

**IN THE DISTRICT COURT  
AT NELSON**

**CIV-2017-042-000321  
[2017] NZDC 18283**

BETWEEN	DEPARTMENT OF IMMIGRATION Applicant
AND	QING LU Defendant

Hearing: 17 August 2017

Appearances: K B Bell for the Applicant  
R R Ward for the Defendant

Judgment: 17 August 2017

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**ORAL JUDGMENT OF JUDGE A A ZOHRAB**

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[1] Ms Lu, you are liable for deportation on the grounds that you are unlawfully in New Zealand. Accordingly, Mr Wilson, an officer of the Immigration Department has applied for a warrant of commitment under s 316 Immigration Act 2009 to facilitate your deportation. The basis on which I need to consider whether or not it is appropriate to issue the warrant of commitment is to be found in s 317 Immigration Act 2009, that deals with decisions on applications for warrant of commitment.

[2] The options I have got in your circumstances are to issue a warrant of commitment in the prescribed form, authorising your detention, or I could order your release from custody under s 320 of the Act on conditions if I am not satisfied that detention is warranted.

[3] Section 317(4) provides that in determining whether to issue a warrant of commitment, or whether to order the person's release on conditions, the Judge must

have regard to, amongst other things, the need to seek an outcome that maximises compliance with the Immigration Act 2009.

[4] The applicant submits that detention in your case is warranted. They suggest that you pose a flight risk, given that you have exhausted all of your legal avenues, that you have failed to leave New Zealand voluntarily, you attempted suicide and there are issues with respect to your honesty, in terms of misleading comments that you have made in the process previously.

[5] Your lawyer submits that you could be released on conditions, that detention is not warranted. He points out the genuine nature of the relationship that you enjoy. He characterises you as naive and vulnerable. He points to the health issues and he has helpfully filed detailed submissions which I will refer to shortly. He points out that application has been made under the Immigration Act to permit Immigration to award a visa to you on an entirely discretionary basis.

[6] You are willing to submit to conditions. You have Mr Burkett who is also willing to assist in doing that. So, in combination, of all of those matters, and a release on conditions would ensure your co-operation, because you have co-operated in the past and in his submission that would not be contrary to s 317(4).

[7] In terms of how we have got to this stage, your lawyer who has very helpfully assisted in preparation of a chronology because the chronology of events as set out in Mr Wilson's affidavit commences on the point of your last arrival in New Zealand on 16 June 2015 when you were granted a work visa upon arrival.

[8] Mr Ward at para [15] of his submissions has gone back further than that. He confirms that you, and I have no reason to doubt what he said, and there has been no suggestion by the applicant or informant that that is not the position. So it seems that you arrived in New Zealand in 2012 on a working holiday visa. You were employed by your now partner, Mr Burkett, for three months as a dairy farm assistant.

[9] He wanted to retain you as an employee. Your then immigration agent was unable to convince Immigration New Zealand to approve your work visa application.

You applied to stay at Massey University and received approval for that. Then in October 2014, and this is referred to in the informant's application, you were involved in a police raid of a brothel. The legality of the raid, and the statement which was made by you was questioned by your then advisor, but that is certainly a red flag from the informant's perspective, your presence there.

[10] You then, in December 2014, moved back to stay at a farm owned by Mr Burkett and on 14 February 2015, that is the date the two of you considered that you formally committed to a de facto relationship, and then the two of you have moved in together.

[11] We have then got a work visa being issued, and if I pick up in terms of Mr Wilson's chronology, we have got a work visa being issued on arrival on 16 June 2015, valid until 30 March to allow you to work as a dairy farmer and to study English.

[12] Then we have got a further work visa application being lodged, and this was "declined failed" on 23 December 2016.

[13] Then on 26 July 2016 you appealed to the Immigration Protection Tribunal. That appeal was declined on 30 December 2016, although the Tribunal directed then that you be granted a three month work visa, and that is usually done effectively on the basis to permit a person to get their affairs in order, and that is what is expressly stated in the legislation.

[14] In any event they granted you a work visa to work for three months. Then, on 23 December 2016, shortly before the expiry of the s 216(b) visa, you applied for a work visa on partnership grounds. This was declined failed.

[15] Then on 3 April 2017 you appealed to the Immigration Protection Tribunal, and that appeal was declined on 30 June 2017.

[16] Effectively the position is that you have been unlawfully in New Zealand since 20 February 2017. However, as Mr Ward points out of course, that ignores the fact there was this appeal process being considered in the background.

[17] As I observed to him, one of the concerns that I had in dealing with this application is that on two occasions you have gone to the Immigration and Protection Tribunal. The significance of that is that that is a specialist tribunal. The people there are dealing with these cases on a day-to-day basis, they have specialist training.

[18] So, for example, when I am dealing with appeals from organisations such as the Disputes Tribunal, the Tenancy Tribunal, the Weathertight Homes Tribunal and other tribunals like the Licensed Motor Vehicle Dealers Tribunal, I am loathe to disturb the decisions that are made by specialist bodies, because they have both specialist training, and understanding of the process.

[19] So, as I say, I note the chronology of events, I note the various applications that have been made, but I note also that on two occasions you have been unsuccessful before the Immigration and Protection Tribunal.

[20] Your lawyer points out that on the second occasion, for example, that the material that was filed was somewhat sparse, and certainly not of the standard that he would have expected to have filed if he had been responsible for making the appeal, but that is not something that I can look behind at this stage. As I say, I am stuck with the chronology which tells me that on two occasions you have been to a specialist tribunal and have been unsuccessful.

[21] So we are at the stage now where you have been unlawfully in New Zealand since 20 February 2017, albeit that I have no reason to doubt what your lawyer has said, in that you had been expecting your specialist advisor to be taking some steps to exhaust any appeal measures.

[22] Essentially what the applicant tells me is that you were located on 16 August at this address in Kaiuma Bay in Havelock. You were then taken into custody by the police.

[23] I am told that there was an attempt at slashing your wrists and that is something that concerns the informant because their concern is that if you are as desperate enough to attempt to do that to yourself, what might you do when you know that you have exhausted all of the legal avenues available to you, and that you are likely to be deported.

[24] You were also interviewed by the informant as well. I am told that it has not been possible to deport you within 96 hours of being taken into custody because your passport has not yet been located, and they need to undertake a risk assessment in Christchurch to determine whether or not you can travel escorted or unescorted.

[25] They believe, this is the informant believes, that if I were to release you on conditions today, you will abscond otherwise than by leaving New Zealand because you failed to depart voluntarily and have been here unlawfully for six months. They suggest that you have been working unlawfully in New Zealand since 20 February this year. Issue is taken with that.

[26] I would understand that effectively that is an inferential conclusion that they have asked the Court to draw, given your previous employment on the farm, and the nature of the relationship. It would not make sense that you have not been working on the farm.

[27] Also, and this is the “red flag” that I was talking about earlier, they say that you have previously provided false information to Immigration New Zealand, particularly, when asked during a visit on 8 April 2016 if you were in a relationship with your employer and you just stated “worker/boss”.

[28] In your work visa application you stated you were single when asked your relationship status, but, however, following your appeal to the Immigration and Protection Tribunal, you advised that you had been in a relationship with your employer since 1 April 2015.

[29] So, there is a concern there, that relatively straight forward and simple questions have not been answered truthfully. Also you failed to provide any information as to when you will in fact depart New Zealand.

[30] Mr Ward, in his detailed written submissions, which I have had the opportunity to read and I will not repeat word for word, submits that detention is not warranted in this case. You are not a flight risk as is suggested, you have a stable home and you have people in Court supporting you today, and you were not wanting to leave that home, save the fact that you were forced to leave it given the arrest situation.

[31] You have pursued a large number of lawful legal avenues in order to remain in the country, and the reason why you are here on an illegal basis is because of this most recent failed appeal to the Immigration and Protection Tribunal.

[32] So his submission is, given that you have always conducted yourself in terms of applications for visas and appeals, that you have followed the rules as it were, his submission is effectively that there is no reason to doubt that you would not follow the rules here, and that you would do as you were told if released on conditions.

[33] Whilst he acknowledges that technically speaking you have been here unlawfully since 20 February 2017, that has got to be seen against a background, or in the context of the fact that your appeal rights have only really closed a short time ago, when the appeal to the High Court was not made by your former advisor.

[34] Your understanding was that after meeting with your former advisor that an appeal was being considered, or drafted to the High Court, and you were under the impression that this was in hand, but apparently that turned out not to be the case.

[35] There is the s 60 application in the background, and the informant says well that is something that can be dealt with quite separately, and quite independently of the process today.

[36] Mr Ward, on your behalf, submits that whilst technically speaking you have been here unlawfully or illegally since 20 February 2017, it is really not as bleak as

that. That it is really since 30 June when your appeal effectively failed that that should be regarded as the relevant date for risk assessment purposes.

[37] His submission is that there is no evidence before the Court other than the bald statement from Mr Wilson that you have been working, and it is submitted that you live on a farm with your partner, but have not been working in breach of any visa requirements.

[38] It is accepted that you previously admitted providing Immigration with incorrect information about your partnership status, and you have apologised for that. That was due to a mistaken belief in his submission, and that you wanted to get the immigration status based on your own merit, as opposed to being put together with Mr Burkett. There was some cultural aspects to it, but also his submission is that the false information was not of the grossest type, when one considers the rationale for why you gave the information that you did.

[39] In terms of the advisor failing to lodge a High Court appeal in time, you were under the impression that this was being done on your behalf, and you had an email from your advisor informing you that the advisor was seeking the advice of an expert lawyer. When you realised that was not the case, you have then approached Mr Ward and he has been working as quickly and as efficiently as he can to try and advance matters and as I said this is a s 60 application and we have got also the submissions that have been filed here.

[40] His submission is given that the support you have got from people in Court today, given the honourable way that you have conducted yourself in terms of making applications where appropriate, then filing appeals where appropriate, and your seemingly thinking that this appeal to the High Court was underway, that this Court could have confidence that if you were to be released on conditions, that you would comply with those.

[41] As part of the discussion with your lawyer, I wondered aloud whether or not it was possible, for example, for a monetary bond to be paid to the Court to assist in ensuring compliance, but that is not possible. It seems that it is only the High Court

that has the power to both order, and also receive monetary sums, to ensure compliance, for example, with bail conditions, and the like, and by analogy, with any payment such as this, as I have no inherent jurisdiction. The only powers that I have are the powers that are given to me by statute, and nowhere in statute can I find an ability to order such a bond.

[42] In terms of the slitting of your wrists, Mr Ward in his detailed submissions, and I will not go through them in detail as to this aspect, points out that there are issues and concerns for your well being. His submission is, that you deserve to spend the remainder of the little time that you have here with your partner, and this is at a place where you call home since March 2015, where not only you have a partner, but you also have a pet and also personal belongings.

[43] Mr Ward on your behalf expresses concerns about your mental health and he urged Immigration to have consideration to the interim obligations under s 177 Immigration Act and Ms Bell, on behalf of the informant, submitted that the informant was well aware of those obligations and is alive to those issues.

[44] His submission also is that if one looks at what has happened, you did not seek to avoid arrest, so that means that the Court can have confidence that you would comply with conditions and the reality of the situation is, is that if you were released on conditions where else could you go? What else could you do? It is not realistic for you to be considered a flight risk because there is nowhere else for you to go as it were and you have had your chance to run already.

[45] And in closing, effectively, he submitted that in your personal circumstances and situation that being kept in custody is no place for someone such as you and he urges a release on conditions.

[46] I am not privy to the contents of all of the applications, but what the chronology that has been helpfully prepared by your lawyer, and also Mr Wilson for the informant, what it tells me is that since 2012 you have been working, effectively towards being able to stay in New Zealand. You have made applications for various visas, and whilst initially visas were granted, what has followed subsequently is that applications have



been declined. You have appealed on two occasions and those appeals have been declined.

[47] So the background against which I must consider the application today by the informant is a clear willingness on your part to want to stay in New Zealand, and a clear indication from the authorities that you have not met the necessary threshold for the various applications, and what has happened now is you have been unlawfully in New Zealand since 20 February 2017.

[48] You have a partner, you have some ties to the country, so you are reluctant to leave. You have acted in an erratic fashion when arrested on this occasion. You have slit your wrists, so that gives me cause for a concern about the lengths that you might go to, to avoid being taken forcibly from the country.

[49] Also of concern is the “red flags” that the informant have identified, not only have you made various applications and have had unsuccessful appeals, there have been occasions where you have been less than truthful. There has been this incident in the brothel which is a concern, but more significantly the issue as far as the status is, between you and Mr Burkett at the time that you answered the question. There has been a “spin” been put on that, but it seems a relatively straight forward question to have been answered, and it is not one that should have caused too many problems. It has been suggested that there are cultural issues, but given that you have been visiting New Zealand since 2012, given you have applied for study at university, given all of the other things that you are doing, given the significance of that sort of question, in the context of these sorts of applications, I find it hard to accept that you struggled with how you should answer that question.

[50] So, against that background, in my view it is appropriate to grant the application for the warrant of commitment. I have concerns about what you might do if you were to be released on conditions. My concern is that you would not co-operate with the process. I accept that there are issues as far as your health are concerned, but I am sure that Immigration will be alive to those matters.

[51] My concern is that you have exhausted all of the various avenues, a specialist tribunal has seen no merit in your application, and I can have no confidence that you would co-operate with the process.

[52] The application for a warrant of commitment is granted on the terms sought.

A A Zohrab  
District Court Judge