

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

1406



BETWEEN

ABDIKARIN ALI HAJI

Applicant

AND

THE MINISTER OF
IMMIGRATION

Respondent

Hearing: 12 November 2003

Counsel: S.L. Laurent and Miss C. Farry for Applicant
M. Corlett for Respondent

Judgment: 12 November 2003

ORAL JUDGMENT OF LAURENSEN J.

Solicitors: Short & Co., P.O. Box 5815, Auckland: Fax 309 9562
Crown Solicitor, Auckland Fax 336 7629

[1] The applicant seeks an urgent interim order for relief pursuant to s.8 of the Judicature Amendment Act 1972. He is a Somali national who came to New Zealand illegally in 1998. He applied for refugee status and was declined. He appealed and this too was declined. An order was made for his removal, at which point an application was made for an order pursuant to s35A of the Immigration Act 1987. The purpose of that application is for a permit in special cases.

[2] On 21 October the Minister decided not to grant a permit.

[3] On 29 October, this being the date that the notice of the decision was received by the applicant's solicitors, they requested the Minister to reassess the position, making specific reference to a United Nations High Commission for Refugees (UNHCR) Report regarding the compulsory return of Somali nationals.

[4] I am advised from the Bar by Miss Farry, counsel for the applicant, that the Minister's office advised today that this report would only be taken into account if it was received by 2 p.m. today. The report has not been received.

[5] In the meantime arrangements have been made to remove the applicant starting with a 2.45 pm flight from Auckland to Hong Kong and then to Johannesburg. Upon arrival in Johannesburg the applicant is to be escorted to Somalia by SMI (Snyman & Migliore International Pty Ltd). Details of travel from Johannesburg to Somalia are not known, however the scheduled departure time from Johannesburg is the morning of Friday 14 November 2003.

[6] This application was brought to the Court orally at approximately 10 a.m. by counsel. Steps were taken immediately to contact the Crown Solicitor's office in Auckland which resulted in Mr Corlett from that office being available in Court with a representative of the Department by 11 a.m. The application was brought on two grounds:

[a] That the Minister had made the final decision not to intervene without seeing the Report;

[b] There is concern the travel documents obtained by the overseas agent SMI for the New Zealand Immigration Service may be of dubious worth.

[7] So far as the second ground is concerned I was advised by Mr Corlett that so far, that documentation has been accepted by the relevant airlines and the authorities in the two transit points, namely Hong Kong and South Africa. Mr Corlett also noted that if, ultimately, the documents were unacceptable in Somalia, then the net result would be that the applicant would be returned to New Zealand.

[8] The applicant indicated that there were further concerns that SMI lacked credibility and that this was a factor which should be taken into account in assessing the issue in relation to the travel documents.

[9] Having heard the arguments in relation to the second ground, I do not see that the concerns as expressed to me regarding the travel documentation, would provide sufficient basis for the Court to consider interfering, even though there may be real concerns at the legitimacy of the agency contracted by the Department.

[10] As to the first ground, I note that this is the first case where the New Zealand Immigration Service has arranged the compulsory removal of a Somali national back to Somalia. It was submitted by the applicant's counsel that Somalia is in a state of great unrest, to the extent that it is difficult to see whether there is an effective central civil authority. These concerns are such that there is real cause to believe that a person removed back there will be in serious jeopardy.

[11] This submission was based on a letter from Amnesty International which set out in some detail its concern at the position in Somalia and refers to the fact that the United States, United Kingdom and Australian immigration authorities have, in recent months, desisted from making orders for the removal back to Somalia until the position has been clarified. I am informed from the Bar that the UNHCR is presently preparing the Report referred to and it is expected (but there is no assurance) that it will be available in about two weeks.

[12] The question is whether the Court should intervene in this case to provide time for the report to be made available to the Minister, for an overall reassessment of the applicant's position in accordance with s.35A of the Act. I was referred to a decision of Hammond J, *Esekielu v Attorney-General* (HC Auckland, M1653/92, 23 February 1993) where His Honour noted in summary that applications of this type, involving as they do a Ministerial discretion in an area of administrative necessity, the Courts have been most reluctant to intervene. Hammond J stated that before any such intervention should occur there must be an indication that there is a real contest and with the applicant having a respectable chance of success.

[13] This is an application only for interim relief. The Court is not required to determine whether the applicant should be allowed to remain because of events in Somalia, or whether the substantive application based on procedural grounds would be successful. The issue as I see it is whether, in the particular circumstances of this case, the removal should proceed if there is a real contest between the parties with the applicant having a respectable chance of success, namely showing that there has been a lack of procedural fairness by the Minister in exercising the discretion to decline to intervene without awaiting the Report.

[14] To my mind the expressed willingness of the Minister to wait for a time before making the final decision, implies that it was accepted the contents of the Report might influence the final exercise of the discretion. This, in turn, implies that the content of the Report might be a relevant consideration when considering the exercise of the discretion.

[15] Because the Minister has, by setting an arbitrary time limit for the receipt of the Report, and has hence not viewed the Report, it seems to me that this can provide a ground for the review of the substantive application.

[16] I consider that on this basis there does appear to be a real contest and one where it could be said, even at this stage, that the applicant has a respectable chance of success based on the breach of procedural fairness, namely to take into account all relevant matters.

[17] Looking at the case from the point of view of balance of convenience, there is on the one hand the applicant's position where, it is submitted, there is a real question as to the continued safety of an individual, which has to be considered in the light of international conventions. I note too the fact that this is apparently the first case where such a removal has arisen in relation to Somalia.

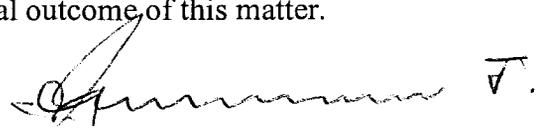
[18] On the other hand there is the huge administrative inconvenience involved in cancelling the arrangements which are due to take place in approximately an hour. These are to be viewed against the diffidence of the Courts in intervening in what has been held to be a situation where administrative decisions are not to be interfered with lightly.

[19] The applicant does not seek an inordinate delay. He seeks only that the final order for removal be not exercised until the Minister has had the opportunity to consider the UNHCR Report. I find that the possibility of the dire consequences to the applicant are such that any consideration of the balance of convenience must, in these circumstances, be answered in his favour.

[20] For very much the same reasons I consider the overall justice of the position requires that an order be made in this case. Noting s.8(2) of the Judicature Amendment Act 1972 I therefore, by interim order, declare that the Crown ought not to take any further action that is consequential on the exercise of the statutory power to remove the applicant pending receipt of the UNHCR Report and submission of the same to the Minister for consideration as to whether the Minister should intervene in that removal. This order is to be reviewed on 12 December 2003 if, by that time, the Report has not been received and considered by the Minister.

[21] In the meantime I further order that the parties are to make urgent enquiries from the UNHCR to establish precisely when that report will be available so that that information can be made available to this Court on 12 December, in case the report has not already been received by that date.

[22] I am informed that the applicant is presently in custody and I therefore direct that he should remain in custody pending the final outcome of this matter.

A handwritten signature in black ink, followed by a checkmark symbol.