**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA83/2010**
**[2010] NZCA 199**

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| AND BETWEEN | AISHA SHEIKH OSMAN<br>Appellant |
| AND | THE QUEEN<br>Respondent |

**CA84/2010**

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| AND BETWEEN | FEISAL SHEIKH OSMAN<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 12 May 2010 |
| Court: | Hammond, Harrison and Fogarty JJ |
| Counsel: | M J Hay and N R Woods for Appellants<br>D R La Hood and P D McCarthy for Respondent |
| Judgment: | 14 May 2010 |
| Reasons: | 19 May 2010 at 10 am |

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**JUDGMENT OF THE COURT**

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**A Appeals allowed.**

**B Sentences of imprisonment set aside.**

**C We substitute instead sentences of:**

**(a) In the case of Feisal Sheikh Osman three months' home detention, commencing from the date of his release from prison.**

**(b) In the case of Aisha Sheikh Osman two months' home detention from the date of her release from prison.**

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**REASONS OF THE COURT**

(Given by Fogarty J)

## Introduction

[1] Feisal and Aisha Osman (husband and wife) appeal against sentences of 14 and 12 months' imprisonment respectively, imposed by Judge Harrop in the Wellington District Court on 26 January 2010. Each had pleaded guilty to three counts of producing and supplying immigration documents, either knowing them to have been obtained fraudulently, or knowing them to be false in a material respect, in breach of s 142 of the Immigration Act 1987.

[2] The appeals are that, first the terms of imprisonment were excessive, and, secondly, a sentence of home detention should have been imposed.

[3] On 14 May 2010 we gave a short result judgment (as indicated in the judgment box above). We said we would give our reasons later. These are those reasons.

**Imprisonment**

[4] Putting the question of home detention to one side, there is no merit in the argument that the sentences of imprisonment were manifestly excessive.

[5] Mr and Mrs Osman are brother-in-law and sister-in-law respectively. Mrs Farduce Mohammed was in New Zealand with her husband, Mr Jamah. They had applied for residence on the basis of refugee status. The effect of that generally is that once it is granted the appellants can include their family members who are not in New Zealand in that application, so the whole family is eligible for New Zealand residence. Mrs Osman filed false documents purporting to be Mrs Mohammed's adopted daughter.

[6] There were other persons involved in a concerted effort to bring relatives of Mrs Farduce Mohammed and her husband, Mr Jamah, to New Zealand. Mr Jamah and his wife, Mrs Mohammed, were sentenced by Judge Tompkins on 26 March 2008. Treating Mrs Mohammed as the lead offender Judge Tompkins took a starting point of 24 months and deducted ten months to take into account various mitigating factors, leading to a concurrent term of 14 months. Home detention was refused to Mrs Mohammed:

> Given the seriousness of her offending, the deliberateness with which it occurred, and the length of time over which it expanded together with the fact that three other persons were, by her actions, unlawfully brought into New Zealand … .

[7] In respect of Mr Jamah Judge Tompkins took a lesser starting point of 14 months from which he deducted six months for mitigating factors leading to an end result of eight months' imprisonment. He granted Mr Jamah home detention, principally to take into account the needs of both defendants' young children.

[8] Judge Harrop sentenced Mr and Mrs Osman, taking into account the sentencing of Judge Tompkins. He regarded the lead offender to be Mrs Farduce Mohammed. Noting her starting point of 24 months he took a starting point for Mr Osman of 21 months and a starting point of 18 months for Mrs Osman. He made a distinction between husband and wife on the basis that the husband was more fully

involved. The end sentence for Mr Feisal Osman was 14 months and for Mrs Aisha Osman, 12 months. It can be seen immediately that this entailed substantial discounts from the starting points. The Judge did this by providing for a 25 per cent discount for the guilty pleas and a further discount for other personal mitigating circumstances.

[9] Mr Woods submitted that the suggested starting points were unreasonably severe. There was no argument against the discounting. Mr Woods sought respective starting points of 15 months and 12 months as against 21 and 18. An appeal Court will only interfere with a sentencing Judge's selection of starting points if there is an error of principle and analysis or the starting point or end point is manifestly excessive. There are no tariff decisions which come to bear.

[10] Judge Harrop could have adopted lower starting points than he did, and still apply a relativity principle to Mrs Mohammed. The starting points reflected a judgment of the degree of relative culpability, which in turn was measured in the context of the seriousness of the offences.

[11] Mr Woods' arguments for lower starting points were essentially arguments for mitigation taking into account the plight of Mr and Mrs Osman living in a refugee camp in Kenya. We were informed by Mr La Hood for the Crown and Mr Woods (most helpfully) of the activity of Mr Osman particularly in obtaining documents, which were false, in Kenya to support the applications as well as completing documents prepared on their behalf. Having heard that information we are left with the view that the starting points selected by Judge Harrop are unassailable on appeal.

**Home detention**

[12] The merit point on appeal is the issue of whether or not the appellant should have been granted home detention. Judge Harrop considered home detention. He regarded it as a difficult question. He referred to general statements of principle in two recent decisions of the Court of Appeal that home detention is a real alternative to imprisonment and carries with it a considerable measure of deterrence and

denunciation. He referred to *R v Iosefa*[1] and *R v D*[2]. However, he went on to say that he had to sentence:

> … based on the principles set out by Higher Courts in relation to immigration breaches, if I can call them that, that a deterrent sentence, a strong deterrent is required.

[13] The Judge quoted from the Court of Appeal in *R v Hassan*[3] where the Court said:

> [27] We also wish to add our voice to those judges who have stressed deterrence as an important sentencing principle in this area. The integrity of the country's immigration system is a vital part of its integrity as a state in deciding who may live within its borders. Those who dishonestly challenge the immigration system can expect deterrent sentences and can expect to be sent to prison.

[14] The issue for argument on this appeal is whether or not Judge Harrop was correct to conclude that he could not follow the general statements of principle provided by the Sentencing Act 2002 as to the availability of home detention as an alternative to imprisonment in his evaluation of the merits, but rather had to decide the case based on the principles set out by the higher Courts in relation to immigration breaches.

[15] The decision was difficult for Judge Harrop because another division of this Court in *R v Ondra*[4] had distinguished *Hassan* and granted home detention to an offender whose permit to reside in New Zealand had expired and who had been served with a removal order. His offence was not against the Immigration Act. He had been sentenced to 16 months' imprisonment after pleading guilty to a charge of cultivating cannabis. The District Court Judge had found "… If I felt that I could properly do my job and give you home detention, I would, but I feel that I cannot, in view of the law."

She was referring to another paragraph in *Hassan* where the Court of Appeal said:

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1 *R v Iosefa* [2008] NZCA 453.
2 *R v D* [2008] NZCA 254.
3 *R v Hassan* [2008] NZCA 402.
4 *R v Ondra* [2009] NZCA 489.

> [34] There can be no question of this sentence being served by way of home detention. The appellant is not entitled to be resident in New Zealand and can expect to be deported immediately upon the completion of the sentence.

[16] In *Ondra* this Court held that *Hassan* should not be interpreted as intending to mean that offenders unlawfully in New Zealand could never be sentenced to home detention.

[17] Unbeknown to Judge Harrop the Court of Appeal has revisited the subject most recently in the decision *R v Vhavha*[5].

[18] The appellant there had been sentenced to 18 months' imprisonment because Judge Weir, the sentencing Judge, considered that *Hassan* precluded home detention. A division of this Court divided.

[19] The majority in *Vhavha* accepted that *Ondra* was correct inasmuch as it said *Hassan* should not be interpreted to say that home detention was out of the question. Having said therefore that Judge Weir had erred by failing to consider the possibility of home detention on its merits the majority then reasoned:

> [19] As this Court observed in *Hassan* with reference to immigration fraud:
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> > [27] ... judges ... have stressed deterrence as an important sentencing principle in this area. The integrity of the country's immigration system is a vital part of its integrity as a state in deciding who may live within its borders. Those who dishonestly challenge the immigration system can expect deterrent sentences and can expect to be sent to prison.
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> This message reflects that, as stated by Keane J in *Department of Labour v Liao* HC AK CRI 2004-404-000499 14 April 2005 at [16], "Immigration status in New Zealand has become a precious commodity" and "The law requires any persons entering New Zealand to be truthful".
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> [20] Home detention is one of a number of options provided for in the Sentencing Act 2002. It ranks below imprisonment in the hierarchy of sentences. Section 15A confers on a sentencing court a discretion to impose a home detention sentence where otherwise an imprisonment term of two years or less would result. The President's judgment at [31] sets out the two-stepped process involved.

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5 *R v Vhavha* [2009] NZCA 588

> [21] That said, we consider that although home detention is available as an alternative sentence to imprisonment in immigration fraud cases, it is only likely to be an appropriate sentence in rare and exceptional cases.
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> [22] We say this because identity fraud (this being such a case) has serious repercussions in the immigration and passport fields. Accurate passport information is fundamental to New Zealand's ability to control its frontier and enforce its immigration policy. A person seeking entry into New Zealand must carry a passport which accurately sets out that person's identity, age, and country of origin. Visa requirements can all too easily be circumvented by obtaining a false passport purportedly issued by a state with which New Zealand has visa-free arrangements. False passport identities are also a mechanism for circumventing legitimate security controls.

[20] The President dissented in *Vhavha*. We agree with his reasons. We note particularly:

> [29] Eligibility for home detention depends upon the sentencing judge deciding that, but for the availability of home detention, the offender would otherwise be sentenced to a short-term sentence of imprisonment (ie of two years or less): s 15A of the Sentencing Act 2002. In effect, the Court is given a discretion to commute to home detention what would otherwise be a short-term sentence of imprisonment. There is nothing in the Sentencing Act to suggest a presumption for or against such commutation, either generally or in respect of particular types of offence. So what is called for is an exercise of sentencing discretion in a way which gives effect to the purposes and principles of sentencing recorded in ss 7 and 8 of the Sentencing Act.

[21] William Young P went on to then examine various approaches within this two stage approach, examining within that context how appropriate it is for sentencing Judges to focus on the nature of the offending and develop rules of thumb, and on the weight to be given to deterrence. He concluded:

> [43] While those considerations may suggest that a strong line on immigration offending (for instance a policy of always imprisoning offenders) might have a tendency to reduce immigration offending, similar lists can be prepared in relation to robbery, burglary and drug dealing (mentioned here because of the examples I have earlier given). Yet when judges deal with robbers, burglars and drug dealers where the otherwise appropriate sentence is imprisonment for two years or less, they do not operate on the basis of a presumption against home detention or treat home detention as appropriate only in "rare and exceptional cases". And, in any event, there are limits to the amount of prison accommodation which the State can be expected to provide in the interests of maximising deterrence.
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> [44] Given these considerations, I am reluctant to single out immigration offending as a particular type of crime for which considerations of deterrence assume such great significance as practically to exclude home detention.

> [45] So, coming back to this case again, I do not see the requirements of holding the appellant to account, denunciation or deterrence as logically controlling the decision whether to commute the otherwise appropriate sentence of imprisonment to home detention. That being so, and the appellant being in all respects a good candidate for home detention, I see the least restrictive outcome principle (see s 8(g)) as the primary consideration, with the result that I would allow the appeal and sentence the appellant to nine months home detention.

**Sentencing is an evaluative exercise in each case**

[22] We think that Judge Harrop erred in law in construing the decision in *Hassan* as preventing him from adopting a case specific two stage evaluation of the merit of home detention, such as was done by Judge Tompkins in respect of the other offenders. Judge Harrop was deflected by *Hassan* away from applying the purposes and principles of the Sentencing Act to these particular offences. The Sentencing Act makes sentencing a discretionary activity. Section 7 provides:

> **7 Purposes of sentencing or otherwise dealing with offenders**
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> (1) The purposes for which a court may sentence or otherwise deal with an offender are -
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> (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
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> (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
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> (c) to provide for the interests of the victim of the offence; or
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> (d) to provide reparation for harm done by the offending; or
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> (e) to denounce the conduct in which the offender was involved; or
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> (f) to deter the offender or other persons from committing the same or a similar offence; or
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> (g) to protect the community from the offender; or
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> (h) to assist in the offender's rehabilitation and reintegration; or
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> (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).
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> (2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

[23] Subsection (2) is important. There is no statutory basis for an appellate court to mandate sentencing to deter in a category of case. Each sentencing judge must approach each case as an individual case. Furthermore, the purposes available in s 7(1) have to be applied rationally. A sentence is not a deterrent to other persons simply because a judge says it will be. The judge needs to have a reasonable belief that will be the case. Such reasons need not be based on proven fact. Judges know the world. In this case we queried how would refugees in a tent camp in Africa be deterred by a short sentence of imprisonment vis-a-vis home detention? The President, in his dissent in *Vhavha* states what we think is the same view, if expressed more generally:

> [40] ... What I am more sceptical about is marginal deterrence, that is, the idea that moderate variations in sentencing severity (such as between a sentence of imprisonment and home detention) have an appreciable impact on rates of offending.

[24] For this reason we consider we are entitled to set aside the Judge's conclusion and embark on the two stage process ourselves. We do not disturb stage one of the process because we have decided not to disturb the judgment of Judge Harrop as to the short term sentences of imprisonment. Paragraphs [33] and [34] of the President's judgment in *Vhavha* encourage examination of the personal circumstances of the offender including their criminal history and whether they are good candidates for home detention. A similar analysis was undertaken by Judge Harrop, particularly in his sentencing indication. There Judge Harrop said:

> There are powerful arguments in favour of home detention being imposed here and that is why I have taken quite some time this afternoon to adjourn and look at the Court of Appeal authorities and also to reflect on the submission that Mr Miller has made on your behalf. There is no doubt in my mind that if I was simply imposing a sentence which was suitable for you in isolation, I would have no hesitation in imposing home detention. I do not think that you need to go to prison, or should go to prison, looking at you as individuals. You have no previous convictions. I expect that serving a prison sentence would be particularly difficult for you. You would be associating with people who are criminals, sometimes of a violent nature. You are otherwise of good character and any personal deterrence can certainly be achieved by a sentence of home detention. There is a need to recognise, as the Court of Appeal has said in *Iosefa* and *R v D* that home detention is a serious deterrent sentence. It is not a light sentence, and as the Court of Appeal said in *Iosefa* it is a real alternative to imprisonment and carries with it a considerable measure of the principles of deterrence and denunciation.

We agree with all of Judge Harrop's comments.

[25] Once it is accepted that home detention can be a deterrent sentence, then we think that in this case the argument against home detention falls away. Sentencing to home detention is still holding the appellants accountable and sending a signal of deterrence.

[26] Mr La Hood for the Crown argued that a home detention sentence would effectively send the appellants back into the community, they being persons who are not lawfully here.

[27] But steps have not been taken to deport the appellants. It is very important for the Court when sentencing not to interfere with nor anticipate decisions of agents empowered by Parliament to deal with deportation issues. This is one of the main points made in *Ondra*:

> [12] Offenders who are unlawfully in New Zealand are liable for removal under the Immigration Act 1987. The making of a removal order is entirely a discretionary matter for the Chief Executive or designated immigration officer: see Part 2 of the Act. Liability for removal is neither conditional upon nor triggered by the offender's convictions; instead, it is dependent upon their unlawful immigration status.

[28] Favourable home detention reports and agreements have been obtained in this case.

[29] The Department of Corrections' full pre-sentence report recommends community detention with community work for Mrs Osman and community detention for Mr Osman who is currently employed full time.

[30] Both were sentenced on 26 January. Both have now served four and a half months. Mr Feisal Osman's sentence being 14 months he was likely to serve seven; and Mrs Aisha Osman of 12 months is likely to serve six. There was a similar situation in *Ondra*, see paragraph [18] where Mr Ondra was sentenced to 16 months, likely to serve eight, had served nearly three, and a home detention sentence of six months was substituted. It would appear the logic in *Ondra* was that he had served nearly the equivalent of a six months term of imprisonment with ten and a little more

months to go. The home detention was approximately half of that rounded up to six months.

[31] On a like basis Mr Osman has served an equivalent of a nine month term of sentence with a five month term of sentence to go, half of that being two and a half months, which rounds up to three months' home detention. On a similar analysis Mrs Aisha Osman has served an equivalent sentence of nine months and has a three month term of sentence to go, rounding that up to two months' home detention.

[32] We think in the circumstances that home detention is the better outcome. It is a more severe sentence than community detention. Accordingly, the appeal is allowed. Mr Feisal Osman will receive a sentence of three months' home detention; and Mrs Aisha Osman of two months' home detention.

[33] In his Minute of 14 May 2010 Hammond J indicated that the address for home detention is to be at Flat 148/39 Owen Street, Newtown, Wellington, or as otherwise directed by the Department of Corrections. The Minute indicated that home detention was to commence at 2.00 pm on 14 May 2010. For the avoidance of doubt, we record those directions here.

Solicitors:
Rowland Woods, Wellington for Appellants
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