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

CR 15 of 2018

BETWEEN:

REX

Applicant

-and-

VASEETH SAMSUDEEN

Respondent

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

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**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 and 1 November 2019

## RULING

### Introduction

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

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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.”*

5. On 4 October 2019, I heard submissions from Mr ‘Aho and Mr Samsudeen told me much of the background to his current predicament.
6. 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]*

7. 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.

## Provisional Ruling

8. At the conclusion of that hearing, I indicated that I was not then prepared to accede to the application. My reasons were set out in my Provisional Ruling later that day. In summary, I expressed reservations about treating Mr Samsudeen's failure to comply with the departure condition as a basis for rescinding the suspension of, and activating, his prison term, in circumstances where:
  - (a) he and those supporting him had made significant efforts, albeit unsuccessful to date, to arrange his departure from the Kingdom;
  - (b) the main reason for his failure at that time was his inability to secure a visa from a destination country, either transiting or final; and
  - (c) therefore, compliance with the condition, unlike the others imposed, was not wholly within his power or control.
9. It was observed, however, that Mr Samsudeen did have the ability, subject to funding for a ticket, to return to Sri Lanka, but that he had not been prepared to do so due to his claimed fear of harm there.
10. In his sentencing remarks, Paulsen LCJ referred [6] to wanting confirmation of that Mr Samsudeen was "eligible to legally enter any destination he proposes to travel to upon leaving Tonga". It is not apparent from the balance of the remarks or any subsequent minute of mention that that confirmation was ever forthcoming.
11. His Honour's decision to impose the departure condition was also informed [11] by the comparable decision in *R v Shinkashvili & ors* (CR 118-124/16). There, Cato J imposed suspended sentences on seven Georgian nationals on conditions which included a departure condition (albeit within 14 days) and did so upon the assurance of the defendants that they intended to leave as soon as their return flights had been obtained and for which they could pay. As it turned out, those defendants did leave the Kingdom, within the time stipulated and without further issue. Mr Samsudeen's case has turned out to be quite different.
12. Another concern was that the orders sought by the Prosecution required Mr Samsudeen to serve the full two year term, at the end of which, the Government

would seek to deport him. That directed attention to the *Immigration Act* and whether the Government could deport or repatriate Mr Samsudeen earlier. Mr 'Aho did not then have any instructions about those matters.

13. Further, those supporting Mr Samsudeen were still exploring further funding for another air fare to a different destination and applying for a visa to other countries including Australia.
14. In those circumstances, I adjourned the further hearing of the application to today and requested:
  - (a) the Prosecution to obtain, and file a memorandum of, instructions 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;
  - (b) Mr Samsudeen 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 for a ticket and/or a visa from a destination country (other than Sri Lanka); and
  - (c) the Attorney General to make further enquiries of the UNHCR in relation to Mr Samsudeen's case for asylum.

#### **Further information**

15. The results of those further enquiries, as reported to the Court over the past few days, include:
  - (a) the Government wants Mr Samsudeen removed from the Kingdom;
  - (b) the Immigration Division of the Ministry of Foreign Affairs has the means to repatriate him to Sri Lanka;
  - (c) the arrangements for the necessary logistics are expected to take about one month;

- (d) in the meantime, Mr Samsudeen reported that he had been working on obtaining a permit to travel to American Samoa, but that he would require a sponsor there and supporting documents could take up to 7 working days to process. A 'Mohammed Rasak' is apparently prepared to pay for his ticket. He told me that, on his Sri Lankan passport, he did not require a visa to enter American Samoa. The balance of his report to the Court was a further attempt to remain and continue to work here in order to, he said, fund his own ticket. As previously indicated, the Court does not have the power, nor if it did, would it be minded in this case, to make any order which could result in Mr Samsudeen remaining in Tonga on an employment permit; and
- (e) the UNHCR conducted a refugee status determination assessment in respect of Mr Samsudeen's claim for asylum to determine whether he is entitled to protection in accordance with the 1951 *Convention relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees*. After careful consideration, they found that he does not satisfy the definition of a refugee in accordance with the Convention.

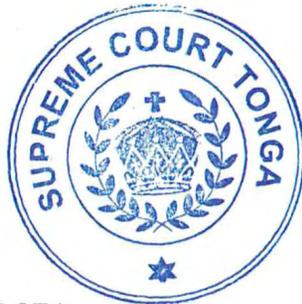
### **Decision on the application**

16. With that further information, and upon a review of my Provisional Ruling, I formed the view that the appropriate course on this application is to:
- (a) decline to exercise my discretion under s.24(3)(d) of the *Criminal Offences Act* to rescind the suspension or activate the prison term; but
- (b) refer the matter to the Principal Immigration Officer to take whatever measures are necessary to remove Mr Samsudeen from Tonga, pursuant to his powers under the *Immigration Act*.
17. The effect of that is to avoid the operation of s.24(4) of the *Immigration Act* which could have meant that Mr Samsudeen had to serve his two-year sentence before then being deported by the Government. It is also aimed at curing the principal problem which is to remove Mr Samsudeen from the Kingdom as quickly as possible.

18. In the face of his objective failure to comply with the departure condition, the point has now come where the Court's ability and willingness to continue to afford Mr Samsudeen any further extensions or other indulgences to permit him to leave the country voluntarily, have been exhausted.
19. The choice is now his: he either continues, without delay, with his proposal to travel to American Samoa and before the government immigration authorities are ready to repatriate him within the next month; or, he will be returned to Sri Lanka.

### ORDERS

20. Accordingly, I make the following orders:
- (a) The application dated 20 September 2019 by the Attorney General pursuant to s.24(3)(d) of the *Criminal Offences Act* is refused.
  - (b) The matter of Mr Samsudeen's removal from the Kingdom is referred to the Principal Immigration Officer to take whatever measures are necessary to remove Mr Samsudeen from Tonga, pursuant to his powers under the *Immigration Act*.
  - (c) By 6 December 2019, if Mr Samsudeen has not voluntarily left Tonga by then, the Attorney General's Office is to file a memorandum reporting on the progress or outcome of the repatriation/deportment process.



NUKU'ALOFA  
1 November 2019

A handwritten signature in blue ink, appearing to read "M.H. Whitten".

M.H. Whitten QC  
LORD CHIEF JUSTICE