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

IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2020-085-000154
[2020] NZDC 5625

BETWEEN	KURT JOHN WILLIAMS Applicant
AND	RAYMOND CLAUDIUS Respondent

CIV-2020-083-000072

AND BETWEEN	COLIN BONOS Applicant
AND	JONACANI DUIKORO SOBA Respondent

Hearing: 27 March 2020

Appearances: C Milnes for both Applicants
D Ewen assisting the Court

Judgment: 1 April 2020

JUDGMENT OF JUDGE W K HASTINGS

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[1] Ms Milnes has applied for fresh warrants of commitment with respect to each of the respondents who have been detained under Part 9 of the Immigration Act 2009. Mr Ewen has applied on behalf of both respondents for leave under s 324(3) to vary the existing warrants of commitment to bring forward their end dates so that the respondents can be released on conditions, in Mr Claudius's case, to an address in [location deleted], and in Mr Soba's case, to an address in [location deleted]. Mr Claudius's and Mr Soba's current warrants of commitment do not expire until 3 April 2020.

[2] The applications were heard during a busy criminal list in the Wellington District Court when New Zealand was at level 4 of the COVID-19 Alert System. Mr Ewen appeared in person; Ms Milnes appeared by telephone; and both respondents appeared via AVL. Although I had the notices of application from Ms Milnes as well as supporting affidavits from each immigration officer, I did not have the benefit of written submissions until Mr Ewen and Ms Milnes filed them late yesterday.

[3] These applications are made against the background of the COVID-19 pandemic. As a result of that pandemic, Parliament has given the executive branch legislative powers under s 8 of the Epidemic Preparedness Act 2006. Exercising those powers, the Prime Minister issued the Epidemic Preparedness (Epidemic Management – COVID-19) Notice 2020 (EMN) on 24 March 2020. Clause 5 of that notice activates certain provisions found in Part 9 of the Immigration Act 2009 "in order to deal with the practical effects of the outbreak of the disease." Those provisions include s 338 which allows a District Court Judge to consider a particular question at intervals of not more than 28 days where the Act would normally require a person to be brought before a Judge at intervals of not more than a stated duration; and s 339 which provides that existing warrants of commitment have effect for 28 days. The Notice also activates s 341, which effectively suspends s 323 by providing that "no account is to be taken of any periods of detention occurring while an epidemic management notice is still in force". While the rest of the notice came into force on 25 March 2020, clause 5 does not come into force until 2 April 2020. These applications were set down so that they could be heard before clause 5 comes into force. I turn now to discuss the circumstances of each respondent.

Raymond Claudius

[4] Mr Claudius is liable for deportation under s 158 of the Immigration Act 2009. He has an extensive history of deceiving immigration authorities by using various identities and not disclosing criminal convictions. He was sentenced by Judge Gilbert on two immigration charges to two years and six months' imprisonment on 22 July 2016. A Deportation Liability Notice was signed on 6 April 2017. On 5 March 2020, he presented himself at the electorate office of the Hon. Grant Robertson and swallowed liquid from a bottle marked "poison." He spent a short time in ICU.

[5] Two warrants of commitment have been issued with respect to Mr Claudius. The first was issued by Judge Grace on Friday, 6 March 2020 for 14 days, to Friday, 20 March 2020. According to the affidavit of Immigration Officer Kurt John Williams dated 24 March 2020, arrangements were made for the respondent to return to Fiji, the country of which the respondent is a citizen, on Wednesday, 18 March 2020, with two police escorts. Mr Williams deposed at paragraph 23 that:

> The respondent required Police escorts due to his criminal history, threats and attempts at self-harm/suicide. The requirement for escorts is part of INZ's Standard Operating Procedures ("SOP") and is also a requirement by the airlines for custodial deportations to ensure the security of the craft, crew and passengers.

[6] Mr Ewen submitted that the reasons for the delay in deporting Mr Claudius were entirely the result of INZ inaction and Police policy changes, the consequences of which should not be visited on Mr Claudius. I will observe however that on Tuesday, 10 March 2020, four days after Judge Grace issued the first warrant of commitment, INZ submitted documentation requesting security clearances to the Wellington International Airport Police. By Thursday, 12 March 2020, INZ received details of both police escorts and booked their travel. On Friday, 13 March, INZ uplifted Mr Claudius's emergency travel document from the Fiji High Commission, but the Police had not received clearances to uplift Mr Claudius for the flight. On Sunday, 15 March 2020, in light of the health risks surrounding COVID-19, the Police withdrew from INZ escort duties.

[7] On Thursday, 19 March 2020, Judge Butler issued the second warrant of commitment for 14 days, to 3 April 2020. According to Mr Williams' affidavit, the government issued a "do not travel overseas at this time" advisory while the hearing was taking place. Neither of the parties knew this at the time. On Monday, 23 March 2020, the government announced that the COVID-19 response was being elevated to level 3, and that the country would be at level 4, the highest level and effectively a lockdown, at midnight on Wednesday, 25 March 2020. This level was said to be maintained initially for four weeks. Mr Williams deposed:

> I have considered using my absolute discretion under section 315 of the Immigration Act 2009 to release the Respondent on conditions. However given the Respondents immigration history of fraud and non-compliance with

> immigration law, his health, the fact that he has no current fixed abode,[1] the impending travel restrictions due to COVID19 and his continued threats of self-harm, I do not think that this is appropriate in the circumstances or in the public interest to release the Respondent. I believe that the continued detention of the Respondent achieves an outcome that maximises compliance with the Immigration Act 2009.

[8] In her written submissions dated 31 March 2020, Ms Milnes submitted that Mr Claudius's tenancy has been terminated, and that the Transitional Housing Oasis Network Inc has confirmed that it has no rooms available. Mr Claudius is unlawfully in New Zealand, is not allowed to work, and is ineligible for benefit. He would not therefore be able to pay rent. Mr Ewen responsibly filed a memorandum acknowledging that in light of "all due steps" to verify the proposed address, it is not available. He submitted that grounds for issuing a further warrant exist, and that there is practically no other course available. A warrant of commitment with respect to Mr Claudius will therefore issue for 28 days from the date of this judgment.

Jonacani Duikoro Soba

[9] Mr Soba is liable for deportation under s 154 of the Immigration Act 2009 on the ground that he is currently unlawfully in New Zealand. Mr Soba's warrant of commitment was issued from the Whanganui District Court by Judge McKenzie for 28 days on 10 March 2020. He had been charged with assault on a person with whom he was in a family relationship, and with doing a threatening act, both arising from incidents on 6 July 2019. Following two breaches of the non-contact condition of his bail, he was remanded in custody on 18 December 2019. He was sentenced to six months' imprisonment by Judge McKenzie on 9 March 2020. Due to the length of time he had spent remanded in custody, he was released that day. On 10 March 2020, INZ applied for a warrant of commitment. Mr Soba sought to be released on conditions to reside with his partner, who was the victim of his offending and who is pregnant with his child. Judge McKenzie declined his application and issued the warrant of commitment. Immigration Officer Colin Bonos deposed in his affidavit of 24 March 2020:

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[1] An address was proposed at the hearing on 27 March 2020. I asked Ms Milnes to make "best efforts" to provide me with information about the suitability of this address and its occupants by 1 April 2020.

> It has not been possible to deport the Respondent from New Zealand within the period of detention authorised by the warrant. As a result of the Respondents criminal offending he requires a Police escort to deport him from New Zealand. Arrangements were made for the Respondents deportation from New Zealand on 18 March 202 with a Police escort. On 16 March 2020, these arrangements were placed on hold as INZ was advised that Police would not be deployed oversees as a result of the international Covid-19 outbreak. At the time of swearing of this affidavit the situation remains the same as a result of the Covid-19 outbreak domestically, with New Zealand about to enter Alert Level 4.

[10] Ms Milnes submitted that I should not grant leave for Mr Soba to make an application under s 324 because no new information has become available that is material to Mr Soba's ongoing detention or release on conditions, and that was unavailable at the time the warrant of commitment was made. She also submitted that Mr Soba's circumstances fall within s 317(2)(b) in that the reasons why a craft was unavailable to take Mr Soba from New Zealand are continuing "and are likely to continue, but not for an unreasonable period." Ms Milnes submitted that Mr Soba's case also falls within s 317(3) because it is, in all the circumstances, in the public interest to make a further warrant of commitment. She submitted finally that while his partner's address is technically available, a release to her address "would mean she would have nowhere to go if there were further incidents of family violence" and would burst the bubble currently protecting her from COVID-19.

[11] Mr Ewen submitted that evidence with respect to Judge McKenzie's findings contained in a Memorandum Outlining Bail Compliance dated 31 March 2020 from the Whanganui Crown solicitor (I do not have Judge McKenzie's sentencing notes or her reasons for deciding to issue the warrant or commitment) is inadmissible under s 50 of the Evidence Act. He also submitted that evidence of the suitability of the proposed address, obtained at my request, was inadmissible with respect to the Police's opinion about the safety of Mr Soba's partner if he were to be released on conditions there. He submitted that this is not a bail application; that the police views are irrelevant in this, a civil proceeding; and that I should respect Mr Soba's partner's autonomy to decide that she was willing to have him at her address.

[12] I disagree with Ms Milnes that no new information has become available in terms of s 324(5) since the warrant of commitment was made by Judge McKenzie. I will grant Mr Ewen leave to make the application because there is much more

information available now about the COVID-19 pandemic, and the government's response to it, than was available to Judge McKenzie on 10 March 2020. This information is material to Mr Soba's ongoing detention or release on conditions.

[13] Turning to the matters in s 317(2), a Judge may issue a warrant of commitment if satisfied on the balance of probabilities that the person in custody is the person named in the application, and that the reasons why a craft is not available to take Mr Soba from New Zealand "are continuing and are likely to continue, but not for an unreasonable period". I think it is fairly safe to assume in the present circumstances that the reasons for the unavailability of transport overseas are likely to continue. Nevertheless, I consider that s 317(3) is a better fit in the circumstances. That subsection provides that the Judge may make a warrant of commitment if it is, in all the circumstances, "in the public interest to do so." Section 317(4) also requires the Judge to have regard to, among other things, the need to seek an outcome that maximises compliance with the Immigration Act, the normal operation of which has been amended in significant ways by the Epidemic Preparedness (Epidemic Management – COVID-19) Notice 2020.

[14] The New Zealand Bill of Rights Act 1990 has not been suspended by any Epidemic Management Notice. It continues to apply to acts done by the legislative, executive and judicial branches of government. Mr Soba continues to have the right not to be arbitrarily detained. Any infringement of Mr Soba's rights, including his right not to be arbitrarily detained, may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic[2] society. Any ambiguity in the activated provisions of the Immigration Act, and any executive action taken by virtue of those provisions, will still have to be assessed through a Bill of Rights Act lens.

[15] Although s 341 effectively suspends the application of s 323 by requiring that periods of detention occurring while an EMN is in force are not counted as part of the consecutive six-month period for which a person has been detained under warrants of

[2] Although Parliament has authorised the Executive branch to legislate, Parliament retains a degree of oversight of the Executive branch by means of the Epidemic Response Committee chaired by the Leader of the Opposition.

commitment, Mr Soba will still have to be brought before a Court every 28 days. INZ will still have to seek a fresh warrant every 28 days. The current COVID-19 level 4 response changes the context in which the assessment of the EMN against the New Zealand Bill of Rights Act is made. There is now a greater infringement on Mr Soba's liberty by virtue of the EMN, but when considered in light of the requirement to be brought back to Court every 28 days, I do not think the infringement is an unreasonable limit. It is a limit that can be justified in a free and democratic society in the grip of a pandemic. Mr Soba is not being arbitrarily detained for that reason. Each time he is brought back to Court, the Judge will have to make a fresh New Zealand Bill of Rights Act assessment.

[16] The current COVID-19 level 4 response also affects the public interest assessment in s 317(3). The extent of community transmission is not yet known, but it is widely known that the number of infections is increasing daily. The government's advice, based on objective scientific modelling, is to eliminate contact outside one's existing "bubble" in order to maximise the possibility of eradication. Whether Mr Soba's release would "burst" his partner's bubble in Ms Milne's words, or "slightly expand" it in Mr Ewen's words, while we are at level 4, we are in lockdown. I do not think it is in the public interest to release Mr Soba in the circumstances as they are known today, nor do I think in the circumstances that a release on conditions maximises compliance with the Immigration Act in terms of s 317(4).

[17] I do not therefore need to consider the admissibility issue raised by Mr Ewen as I have not relied on the evidence to which he objects.

[18] For these reasons, Mr Ewen's application is declined, and Ms Milnes' application is granted. A warrant of commitment with respect to Mr Soba will issue for 28 days from the date of this judgment.

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Judge WK Hastings
District Court Judge

Date of authentication: 01/04/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.