IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

Appellate Jurisdiction

CIVIL APPEAL NO. 32 OF 2008
Miscellanous Appeal No. 8 of 2008
[On Appeal from Suva High Court Action No. 140 of 2008]

BETWEEN : **JOSEFA RAVATUDEI**, *Principal Immigration Officer*
: **YOGENDRA KUMAR**, *Immigration Inspector*
: **PAULA YAVITA**, *Passport Control Officer*
: **ASESELA NIU**, *Special Constable*
: **DIRECTOR OF IMMIGRATION**
: **PERMANENT SECRETARY FOR DEFENCE, NATIONAL SECURITY AND IMMIGRATION**
: **THE COMMISSIONER OF POLICE**

Appellants/Respondents
(Respondents in the High Court)

AND : **EVAN DAVID HANNAH**

Respondent/Applicant
(Applicant in the High Court)

Before the Honourable Justice of Appeal, Mr Justice John E Byrne

Counsel : C. T. Pryde, Solicitor General & Ms M. Rakuita for the Appellants
: J. Apted for the Respondent

Dates of Hearing: 12th, 17th June 2008
Date of Ruling: 26th September 2008

RULING

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[1] I have before me three applications. The first is by the *Respondent* Mr Hannah to discharge an order which I made on the 20th of May

2008 which was sealed on the 21st of May 2008. Secondly an application by the *Appellants/Respondents* Joseva Ravatudei & Ors for a stay of proceedings by the *Applicant* Mr Hannah in the High Court and thirdly an application to strike out the Notice of Appeal by the *Appellants* Josefa Ravatudei & Others.

[2] That very brief summary in itself gives no indication of the nature of these proceedings which I am satisfied are of great constitutional importance. When all parties appeared before me again on the 27th of May 2008 I stated that this case raised important matters of law involving the Constitution and Immigration Act as well as the status of the Writ of Habeas Corpus.

[3] Now having heard and read lengthy oral and written submissions by the parties I see no reason to change the opinion I previously expressed.

[4] Really the main application before me is for leave to appeal from orders of the High Court made by Mr Justice Jitoko on the 15th and 16th of May 2008. To understand the circumstances in which those orders were made and the applications now before me it is necessary to relate as briefly as possible the factual background of this case. The *Respondent* Mr Hannah was at all relevant times the publisher and Managing Director of the Fiji Times. He is an Australian citizen but is married to a Fiji citizen, Dr Katarina Tuinamuana, and they have an infant son, Benjamin.

[5] **Mr Hannah's Detention**

According to what is referred to as his second Supplementary Affidavit, sworn on the 9th of May 2008, the veracity of which I see no reason to doubt, on Thursday evening the 1st of May at about 6.30pm, four men came to the front door of his home at 3 Deovji Street, Tamavua. He was told by his wife's sister, Meliki Tuinamuana who was at the house at the time that there were three immigration officials and a police officer at the door who wanted to see him.

[6] Mr Hannah immediately called various solicitors from his present solicitors Munro Leys, to seek legal assistance. He also called the Fiji Times news room to inform them of the situation which, I think it fair to say, Mr Hannah, being an experienced journalist, considered had some news value.

[7] This was borne out by the front page of the Fiji Times of the 2nd of May 2008 which under a headline **"Arrested"** and a sub-heading **"Regime takes Fiji Times Boss"** had a photograph of Mr Hannah which bore the caption **"Forced Out"** ... the Fiji Times publisher Evan Hannah is escorted out of his Tamavua home in Suva by officers last night."

[8] In his Supplementary Affidavit Mr Hannah then describes the journey which he and those taking him into their custody made from Tamavua to Nadi. The motor vehicle in which he was taken was followed by members of the media which Mr Hannah's custodians attempted successfully to evade by changing motor vehicles some distance after they left Suva. Mr Hannah deposed

that the *First Respondent*, Joseva Ravatudei told him that they had an order for his deportation and showed him a copy of a Removal Order signed by the *Sixth Respondent*, the Permanent Secretary for Immigration dated the 1st of May 2008. The *First Respondent* advised Mr Hannah that the reason for the order was that he was in breach of his work permit. The *First Respondent* refused to specify the nature of the breach.

[9] It is common ground that the Removal Order stated that Mr Hannah was to be removed after seven days and initially much was made of this by Mr Hannah's counsel.

[10] I am satisfied that this Removal Order was made under the old Immigration Act whereas the Removal Order governing Mr Hannah's deportation was made under Section 15 of the Immigration Act No. 17 of 2003. Section 15(1) & (2) state that the Permanent Secretary for Immigration may make a written order directing a prohibited immigrant to leave the Fiji Islands and remain out of the islands either indefinitely or for a period specified in the order. Sub-section 2 states that an order made under sub-section 1 takes effect either on the date of service unless the person concerned is serving a sentence of imprisonment. Therefore, although those taking Mr Hannah into custody served him with an order made under the previous Immigration Act, I am satisfied that the order made for his deportation was valid under the 2003 Act.

[11] Mr Hannah and his custodians stopped at the Korolevu Police Station at about 10.00pm for a toilet break during which Mr Hannah telephoned his wife on his mobile phone to assure her that

he was safe. His wife told him that their lawyers had managed to obtain an order preventing his detention.

[12] Mr Hannah then informed his four custodians of this Order and advised them that they would be in breach of the Order if they continued with his deportation. He received no response from his custodians.

[13] He says in his Affidavit that he repeated the information about the Court Order twice more in the hearing of all four men during the following drive to Nadi, each time asking the *First Respondent*, Mr Ravatudei whether he had an obligation to check on the veracity of the information. Again, Mr Ravatudei was apparently still unmoved.

[14] On arrival at Nadi he was taken by his custodians to a house where he several times again raised the issue of the Court Order with his custodians. Again they were unmoved. Apparently on the assumption that perhaps patience and perseverance might still win the day for him, Mr Hannah again told his custodians that there was a Court Order preventing his deportation. I note that he did not state the name of the Judge who made the Order and shortly I shall mention this because I consider there are some curious features about the way in which the Order was made.

[15] Eventually Mr Hannah was placed on a Korean Airlines flight from Nadi to Seoul which departed at approximately 10.00am on the 2nd of May. He was to have flown on another Korean Airlines flight to Sydney, his Australian address, but his employer had made

arrangements for him to fly with another airline and he arrived in Sydney at approximately 7.30am on the 3rd of May.

[16] **Were the Respondents Served with the Order of Mr Justice Jitoko?**

An Affidavit of Service has been sworn and filed by Faizal Haniff a Senior Associate of Mr Hannah's solicitors. This Affidavit was sworn on the 2nd of May 2008 and states as far as relevant that on instructions from Mr John Apted who appears as counsel for Mr Hannah, Mr Haniff travelled to Nadi in the early hours of the 2nd of May 2008 with the following documents:

i) Writ of Habeas Corpus Ad Subjiciendum.
ii) Notice To Be Served With Writ of Habeas Corpus Ad Subjiciendum.
iii) Order on Application for Leave to Issue Writ of Habeas Corpus Ad Subjiciendum.

[17] Mr Haniff deposes among other things that he served a copy of the relevant Order on servants of the Immigration Department at Nadi Airport. I will go further and say that I am satisfied attempts to evade service of the Order were made by officers of the Immigration Department at Nadi. The question then arises whether the fact that they were served makes any difference to Mr Hannah's case. Mr Pryde says that whether or not the Order was properly served is not a matter which concerns a writ of Habeas Corpus, and in my Judgment this is a question among many others which, for reasons which I shall give, I consider should be referred to the Full Court for an authoritative Ruling.

[18] **The Ruling and the Ex-tempore Decision**

The second dated the next day and delivered at 4.00pm was an Ex-tempore Ruling on Leave and Stay.

Before discussing these however, I must mention the statement by counsel for Mr Hannah in response to a question I asked him at the beginning of the hearing as to why Mr Justice Jitoko was the Judge who made the orders and to whom the first application had been made. Mr Apted replied that Mr Justice Jitoko was the only Judge available at the time on the 1st of May 2008. I have since made enquiries and it appears there were several senior judges available to hear the application. It is not clear why Mr Justice Jitoko was chosen.

[19] I say this out of no disrespect to Mr Justice Jitoko who on the 1st of May was obliged to give a quick decision as to whether the writ be issued and then two urgent decisions first on the *Respondents'* summons to strike out the Writ on the ground that the action disclosed no reasonable cause of action and then his Ruling of the next day on whether leave should be granted to appeal his previous day's Ruling and to grant a stay for the *Respondents*. The *Respondents* relied on an Affidavit by Viliame Naupoto, the Director of Immigration and the *Fifth Respondent* in these proceedings who stated that the Applicant Mr Hannah had on the 2nd of May left Fiji and was then in Australia. He said that therefore Mr Hannah was no longer in the custody or control of the *Respondents* as he was out of the High Court jurisdiction. In other words, Mr Naupoto said the Fiji authorities were not in a position to produce the body of

Evan Hannah before Mr Justice Jitoko and it was therefore impossible to obey the Writ.

[20] The Judge agreed with the *Respondents'* submission that the Writ of Habeas Corpus is remedial and not punitive in nature. It must not be used as a way of punishing those who may have wrongfully detained or have since parted with the custody of the detainee. He stated that, according to Halsbury, the Writ is inapplicable if the illegal detention has ceased before the application for the Writ is made. However, he said that statement must be contrasted with the Privy Council decision in Gossage's case [**Thomas Barnardo -v- Mary Ford** (1892) AC 326 where, according to Jitoko J. the House of Lords affirmed a decision of the Court of Appeal that the Writ of Habeas Corpus ought to have been issued in that case notwithstanding that the detainee was no longer in the custody of the authority but had been taken to another country.

[21] The *Applicants/Respondents* submit to me that His Lordship failed to realise the reasons for the decision of the House of Lords and erred in the way he applied it to the present proceedings. He failed to give due weight to the statements, particularly of Lord Herschell and Lord Watson, which I shall quote in a moment. Before doing so it is desirable to refer to the facts in Gossage which were stated by Lord Herschell and I shall set them out briefly here. Harry Gossage was a boy whom a clergyman residing at Folkestone had found in Folkestone destitute and homeless. The clergyman requested Dr Barnardo who had homes for destitute children to take the young Gossage into one of his homes which the doctor did. The mother of the boy later confirmed that she wished Dr Barnardo to keep her son in his home as she could not afford to keep him herself. Some

time later the boy was removed to Canada by another person and Dr Barnardo alleged that he did not know the address of such person or where he or the child was.

[22] The mother of Gossage then applied to the High Court for a Writ of Habeas Corpus and it appeared that before the proceedings began Dr Barnardo had without authority from the mother handed over the child to a person who took him to Canada. The Court of Appeal confirmed a decision of the Judge in the Queen's Bench Division that the Writ should issue on the ground that the *Applicant* was entitled to have a return to be made to the Writ in order that the facts might be more fully investigated. At page 338 of the Report Lord Herschell said:

> ***"The question is not whether one who has parted with the custody of a person committed to his care can be made amenable to the law if he wrongfully parts with that custody, but whether the Writ of Habeas Corpus is the appropriate remedy".***

[23] After stating that the terms of the Writ required the recipient to have the body of the person named in it "taken and detained under your custody", His Lordship said, "This indicates that the very basis of the Writ is the allegation and the prima facie evidence in support of it, that the person to whom the Writ is directed is unlawfully detaining another in custody. To use it as a means of compelling one who has unlawfully parted with the custody to another person to regain that custody, or of punishing him for having parted with it, strikes me at present as being a use of the writ unknown to the law and not warranted by it". Lord Watson said at pp 333-334,

"The remedy of Habeas Corpus is, in my opinion, intended to facilitate the release of persons actually detained in unlawful custody, and was not meant to afford the means of inflicting penalties upon those persons by whom they were at some time or other illegally detained. Accordingly, the Writ invariably sets forth that the individual whose release is sought, whether adult or infant, is taken and detained in the custody of the person to whom it is addressed, and rightly so, because it is the fact of detention, and nothing else, which gives the Court its jurisdiction". At p334 Lord Watson doubted whether the law stated by Lindley L. J. in the Court of Appeal that the Writ could be used to have a child illegally deported returned to England under a Writ of Habeas Corpus was correct. At p335 he said:

> ***"I do not for a moment suggest that there is not a legal wrong committed in both cases; but that wrong is the very reverse of illegal detention, for which alone the Writ of Habeas Corpus was meant to give a remedy. If there be no other remedy in such cases, I am satisfied that it is for the legislature, and not for any Court, either of law or equity, to provide one; and I cannot see the propriety of this Court applying to these cases a remedy which was intended for a totally different purpose.***

[24] In the result the House of Lords upheld the decision of the Judge in the Queen's Bench Division and the Court of Appeal that on the particular facts the Writ could be issued so that the facts regarding

the removal of Harry Gossage to Canada might be more fully investigated.

[25] The *Respondents* submit that it is clear from Gossage's case that even if a legal wrong is committed, continued detention is essential to ground or sustain a Writ for Habeas Corpus. In this regard in his Ruling of the 16th of May, Jitoko J. said that the Writ had been issued some twelve hours before Mr Hannah had been removed from the country. He referred to Affidavits filed by Mr Hannah and others supporting his application, alleging that the Writ and the Order of the Court made on the 1st of May had at the very least, come to the notice and knowledge of the *Respondents* well before the *Applicant* was removed from the country. He said, "This raises serious issues that go to the very heart of the rule of law in this country. It is surely the right of the *Applicant*, and I suggest is also in the interest of the State, to demand the Writ be returned even in the absence of the *Applicant*, in order that the facts of his removal should be fully investigated". The *Respondents/Applicants* argue that in these remarks Jitoko J. showed that he did not understand the real purpose of a Writ of Habeas Corpus. In Gossage, the House of Lords following Mathew J. in the Queen's Bench Division and the Court of Appeal had held that the only reason which can lead to the issuance of a Writ of Habeas Corpus after release of a detainee is where the Court entertains a doubt whether it is a fact that at the material time the person alleged to be detained was not in the control of the *Respondent* to the Writ. In this case, the *Respondents* argue there can be no doubt that they no longer have control or custody of Mr Hannah because of the applicability of Immigration laws. They say therefore that this is an important question of law which should as a matter of public importance be

referred to the Full Court for its decision. I agree and shall make this one of my orders at the conclusion of this Ruling.

[26] I do not propose to refer to most of the other cases which were cited to me because generally they state the cardinal principle of law that detention is a condition precedent to the issue of a Writ of Habeas Corpus. I consider it desirable in the interest of the public and the parties to this litigation that the Full Court of Appeal should be given the opportunity to review these cases or confirm or distinguish them from the facts in the instant case.

[27] Much was made in the very able submissions of Mr Apted that the *Respondents* were guilty of many procedural errors in that they failed to bring to my attention facts which had been before Jitoko J. and were not mentioned to me when I made my order on the 20th of May. It is possible that the *Respondents* did not make full and frank disclosure of all material facts to me but the stage has now been reached where these proceedings are inter-partes, and as I have said earlier, I have heard full and cogent arguments by both sides. That said, however, it is desirable to mention one case on which the *Applicants* rely and which was not mentioned to Jitoko J. I refer to the decision of the Full Court of the Federal Court of Australia in **Ruddock -v- Vadarlis** [2001] 110 FCR 491otherwise known as the Tampa case whose facts received much publicity at the time of the incident and before the Federal Court gave its decision. The facts as partly stated in the head note were that a Norwegian container ship, *the MV Tampa*, in response to a request by the Australian Coast Guard, rescued 433 people from a wooden fishing boat sinking in the Indian Ocean about 140 kilometres north of Christmas Island (an Australian territory). The vessel

started to head towards Indonesia, but upon the objection of some of the rescuees, some of whom threatened suicide, headed towards Christmas Island. When the *M V Tampa* was approximately 13.5 nautical miles off Christmas Island, the Administrator of Christmas Island. acting on the request of the Australian Cabinet Office, closed the port of Christmas Island. The Australian government requested the captain of *Tampa* not to enter Australian territorial waters but two days later due to mounting concerns that some of the rescuees were very sick, the Captain took the *M V Tampa* into Australian territorial waters and stopped about four nautical miles off Christmas Island. Later a solicitor named Vadarlis and the Victorian Council for Civil Liberties filed separate proceedings seeking, amongst other things orders in the nature of Habeas Corpus.

[28] By majority (Beaumont and French JJ.) the Court held that because the rescuees were aliens and not being members of the community that constitutes the body politic of Australia, they had no right to enter and that therefore there could be no detention. Earlier in his Judgment at paragraph 104 Beaumont J. stated:

> ***"A further, fundamental, question must arise as to the scope of the Court's power to issue (as was done here) a Writ of Habeas Corpus not merely to release the occupants, but also (in the context of a claim (as pleaded) clearly aimed at obtaining access to the statutory "migration zone" to "bring those persons ashore to a place on the mainland of Australia"; in other words, to use the Writ to achieve an entry to Australia, which entry would otherwise be without***

authority and unlawful. This Court, in my view, has no power to authorise such an entry. It is plain that this is exclusively a matter for the Executive (see Minister for Immigration and Ethnic Affairs -v- Guo (1997) 191 CLR 559 at 578-579, 598-600).

[29] The *Applicants/Respondents* say that this passage applies to the situation here in that Mr Hannah, being a prohibited immigrant, has no right to be admitted to this country. Consequently no Court in Fiji has the power to authorise such an entry which is exclusively a matter for the executive. Towards the end of his Judgment in Tampa, French J. at p548 said:

"That in turn raises the question what freedom did the rescuees have which the Commonwealth, without authority, constrained? It points to the reality that nothing done by the Commonwealth amounted to a restraint upon their freedom, they having neither right nor freedom to travel to Australia".

[30] The *Applicants/Respondents* say that similar reasoning applies to Mr Hannah. It is submitted that by Section 16 of the Constitution he was allowed to reside in Fiji provided he obeyed the law. Once he was declared a prohibited immigrant he no longer has the right to return to Fiji and consequently there can be no control by Fiji of his movements. Counsel continued that the only way he can return to Fiji would be by challenging the order of the Minister or the Permanent Secretary, and this he has not done. For these reasons it

is submitted I should grant a stay of proceedings in the High Court and give leave to appeal to the Full Court.

[31] **The Principles Applicable on Stay**

It remains for me to consider whether apart from the matters I have mentioned above the application for stay comes within the principles governing such. These were recently considered by the Court of Appeal in **Natural Waters of Viti Limited -v- Crystal Clear Mineral Water (Fiji) Limited** Civil Appeal No. ABU0011 of 2004 of the 18th of March 2006 and I now quote the relevant parts of the Court's Judgment:

> ***"The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005):***
>
> > ***"On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful": Duncan -v- Osborne Building Ltd. (1992) 6 PRNZ 85 (CA), at p.87.***
>
> ***The following non-comprehensive list of factors conventionally taken account by a Court in***

considering a stay emerge from Dymocks Franchise Systems (NZW) Pty. Ltd. -v- Bilgola Enterprises Ltd. (1999) 13 PRNZ 48, at p.50 and Area One Consortium Ltd. -v- Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 2000:

a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd. [1977] 2 NZLR 41 (CA).
b) Whether the successful party will be injuriously affected by the stay.
c) The bona fides of the applicants as to the prosecution of the appeal.
d) The effect on third parties.
e) The novelty and importance of questions involved.
f) The public interest in the proceeding.
g) The overall balance of convenience and status quo".

[32] Applying those principles I am satisfied that a Stay should be granted in this case. Certainly sub paragraphs (e), (f) and (g) apply and no one can doubt the bona fides of the *Applicants* as to the prosecution of the appeal. The only question remaining is whether the appeal will be rendered nugatory? The *Applicants* submit that given the nature of the appeal in this case and its purpose to question the propriety and continuation of Habeas Corpus in cases where detention has come to an end, any appeal would be rendered nugatory if a Stay is not granted. I agree. I also consider the

issues raised in the *Applicant's* proposed appeal have significant bearing on the future administration of civil justice here in so far as the State is concerned. It must be of interest to the public generally to have a definitive Ruling on the issues raised in this appeal, namely that in relation to the proper purpose and use of Habeas Corpus proceedings. For these reasons I grant the *Applicant's* leave to appeal to the Full Court and order a Stay of all proceedings in the High Court until the final determination of these proceedings. I make orders in these terms. Costs will be in the cause.

[John E Byrne]
JUDGE OF APPEAL

At Suva
26th September 2008