IN THE COURT OF APPEAL OF NEW ZEALAND

CA48/2009
[2009] NZCA 50

BETWEEN	MAHINDER SINGH First Appellant
AND	ADELAIDE ATAPETA TIOPIRA Second Appellant
AND	CYDNEY MICHELLE KAUR Third Appellant
AND	KULWINDER SANTOS ILIJAH SINGH Fourth Appellant
AND	QTANA SHARMA Fifth Appellant
AND	MINISTER OF IMMIGRATION First Respondent
AND	THE ATTORNEY GENERAL Second Respondent

Hearing: 17 February 2009

Court: William Young P, Hammond and Robertson JJ

Counsel: F C Deliu and R Zhao via video link for Appellants
I C Carter and M R L Silverwood for First Respondent

Judgment: 3 March 2009 at 3.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by William Young P)

Introduction

[1] Before us is what is expressed to be an application for leave to appeal against a judgment of Heath J delivered on 17 December 2008 in which he dismissed an application for interim relief to restrain the removal of the first appellant, Mr Mahinder Singh, from New Zealand, pending determination of judicial review proceedings. The appellants have also filed an associated application to this Court for interim relief pending the hearing of the appeal.

[2] There is no leave requirement in relation to the judgment of Heath J and we propose to treat the case as an appeal against his judgment.

[3] The case involves the now very familiar situation of an overstayer relying on New Zealand born children in judicial review proceedings which seek to prevent removal under the Immigration Act 1987: see *Ye v Minister of Immigration* [2008] NZCA 291 and *Huang v Minister of Immigration* [2008] NZCA 377. We note that the debate generated by that litigation will continue because the Supreme Court has granted leave to appeal against both judgments. In those cases, as in this case, the primary focus was on what is known as the humanitarian interview. In *Ye*, three conflicting approaches to the scope of judicial review in this context were adopted, none of which commanded majority support. In *Huang*, a unanimous position on the role of the interview and the limits of judicial review was established but this of course is subject to change given the grants of leave to appeal in the two cases.

Background

[4] The nature and timing of Mr Singh's interactions with the Immigration Service are firmly established but beyond that the factual background is murky to say the least.

[5] Mr Singh is an Indian national who arrived in New Zealand in November 1995 on a visitor's permit. He sought but failed to obtain refugee status. The Refugee Status Appeals Authority concluded that his narrative of events was not credible. His visitor's permit expired on 23 August 1997. Mr Singh did not, however, comply with his obligation to leave New Zealand. In 1998 he married the second appellant, Adelaide Tiopira, a New Zealand citizen. She has three children, Cydney, Kulwinder and Qtana, who are all New Zealand citizens and were born on 17 January 1999, 7 November 2000 and 9 November 2002 respectively**.** Her children are also parties to this appeal. Mr Singh claimed in his affidavit to be the father of all three children. This does not appear to be true. On the material before us, it seems that he is the father of Cydney. His claim to be the father of Kulwinder has been denied by Ms Tiopira (although he is named as Kulwinder's father on his birth certificate). It is reasonably clear that he is not the father of Qtana.

[6] In May 1998, before Cydney's birth, the appellant was served with a removal order. He appealed to the Removal Review Authority and his appeal was allowed to the limited extent that the default period for which the removal order would otherwise have remained in force was reduced from 5 years to 18 months.

[7] Mr Singh did not leave New Zealand and was able to regularise his position under a special direction granted by the Minister of Immigration on 30 March 2001. Under this direction he was issued with a work permit for six months and the removal order was cancelled. He was given the opportunity to apply for residence under the policies then in force.

[8] Such an application was duly made but was not accepted as not all the required documentation was provided. Mr Singh's work permit was extended, from time to time, until 30 April 2003, but no application for permanent residence was re-lodged. From May 2003 Mr Singh therefore resided in New Zealand unlawfully. It may be that he did not pursue his application for permanent residence because he and Ms Tiopira separated, probably in 2001 or 2002.

[9] In what appears to have been 2001, Ms Tiopira entered into a de facto relationship with another man, Rakesh Gondlyala, who was also an Indian national.

In support of this man's application for permanent residence, she wrote to the Immigration Service in 2004 referring to Mr Singh as "a real wolf in sheep's clothing", "a chronic alcoholic" and "mentally and physically abusive". Mr Gondlyala's application for permanent residence was successful but he subsequently left New Zealand.

[10] Immigration officers located Mr Singh at 8 pm on 4 November 2008 in Whakatane. He was served with a removal order under s 54 of the Immigration Act and detained in custody. That night an immigration officer, Mr Finn, conducted a humanitarian interview. At the conclusion of this process Mr Finn decided to defer a decision on whether to remove Mr Singh until he could interview Ms Tiopira. She was interviewed on 18 November 2008 and again on 27 November 2008.

[11] The upshot was that Mr Fellows, another immigration officer, confirmed the removal order on 3 December 2008.

[12] Mr Singh has remained in custody, under s 60 of the Immigration Act, since he was served with the removal order on 4 November 2008.

Credibility issues

[13] As we have noted, Mr Singh's narrative in support of his refugee status application was rejected as not being credible. In the course of the proceedings before the Removal Review Authority Mr Singh produced a forged medical certificate in support of his case. According to what Ms Tiopara told an immigration officer at her second interview, Mr Singh on one occasion went to an Immigration Office with another woman who impersonated Ms Tiopara and passed her child off as Ms Tiopara's. Mr Singh's very short affidavit in support of his application for interim relief appears to be misleading as to the children (as it states that "three children were born from [their] marriage") and incorrectly asserted that there had not been a humanitarian interview when plainly there had been. He also claimed not to speak or understand "any English". We will revert to this point shortly. In the statement attached to his affidavit he made assertions as to the extent of his

association with his children and his support of them which appear to be exaggerated, to say the least.

[14] Mr Singh's affidavit bears a notation indicating that it was translated to him by Baljinder Singh who, on the face of the affidavit, claims to be Mr Singh's brother. Baljinder Singh has been elsewhere described as Mr Singh's cousin although according to Ms Tiopira, he and Mr Singh are not related.

[15] Ms Tiopira's affidavit is expressed in terms which contrast starkly with what she told the immigration officer. In the affidavit she asserts that she and Mr Singh had "3 biological children together" whereas she told the immigration officer that Mr Singh is the father only of her oldest child. She asserted that Mr Singh has always been "a very kind and loving husband and partner and a great father", a statement which is flatly contradicted by the letters she wrote and what she told the immigration officer in November last year. There are other assertions in her affidavit about the attitude of her friends and relatives to Mr Singh and the background to a proposed reconciliation which do not sit easily with what she has said on other occasions.

[16] In an affidavit sworn on 18 November 2008, Ms Leila Orazbekova, a clerk employed by counsel for Mr Singh, said:

> [Mr Singh] does not understand even an elementary word in English. He could not understand basic words.

As we have noted, Mr Singh has asserted, that he does not speak "any English". We accept that he gave his evidence to the Refugees Status Appeal Authority (over 11 years ago) through an interpreter. But we do not accept that he has a complete lack of any English. He has lived in New Zealand for over 13 years. He has married and had at least one child. He has worked. He is recorded as telling the immigration officer at his humanitarian interview that he did not require an interpreter. The officer (who presumably does not speak Punjabi) collected and recorded coherent answers from Mr Singh, suggesting that Mr Singh has at least a reasonably functional grasp of English.

The basis upon which Mr Singh seeks to challenge his proposed removal

Overview

[17] As seems to be unfortunately common in cases of this sort, the basis of the claim is not well pleaded or supported by affidavits. The only concrete complaint made by Mr Singh in his affidavit is that there had not been a humanitarian interview, a complaint that is obviously unfounded. The more general background evidence that has been put forward is, on our appreciation, also distinctly unsatisfactory and unreliable.

[18] Doing the best we can with what we have, and ignoring arguments which are completely untenable, Mr Singh's case primarily rests on the following arguments:

(a) The statutory discretions associated with the proposed removal have miscarried because the interests of Mr Singh's children have not been addressed in a way which is consistent with New Zealand's obligations under the United Nations Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 ("the general argument"); and

(b) The particular procedures adopted by the Immigration Service breached Mr Singh's rights under the New Zealand Bill of Rights Act 1990, particularly because at the humanitarian interview no interpreter was present and he was not provided with legal assistance ("the particular arguments").

Some assessment of the merits of these contentions is required.

The general argument

[19] It will be noted that this argument very much involves a challenge to the substance of the decision made by the immigration officer. How rigorous the courts should be in this context is open to debate, as illustrated by the significant differences in the approaches favoured by the judges who sat in the *Ye* and *Huang*

appeals. In the High Court, Heath J was bound by *Huang*, which established that intensity of review in this area will be light: *Huang* at [62] – [67]. Given that the Supreme Court has granted leave to appeal in both cases, there is no point in us again going over what is now well-trod ground.

[20] There are some aspects of the present case which we see as particularly material in the present context:

(a) Mr Singh's case has been well and truly addressed by the Removal Review Authority, the Minister of Immigration and the Immigration Service. While the decision of the Removal Review Authority and the subsequent ministerial direction were some time ago, the changes in circumstances since then do not favour Mr Singh. At the time of the Removal Review Authority hearing he was living with Ms Tiopira and she was pregnant with Cydney. He subsequently separated from Ms Tiopira. It seems likely that he is not the father of Ms Tiopira's other children, although he does appear to have been, at least briefly, a father-figure for Kulwinder. On the assessment of the immigration officers – an assessment which we regard as plausible – a period of six years passed (between approximately 2002 and early 2008) with no contact between Mr Singh and the children.

(b) The interests of Mr Singh's children (or child) are a primary consideration but not necessarily predominant. Those interests had previously been addressed by the Removal Review Authority in relation to Cydney (at a time when she was *en ventre sa mère*) and her interests and those of Kulwinder were later addressed by the Minister. The upshot of the statutory processes was that, after allowance had been made for those interests, Mr Singh's entitlement to remain in New Zealand lapsed in April 2003.

(c) Unless the humanitarian interview process completely trumps the formal statutory processes under the Immigration Act (and we do not believe that it does: see *Huang* at [52] – [53]), the task of the

immigration officers was comparatively limited. Nothing had relevantly changed in favour of Mr Singh since his case was formally addressed under the Immigration Act and, in light of this, it is difficult to see what legitimate reason there could be for not proceeding with the removal.

(d) Mr Singh does not qualify for residence under current policies.

(e) Mr Singh's relationship with the children of Ms Tiopira has been attenuated to say the least. Although Mr Singh and Ms Tiopara now both claim in their affidavits that they hope to live together again in the future, we doubt the veracity of these statements given the surrounding evidence. If such a limited relationship precludes Mr Singh's removal, it might be thought that New Zealand's immigration policies will be unenforceable in relation to any male overstayer who takes the precaution of having a child by a New Zealand woman and maintains an exiguous relationship with that child.

[21] Against that background, and recognising that we cannot anticipate with confidence the outcome of the *Ye* and *Huang* cases in the Supreme Court, we consider that Mr Singh has no substantial prospect of successfully arguing that his proposed removal involves the unreasonable exercise of the relevant statutory discretions.

The particular arguments

[22] The more particular complaints raised by counsel are not mentioned, or at least not developed in an acceptable way, in the affidavits. For instance, the assertions as to Mr Singh's complete inability to understand "any" English, including "basic" and "elementary" words are simply not credible, as we discussed above at [16]. Issues as to whether he was given appropriate bill of rights advice when he was first detained and whether he was afforded an opportunity to have a

lawyer or an agent present at the humanitarian interview were not raised in the affidavits at all.

[23] That said, we could not fairly conclude that the processes followed by the immigration officers would necessarily be upheld at trial. While we consider that there has been serious exaggeration as to Mr Singh's inability to speak English, it may be that he was not particularly well equipped to give a good account of himself when interviewed. The information he provided at interview does have a rather sketchy look to it at places. The interview notes record that he was asked if he had an agent (and replied "no") but conceivably more explanation as to what this question meant was required. The immigration officers concerned did not go back to Mr Singh after receiving and considering information supplied by Ms Tiopira which was adverse to him, an approach which might be thought not to have been consistent with the rules of natural justice (assuming that they apply in unattenuated form to the process). All of this falls to be considered in a context of uncertainty as to what is required of immigration officers pending determination of the *Ye* and *Huang* cases in the Supreme Court.

[24] All in all, we are prepared to assume that Mr Singh has an arguable basis for challenging aspects of the process followed by the immigration officers. So we accept that if the case goes to trial, there is a possibility that the Court may require the humanitarian interview process to be gone through again. It is right to say, however, that we think that any such success would be temporary because we cannot see how Mr Singh can realistically expect to be permitted to remain in New Zealand.

The legal test

[25] The application is made under s 8(1) of the Judicature Amendment Act 1972 which permits the making of an interim order of the kind proposed and relevantly provides:

> **8 Interim orders**
>
> (1) …, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order …

[26] The leading case is *Carlton and United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA), which established that there is no requirement to address such an application exactly as if it were for an interim injunction: at 430. That said, obviously the strength of an applicant's case will be a material consideration, as this Court recognised in that case. We note that in *Esekielu v Attorney-General* (1993) 6 PRNZ 309 at 313 (HC) (a case decided in an immigration context), Hammond J took the view that s 8 required "a real contest between the parties" and a showing "that the applicant has a respectable chance of succeeding in that contest".

The discretion in this case

[27] We have accepted that Mr Singh may be able to challenge the particular processes carried out by the immigration officers associated with his proposed removal. We do not, however, see this as a controlling consideration when determining whether to grant interim relief. This is because we consider that the "position" of Mr Singh which is said to warrant preservation under s 8 of the Judicature Amendment Act requires a broader assessment. We also think it necessary to address what we see as some adverse consequences of preventing removal.

[28] Given the credibility issues we have discussed above at it is difficult to determine Mr Singh's true "position". What we do know for certain is that Mr Singh is an overstayer who is under a legal obligation to leave New Zealand. The making of an interim order would obviously facilitate his continuing breach of his legal obligations. This is in a context in which we see no realistic and substantial prospect of Mr Singh legitimately achieving the right to remain in New Zealand. This is not a particularly meritorious "position".

[29] In the course of his submissions Mr Deliu earnestly maintained that Mr Singh would remain in detention if a stay were granted. We have reservations about whether that is correct. We suspect that Mr Singh might not be as phlegmatic as Mr Deliu about this postulated continuing detention. Assuming, however, that Mr Deliu is right, the position to be preserved would involve further substantial

detention, a consideration which might be thought to detract from the appropriateness of maintaining the status quo.

[30] In fact, however, we think that Mr Deliu is wrong as to the likely consequences of us allowing the appeal. If this happened, we think that the hearing of the substantive proceedings would be held over pending the outcome of the *Ye* and *Huang* appeals and that Mr Singh would probably have to be released under s 60(7). This provides that no person may be detained under warrants of commitment for a consecutive period of more than three months, unless the person is a person to whom subs (6) applies. Subsection (6) relevantly relates to individuals who cannot be removed from New Zealand by reason of their own actions. It is plainly open to argument that this subsection would not apply to Mr Singh if his removal was prevented by court order. If he were released, there is no reason to suppose that he would be any more compliant in relation to his dealings with the Immigration Service than he has been to date. So there would be a risk of flight and the associated possibility of further attempts by him to create family connections in New Zealand. We see these possibilities as being contra-indications to the grant of a stay.

[31] There are also broader policy considerations. It is clear from its preamble that the Immigration Amendment Act 1999 (which introduced the current removal process) had the purpose of ensuring that those who do not comply with immigration procedures and rules are not advantaged in comparison with those who do. To restrain Mr Singh's removal would not, in the context of this case, be consistent with the fulfilment of that purpose, not just in relation to Mr Singh but more generally. As already indicated, allowing the appeal would signal to the Immigration Service that it cannot enforce current immigration policies as to the removal of overstayers in the position of Mr Singh pending determination of the *Ye* and *Huang* cases (despite Mr Singh not being in the same situation as those appellants as he is not the caregiver of any of the children). This would be demoralising for the Immigration Service (in terms of enforcement) and would serve to encourage others in the position of Mr Singh not to comply with their legal obligations.

Disposition

[32] Consistently with our balancing of what we see as the relevant considerations, the appeal is dismissed. We note for the sake of completeness that the associated application for interim relief made to this Court is redundant.

Solicitors:
Equity Law, Auckland for Appellants
Crown Law Office, Wellington for First Respondent