

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT PAPA KURA**

**I TE KŌTI-Ā-ROHE
KI PAPA KURA**

**CIV-2020-092-001094
[2021] NZDC 7060**

BETWEEN	IMMIGRATION NEW ZEALAND Plaintiff
AND	FANA IKA TESIMALE Defendant

Hearing: 16 April 2021

Appearances: M Denyer for the Plaintiff
L Tohill for the Defendant

Judgment: 16 April 2021

ORAL JUDGMENT OF JUDGE DAVID J HARVEY

[1] Mr Tesimale has been before the court where the Immigration department has sought and has obtained warrants for his continuing commitment pending his deportation.

[2] On 9 April 2021, a warrant of commitment was granted by her Honour Judge Lovell-Smith following an application for continued detention and an order was made for continued detention of Mr Tesimale until 7 May 2021. Leave, however, was reserved to Mr Tesimale to bring an application for release on conditions pursuant to s 320 of the Act and that application has been made.

[3] Regrettably, the submissions in support of the application were filed on Wednesday and had only come to my attention when I came into court this morning, but I have had an opportunity of familiarising myself at an earlier stage with all of the matters leading up to 13 April 2021, and the submissions that have been filed pretty

much reflect arguments that have been made in the past with perhaps some polishing in some respects and some modification in others.

[4] As if things were not complicated enough there is to be a hearing in the High Court on 22 April, where judicial review of a decision of her Honour Judge Bouchier which was made last year in this matter is to be heard.

[5] On successive applications for a warrant which have been opposed decisions have been made both by Judge Lovell-Smith and myself. If I can encapsulate my own reasoning on the matter, perhaps slightly more elegantly than I have expressed it before, the concerns that I have are that, notwithstanding Mr Tesimale has been in custody for a considerable period of time following his release upon completion of a sentence for sexual offending, he should not be released on conditions because he cannot be trusted to comply with those conditions and my reasoning for that is that he came into this country lawfully.

[6] He remained in the country unlawfully. He operated under the radar, as it were, until such time as he came to the attention of the authorities when he was charged with sexual offending and after full completion of his sentence and the difficulties that he had in that regard inspire little confidence that he will abide by conditions of release.

[7] Mr Tesimale is from Tuvalu and, as I have indicated, he came to New Zealand on 27 September 2003 and remained here unlawfully since 27 June 2004. His conviction and sentence were on 5 May 2016. It was in respect of three sexual offences which occurred over a four year period while he was unlawfully in New Zealand. He was sentenced to a total of three years and 11 months' imprisonment. He was denied parole which probably says quite a bit about the Parole Board's confidence in his eligibility for parole and he ended up serving his entire sentence. His statutory release date was 1 April 2020, last year just as the COVID-19 emergency was beginning to gain full traction.

[8] Upon his release, he was arrested and detained for the purposes of deportation because he had been unlawfully in New Zealand for over 15 years and there had been

subsequent warrants for commitments since 3 April 2020. He has opposed them on eight occasions and has been unsuccessful.

[9] The problem is not that Immigration wants to keep him in custody for an indefinite period of time but because the COVID-19 emergency has made it impossible for Mr Tesimale to be deported to Tuvalu and that is because Tuvaluan government has closed the border in response to the COVID-19 pandemic. There have been efforts made to deport the applicant on a repatriation flight and that was not possible. Flights to Tuvalu on Fiji Airlines, the only commercial flights available, will commence in September 2021 all being well. If there is one thing that the COVID-19 emergency has taught, it is that certainty is an uncertain outcome. As I have said, Immigration New Zealand booked Mr Tesimale on a New Zealand Defence Force flight which did not go ahead because Tuvalu did not grant approval.

[10] Repatriation remains possible as an alternative to a commercial flight but the Tuvaluan border authorities must agree and it transpires that the Ministry of Foreign Affairs and Trade has been in negotiation and continues to be in negotiation with the Tuvaluan government in an effort to try and sort something out, but on occasions negotiations between governments can be less certain within the COVID-19 emergency and they always seem to take an inordinate amount of time.

[11] The situation, as I understand it, in this particular case is this. Ms Tothill for Mr Tesimale argues that his detention is unlawful and unreasonable, and she suggests that a higher test contained in s 323 of the Immigration Act to justify continued detention should be applied. Section 323 under normal circumstances would apply. No question. It deals with decisions on warrants of commitment where detention is for a period of more than six months, but the problem with that is that the s 323 cannot be advanced because s 323 relies upon the calculation of times for during which a person has been detained and the calculation of a consecutive period for detention for the purposes of s 323 is specifically addressed in s 341 of the Immigration Act. Section 341 says that, "No account is to be taken of any periods of detention occurring while an epidemic management notice is in force". That pretty much side lines the consideration of s 323, in my view.

[12] That means that the court is cast upon the shoulders of s 317 to determine whether or not detention should be continued. Section 317 deals with decisions on a warrant of commitment and a warrant of commitment can be made if, “A judge is satisfied on the burden of proof that the person in custody is the person named in the application.” There is no question about that. That is set out in s 317(2). Now there are four possibilities. Only one of which needs to apply for a warrant of commitment to be issued.

[13] The first is, “A craft is likely to be available, within the proposed period of the warrant of commitment, to take the person from New Zealand.” And the situation essentially is that there is no craft available between now and 7 May when the current warrant of commitment expires.

[14] Then there is the issue of, “The reasons why a craft was not available to take the person from New Zealand are continuing and are likely to continue, but not for an unreasonable period.” Now, certainly the situation relating to Mr Tesimale’s deportation to Tuvalu is not going to take place in the foreseeable future. We are looking at possibly five months before commercial flights resume to Tuvalu. The question is whether or not that period is unreasonable.

[15] There are possibly two ways of looking at that. The first is that is there a reason for the fact that there is not a craft available and, of course, there is; because Tuvalu has closed its borders. The other is slightly wider in scope. It is that deals with these rather nebulous issues of whether or not it is fair for somebody to be retained in custody for such a lengthy period of time. Third situation is that, “The other reasons the person was not able to leave New Zealand are still in existence and are likely to remain in existence.” But again, not for an unreasonable period of time. So the focus, at least, of subsection 2(b) and (c) is upon continued reasonableness of the length of time that they may remain in detention and then finally, s 317(2)(d) says, “The person has not supplied satisfactory evidence of his or her identity”, which does not apply in this case.

[16] If I am not satisfied that any of those situations apply, subsection (3) says that I can make a warrant of commitment anyway if it is in the public interest to do so.

[17] Once again, Ms Tothill argues pretty much the human rights argument that public interest involves a balancing, a weighing of the particular interests of the Immigration department on the one hand and the human rights interest of an individual on the other.

[18] The circumstances surrounding Mr Tesimale's case are unusual and I think that would probably be the lightest way that I could express it. Certainly the impact of the COVID-19 emergency has resulted in extraordinary consequences. Those consequences were felt by every citizen in this country when the country was placed on a level 4 lockdown and where in some respects the law seem to be turned on its head and where everything was unlawful unless the powers that be decreed that it was lawful whereas, of course, normally the reverse applied and the impact of the COVID-19 emergency, the restrictions that the New Zealand government has placed upon the activities of its citizens which still remain, the restrictions that other sovereign nations have placed upon the movement of individuals through their borders amounts to extraordinary circumstances in my view.

[19] Furthermore, I am satisfied that conditions for release have been proposed which on first blush appear to be reasonable and available. Certainly the present situation amounts to a continuing and somewhat indefinite de facto detention. The release conditions that are proposed are that Mr Tesimale would reside at [address deleted]. He would have a non association condition with any person under the age of 16, that he would report to the police at Pukekohe three times a week. These are set out in the opposition of 9 April. That he would make himself available for a repatriation flight, that he would provide a guarantor of his performance, that he would submit to a curfew and that he would engage his best endeavours to accommodate the requirements of the immigration department as far as his deportation is concerned.

[20] As I have said at the beginning of this decision, the real root of the problem is that he has demonstrated an unwillingness to abide by his requirements as far as immigration is concerned. I cast back to his initial entry in to this this country and his remaining in the country under the radar and he would probably still be under that radar were it not for his fortuitous arrest and charge with criminal offending.

[21] Furthermore, as Mr Denyer has argued and pointed out, that criminal offending took place whilst he was unlawfully in this country. Now, of course, retaining him in custody pending deportation cannot be seen as an added punishment for the fact that he has offended. He has served his time for that but the risk as I see it is that given his past conduct he may abscond and go dark and there is a possibility although it is not a strong one that he could re-offend because apart from his sexual offending there was no other offending on Mr Tesimale's part.

[22] Essentially, what would happen if I were to refuse the application for release upon conditions would be that it would be in the public interest to prevent him absconding so that in the fullness of time, whenever that might be, he might be deported.

[23] This is an unusual case and it is one that has attracted continued arguments of a similar nature application by application. One would have thought that perhaps Mr Tesimale might realise the futility of his continued resistance to his detention and fold his tent and await the day when there is a flight to Tuvalu but the law does not work that way. He is entitled to oppose. He is entitled to challenge. He is entitled to assert his right to liberty. He is entitled to challenge the state to justify its position as far as continued detention is concerned. As I have said, I think the circumstances in this particular case are extraordinary.

[24] I am of the view that it is not in the public interest to continue a person's detention indefinitely. Even although there might be a risk of absconding, going dark or re-offending. The conditions that have been advanced are quite stringent. I would probably have more enthusiasm for granting conditions if they included

some form of electronic monitoring but that is not available. So I am cast back upon the conditions that have been proposed.

[25] Somewhere along the line, there has got to be an end to this because it seems to me that although there may be a reason for Mr Tesimale's detention, it is, nevertheless, becoming quite unfair and quite unjust and I mean no criticism of the Department of Immigration when I say that but, in this particular case, there are extraordinary circumstances which, in my view, have dictated the outcome.

[26] For those reasons, I am prepared to allow release upon conditions and those conditions are those that are set out in paragraph [3] of notice of opposition dated 9 April 2021.

Judge D Harvey
District Court Judge

Date of authentication: 21/04/2021

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.