

**IN THE DISTRICT COURT  
AT CHRISTCHURCH**

**CIV-2016-009-001452  
[2016] NZDC 15478**

BETWEEN	DEPARTMENT OF IMMIGRATION Applicant
AND	DEFANG DONG Respondent

Hearing: 12 July 2016

Appearances: K South for the Applicant  
D Zhang for the Respondent

Judgment: 12 July 2016

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**ORAL JUDGMENT OF JUDGE R E NEAVE**

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[1] This is an application for a warrant of commitment under s 317 of the Immigration Act 2009. The background to this application is set out in the several minutes and final decision of Davidson, J in relation to applications for judicial review of the decision to deport Mr Dong or perhaps more to the point judicial review of the decision not to grant a waiver of deportation.

[2] The power to control the borders of a country is a jealously guarded one. It is one that is very much susceptible to the politics of the day and also policy decisions which need to be made by elected governments. On the other hand the Act that has now been put in place, in part due to the legislative response to the Supreme Court's limitations on earlier proceedings, sets a very high barrier for those who would seek to challenge such decisions. It is unnecessary, and would not be proper for me to indulge, in an analysis of the policies behind it save to say that the legislation is draconian and provides very limited grounds for judicial review of decisions of this nature. However, such decisions are not completely immune from review and the

Courts will jealously guard their duty to ensure compliance with the statutory regime, particularly in such a case.

[3] It is clear that the decision making process which has led Mr Dong to his current situation has not been free from difficulty. Davidson J's decision while final in some respects is an interim one to the extent that further information is to be provided by the applicant in this case to enable consideration of the decision to deport Mr Dong. In turn, Davidson J's decision is currently under consideration by the Crown Law Office as to whether or not there should be an appeal and it cannot be guaranteed that once the decision is reached in light of Davidson J's ruling that there may not be further issues or challenges arising.

[4] The background to this is that there will be some considerable time before Mr Dong's position can be resolved. He has now been in custody since 18 March 2016. It will be some time before his position can be considered. This Court is always going to be uncomfortable about the detention of an individual in prison who has committed no crime.

[5] If I am satisfied that the respondent is the person named in the application for the warrant of commitment there is a discretion as to whether or not he is detained or released from custody on conditions as per s 320 of the Act. Although not expressed in the same terms it seems to me a very similar enquiry will be required in reaching such a decision as might face a Judge considering under Bail Act 2000 whether a respondent poses a risk of flight or failing to appear.

[6] Obviously, if there was any prospect of the respondent disappearing back into the woodwork, as it were, so that when the time came for his removal he simply could not be located and thus frustrating the whole purpose of the Immigration Act 2009 procedures up until now, I would not hesitate to direct a further warrant of commitment:

[7] However, this respondent is someone whose situation provides a certain guarantee of safety insofar as the applicant is concerned. Whilst it is accepted that the respondent has been in New Zealand unlawfully, he is married to a wife who has

lived in New Zealand for over 10 years who is currently on a work visa and is applying for permanent residence. If she is granted permanent residence, and at the moment there is no reason to believe that she will not get it, the respondent, of course, has a pathway to citizenship because there seems to be no question that this is a genuine marriage.

[8] Any steps by the respondent or his wife which mean that he does not answer to his responsibilities will not only jeopardise his own position and will certainly bring an end to any prospect of a humanitarian approach being taken to his application, but is likely to have very severe ramifications for his wife's application for permanent residence. One of the factors referred to in the applicant's documents is that the respondent has expressed a view that he wants to stay in New Zealand. Therefore, any steps which jeopardise both his and his wife's chances of staying in New Zealand seem to me to be highly unlikely to occur. Self-preservation is the best guarantee of future behaviour that I can think of.

[9] Ms South does not consent to a release on conditions and indeed has instructions to oppose any such release but she very properly and sensibly realises the sorts of issues that I have touched upon do mean that this case perhaps might fall within an area where I could consider a release.

[10] I am satisfied firstly because of the length of time that the respondent may end up being retained through no fault of his own, coupled with the guarantee from his wife's position and the conditions that can be imposed that detention is not warranted. Any detention needs to be measured against the standards and safeguards set out in the New Zealand Bill of Rights Act 1990. It is also clear under subs 5 of s 317 that the grounds for establishing the sorts of circumstances which might lead to a respondent remaining in custody are really on the applicant.

[11] It is potentially arguable that s 317 (5)(c) could be said to operate against the respondent, namely that there is an indirect reason for him being able to leave as a result of his action but as the action which would be relied upon is the respondent exercising his constitutional right to challenge a decision of the Court, I would

require very considerable persuasion that a person exercising such a right thereby deprives themselves of liberty.

[12] In those circumstances, and the applicant not purporting to rely on subs 5 I am satisfied that the following conditions mitigate any risk and on that basis release on these conditions is appropriate, namely:

- (a) That the respondent resides at [address deleted].
- (b) He reports to Immigration New Zealand at 110 Wrights Road each Monday, Wednesday and Friday [time of day deleted].
- (c) He is to attend any required interview for the purposes of determining his immigration matters whether or not that occurs within the hours of 10 or 11 or any other time.

[13] Those conditions I think meet everyone's needs and the respondent is accordingly released on those conditions.

R E Neave  
District Court Judge