliens Order 1953."*

That Order was made under the Aliens Act 1905: *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 160 per Lord Denning MR.

[37] This accords with the general principle applied in *Attorney- General v De Keysers Royal Hotel* [1920] AC 508, 526 where Lord Dunedin said:

> *"... if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think that the observation of the learned Master of the Rolls is unanswerable. He says: "what use would there be in imposing limitations if the Crown could at it's pleasure disregard them and fall back on the prerogative?"*

[38] We conclude therefore that the common law prerogatives of the Crown in respect of aliens ceased to be available in Tonga following the passing of the Immigration Act, and the prerogative cannot support the order for the appellant's removal.

[39] A declaration that a person is an undesirable immigrant made under s.8(2)(g) has no immediate effect on the rights or liberty of the relevant alien.

[40] If further executive action is to be taken the powers in s.11(2) or (3) must be exercised. In either event the person affected has a right of appeal to the Prime Minister under s.11(4), and prima facie this is his opportunity to be heard against action taken under s.11, and any earlier steps such as a declaration under s.8(2)(g) which supported that action.

[41] If the alien's appeal to the Prime Minister under s.11(4) is dismissed and the alien does not leave of his own accord an order for his removal may be made under s.23(1) which will attract a further right of appeal to the Prime Minister under s.23(2). If the order for his removal was made before an appeal under s.11 (4)

was either lodged or could be "heard" both appeals could be "heard" together.

[42] Prima facie an alien's only avenue for redress against a valid exercise of the powers conferred by the Immigration Act are his rights of appeal under s.11(4) and s.23(2), but they do not exclude judicial review for invalid exercises of those powers.

[43] Since the order for the appellant's removal must be set aside it is not necessary for the Court to deal with Mr Niu's arguments that the appellant was entitled to be informed in advance of the basis on which a declaration under s.8(2)(g) would be sought against him, and to be given a reasonable opportunity to answer that case.

[44] It is also unnecessary for the Court to deal with his further argument that the procedures leading up to the decision of the Prime Minister to dismiss the appellant's appeal under s.23(2) were unfair and denied the appellant natural justice. The Court did not hear full argument on these questions, and we were not referred to the decision of Martin CJ in *Haidas Kada v The Principal Immigration Officer* (no.67/88), available on the website of the Crown Law Office, who dismissed an action for judicial review of

the dismissal by the Prime Minister, without reasons, of the plaintiff's appeal from the decision of the Principal Immigration Officer refusing his application for a permit to remain in Tonga, a decision under an earlier version of the Act. In these circumstances we should not express what would necessarily be only tentative opinions on these questions.

[45] We propose however to express our views on two further arguments where in our judgment the law is clear. Mr Niu argued that the appellant was entitled to an oral hearing of his appeal to the Prime Minister under s.23(2), and that the Crown was not entitled to use the deportation power to return the appellant to the United States. On both these questions we agree with the Chief Justice.

[46] The decision in *Local Government Board v Arlidge* [1915] AC 120 stands as clear authority for the propositions that there is no general right to an oral hearing before an administrative decision maker, and that a hearing on the papers may be perfectly fair for legal purposes.

[47] It is also clear that a concurrent power to order the extradition of an alien does not prevent the Executive using its power of deportation to achieve the same practical result. The deportation power may be used to return a fugitive from justice to his own Country: *R v Governor of Brixton Prison ex-parte Soblen* [1963] 2 QB 248 CA. The powers are different although they may overlap. Citizens of Tonga cannot be deported but may be extradited. Aliens may be deported or extradited to their own country, or extradited to a foreign country.

[48] The following orders are made:

(1) Appeal allowed.

(2) Orders of the Supreme Court of 14 August 2014 set aside.

(3) In lieu thereof a declaration that the removal order of 5 May 2014 in respect of the appellant is null and void and without legal effect.

(4) The said removal order is quashed.

(5) The third respondent is to pay the appellant's costs of the appeal, and of the habeas corpus and judicial review proceedings in the Supreme Court.

(6) The appellant is unconditionally released from his bail.

(7) The proceedings are remitted to the Supreme Court for the hearing and determination of the appellant's claim for damages.

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Salmon J

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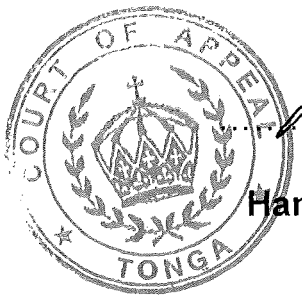
Handley J



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Hansen J

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Tupou J