

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

MISCELLANEOUS ACTION NO. 50 OF 2001

**IN THE MATTER OF ROBERT
HILTON BOTTAMLEY**

AND

**IN THE MATTER of an
Application under Order 54 of the
High Court Rules for a Writ of
Habeas Corpus**

Mr. P. Howard for the Applicant

Ms. N. Basawaiya for the Respondent

JUDGMENT

This application was commenced by Writ of Habeas Corpus by Salote Tuvou, the then fiancée (now married to applicant) of Robert Hilton Bottamley (the 'applicant'). The said Bottamley, who is a prohibited immigrant is now for the purposes of this application referred to as the 'applicant'.

The Orders sought are as follows as per Amended Notice of Motion dated 6 November 2001:

- 1) *That by virtue of Section 16(b) of the Constitution of the Republic of the Fiji Islands the Applicant is entitled to enter and reside in Fiji as he is married to a Fiji Citizen;*
- 2) *That the Applicant was not validly served with a Removal Order in terms of Section 15 of the Immigration Act (Cap.88);*

- 3) *The Applicant was wrongfully arrested on 6 August 2001 by Immigration Officers;*
- 4) *The Applicant is being wrongfully detained in Suva Prison since 6 August 2001;*
- 5) *That pending the full hearing of this matter the Applicant be granted bail;*

Background

This action commenced with a Writ of Habeas Corpus ad Subjiciendum by Ms. Tuvou by an affidavit sworn by her on 15 October 2001 and a supplementary affidavit was sworn on 18 October 2001. A further supplementary affidavit was sworn by her on 1 November 2001 in which she stated mainly that at Suva Prison on 29 October 2001 she was married to the applicant. She says that because of her marriage, under section 16(b) of the Constitution of the Republic of the Fiji Islands effective from 24 July 1998 her husband the applicant has the right to enter and reside in Fiji because she is his wife and a citizen of Fiji. She also stated that she is pregnant through him.

Then on 2 November 2001 she applied for bail for his release from Prison further to the 'Removal Order' signed by the Permanent Secretary for Home Affairs and Immigration.

The Respondent filed 3 affidavits in Reply to the applicant's affidavits and those filed on his behalf, opposing the application.

There was then filed on 19 November 2001 an affidavit in Reply to the Respondent's affidavit by the applicant.

The motion was heard by me on 20 November 2001. I had the benefit of written submissions from both Counsel.

Since I was proceeding on leave and was not to resume work until mid-January 2002, I stated that I will give judgment on notice. However on 20 November I made an Order for applicant's release from prison on bail on condition that he report to Police Post at Pacific Harbour and that he deposit his passport in Court.

The applicant is a 54 year old man and a citizen of New Zealand with a Passport of that country and which does not expire until 22 March 2009. By occupation he is a logging contractor.

The Immigration Officers arrested him on 6 August 2001 and took him to Korovou Prison. Ms. Tuvou says that the applicant came to Fiji to get married to her and they have lived in de facto relationship for a while and she became pregnant.

Initially the applicant arrived at Nadi Airport on 23 August 2000 and was issued with a visitor permit for few months and on 4 November 2000 further 2 months extension was granted on application by him to expire on 23 February 2001. But on 2 February 2001 he was told to leave the country within 14 days failing which deportation proceedings will be instituted against him.

Consideration of the issues

The motion is opposed by the Respondent the Minister for Immigration. I have considered the written and oral submissions from both counsel.

The learned counsel for the applicant has raised a number of legal issues which need serious consideration. He says in effect that the applicant entered Fiji

lawfully and at the time when he was arrested pending a reply on his application of 24 November 2000 for extension he was still lawfully in Fiji. He submits that the Removal Order was issued unlawfully because the applicant was not given an opportunity to question the grounds on which he was declared a prohibited immigrant or what class of prohibited immigrant which was contrary to section 11(3) of the Immigration Act.

Be that as it may, as Mr. Howard has stated, what complicates matters is that while the applicant was in Fiji after the permit expired and while his extension was pending, he got married to a Fiji Citizen, namely, the said Salote Tuvou with whom he lived for some time in New Zealand and Fiji. Tuvou says that this was not a 'marriage of convenience'. Mr. Howard submits that because the applicant is here lawfully and has now married he should be allowed to remain in Fiji under section 16 of the Constitution (Amendment) Act 1997 which provides as follows:

"16. The following persons may enter and reside in the Fiji Islands so long as they comply with conditions prescribed by the Parliament governing entry and residence:

- (a) former citizens;*
- (b) a foreign wife or widow or foreign husband of widower of a citizen*
- (c) a child of a citizen."*

Further in support of his arguments he refers to section 14 of the Immigration Act (Cap.88) which provides:

"14. It shall be unlawful for any person to remain in Fiji after the expiration or cancellation of any permit issued to or in respect of him under the provisions of this Act unless he is otherwise entitled or authorised to remain in Fiji under the provisions of this Act."

Then he goes on to refer to s34(5) of the Constitution which states:

"(5) Every person who is not a citizen but is lawfully in the Fiji Islands has the right not to be expelled from the Fiji Islands except pursuant to an Order of the Court or a decision of the Minister on a ground prescribed by law."

Finally, in the 'Removal Order' he says that it is contrary to sections (6) & (7) of the Act to make an order that PI 'remain out of Fiji indefinitely ...' for 'the maximum period a visitor is to remain out of Fiji, except with the prior permission of the Minister is 12 months'.

Therefore, he says that the Removal Order is unlawful.

The Respondent's arguments have been well set out in the written submission of Ms. N. Basawaiya. The circumstances in which the applicant entered Fiji this time and previously have been stated by her and his status in the eyes of the Respondent is also stated.

It appears that the applicant is in the 'bad books' so to say of the Immigration Department having been declared a prohibited immigrant previously in 1995 and had to be flown out of the country. He entered again on two other occasions, one with permission and one without. This time, on the third occasion he entered Fiji without prior approval on 23 August 2000 but was granted a four month's visitor's permit valid until 23 December 2000. He was told to leave by 2 February 2001. On 25 April 2001 the Permanent Secretary for immigration issued a Removal Order pursuant to section 15 of the Act as well as a warrant of detention. He was detained on 6 August 2001 and taken to prison; the applicant had refused to acknowledge the Removal Order after it was given to him.

From the facts it is perfectly clear that at the time of his arrest Robert Hilton Bottamley was a 'prohibited immigrant' as his visitor's permit had expired on 23 December 2000 and he has been residing in Fiji unlawfully from then until his arrest and subsequent detention on 6 August 2001.

I find that the Order for his arrest and detention was lawfully made by the Respondent pursuant to section 15 of the Act which provides:

- (1) *The Permanent Secretary may make an order directing that any person whose presence within in Fiji is, under the provisions of this Act, unlawful, shall, as the Permanent Secretary may specify from the date of service of the order on such person or on completion of any sentence of imprisonment which he may be serving, be ordered to leave Fiji or be removed from and remain out of Fiji either indefinitely or for a period to be specified in the order.*
- (2)
- (3) *A person against whom an order under this section is made may, before he leaves Fiji and while being conveyed to the place of departure, be kept in prison or police custody, and while so kept shall be deemed to be in lawful custody.*

The applicant's application for extension was denied by letter of 15 February 2001 and the last extension sought was until 17 April 2001. His immigration status was not regularised, therefore his presence in Fiji was unlawful.

Now, this brings me on to the question whether the applicant's marriage to Salote Tuvou has changed his immigration status.

It is clear that the marriage took place after his arrest and detention. I agree with Ms. Basawaiya that the applicant is not entitled to an automatic right of residence, rather that he as the foreign husband of a citizen must comply with the

provisions of the Act, as it governs the entry and residence of prospective immigrants wishing to enter and reside in Fiji. The relevant section in this regard is section 8 of the Act which provides:

- (1) *The Permanent Secretary may issue a permit in the appropriate form to any person entitling him to enter and reside or to reside or work in Fiji, upon such conditions as to the security to be furnished, the profession or occupation which the holder may exercise or engage in and the person by whom the holder may be employed within Fiji, enters any other matter whether similar to the foregoing or not which the Permanent Secretary may deem fit to impose or as may be prescribed, and may at his discretion vary any such condition:*

Provided that except with the approval of the Minister, no such permit may be issued to any person who is unlawfully in Fiji, in lawful custody or is a patient in a mental hospital.

Just because the applicant is now married to Salote Tuvou and has become a 'foreign husband' under s16 of the Act does not automatically mean that he can 'enter and reside' for as that section says he has '*to comply with conditions prescribed by the Parliament governing entry and residence*'. The above-quoted section 8(1) is relevant in this regard wherein the proviso is quite clear that 'no such permit may be issued to any person who is unlawfully in Fiji, in lawful custody or is a patient in a mental hospital'.

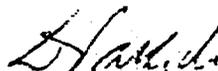
Conclusion

To sum up, I find that the arrest and detention of Robert Hilton Bottamley was lawful. It is clear that he has fallen foul of the law in the past and had to be deported and he has again flouted the law and has been properly declared a prohibited immigrant. His unlawful presence or forceful stay here does not become legal because he has now married a Fiji citizen after living with her in de facto relationship for about three years in Fiji and New Zealand. Now he has made his wife pregnant

and wants to reside in Fiji with a 'tag' on him as a Prohibited Immigrant. One cannot circumvent the immigration laws in this manner. The provisions of the Immigration Act are to be complied with; the provisions of the Constitution referred to by Counsel will not help him as its provisions have to be read with the Act relevant to this case.

For these reasons, for Robert Hilton Bottamley his honeymoon is over, he has managed to prolong his stay as a prohibited immigrant for a while in Prison and later out on bail. I cannot see why he cannot go back to his country of New Zealand of which he is a citizen and take his wife with him and look after her for he has taken the responsibility to do so. If there is an application before the Minister for Immigration for permit to reside now that he is married, then it is for the Minister to decide; but because he is a prohibited immigrant he cannot be allowed to remain.

The application for writ of habeas corpus is dismissed with no order as to costs.


D. Pathik

Atg. Judge

At Suva

3 April 2002