Supreme Court of New Zealand
Te Kōti Mana Nui

26 March 2015

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

SAMUELA FALETALAVAI HELU v IMMIGRATION AND PROTECTION TRIBUNAL AND MINISTER OF IMMIGRATION (SC 72/2013)

[2015] NZSC 28

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

The appellant has lived in New Zealand since he arrived from Tonga in December 1996 at the age of six. In April 2003, he and his family were granted residence permits. When he was 17 years old, the appellant committed the aggravated robbery of a convenience store in Auckland and on 20 May 2009 he was sentenced to two years' imprisonment. As the aggravated robbery had taken place less than five years after the granting of his residence permit, conviction of the offence made the appellant eligible for deportation in the discretion of the Minister of Immigration under s 91(1)(c) of the Immigration Act 1987. The Minister ordered his deportation on 17 March 2010.

Mr Helu exercised his right of appeal to the Immigration and Protection Tribunal under s 105 of the Act, which provides that the Tribunal may quash a deportation order if it is satisfied that it would be unjust or unduly harsh to deport the appellant, and that it would not be contrary to the public interest to allow the appellant to remain in New Zealand. The Minister's decision was upheld by the Tribunal which found that, while it would be unduly harsh to deport Mr Helu, it was not persuaded that it would not be contrary to the public interest for him to remain in the New Zealand.

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The appellant has sought judicial review of the Tribunal's decision. In the Court of Appeal and High Court, the decision of the Tribunal was upheld. The Supreme Court gave the appellant leave to appeal.

At the hearing of the appeal the appellant submitted that the Tribunal had failed properly to take into account article 12(4) of the International Covenant on Civil and Political Rights, which guarantees that no-one will be arbitrarily deprived of the right to enter their own country, and that the Tribunal failed properly to take into account his age. Counsel for the appellant also submitted that the Tribunal applied the incorrect test in assessing the public interest. As well as challenging the Tribunal's consideration of New Zealand's international obligations, counsel for the appellant submitted that the "sliding scale" approach to the risk of reoffending in assessing the public interest was too rigid. The Tribunal had said that under the sliding scale, the more serious the crime the lower the chance of reoffending that triggers an adverse public interest finding under the Act.

Counsel for the respondent supported the Tribunal's use of the "sliding scale" as a legitimate approach to assessing the risk of reoffending and whether it would be contrary to the public interest for the appellant to remain. The respondent also submitted that the Tribunal properly observed the requirements of the applicable international instruments, and that the Tribunal had properly considered the appellant's age at both stages of the s 105 inquiry.

The Court has held by majority comprising Elias CJ, McGrath and Glazebrook JJ that the test under s 105 was wrongly applied and that the matter must be remitted to the Tribunal for its reconsideration. Elias CJ and Glazebrook J were of the view that the Tribunal had applied a sliding scale approach in which a moderate risk of reoffending was determinative instead of considering all matters which bore on the public interest. McGrath J, for different reasons, was of the view that the sliding scale approach had been applied too simplistically by the tribunal. William Young and Arnold JJ dissented, and would have dismissed the appeal.

The Court was divided on the approach to be taken under s 105. McGrath, William Young and Arnold JJ held that the test to be applied under s 105 involves two separate inquiries. The test of whether or not it is contrary to the public interest for the appellant to remain in New Zealand is to be addressed separately from the inquiry into whether it would be unjust or unduly harsh to deport. The humanitarian considerations that come into the unjust or undue harshness test, while they must be taken into account in the second inquiry where they relate to the public interest, must not undermine the function of the public interest test as a control on the humanitarian limb of the section. They also held that appropriate weight was given to public interest considerations of family unity and the appellant's age.

Elias CJ and Glazebrook J disagreed. They expressed the test in different ways. They also considered that the Tribunal had failed properly to take into account the appellant's age and identification with New Zealand. Elias CJ took the view that, if it had done so, the Tribunal could only have concluded that deportation was a disproportionate response and not in the public interest. She would therefore have quashed the Tribunal's determination without remitting the matter. Glazebrook J took the view that the matter should be remitted for further consideration by the Tribunal.

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