DEHAN ZHANG and Anor v PERMANENT SECRETARY FOR HOME AFFAIRS AND IMMIGRATION and Anor

HIGH COURT — CIVIL JURISDICTION

SCOTT J

9 August 2002

[2002] FJHC 21

Citizenship and migration — deportation — application for a fresh permit by an unlawful immigrant — power of the permanent secretary to issue permits — Immigration Act (Cap 88) s 11(2)(a).

The Plaintiffs were granted a permit to enter and reside in Fiji however their permits expired. The Director of Immigration advised that the two Plaintiffs' permits are null and void and their presence in the country were illegal. The Plaintiffs sought declarations and orders that they be prevented from being deported on the ground that they have a pending application for fresh permits to be issued to them.

Held — (1) The presentation of an application for a fresh permit does not alter the status of an unlawful immigrant.

(2) The primary responsibility for issuing permits is given to the Permanent Secretary. The Permanent Secretary is also given the power to remove unlawful immigrants. Both powers are permissive. It is a power granted to the Permanent Secretary not a right given to an applicant.

(3) It has been held that an unlawful immigrant wishing to pursue litigation arising from a decision not allowing him to reside in Fiji cannot be permitted to remain in Fiji to pursue that litigation. To allow otherwise would be to create a substantial mischief.

Reliefs disallowed.

Cases referred to

Cantilla v Director of Immigration HBJ 12/95L; *Re: Cui Zhong Yi and Ors* HBJ 2/97S; *Roy v Kensington & Chelsea & Westminister Family Practitioner Committee* [1992] 1 AC 624, cited.

S.R. Valenitabua for the Plaintiffs

J.J. Udit for the Defendants

Judgment

Scott J. On 25 February 1999 the 1st Plaintiff was granted a permit 369/99 to enter and reside in Fiji. The purpose of the permit was to enable him "to work in Fiji as a chef for Taisin Restaurant Limited Lami". The permit expired on 16 February 2002.

On 25 February 1999 the Taisin Restaurant Limited was granted a permit 164/99 to employ a non-Fiji citizen. The employee was the 1st Plaintiff. The first condition of the permit was that the employee would be employed solely by the employer stated. The sixth condition of the permit was that it was immediately to become void upon breach of any of the other conditions. The permit expired on 16 February 2002.

On 1 March 2000 the 2nd Plaintiff was granted a permit 442/2000 to enter and reside in Fiji. The purpose of the permit was to enable her "to reside with husband Dehan Zhan holder of permit 369/99". The permit expired on 16 February 2002.

On 4 March 2002 the Second Defendant (the Director) wrote to Mr Yin Kit Yee (apparently one of the proprietors of the Taisin Restaurant) pointing out that the restaurant had ceased trading in 1999 and that accordingly permit 164/99 had been avoided. The Director advised that the two Plaintiffs' permits "are now null and void and their presence in the country are now illegal". It would perhaps have been simpler to point out that the two permits to enter and reside had expired by effluxion of time but nothing turns on this point since Mr Valenitabua accepted in paragraph 1.1 of his excellent written submission that the Plaintiffs are in fact unlawful immigrants present in Fiji. Their status follows from the operation of s 11(2)(a) of the Immigration Act (Cap 88) (the Act).

On 25 March 2002 the Plaintiffs commenced these proceedings by way of originating summons. The various declarations and orders sought were designed to prevent the Plaintiffs being deported pending the processing by the Defendants of the Plaintiffs application for fresh permits to be issued to them.

A preliminary issue raised by Mr Udit who also filed a most helpful written submission, was that on the face of it the Plaintiffs had chosen wrong method to bring their claims before the court. He suggested that proceedings should have been commenced by way of judicial review. In view of the fact however that the Plaintiffs commenced these proceedings within 3 weeks of the 3 March letter and that the originating summons process is not obviously unsuitable for determination of the Plaintiffs claim I decide the preliminary issues in favour of the Plaintiffs (see also *Roy v Kensington & Chelsea & Westminister Family Protection Committee* [1992] 1 AC 624).

The second preliminary question raised by Mr Udit was whether the Plaintiffs had in fact made an application for a new permit or permits. According to an affidavit sworn by Eminoni Bola, an employee of the Immigration Department on 2 August 2002 an extensive search of the department's registry had not disclosed that any application has been received. Mr Valenitabua however relied on an affidavit sworn by his clerk Vilikesa Cakau on 5 August which exhibits a copy of an application sent to the Director together with a bank cheque on about 28 March.

In my opinion the presentation of an application for a fresh permit does not alter the status of an unlawful immigrant. I think I am also entitled to take judicial notice of the fact that the various registries within the Departments of the Fiji Government are not always as efficient as they might be. For these reasons I am prepared to proceed to the substance of the Plaintiff's case on the assumption that the 1st Plaintiff did in fact apply for a new work permit to be issued to him on about 28 March. It may however be noted that there is nothing to suggest that any application has ever been made by or on behalf of his wife, the Second Plaintiff.

As will be seen from his written submission Mr Valenitabua's principal argument is that the proviso to s 8(1) of the Act grants unlawful immigrants a right to apply to the minister for a permit or a new permit to be granted to them.

The first paragraph of s 8(1) permits the Permanent Secretary to issue permits to enter and reside or to reside or to work in Fiji. The proviso however reads:

> *Provided that, except the approval of the Minister, no such permit may be issued to any person who is unlawfully in Fiji …*

Mr Valenitabua's argument is, if I may say, ingenious but I do not think it can succeed.

The primary responsibility for issuing permits is given by s 8 to the Permanent Secretary. The Permanent Secretary is also given the power to remove unlawful immigrants by s 15. Both powers are permissive. The proviso, as I read it, is a fetter on the Permanent Secretary's powers, not a right given to an applicant. If Mr Valentabua's reading of the proviso were correct then it would have the consequence that an unlawful immigrant has a right to have his application considered by the minister and to remain in Fiji while the application is considered. That proposition however is contrary to s 18(2) of the Act which gives the Permanent Secretary the power to grant an applicant a temporary permit to remain in Fiji while he pursues an appeal to the minister against a decision refusing him a permit *except* in the case where the applicant is an unlawful immigrant.

In a number of decisions of this court, some of which are referred to in *Re: Cui Zhong Yi and Others* HBJ 2/97S it has been held that an unlawful immigrant wishing to pursue litigation arising from a decision not to allow him to continue to reside in Fiji cannot be permitted to remain in Fiji to pursue that litigation. To allow otherwise would be to create a "substantial mischief" (per Lyons J in *Cantilla v Director of Immigration* HBJ 12/95L). In my opinion the same principle has to be applied to persons who have become unlawful immigrants by reason of the expiry or nullification of their visas but who wish to renew or extend them.

There is nothing to prevent the Plaintiffs from leaving Fiji and then renewing their applications to return and work here. In my opinion however they are not entitled to remain here after their former permits have expired. The reliefs sought are refused.

Reliefs disallowed.