IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-1308

UNDER	the Judicature Amendment Act 1972
BETWEEN	SI JONG PARK First Plaintiff
AND	HYE SUN BAI Second Plaintiff
AND	IL HO PARK Third Plaintiff
AND	CHIEF EXECUTIVE, DEPARTMENT OF LABOUR Defendant

Hearing: 24 May 2006

Counsel: S Laurent for Plaintiffs
K E Hogan for Defendant

Judgment: 29 May 2006

JUDGMENT OF HEATH J

Solicitors:
Laurent Law, Auckland
Crown Solicitor, Auckland

Introduction

[1] Si Jong Park and Hye Sun Bai are husband and wife. Il Ho Park is their son. All came to New Zealand lawfully some time ago as visitors.

[2] In 2005 Mr Park and his wife each applied for a work permit so that they could take up employment and live in New Zealand. Their son sought a student permit. All applications were declined.

[3] Mr Park sought reconsideration of his application for a work permit. By letter dated 20 January 2006, Mr Park's application for reconsideration was declined. Mr Park seeks judicial review of that decision. Both his wife and his son seek judicial review of the adverse decisions affecting them.

[4] Ms Hogan, on behalf of the Chief Executive, acknowledged that if Mr Park were to succeed in his application for judicial review and, subsequently, obtain a work permit both his wife and his son would be entitled to remain with him as dependants. For that reason, it is unnecessary to consider separately Hye Sun Bai and Il Ho Park's applications.

[5] The main issue on Mr Park's application is whether the immigration officer who declined reconsideration applied the correct legal test in making his decision.

The facts

[6] On 22 September 2005 an application was made on behalf of Mr Park for a work permit. The permit was sought to enable Mr Park to work in New Zealand, until 16 June 2007, under the Government's "General Work" policy.

[7] At the time the application was made Mr Park, were all in New Zealand lawfully. Mr Park's visitor's permit was valid until 25 November 2005.

[8] Mr Park had received an offer of employment as a Marketing/Accounts Manager from Green Life Trading Co Ltd of Auckland. The position was said to be full-time, the duties including marketing and management of all aspects of the accounting section of the business.

[9] Mr Park's application for a work permit was declined by an immigration officer, exercising delegated decision making powers from the Minister of Immigration. In a decision letter dated 28 November 2005, Mr Park was advised that he did not meet the general work criteria because the position was one that could be filled by a New Zealander and the financial situation of the proposed employer was insufficiently stable to satisfy the decision maker that Mr Park would be employed for the duration for which the permit was to be granted. Mr Laurent, for Mr Park, accepted that it was open for the immigration officer to make that decision on the available information.

[10] On 16 December 2005, an application was made on behalf of Mr Park "seeking reconsideration" of the work permit application. The application provided additional information on the two issues on which the initial application had been declined.

[11] At the time Mr Park made his "reconsideration" application he was no longer in New Zealand lawfully, his visitor's permit having expired. Because of that immigration status, he was not entitled as of right to a reconsideration of the decision not to grant a work permit as of right.

[12] However, an immigration officer elected to reconsider the decision. The reasons given for refusing to change the decision to refuse a work permit are pivotal to the determination of the judicial review proceeding.

[13] The relevant parts of the decision letter of 20 January 2006 state:

> **Your original application for a work permit was declined because:**
>
> - **Our labour market check confirms that there are suitable candidates to fill this position.**

- **Not satisfied that this company could sustain this new employee based on the financial information provided by the employer.**

Which indicated that you had failed to meet work permit policy

WG4d

Visa and immigration officers must not issue a work visa or grant a work permit to a non New Zealand citizen or resident worker applying on the basis of an offer of employment, unless they are satisfied that:

i. there are no New Zealand citizens or residents available to do the work offered.

ii. The job offer is both genuine and sustainable for the duration of the employment contract, and

There is also nothing special about your application that suggests an exception to policy should be made. We have given careful consideration to your request for reconsideration and have taken into consideration all of the information supplied. Unfortunately, we are however, unable to approve your request for reconsideration because:

After assessing the information provided inline with the previous declined application, I am not satisfied that the information is "new and compelling" and warrants the grant of the reconsideration, as per the policy indicated below

E7.35.1 Reconsidering a declined application

b. While not legally obliged to reconsider declined applications for a temporary visa, visa officers may do so if new and compelling information is promptly provided.

We note that your current permit expires on 27 January 2006. Please ensure that it remains valid during the remainder of your time in New Zealand. If the end of your allowable time in New Zealand is approaching, you should make arrangements to leave New Zealand before your temporary permit expires.

Those parts of the letter which are emboldened or in italics replicate the font used in the decision letter. Those parts that are also underlined represent my emphasis.

[14] Mr Laurent submits that the reason given for declining to reconsider

a) evidences an error of law in the decision maker's approach to the question or,

b) demonstrates that the decision maker illegitimately fettered his discretion in deciding not to reconsider the initial decision.

The error of law point

[15] A work permit is a temporary permit entitling a non-resident to remain in this country to work. The term "permit" is defined in s2(1) of the Immigration Act 1987 (the Act) to include:

> a residence permit and any type of temporary permit, pre-cleared permit, or limited purpose permit

[16] Reconsideration of a decision to decline a temporary permit is undertaken pursuant to s31 of the Act. Section 31 provides:

> **31 Reconsideration where application for another temporary permit is declined**
>
> (1) Where an application for another temporary permit under section 29 or section 30 of this Act is declined, the applicant may, at any time while the applicant is the holder of a current temporary permit, apply in the prescribed manner for a reconsideration of the decision.
>
> (2) The fact that an application for reconsideration has been made under this section shall not of itself entitle the applicant to remain in New Zealand after the date of expiry of the applicant's current temporary permit, but, until any such application for reconsideration has been determined,—
>
> (a) No removal order shall be made or (if already made) served in respect of that person; and
>
> (b) That person is not liable to be removed under Part 2.
>
> (3) If the decision to decline the original application was made by the Minister personally, it shall be reconsidered by the Minister personally.
>
> (4) In any other case, the decision to decline the original application shall be reconsidered by an immigration officer of equal grade or senior to the one who made the decision, or by the Minister.
>
> (5) If the decision to decline the original application is confirmed and no permit is granted following reconsideration under this section, an immigration officer must inform the applicant, in writing, of—
>
> (a) The decision; and
>
> (b) In the case of a person who still holds a permit, the date on which the person will have an obligation to leave New Zealand; and
>
> (c) In the case of a person who no longer holds a permit, the fact that the person is already obliged to leave New Zealand; and

> (d) The period within which the applicant may bring an appeal under section 47 against the obligation to leave New Zealand, and the date from which the period runs.
>
> (6) The result of any reconsideration under this section of a decision to decline an application for another temporary permit shall be final and conclusive, and no further application for reconsideration of that decision shall be made or entertained.

[17] The term "reconsideration" is not defined in the Act. Nor has it been the subject of judicial definition. However, the meaning of the term is clear. The statute avoids the language of "appeal" or "review" and, instead, employs the term "reconsideration". That term plainly envisages a fresh appraisal of an application that has already been determined.

[18] There was no real dispute between Mr Laurent and Ms Hogan on the meaning of the term "reconsideration". I hold that the obligation on the immigration officer conducting the "reconsideration" is to consider afresh the original application on the basis of all information provided, including new information responding to the grounds upon which the original application was declined and the grounds for the initial refusal given by the first decision maker.

[19] Although, contrary to s31(1) of the Act, Mr Park was not the holder of a current temporary permit at the time his application to reconsider was made, it is clear that the immigration officer proceeded to reconsider the application as if he were entitled to make it. Having assumed the responsibility to undertake that task, I agree with Mr Laurent that it was necessary for the immigration officer to follow the same processes as he would have followed had Mr Park been an eligible applicant.

[20] The critical issue is whether the immigration officer erred in law in the test he applied. Mr Laurent submits that by applying criteria relevant to those seeking reconsideration of the refusal of a visa, the immigration officer erred in law. To the contrary, Ms Hogan submits that the reference to "new and compelling" information in the decision letter, while consistent with the temporary visa policy to which he also referred, was immaterial to the decision reached on the application. She submits that the evidence of the decision maker, Mr Aso, makes it clear that he did take account of all relevant factors in reaching a decision to decline reconsideration.

[21] The question whether the immigration officer erred in law turns on the specific words used in the letter of 20 January 2006 and the legislative and policy background to reconsideration of temporary visas and work permits respectively.

[22] The definition of the term "visa" in s14A of the Act makes clear that a visa does not have the effect of a permit: s14A(2). Because of its nature, a visa is sought by a person who is not in New Zealand at the time of the application and who is not otherwise entitled to enter the country.

[23] As Mr Laurent submits, the critical difference between a visa and a permit is that a visa allows the holder to travel to New Zealand and to seek a permit upon entry. A permit is sought in New Zealand and allows the holder to remain in New Zealand, for example, as a visitor, worker or student.

[24] The reason given by the immigration officer for refusing the request for reconsideration is restated below:

> **After assessing the information provided inline with the previous declined application, I am not satisfied that the information is "new and compelling" and warrants the grant of the reconsideration, as per the policy indicated below**
>
> *E7.35.1 Reconsidering a declined application*
>
> *b. While not legally obliged to reconsider declined applications for a temporary visa, visa officers may do so if new and compelling information is promptly provided.*

[25] The single reason given relates to the policy for reconsideration of a temporary visa. The crucial difference between the policies for visas and reconsideration of permits is that no decision in favour of a visa applicant can be made unless "new and compelling information" is promptly provided.

[26] So, the approach to reconsideration of refusal of a temporary visa is dependent upon "new" and "compelling" information designed to change the mind of the original decision maker, whereas the purpose of reconsideration of a decision to refuse a permit turns on a fresh appraisal of the information submitted in support of the application (including new information) in light of the reasons for the refusal of the originating application.

[27] Under s13A(1) of the Act, any immigration officer performing functions under the Act is required to have regard to relevant Government policies. The policy concerning reconsideration of a declined application for a temporary permit (policy E7.35.1) is set out below:

> a. An immigration officer of equal grade or senior to the one who made the decision may reconsider a declined application for a further temporary permit or one of another type if the applicant applies in writing while still holding a current temporary permit.
>
> …
>
> c. Applications for reconsideration should be considered against the temporary entry policy applying to the original application, as well as against an 'exception to policy' consideration (see E7.10(b)).
>
> …
>
> e. The fact that a person has applied to have a declined application for a temporary permit reconsidered does not of itself entitle them to remain in New Zealand after the temporary permit expires, but:
>
> i. until a decision on the application for reconsideration has been made:
>
> - no removal order may be made or (if already made) served in relation to that person; and
>
> - that person is not liable to be removed; and
>
> ii. (in the case of a person who applied for the reconsideration while still lawfully in New Zealand) the 42-day period within which the person may appeal against having to leave New Zealand does not start until they have been advised that the decision to decline to grant a permit has been confirmed, if applicable.
>
> f. If the decision to decline the original application is confirmed and no permit is granted after reconsidering it, an immigration officer must inform the applicant in writing of:
>
> i. the decision; and
>
> ii. (in the case of a person who still holds a permit) the date on which the person will have an obligation to leave New Zealand; and
>
> iii. (in the case of a person who no longer holds a permit) the fact that the person must already leave New Zealand; and
>
> iv. the fact that they have 42 days in which to appeal against having to leave New Zealand, starting from the later of:

- (in the case of a person who still holds a permit) the date their permit expires; and

- (in the case of a person who no longer holds a permit) the date they are advised of the decision.

g. The result of reconsidering a decision to decline an application for another temporary permit is final and conclusive, and no further application to have that decision reconsidered may be made or entertained.

[28] Ms Hogan submitted that there was no material difference between the test applied by the immigration officer who reconsidered Mr Park's application and the specific policy pursuant to which reconsideration was to be undertaken.

[29] With respect, I do not accept Ms Hogan's submission.

[30] Mr Aso stated that he was not satisfied that the information was "new and compelling" and warranted "the grant of the reconsideration, as per the policy indicated below". The visa policy was stated immediately below those observations.

[31] Mr Aso's linkage between the need for "new and compelling" information and the temporary visa policy is emphasised by the placement of the words "new and compelling" in quotation marks in the immigration officer's decision letter: see para [13] above. Had he not taken the view that such information was required to grant the application, I cannot see why he would have stated those words in quotation marks.

[32] I do not overlook that Mr Aso deposes that he did in fact determine the application on the basis of the correct policy. However, it is the decision letter that informs the reasons for making the decision. An applicant ought to be able to rely on reasons set out in the decision letter. A Court must also be mindful of the possibility of subconscious reconstruction of the decision making process when an affidavit conflicts with the terms of the decision maker's decision and letter itself. Therefore, the Court should review the decision making process in light of what was conveyed to the applicant, even when there is no legal obligation to give reasons for a decision.

[33] Ms Hogan further argued that if there were any error of law I ought not, in any event, to grant relief. I do not accept that submission.

[34] In my view, the appropriate test to apply is this: had the correct test (namely, a fresh appraisal of the application having regard to all available information in light of the initial grounds for refusal) been applied, could a reasonable person in the position of the decision maker have made a decision to grant the application? The answer to that question must be "yes". For that reason, discretionary relief cannot be granted in favour of the Chief Executive.

[35] Just because the wrong test was applied does not necessarily mean that Mr Park will succeed when his application is considered further. It simply means that he is entitled to have proper consideration given to it. He may or may not succeed in obtaining a work permit. Judicial review is concerned with process, not with the merits of a decision.

[36] It is unnecessary for me to consider further other grounds of review.

Result

[37] For the reasons given Si Jong Park's application for judicial review is granted. The following orders are made:

a) A declaration that the decision of 20 January 2006 is invalid.

b) A declaration that the defendant ought to consider further, in accordance with the test set out in this judgment, Mr Park's application for reconsideration of the decision to refuse the work permit.

[38] I make no findings on the applications for judicial review made by Mr Park's wife and son. I rely on Ms Hogan's advice that they will be entitled to stay in New Zealand with Mr Park until his application is finally determined. I rely also on Mr

Laurent's advice that if Mr Park's application for reconsideration were refused both his wife and son would not wish to stay in New Zealand without him.

[39] To bring finality to this application, I dismiss the wife's and the son's applications for judicial review while reserving to them the ability to apply to reinstate their proceedings on application made within three months of today's date. I do that in case unforeseen circumstances emerge that require their applications to be considered.

[40] I record that the usual practice is not to remove persons in the position of Mr Park, his wife and his son from New Zealand while reconsideration of the initial decision to refuse a work permit is undertaken. I need make no order in that regard.

[41] Mr Park, having been successful in his claims, is entitled to costs. Costs are awarded on a 2B basis together with reasonable disbursements. Both are to be fixed by the Registrar.

[42] I thank counsel for their assistance.

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P R Heath J

Delivered at 2.00pm on 29 May 2006