

BETWEEN AHMED ZAOUI  
Appellant

AND THE ATTORNEY-GENERAL  
First Respondent

AND THE SUPERINTENDENT, AUCKLAND  
CENTRAL REMAND PRISON  
Second Respondent

AND HUMAN RIGHTS COMMISSION  
Intervener

Court: Elias CJ, Gault, Keith, Blanchard and Eichelbaum JJ

Counsel: R E Harrison QC and D Manning for the Appellant  
T Arnold QC, Solicitor-General, C R Gwyn and  
T M Luey for the Respondents

Hearing: 9 December 2004

Judgment: 9 December 2004

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**JUDGMENT (No 2) OF THE COURT**

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- A The appeal is allowed to the extent of the orders made.**
- B Until the Inspector General of Intelligence and Security makes his decision under s114J of the Immigration Act 1987, the appellant is granted bail on the following conditions:**
- i) The appellant is to report to the Auckland Central Police Station between the hours of 10am and 4pm each Tuesday and Friday**
  - ii) The appellant is to reside at the Dominican Friary at 1 St Benedict Street, Newton, Auckland and is to be present at that address each day between the hours of 10pm and 6am.**
  - iii) There are to be filed in the High Court at Auckland by 5 pm on Wednesday 15 December 2004 the following undertakings:**

- a) **An undertaking by the appellant that he will observe the conditions of bail**
  - b) **An undertaking by Peter Murnane, Dominican Friar and Catholic Priest, that he will immediately upon becoming aware of any breach by the respondent of any condition of bail, he will report such breach to the police at Auckland Central Police Station**
- C Leave is reserved to the Attorney-General or to Mr Zaoui to apply for variation of the conditions of bail or for revocation of bail.**
- D The matter of bail is remitted to the High Court at Auckland. Any applications for variation or revocation of bail are to be made in that Court.**
- E Any question of costs on the appeal is reserved. Counsel may file memoranda if necessary.**

## **REASONS**

[1] The Court determined by judgment of 25 November 2004 that the High Court has jurisdiction to grant bail to a person detained under Part 4A of the Immigration Act 1987. We also determined that a District Court, or the High Court on removal of an application into that Court, may vary a warrant of commitment issued under s114O of the Immigration Act to direct that detention under such a warrant be in premises other than a penal institution. The only alternative premises identified as potentially suitable were those contained in the Mangere Refugee Resettlement Centre. Ahmed Zaoui's application for bail or variation of the warrant to permit his transfer to the Mangere Centre was adjourned to today to enable the Crown to put before the Court any further material bearing on the determination and to permit further argument, the questions of jurisdiction having been resolved.

[2] At the resumed hearing this morning, the respondents no longer maintained their earlier position that the Mangere Centre is unsuitable for the detention of the appellant. The Solicitor-General acknowledged that the review of the security risk certificate by the Inspector-General may take a further 6-12 months. In those circumstances, the respondents do not oppose the transfer of the appellant to the Mangere Centre, where he would continue to be detained, if appropriate conditions

are set. The conditions sought are to enable monitoring and control of the appellant's activities so that national security concerns can be met. The respondents oppose the release of the appellant on bail on the grounds that, unless detained, such monitoring and control will not be possible.

[3] The national security concerns relied upon by the respondents are those indicated by the Director of Security in the summary provided by the Director on 27 January 2004, in explanation of his security risk certificate under Part 4A of the Act. The certificate is directed to the risk to national security if Mr Zaoui is permitted to settle in New Zealand. It is not directly concerned with the risks which might be posed by Mr Zaoui's presence in the New Zealand community on bail on conditions while the statutory review of the security risk certificate is completed, as the Solicitor-General fairly accepted.

[4] The provisions of Part 4 of the Act contemplate prompt determination. That has not proved possible in the case of Mr Zaoui. He has already been in custody in penal institutions for 2 years and faces further delay before his status is resolved. It is now accepted by the respondents that some amelioration in the conditions in which he is being held is appropriate. The question for the Court today is whether the appropriate response is variation of the warrant to enable Mr Zaoui's transfer to the Mangere Centre or release on bail with conditions. We are of the view that bail is the preferable outcome.

[5] Transfer to the Mangere Centre, on the terms proposed by the respondents, would be a continuation of detention. Given the time the appellant has been in custody and the time now expected before his application for review will be determined, further detention could only be contemplated if the risk of release on bail justifies it. Release on bail is not liberty and in the typical case specific conditions may be imposed to meet any particular risks. The usual risks identified in criminal cases have little application to the present case. The respondents have not suggested that there is an appreciable risk that the appellant will abscond and there is no question of risk to witnesses or concern about criminal offending while on bail, which are usual concerns when a court is considering the bail of someone charged with a criminal offence. The risks identified by the respondent in the present case

are risks to national security which may arise from activities of the appellant. The question for the court is whether those risks can be reasonably contained by the terms of bail. The term of bail is limited to the period before status is determined. It operates effectively as a suspension of the warrant of commitment.

[6] Identification of the risks in the temporary release of the appellant pending determination of his status is therefore key to the choice between continued detention in the Mangere Centre and release on bail. The Solicitor-General was pressed to identify the risks which might arise. He acknowledged that they did not include concerns about violence in New Zealand as a result of activities by Mr Zaoui. He identified them rather as the continuation in New Zealand of the activities and associations of the appellant in Europe reported by the Director of Security in his Summary, based on publicly known information and classified security information which cannot be divulged. It concludes:

*The protection of New Zealand from activities within or relating to New Zealand that –*

It is reasonable to suspect that if permitted to settle in New Zealand Mr ZAOU I would in due course undertake, facilitate, promote or encourage activities like those of which he was convicted in Belgium and France and/or which the Swiss government decided endangered Switzerland's domestic and external security. His presence here would attract, both directly (people who wish to work with him) and indirectly (people encouraged to believe that New Zealand is a safe haven for people with his sort of record), other people likely to engage in activities of security concern.

*Are influenced by any foreign organisation or any foreign person;  
and*

Mr ZAOU I is a foreign person. He has a long record of involvement with foreign persons and foreign organisations, including leadership. There is good reason to believe that any future activities he may undertake will be influenced by other foreign persons and/or by foreign organisations.

*Are clandestine or deceptive, or threaten the safety of any person;  
and*

The activities of which he was convicted in Belgium and France were clandestine or deceptive or threatened the safety of persons. The Swiss government believed that his activity in Switzerland "may lead to acts of violence, and even attacks, in Switzerland". Activities of

this kind in New Zealand, by Mr ZAOUI or by others attracted to New Zealand by his presence here, could threaten the safety of New Zealanders.

*Impact adversely on New Zealand's international well-being.*

As part of the international community it is New Zealand's responsibility to take its proper part in controlling, defeating and preventing activities of security concern, such as those of which Mr ZAOUI has been convicted in Belgium and France and for which he was deported from Switzerland. Consistent with this, it is a government objective to ensure that New Zealand is neither the victim nor the source of acts of terrorism or other activities of security concern, and to prevent New Zealand from being or becoming a safe haven for people who have undertaken, or may be intending to undertake, such activities.

If Mr ZAOUI, with his public record, were allowed to settle here, that would indicate that New Zealand has a lower level of concern about security than other like-minded countries. That would impact adversely on New Zealand's reputation with such countries and thus on New Zealand's international well-being.

If Mr ZAOUI, or other people attracted to New Zealand by his presence here, were to undertake, facilitate, promote or encourage activities of security concern, either in New Zealand or elsewhere from within New Zealand, the adverse impact on New Zealand's reputation and thus on its international well-being would be compounded.

[7] We consider it appropriate to accept the summary for the purposes of this hearing. But it is directed at risks to national security should the appellant be permitted to settle in New Zealand, not at the risks he poses if released for the period during which the review is completed. Nor is there any indication in the material to suggest that the activities and associations undertaken by the appellant in other jurisdictions, which are relied upon in the summary, are activities and associations readily available to him in New Zealand. The security risks identified are essentially those associated with leading and participating in criminal activities in relation to Algerian politics and encouraging the perception that New Zealand is a safe haven for those intending to undertake similar activities. The concern is with communicating and associating with others. The Solicitor-General acknowledged that such risks would require monitoring and control even in the Mangere Centre and that he had not found it possible to identify in advance what communications and associations are a risk to national security.

[8] Although the difficulty of framing any condition to guard against such risks was put forward as an argument against granting bail, we consider that similar difficulties arise whether the appellant is in custody in a penal institution or in the Mangere Centre. The Solicitor-General disavowed any intention to keep Mr Zaoui isolated. He accepted that it would be wrong to stop him receiving visitors. The problem is not so much one of control but of identification of risk, an identification the Crown is not able to undertake in advance because it is unable to specify the people or groups whose associations or contact with Mr Zaoui would give rise to security concerns. We are not convinced that in the time that bail is likely to continue the control of detention is proportionate to the risk. It seems to us that the more effective control is to grant leave to apply to vary the terms of bail or to revoke it should such risk eventuate. If it did, it might involve breaches of the criminal law including the Terrorism Suppression Act 2002.

Solicitors:  
McLeod & Associates, Auckland for the Appellant  
Crown Law Office, Wellington for the Respondents