

**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY**

CR 15 of 2018

BETWEEN:

REX

Applicant

-and-

VASEETH SAMSUDEEN

Respondent

**APPLICATION BY THE CROWN TO RESCIND SUSPENSION OF
SENTENCE PURSUANT TO S.24(3)(d) OF THE CRIMINAL OFFENCES ACT**

BEFORE: LORD CHIEF JUSTICE WHITTEN
COUNSEL: Mr T. 'Aho, Crown Law for the Prosecution
Mr V. Samsudeen in person

Date of hearing: 4 October 2019

PROVISIONAL RULING

1. On 17 April 2019, the respondent, Mr Samsudeen, was sentenced on his plea of guilty to two counts of knowingly dealing with a forged document contrary to section 172 of the *Criminal Offences Act*. The essence of the charges was that on 10 May 2018, he entered Tonga, and on 12 May 2018, attempted to board a flight from Tonga to New Zealand, on both occasions by presenting to customs officials a French passport knowing that it was a forgery.
2. Paulsen LCJ sentenced him to two years imprisonment, fully suspended, on conditions which included that he was to leave Tonga no later than two months from the date of sentencing, and that he could apply to the Court for an extension

rec'd 09/10/19
[Signature]

of time to remain for a limited period if there were exceptional difficulties in facilitating travel on written notice to the Crown (the “*departure condition*”).

3. Subsequent minutes of the then Lord Chief Justice dated 21 June 2019, 28 June 2019, 8 July 2019 and 19 July 2019 record that despite his various efforts, and extensions granted by the court, the respondent had not left the country and has therefore not complied with the departure condition. On the last occasion, his Honour noted that:

“The position has now clearly been reached whereby the Kingdom will need to take steps to remove Mr Samsudeen doing from Tonga or make application under s.24(3)(d) of the Criminal Offences Act (or both).”

4. On 20 September 2019, the Crown filed the current application pursuant to the said provision, for rescission of the suspended sentence. The orders sought by the Crown include:

“4. That at the conclusion of the Respondent’s sentence, the Principal Immigration Officer is to take whatever measures are necessary to remove the Respondent from Tonga, pursuant to his powers under sections 21-24 of the Immigration Act.”

Background

5. Mr Samsudeen told me much of the background to his current predicament. As previously noted, the genesis of his situation is that he claims to have suffered persecution and threats to his life in Sri Lanka, having witnessed a murder, and due to, from what he described, wide spread violence towards the Muslim community in his home city, including by authorities there. As a result, he has applied to the UNHCR for refugee status. His original intention before he was detained and the reason for him attempting to travel through Tonga, was to seek asylum in New Zealand.
6. Tonga is not a signatory to the UN *Convention Relating to the Status of Refugees*. Further, it is not the role of this Court to seek to assess or determine the accuracy of the respondent’s claims, nor it would be able to, based on the information available to date. I would add however, that having observed Mr Samsudeen

during his remarks and answers to the court, I was not left with any impression of doubt about the central elements of his account.

7. Mr Samsudeen said that around 15 July 2019, he was interviewed by a representative of the UNHCR. He showed me a business card bearing the UNHCR logos and the contact details of a 'Chanelle Taoi'. Ms Taoi is referred to in a letter on the court file dated 15 July 2019 from Louise Aubin, UNHCR Representative, to the Attorney General. In that letter, Ms Aubin stated, inter alia:

"As Mr Samsudeen is an asylum seeker, UNHCR would like to respectfully request that the Supreme Court proceedings be adjourned until an outcome of his refugee status determination is made. UNHCR expects to complete the assessment no later than 31 August 2019."

8. Mr 'Aho advised that, to the best of his knowledge, no further communication has been received from the UNHCR on this matter. It is not clear whether Mr Samsudeen has since had any further contact with Ms Taoi or anyone else from the UNHCR either.
9. Mr Samsudeen said that he has no money, here or overseas, having expended all his savings on his ill-fated trip from Sri Lanka to Hong Kong where he acquired a false passport, and then onto Tonga. Further, he cannot work here because he does not have an employment permit. In his current circumstances, it would appear unlikely that he would be issued one. He asked the court to issue a work permit for a year so that he could save the money required to purchase a ticket and leave voluntarily. Like my predecessor, I informed Mr Samsudeen that that was not possible.
10. To date therefore, Mr Samsudeen has been supported by members of the Tonga Muslim community. That support, together with funds from people he described as 'friends in Australia', included the purchase of a ticket for a flight to the Cook Islands on 27 July 2019, transiting through Auckland. However, Mr Samsudeen's application for a visa to enter New Zealand was declined. The ticket was therefore effectively wasted. He told me there was no refund after its cancellation and that his friends are unable to provide any further funds for another ticket.

11. In addition to previous letters of support from members of the Muslim community on the file, Mr Samsudeen handed up a further letter, dated 26 September 2019, from James Kaumavae, a priest of the Muslim league (“Tonga Convert Association”). Mr Kaumavae and his family have supported Mr Samsudeen since his original incarceration on remand. They funded his bail and he has been living with them since. Mr Kaumavae wrote highly of Mr Samsudeen, including how his talent as a cook had been applied in catering for various groups including within the Mormon and Muslim congregations. He also described the mental anguish Mr Samsudeen has been suffering due to his plight. Mr Kaumavae says that he will continue to support Mr Samsudeen despite his family’s limited resources.

12. Also in attendance at the hearing was Mr Palu of the Free Wesleyan Church crisis centre. Mr Palu addressed the court and informed me that Mr Samsudeen’s case had been referred to him by the UNHCR. He said that in his experience with the crisis centre, Mr Samsudeen’s case was unique. He too expressed concerns for Mr Samsudeen mental health and said that he was taking Mr Samsudeen to an appointment with a psychologist later that morning. He added that he is currently working on sourcing funds for an air ticket and investigating what countries in the region might issue a visa for Mr Samsudeen’s travel out. He specifically mentioned that over the next two weeks or so he will make enquiries of the immigration authorities in Australia. Like the former Chief Justice in relation to his views on Mr Samsudeen’s prospects of being granted a visa for New Zealand, I have grave doubts that he will be successful in a similar application to Australia. Mr Palu also mentioned the possibility of getting Mr Samsudeen on board a ship, perhaps working as a cook in order to depart Tonga. The visa issue would still need to be addressed.

Section 24(3)(d)

13. Section 24(3)(d) of the *Criminal Offences Act* provides:

The Court may also impose conditions during the period of suspension of sentence, including a requirement that supervision by a probation officer or another responsible member of the community takes place. A

breach of such conditions may, upon application, result in the rescission of the suspensions order. [emphasis added]

14. It is plain that Mr Samsudeen is in breach of the departure condition. It is equally plain that the section provides scope for discretion in the court's assessment of such an application in determining whether a particular breach warrants rescission of the suspension.
15. Like the example given in the first sentence of the section, compliance with all the conditions of his sentence, except the departure condition, are more or less within Mr Samsudeen's ability or control. As the above background illustrates, to comply with the departure condition, a person in Mr Samsudeen's position requires sufficient funds for passage, but more importantly, a visa from the destination country. In Mr Samsudeen's case, neither have been within his ability or control.
16. There is one exception to that. If he is able to obtain the funds for a ticket (something which after heard from Mr Palu, he may have some prospects of achieving in the short term), Mr Samsudeen could return to Sri Lanka, either in transit en route to another country, or otherwise. He was emphatic about not doing so because of his feared persecution referred to above. However, there is no question that he cannot remain in Tonga, and unless and until he can secure a visa to enter another country, Sri Lanka appears his only option.

Reservations

17. In those circumstances, I expressed to Mr 'Aho my deep reservations about acceding to the application, by what might be described as a 'black letter' approach, when the reasons for Mr Samsudeen's breach of the departure condition have not been entirely his choice, or within his ability or control. On the contrary, even though to date he has been unsuccessful, I am satisfied that, with the generous support of others, he has made and is continuing to make extensive efforts to comply with the condition.
18. My concerns about rescinding the suspension at this stage were not ameliorated by Mr 'Aho's instructions, consistent with order 4 of those sought, that if the

application is granted, the Government intends to deport Mr Samsudeen back to Sri Lanka, but only after he has completed his two-year prison term. During exchanges with counsel, it was agreed that that outcome could be regarded as double punishment. On reflection, that may not necessarily be a correct characterization.

19. Had the sentence not been suspended, Mr Samsudeen would have been required to serve the prison term, and thereafter, either leave Tonga voluntarily or the Government could consider whether to deport him under the *Immigration Act*.
20. Similarly, had the departure condition not been imposed, and assuming he did not breach any of the other conditions, Mr Samsudeen would have been at large in the community until he either left Tonga voluntarily, or the Government took steps to deport him under the same Act.

Immigration Act

21. Mr Samsudeen was sentenced for breach of the general provision in s.172 of the *Criminal Offences Act*. Sections 5(3)(c), 11(3), 20(2) and 33(e) and (f) of the *Immigration Act* specifically proscribe the conduct which led to his arrest. However, s.34 provides a lesser general penalty on conviction of imprisonment for a term not exceeding 2 years or a fine not exceeding \$100 or both.
22. Part VI provides for removal of unlawful immigrants from the Kingdom. Section 24(4) provides if a person in respect of whom a removal order is made under that Act has been sentenced to any term of imprisonment such sentence shall be served before the order is carried into effect unless Cabinet otherwise directs. It is not immediately clear whether that provision operates in respect of a sentence imposed for an offence under the *Immigration Act* or any. Also, I am not aware of whether any removal order has been made in respect of Mr Samsudeen as yet. Discussions with Mr 'Aho during the hearing did not extend to whether order 4 of those sought by the Crown is based on this provision, but it would appear it is or is at least informed by it.
23. I asked Mr 'Aho whether, if the suspension was rescinded and Mr Samsudeen commenced the prison term, it was open to the Government to commence

arrangements for his deportation immediately or within any specified period other than after the completion of the term, and if so, whether he had any instructions about the Government's position on that. He said he did not have those instructions but would make enquiries.

24. I also note in passing that s.31 provides that a person residing in the Kingdom may apply to the Prime Minister for repatriation at the cost of the Government where that person is:
- (a) not a citizen of the Kingdom;
 - (b) by reason of destitution, infirmity or mental incapacity, unable to obtain employment or to support himself;
 - (c) unable to pay the cost of his passage to the country of his birth or citizenship; and
 - (d) is or is likely to become a charge upon the public or on a charitable institution.
25. Mr Samsudeen would appear to be such a person.
26. As indicated during the hearing, having regard to all the circumstances outlined above, and the discretion conferred by s.24(3)(d), I am not presently satisfied that it is appropriate to treat Mr Samsudeen's failure or inability to date to comply with the departure condition as a breach warranting rescission of the suspension of his prison sentence. That dissatisfaction extends to doubts about whether the former Chief Justice intended breach of the departure condition should trigger the lifting of the suspension, in circumstances where compliance proves impossible or frustrated. However, as noted above, and as presently informed, it may well be possible for Mr Samsudeen to return to Sri Lanka.

DIRECTIONS

27. Accordingly, I make the following directions:
- (a) The further hearing of the application is adjourned to 1 November 2019 at 9AM.

- (b) By 30 October 2019:
- (i) Crown Law is to file a memorandum of instructions; alternatively, a letter from the relevant authority in relation to the Government's position on deportation of Mr Samsudeen or other removal or repatriation action under the *Immigration Act*, including the time frames for any such action;
 - (ii) Mr Samsudeen is to file a letter setting out all further information concerning any action, enquiries or other communications had in relation to his ability and arrangements to leave the Kingdom, including whether he has obtained funding for a ticket and/or a visa from a destination country (other than Sri Lanka), and when.
- (c) The Court also requests the Attorney General to make further enquiries with the UNHCR in relation to Mr Samsudeen's case and report as to the outcome of those enquiries by memorandum filed by 30 October 2019.

NUKU'ALOFA
4 October 2019



A handwritten signature in black ink, appearing to read "M.H. Whitten", is written over a horizontal line.

M.H. Whitten QC
LORD CHIEF JUSTICE