IN THE SUPREME COURT OF NEW ZEALAND

SC 124/2014
[2015] NZSC 76

BETWEEN	JIANYONG GUO, JIAXI GUO AND JIAMING GUO Applicants
AND	MINISTER OF IMMIGRATION Respondent

Hearing: 1 April 2015

Court: Elias CJ, William Young, Glazebrook and Arnold JJ

Counsel: R M Dillon (via video link) for Applicants
C A Griffin and M F Clark for Respondent

Judgment: 3 June 2015

JUDGMENT OF THE COURT

A The application for leave to appeal by Jianyong Guo is dismissed.

B The applications for leave to appeal by Jiaxi Guo and Jiaming Guo are granted (*Guo v Minister of Immigration* [2014] NZCA 513).

C The approved ground of appeal is whether the Court of Appeal was right to decline the applications of Jiaxi Guo and Jiaming Guo for leave to appeal to the High Court against the decision of the Immigration and Protection Tribunal dismissing their appeals against deportation.

REASONS

[1] In March 2002, Mr Guo and Mrs Hong, who are Chinese citizens, arrived in New Zealand with their daughter Jiaxi Guo, then aged 11 or 12. In June 2006, Mr Guo applied for residency, listing Mrs Hong, Jiaxi and the couple's son, Jiaming,

as secondary applicants. Jiaming was born in New Zealand, but is not a New Zealand citizen. All applicants were granted residency in September 2006.

[2] The couple also have another child, Ellen, who is a New Zealand citizen by birth.[1] Accordingly, she is not subject to any deportation process.

[3] In December 2008, Mr Guo was convicted of importing a large amount of pseudoephedrine, a class C controlled drug, and of possessing the same drug for supply. He was sentenced to imprisonment for five years, three months. The Court of Appeal dismissed his appeal against those convictions.[2]

[4] In June 2009, Mr Guo was served with a deportation order under s 91(1)(a) of the Immigration Act 1987 (the 1987 Act). He appealed against the order on humanitarian grounds. His appeal was dismissed by the Tribunal but following a successful judicial review application, the matter was remitted to the Tribunal for rehearing. On the rehearing, the Tribunal again dismissed Mr Guo's appeal.[3]

[5] The other applicants, who had obtained residence as Mr Guo's family members, were served with deportation liability notices under s 158(1)(b)(ii) of the Immigration Act 2009 (the 2009 Act) in 2011. The ground on which these were issued was that their residence visas had been granted on the basis of a visa (Mr Guo's) procured through false or misleading representations, or failure to later disclose relevant information (Mr Guo's involvement in the illicit drug trade). The applicants other than Mr Guo were entitled to appeal both on the facts under ss 201(1)(a) and 202(c) of the 2009 Act and on humanitarian grounds under ss 206(1)(c) and 207.

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1 Both Ellen and Jiaming were born in New Zealand. Under the law as at February 2004 when she was born, Ellen was entitled to New Zealand citizenship by virtue of being born in New Zealand. However, by the time Jiaming was born in May 2006, s 6 of the Citizenship Act 1977, which provides for citizenship by birth, had been amended by s 5 of the Citizenship Amendment Act 2005, with the effect that a person is a New Zealand citizen by birth if he or she was born in New Zealand before 1 January 2006 or, if born in New Zealand after that date, one of his or her parents was either a New Zealand citizen or was entitled to reside in New Zealand indefinitely. That meant that Jiaming was not entitled to New Zealand citizenship by birth.

2 *R v Guo* [2009] NZCA 612.

3 *Guo v Minister of Immigration* [2013] NZIPT 600006 [Tribunal decision].

[6] Finally, we note that Mrs Hong left New Zealand for China on 4 July 2013, which had the effect of withdrawing her appeal.[4] She was served with a New Zealand deportation order at Shanghai Airport on 15 July 2013 and so cannot return to New Zealand.

[7] The rehearing of Mr Guo's humanitarian appeal under s 105 of the 1987 Act was heard together with the general appeals of Jiaxi and Jiaming under the 2009 Act. The Tribunal dismissed the applicants' appeals against deportation.[5] The applicants then applied to the High Court under s 245 for leave to appeal against the Tribunal's decision. Their application was unsuccessful.[6] Following that, the applicants sought leave from the Court of Appeal to appeal to the High Court against the Tribunal's decision, but that application was also refused.[7] The applicants now seek leave to appeal to this Court against the decision of the Court of Appeal refusing them leave to appeal to the High Court. What they seek from this Court if leave to appeal is granted is that they be given leave to pursue their appeal against the Tribunal's decision in the High Court.

Issues

[8] There are two issues for consideration:

(a) Does the Court have jurisdiction to entertain an appeal from a refusal by the Court of Appeal to grant leave to appeal to the High Court under s 245 of the Immigration Act?

(b) If so, should leave be granted?

Legislation

[9] We begin with the Immigration Act 2009. Relevantly, s 245 provides:

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4 See Immigration Act 2009, s 239.
5 Tribunal decision, above n 3.
6 *Guo v Immigration and Protection Tribunal* [2014] NZHC 804 (Gendall J). The applicants also sought leave under s 249 to commence judicial review proceedings, but that application was declined and was not pursued further.
7 *Guo v Minister of Immigration* [2014] NZCA 513 (O'Regan P, Ellen France and Miller JJ).

> **245 Appeal to High Court on point of law by leave**
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> (1) Where any party to an appeal to, or matter before, the Tribunal (being either the person who appealed or applied to the Tribunal, an affected person, or the Minister, chief executive, or other person) is dissatisfied with any determination of the Tribunal in the proceedings as being erroneous in point of law, that party may, with the leave of the High Court (or, if the High Court refuses leave, with the leave of the Court of Appeal), appeal to the High Court on that question of law.
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> …
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> (3) In determining whether to grant leave to appeal under this section, the court to which the application for leave is made must have regard to whether the question of law involved in the appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to the High Court for its decision.
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> …

[10] This provision allows an appeal against a Tribunal decision to the High Court on a point of law, provided that the High Court or the Court of Appeal gives leave. No explicit provision is made for a further appeal to the Supreme Court if the Court of Appeal refuses leave to appeal to the High Court.[8]

[11] Section 246 deals with appeals where leave has been granted and the High Court has determined the appeal. It provides in part:

> **246 Appeal to Court of Appeal on point of law by leave**
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> (1) Any party to an appeal under section 245 who is dissatisfied with any determination of the High Court in the proceedings as being erroneous in point of law may, with the leave of that court (or, if the High Court refuses leave, with the leave of the Court of Appeal), appeal to the Court of Appeal. Section 66 of the Judicature Act 1908 applies to any such appeal.
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> (2) In determining whether to grant leave to appeal under this section, the court to which the application for leave is made must have regard to whether the question of law involved in the appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to the Court of Appeal for its decision.
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> …

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[8] We note that s 245 of the Immigration Act 2009 has now been amended, effective 7 May 2015, to include a new s 245(1A): "A decision by the Court of Appeal to refuse leave to appeal to the High Court is final." See the Immigration Amendment Act 2015, s 61. We will refer to the section in the form it was when this case was argued.

Again, there is no explicit provision for a further appeal to this Court.

[12] Although the Supreme Court is not mentioned in ss 245 and 246, it is clear from later provisions in the Act that Parliament contemplated that appeals could go to the Supreme Court in appeal or review proceedings under the Immigration Act. In particular:

(a) Section 251 provides that the Judicature Act 1908 and the Supreme Court Act 2003 are subject to ss 247, 248, 249, 250, and 262 of the Immigration Act.[9] The principal purpose of those provisions appears to be to restrict the availability of judicial review in immigration matters.

(b) Sections 254 and 255 address the situation where, in an appeal to the Court of Appeal or the Supreme Court in appeal or review proceedings, classified information is relied upon.

[13] Turning to the Supreme Court Act, s 7 deals with appeals against decisions of the Court of Appeal in civil cases. It provides:

> The Supreme Court can hear and determine an appeal by a party to a civil proceeding in the Court of Appeal against any decision made in the proceeding, unless–
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> (a) an enactment other than this Act makes provision to the effect that there is no right of appeal against the decision; or
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> (b) the decision is a refusal to give leave or special leave to appeal to the Court of Appeal.

[14] Section 8 deals with appeals from the High Court in civil cases. It provides:

> The Supreme Court can hear and determine an appeal by a party to a civil proceeding in the High Court against any decision made in the proceeding, unless–
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> (a) an enactment other than this Act makes provision to the effect that there is no right of appeal against the decision; or
>
> (b) the decision is a refusal to give leave or special leave to appeal to the High Court or the Court of Appeal; or

[9] Some of these provisions have also been amended by the Immigration Amendment Act 2015.

(c) the decision was made on an interlocutory application.

[15] Accordingly, the Court does not have jurisdiction to hear an appeal from a refusal by the Court of Appeal to grant leave or special leave to appeal to itself (s 7(b)) or from a refusal by the High Court to grant leave to appeal to itself or the Court of Appeal (s 8(b)).

Evaluation

[16] Ms Griffin for the Minister noted that under s 245, the Court of Appeal does not hear an appeal from the refusal of the High Court to grant leave to appeal (to itself) but rather reaches its own decision whether, applying the test set out in s 245, leave should be granted for an appeal to the High Court. She submitted that, while s 245 did not explicitly state that a decision of the Court of Appeal under it was final, it is implicit in s 245 and the scheme of the Supreme Court Act that it is final, so that s 7(a) of the Supreme Court Act would apply.

[17] In interpreting the Supreme Court Act on the issue of jurisdiction, our approach is to consider whether the statutory language clearly restricts the Court's jurisdiction. If it does not, that is a powerful indicator that the Court has jurisdiction.

[18] Dealing first with s 7(a), it is true that s 245 of the Immigration Act makes no provision for an applicant who is refused leave to appeal to the High Court from the Court of Appeal to appeal to this Court against the refusal. However, s 246 does not refer to the possibility of an appeal to this Court from the Court of Appeal's decision on a substantive appeal from the High Court either. Yet the other provisions we have referred to in the Immigration Act contemplate that there will be appeals in immigration matters to this Court. Accordingly, we do not accept that the scheme of the Immigration Act is such as necessarily to exclude jurisdiction in the present context. Accordingly, we do not see s 7(a) as applying.

[19] As to s 7(b), it provides that the Court has no jurisdiction in respect of Court of Appeal decisions refusing to give leave to appeal to the Court of Appeal. In the present case, however, the Court of Appeal's refusal relates to leave to appeal to the

High Court, so that it does not fall within the language of the s 7(b) prohibition. Having said that, we acknowledge two points:

(a) It is difficult to see why this Court would have jurisdiction to hear an appeal from a decision of the Court of Appeal refusing leave to appeal to the High Court but would not have jurisdiction in respect of a decision of the Court of Appeal refusing leave to appeal to itself.

(b) It is clear from s 8(b) that this Court has no jurisdiction in relation to a decision of the High Court refusing leave to appeal to itself or the Court of Appeal, so it seems odd that it would have jurisdiction in respect of a decision of the Court of Appeal refusing leave to appeal to the High Court.

[20] However, while ss 7 and 8 state that the Court does not have jurisdiction to hear an appeal from a refusal by the Court of Appeal to grant leave to appeal to itself or from a refusal by the High Court to grant leave to appeal to itself or to the Court of Appeal, the Act does not explicitly exclude jurisdiction in respect of a decision of the Court of Appeal refusing leave to appeal to the High Court. While this may well be an oversight, which, at least in the immigration context, has now been remedied,[10] we consider that we have jurisdiction given the absence of a clear prohibition.

[21] Ms Griffins' fall back argument was that, if the Court had jurisdiction, it was a jurisdiction to be exercised only in "compelling circumstances".[11] However, if the Court has jurisdiction, as we have concluded it does, we consider that the application for leave should be considered in terms of the relevant provision of the Supreme Court Act, in this case s 13.

[22] We consider that the requirements of s 13 are met in the present case, but only in relation to Mr Guo's children. At the time of the Tribunal's decision in July

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10 See n 8 above.

11 This is the language used by this Court in *Coleman v Attorney General* [2013] NZSC 52, [2013] 2 NZLR 495. There the Court held that it could, subject to ss 13 and 14 of the Supreme Court Act 2003, grant leave to appeal directly from a substantive decision of the High Court, even though the High Court and the Court of Appeal had refused leave to appeal to the Court of Appeal from that decision: at [4].

2013, Jiaxi was 22 and Jiaming was seven. Ellen, the New Zealand citizen, was nine. The Tribunal accepted that Jiaxi was like a "second mother" or "extra parent" to her younger siblings. The Tribunal held that there were exceptional circumstances of a humanitarian nature in respect of both Jiaxi and Jiaming,[12] but concluded that it was not unjust or unduly harsh for them to be deported.[13] In relation to Ellen, the Tribunal considered whether it should grant all the appeals (apart from Mrs Hong's, which had been abandoned) so as to allow her to remain in New Zealand with her family. It concluded, however, that Mr Guo's involvement in the drug trade and the circumstances of his obtaining residence in New Zealand for himself and his family outweighed Ellen's rights at international law.[14] It appears that the Tribunal did not consider in any detail whether, given Jiaxi's age and role within the family, she and her siblings should be permitted to stay in New Zealand despite the absence of their parents, which is, we acknowledge, an unusual possibility.[15]

[23] We propose to grant Jiaxi Guo and Jiaming Guo leave to appeal against the decision of the Court of Appeal refusing leave to appeal to the High Court. They will have to persuade us that there is a point of law arising from the Tribunal's decision that is sufficient to meet the test under s 245. The application for leave to appeal by Jianyong Guo is dismissed as we do not consider that it raises any arguable point.

Solicitors:
Queen City Law, Auckland for Applicants
Crown Law Office, Wellington for Respondent

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12 Tribunal decision, above n 3, at [134].
13 At [144] and [156].
14 At [161].
15 The Tribunal seems to refer to this possibility at several points but does not discuss it when addressing the children's position, especially that of Ellen.