

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-008312

UNDER s 8 Judicature Amendment Act 1972
IN THE MATTER OF a decision to issue a removal order served
on 10 December 2008
BETWEEN MALEK ZAYR
Plaintiff
AND CHIEF EXECUTIVE, DEPARTMENT OF
LABOUR
Defendant

Hearing: 19 December 2008

Appearances: Simon Laurent for Plaintiff
Mark Woolford for Defendant

Judgment: 19 December 2008

JUDGMENT OF HARRISON J

SOLICITORS

Laurent Law (Auckland) for Plaintiff
Meredith Connell (Auckland) for Defendant

Introduction

[1] Mr Malek Zayr filed an application in this Court yesterday for interim orders restraining Immigration New Zealand from executing a removal order at 2.15 pm tomorrow, 20 December 2008, pursuant to s 54 Immigration Act 1987.

[2] The circumstances demand an urgent judgment. I have heard succinct argument from Mr Simon Laurent for Mr Zayr and Mr Mark Woolford for Immigration New Zealand supplemented by written synopses. I have formed a view on the application and it is essential that I communicate it immediately.

Background

[3] Mr Zayr is a Syrian national. He is aged 47 years. He arrived in New Zealand in August 2004 on a limited purpose visa issued by the Dubai office of NZIS. NZIS alleges that the visa was obtained fraudulently. In any event, during the currency of his limited purpose permit Mr Zayr applied for refugee status. His application was declined by the Refugee Status Branch of NZIS on 28 April 2005. At that time the RSB was aware that Mr Zayr had earlier applied for but had been refused refugee status in Australia in 2001.

[4] Mr Zayr appealed to the Refugee Status Appeals Authority. His appeal was filed on 3 May 2005 and dismissed in a reasoned decision delivered on 28 July 2006. It is relevant to note that the RSAA rejected categorically Mr Zayr's explanation of the circumstances giving rise to his claim that he was at risk if he returned to Syria. It found his story implausible and did not accept Mr Zayr's credibility. The Authority was satisfied there was no real chance that he would be persecuted upon his return to Syria.

[5] Mr Zayr did not, however, give up. He appealed to the Removal Review Authority following revocation of his work permit with effect from 31 August 2006. That appeal was dismissed on 24 May 2007. Ms Irene Atia, an immigration officer employed by Immigration New Zealand, has deposed to Mr Zayr's failure to regularise his status or to depart New Zealand voluntarily following the RRA

decision. She located him working illegally in a butcher shop in Sandringham on 10 December 2008. She served a removal order on him. At her request, accompanying police officers took Mr Zayr into custody pending removal. Nevertheless, Ms Atia did not make a final decision to proceed with Mr Zayr's removal until completion of a humanitarian questionnaire on 12 December.

[6] Ms Atia deposes to her preference that Mr Zayr effect his departure from New Zealand without the need for police escorts. She envisaged transporting him to the airport in custody before placing him on a plane with his passport and ticket to Damascus, Syria. Ms Atia was able to speak to Mr Zayr in Arabic. She offered Mr Zayr this option. He responded emphatically of his intention to cause problems if placed on a plane bound for Damascus. He communicated this intention in aggressive and emotional terms while in the cells at Auckland District Court. He confirmed that he would cause security problems on the plane.

[7] Immigration New Zealand then arranged to remove Mr Zayr with police escorts. This process took time. It has now booked him to depart Auckland International Airport tomorrow by Malaysia Airlines. He will be accompanied by three New Zealand police officers. They will travel with him as far as Dubai. The intention is that he will then be placed on an Emirates Airways flight to Damascus. On that leg of the journey he will be accompanied by airline security personnel.

[8] Significantly Ms Atia, who swore her affidavit yesterday, deposes that the offer of a supervised departure remains open subject to approval by the police and by Malaysia Airlines. Understandably Immigration New Zealand does not wish to incur the expense of three police escorts. But Mr Laurent confirms this morning Mr Zayr's continuing rejection of Immigration New Zealand's offer.

Statutory Provisions

[9] I am indebted to Mr Woolford for providing at short notice a concise summary of the relevant statutory scheme. In essence a non New Zealand citizen who remains in New Zealand without having a permit faces these statutory consequences: (1) he is deemed to be in New Zealand unlawfully: s 4(2); (2) he has

no right to apply for any further permit, which may only be granted in the exercise of the Minister's special discretion: ss 35A and 130; (3) he is under a statutory obligation to leave whether or not he is aware of the obligation or its implications: s 45; and (4) he is encouraged to depart voluntarily from New Zealand or face the alternative of a coercive removal procedure and a five year ban from returning to New Zealand. I add what is undisputed. Mr Zayr has emphatically refused Immigration New Zealand's offer of the opportunity to depart voluntarily. He must live with the statutory consequences given the common ground that he is presently in New Zealand unlawfully.

[10] It is relevant also to note that Mr Zayr had carefully prescribed rights of review and challenge to the RSB's original decision. He exercised those rights and the process inevitably generated a delay of some three years after his arrival before a final decision was made. However, from 24 May 2007 his unlawful status was beyond challenge. He failed to comply with his legal obligations and depart New Zealand voluntarily. Instead he remained illegally for 18 months until his arrest.

[11] Mr Laurent challenges the validity of Immigration New Zealand's decision to remove Mr Zayr forcibly and under escort. He submits that Mr Zayr has a prima facie or arguable case of unlawfulness such as to justify an interim order pending determination of his substantive challenge. Mr Laurent's submission is that there is a real contest between the parties and that it is necessary to preserve Mr Zayr's position pending the result of a substantive application for review by granting interim relief. Otherwise, he submits, a final determination in Mr Zayr's favour would be rendered nugatory.

[12] The threshold question is whether or not there is a real contest between the parties as Mr Laurent submits. He has focused his argument commendably to a narrow point. He identifies the flawed aspect of the decision as Immigration New Zealand's direction that Mr Zayr be removed forcibly. Mr Laurent submits that Immigration New Zealand had the option to serve the removal order and monitor Mr Zayr's voluntarily departure to Syria without taking him into custody; that Mr Zayr could have left New Zealand voluntarily and returned to Syria without

attracting particular attention from the domestic authorities; but that by invoking the mandatory mechanism Immigration New Zealand removed this option, exposing Mr Zayr to much greater risk than he would otherwise have faced. This is because the attention of the Syrian authorities will inevitably be drawn to the nature of Mr Zayr's arrival either under the escort of New Zealand police officers or in the custody of the captain of the aircraft.

[13] I agree with Mr Woolford that this argument is not seriously tenable. Section 59 provides as follows:

- (1) Any member of the Police may arrest without warrant a person on whom a removal order has been served and detain that person in accordance with this section.
- (2) The purpose of arrest and detention under this section is to execute the removal order by placing the person on a craft that is leaving New Zealand.

...

[14] Mr Laurent accepts the empowering nature of this provision. It authorises a police officer (under the direction of Immigration New Zealand) to arrest a person such as Mr Zayr without warrant and then detain him. The nature of this power is unconditional, providing of course it is exercised for the purpose of executing the removal order by placing the person on an aircraft leaving New Zealand. I am not satisfied that the police officer or Immigration New Zealand is under any additional obligation to provide Mr Zayr with an election at that juncture on whether or not to leave voluntarily or by force.

[15] However, even if I was wrong in that provisional conclusion, I am in no doubt whatsoever that any error is of a purely technical or academic effect. Ms Atia's uncontested evidence is that on 12 December and thereafter continually through to 18 December she offered Mr Zayr the opportunity to leave New Zealand voluntarily. He has rejected that offer. Mr Laurent submits that he is unable to consider it rationally given the circumstances of his custody. I do not, however, accept that proposition. The option is undeniably open and he has had the benefit of Mr Laurent's advice throughout. It matters not whether the environment is in a police cell or elsewhere; the character of the right of election remains unchanged.

[16] Mr Zayr holds the key to his treatment following return to Syria. He can still if he chooses travel voluntarily on connecting flights to Dubai and Damascus. He can if he wishes, upon giving an appropriate undertaking, remain under the custody of the captain of the aircraft. If he takes that step he will not physically return to Syria under the overt supervision of a third party.

[17] In making that observation I do not necessarily accept the submission that he will somehow be exposed to a risk even if under supervision. As noted, the New Zealand authorities were satisfied he was not at danger of persecution if he returned to Syria. In my judgment that situation will not change even if Mr Zayr is accompanied by a supervisor. And I repeat that the power to rectify what he regards as a situation of risk lies in his hands alone. Mr Zayr cannot set up his own refusal to leave voluntarily, even though he is here unlawfully and Immigration New Zealand is authorised to order his removal, to invoke a discretionary remedy.

[18] Mr Zayr's application for an order for interim relief is dismissed with the consequence that Immigration New Zealand's decision to deport him remains valid and in full force and effect. I wish to record my appreciation for the skilled assistance given today at short notice by both Mr Laurent and Mr Woolford. There will be no order for costs.

Rhys Harrison J