

**IN THE DISTRICT COURT  
AT HAMILTON**

**CIV-2017-019-000369  
[2017] NZDC 5192**

BETWEEN                      BIMAL PRASAD OF HAMILTON,  
   IMMIGRATION OFFICER  
   Applicant

AND                              XIAOQUAN CHEN  
   Respondent

Hearing:                      13 March 2017

Appearances:                Ms Needham for the Applicant  
   Ms Filau for the Respondent

Judgment:                    13 March 2017 at 4.30pm

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**RESERVED JUDGMENT OF JUDGE A S MENZIES  
[Application for Warrant of Commitment]**

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[1]     The applicant, Bimal Prasad an immigration officer of Hamilton, has applied pursuant s 316 of the Immigration Act 2009 (“the Act”) for a warrant of commitment for a period of 28 days to 10 April 2017 in respect of the respondent Xiaoquen Chen.

[2]     The application was called before me earlier this morning and I heard submissions from counsel. I reserved the decision to consider those submissions over the luncheon adjournment and now provide this decision in writing.

[3]     The respondent is a Chinese national who arrived in New Zealand on 28 June 2009 on a work visa that expired on 28 June 2010. Since that time the respondent has applied to Immigration New Zealand for visas which have been variously granted and declined as follows:

- (a)     Application for visitor’s visa granted on 1 June 2010 with expiry date of 1 December 2010.

- (b) Application for student visa granted on 10 February 2011 with expiry date of 11 June 2011.
- (c) Application for further student visa granted on 13 July 2011 with expiry date of 11 December 2011.
- (d) Request to the Minister of Immigration on 10 May 2016 for a special visa refused on 8 June 2016.
- (e) Submissions dated 29 July 2016 to the Minister as to visa status. The Minister declined to intervene on 19 October 2016.
- (f) A request dated 14 February 2016 for further work visa – declined.

[4] As a result of that process, the respondent became unlawful in New Zealand on 12 December 2011 upon the expiry of the further student visa on 11 December 2011.

[5] On 31 January 2017 a site visit was conducted by Immigration New Zealand and police officers to execute a deportation order at the respondent's address of [address details deleted] Hamilton. Upon seeing the Immigration New Zealand officers, the respondent absconded.

[6] A message for the respondent to contact Immigration New Zealand was given to the respondent's partner but no contact eventuated from the respondent.

[7] There are no proceedings before the Court relating to the respondent apart from the current application for a warrant. There are no further formal applications before Immigration New Zealand. However counsel for the respondent advised in Court today that a request has been made for an interview with a compliance officer for a humanitarian interview. Counsel advised that a compliance officer has the ability to cancel the deportation. A meeting time was in place but deferred pending the outcome of this application.

[8] The application was supported by an affidavit from the applicant which details the history described. Counsel for the respondent Ms Needham confirmed that the warrant is sought.

[9] The respondent through counsel Ms Filau, indicated that the application is opposed. The opposition is not based on any grounds that the necessary criteria for the warrant have not been established. Rather the opposition is based upon the desire to have the application either deferred or cancelled entirely to enable the respondent to explore further steps to remain in the country. Ms Filau handed up today an affidavit that has been sworn by Yan Lin who is the respondent's wife. She confirms in her affidavit that she married the respondent on 31 October 2015 having been in a committed relationship since April 2014. A copy of the marriage certificate was attached.

[10] Ms Lin confirmed that she is over seven months pregnant with the delivery date estimated as [date deleted] 2017. Ms Lin has provided medical information [medical details deleted] and is anxious therefore both to have her husband's support during the pregnancy and birth period as well as his ongoing support thereafter.

[11] Ms Lin is a New Zealand resident having lived in New Zealand for over seven years. She owns her own home and operates a construction business. She and the respondent have been residing at the address of [address details deleted] where the immigration officers attempted to execute the deportation order. That is the property owned by Ms Lin.

[12] The essence of the affidavit evidence is that Ms Lin and the respondent have been in a committed relationship of some time, are now married, are expecting a child and have stability in the form of the ownership of property and operation of a business.

[13] Based on that background, the respondent submits that the application for the warrant should be declined or alternatively that the respondent should be released on conditions because appropriate conditions can be crafted to ensure compliance with

any deportation that may eventuate. It is clear however that the respondent intends to pursue attempts to remain in the country.

[14] The affidavit of Ms Lin although sworn after the applicant's affidavit, does not comment on the issue of the message being left with the respondent by the immigration officers. The explanation that was provided by the respondent through counsel today was that the respondent contacted his lawyer as a result but is unsure whether any contact was made with Immigration New Zealand as a consequence.

[15] Counsel also offered today an explanation about the reported absconding upon arrival of the immigration officers. That explanation was to the effect that the respondent acknowledged that he absconded but did so because he did not know who the immigration officers were.

[16] The respondent's counsel provided me with a copy of a District Court judgment of Judge R E Neave in *Department of Immigration v Defang Dong*<sup>1</sup>. In that decision, an application for warrant of commitment was made under s 317 of the Act and the Judge was persuaded in the circumstances prevailing that it was appropriate to release the respondent on conditions.

[17] Counsel for the respondent also provided a series of sample conditions in such circumstances.

## **Discussion**

[18] There is no question that the grounds for the issue of a warrant have been made out. There is no contest to the fact that the respondent has been unlawfully in New Zealand since 12 December 2011. What I am being asked to do by the respondent is either to decline the application or release the respondent on conditions.

[19] The submission that the application should be declined is essentially based on humanitarian grounds. The personal circumstances of the respondent being

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<sup>1</sup> *Department of Immigration v Defang Dong* [2016] NZDC 15478.

primarily his marriage and the impending birth of their child are being advanced as reasons why ongoing approaches will be made to Immigration New Zealand for the respondent to remain in the country. The District Court has no jurisdiction to deal with such issues nor second guess how Immigration New Zealand might deal with any current or future approaches by the respondent for permission to stay in New Zealand.

[20] It is clear from the affidavit in support of the application that there have been numerous approaches to Immigration New Zealand already and all of the more recent ones have been declined. The most recent was in February 2017 at a time when obviously the Immigration Department would have been aware of the defendant's personal circumstances. Although further steps have been signalled, there is no formal application before Immigration New Zealand and there are no Court proceedings challenging past immigration decisions.

[21] In terms of the first issue, it is therefore my view that the grounds have been made out and are not contested in terms of the merits of the application.

[22] The issue for determination then falls to be whether a warrant should be issued or whether the defendant should be released upon conditions. I accept that the *Dong* decision referred to is an example of circumstances where the Judge considered it appropriate to release the respondent on conditions. However that decision can clearly be distinguished. Mr Dong had proceedings before the High Court challenging the position of Immigration New Zealand. At the time the matter was before the District Court, the High Court had issued what was described as a decision that "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." Accordingly the deportation decision itself was under challenge and under review before the courts. That is not the case here.

[23] I accept that I can direct the respondent's release on conditions. There is clearly a stable address and further conditions such as a curfew and reporting could be directed. Such restraints would go some way towards avoiding any risk of flight.

[24] As against that, the respondent was residing at that address when approached by immigration officers. His response was flight. His explanation that he did not know who the immigration officers were may well have been correct but did not justify his actions for a moment. The visit was to his home and there is no reason why he should not have given the officers the opportunity to explain who they were. Further it appears from the affidavit that they were accompanied by police officers who would doubtless have been in uniform. There is a very obvious inference that the respondent knew full well what the visit meant and took off as a result.

[25] The message left with his wife at the same property did not produce any result and it was necessary for the immigration authorities to locate the respondent and arrest him.

[26] The respondent has shown by his own actions that he will attempt to evade the authorities and I have no confidence that release conditions would prevent that outcome.

[27] I am therefore not prepared to release the respondent on conditions. The warrant sought is to issue.

[28] If, as counsel for the respondent argues, there remain avenues open to challenge the deportation, there is no reason why those avenues cannot be pursued notwithstanding the issue of the warrant. Doubtless matters become more urgent but there have been frequent approaches by and on behalf of the respondent to Immigration New Zealand. The reality is the respondent has been unlawfully in the country since 2011.

A S Menzies  
District Court Judge