EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT TAURANGA

CIV-2017-070-000178
[2018] NZDC 10812

BETWEEN	MURRAY GARDINER Applicant
AND	[GEORGO BOOKER] Respondent

Hearing: 29 May 2018

Appearances: A Pollett for the Applicant
E Burke for the Respondent

Judgment: 1 June 2018

RESERVED DECISION OF JUDGE T R INGRAM

---

[1] Mr [Booker] is a Brazilian national who has been in New Zealand unlawfully since 2011. He has now been in custody since [date deleted] February 2017, a little over 15 months. His current warrant of commitment expires on [date deleted] June.

[2] The Crown have applied for a fresh warrant of commitment, which has been opposed. The legal issue in this case is whether the present application for a warrant of commitment falls to be considered under the provisions of s 317 of the Immigration Act 2009 or under s 323.

[3] Section 317 provides:

> **317 Decision on application for warrant of commitment**
>
> (1) On an application for a warrant of commitment, a District Court Judge—
>
> (a) must, if satisfied on the balance of probabilities that the person is not the person named in the application for the warrant of commitment, order that the person be released from custody immediately:
>
> (b) may, in any other case, either—
>
> (i) issue a warrant of commitment in the prescribed form authorising the person's detention, in a place named in the warrant, for a period of up to 28 days, if satisfied of the matters in subsections (2) and (3) (and having taken into account the matters in subsections (4) and (5)); or
>
> (ii) order the person's release from custody on conditions under section 320, if the Judge is not satisfied that detention is warranted.
>
> (2) A Judge may issue a warrant of commitment if satisfied on the balance of probabilities that the person in custody is the person named in the application and that any 1 or more of the following applies:
>
> (a) a craft is likely to be available, within the proposed period of the warrant of commitment, to take the person from New Zealand:
>
> (b) the reasons why a craft was not available to take the person from New Zealand are continuing and are likely to continue, but not for an unreasonable period:

(c) the other reasons the person was not able to leave New Zealand are still in existence and are likely to remain in existence, but not for an unreasonable period:

(d) the person has not supplied satisfactory evidence of his or her identity.

(3) If subsection (2) does not apply, the Judge may, nevertheless, make a warrant of commitment if it is, in all the circumstances, in the public interest to do so.

(4) 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, among other things, the need to seek an outcome that maximises compliance with this Act.

(5) Unless there are exceptional circumstances, the Judge must not release the person on conditions if—

(a) the identity of the person is unknown; or

(b) the person's identity has not been established to the satisfaction of the court; or

(c) a direct or indirect reason for the person being unable to leave New Zealand is, or was, some action or inaction by the person occurring after the person was—

(i) served with a deportation liability notice; or

(ii) arrested and detained for the purpose of deportation or turnaround; or

(d) the person claimed refugee or protection status only after the person was—

(i) served with a deportation liability notice or deportation order **[**or with a removal order under the former Act**]**; or

(ii) arrested and detained for the purposes of deportation or turnaround.

[4] Section 323 provides:

323 Decisions on warrants of commitment where detention beyond 6 months

(1) This section applies where a person would, upon a successful application for a further warrant of commitment under section 316, be detained under consecutive warrants of commitment for a continuous period of more than 6 months following—

(a) the person's initial detention under a warrant of commitment, where the person has exhausted all appeal rights under this Act at the time of that initial detention, or had no such appeal rights; or

(b) where paragraph (a) does not apply, the later of—

(i) the conclusion of any appeal proceedings brought by the person; or

(ii) the expiry of any period for bringing such an appeal; or

(c) the date when a claim for recognition as a refugee or a protected person is finally determined (within the meaning of section 128), if the claim was made only after the person—

(i) was served with a deportation liability notice or order; or

(ii) was arrested and detained for the purpose of deportation or turnaround.

(2) A further warrant of commitment authorising the detention of a person to whom this section applies must be issued if a District Court Judge is satisfied—

(a) that the person's deportation or departure is prevented by some action or inaction of the person; and

(b) that no exceptional circumstances exist that would warrant release.

(3) If the Judge is not so satisfied, the Judge must order the person's release on conditions under section 320.

(4) An application for a further warrant of commitment in a case to which this section applies—

(a) must be supported by evidence under oath by an immigration officer; and

(b) must include a statement as to why the further warrant is required; and

(c) may include any other supporting evidence.

(5) The Judge may require the immigration officer to attend the hearing to give evidence and be subject to cross-examination.

(6) The period of 6 months referred to in subsection (1) must be calculated exclusive of any period commencing on the date on which the person to whom the warrant relates escapes from lawful custody and ending 96 hours after the date on which the person is again taken into custody under this Act.

(7) This section does not apply to a person whose deportation has been ordered under section 163.

(8) To avoid doubt, if a person to whom subsection (1)(c) applies makes a subsequent claim, the 6-month period must be treated as starting on the date the subsequent claim is finally determined.

(9) In subsection (1),—

appeal proceedings means the proceedings in respect of which the appeal rights are exercised

appeal rights means—

(a) the rights of appeal the person has or had against liability for deportation; and

(b) the refugee and protection appeals associated with any claim made before the person was served with a deportation liability notice or arrested and detained for the purpose of deportation or turnaround.

(10) For the purposes of subsection (2), exceptional circumstances do not include—

(a) the period of time that a person has already been detained under this Part; or

(b) the possibility that the person's deportation or departure may continue to be prevented by some action or inaction of the person.

[5] It would seem that s 317 is designed to cover the general case of detainees on their initial detention, or where five or fewer renewals of 28 day warrants of detention have been granted. The section covers the position of those who apply for refugee status after detention, and under ss 5 a Judge must not release a person on conditions where refugee status has been claimed only after detention, in the absence of "special circumstances".

[6] Section 323 on the other hand, appears to be aimed at detainees who will be detained for a period of more than six months if a further application for a warrant is successful, but only in specific limited circumstances. Most warrants are issued for a period of 28 days, and s 323 is accordingly aimed at detainees who have been the subject of multiple applications for warrants of commitment over a period of more than five months. Jurisdiction to act under s 323 is contingent upon one or more of the three disjunctive alternatives covered in subsection (1) (a), (b), or (c). Those

alternatives cover three possibilities. Subsection (1) (a) covers the case of those detainees who had no appeal rights, or whose appeal rights had been exhausted, at the time of detention. Subsection (1) (b) applies only where subsection (1) (a) does not apply, and covers the case of a detainee who has who has had appeal rights at the time of detention, and whose appeal has been concluded, or who has lost such appeal rights by expiry of the appeal period. Subsection (1) (c) covers the case of someone who has made a claim for refugee status after detention. Subsection (1) (c) is not limited to detainees to whom subsection (1) (a) does not apply, so a detainee can be brought within the operation of the section under both provisions.

[7] The rigidity of subs (10), excluding time in detention from consideration as "exceptional circumstances", was clearly designed to disincentivise multiple applications and appeals, by excluding time spent in detention from being a viable ground to base a claim of "exceptional circumstances" on.

[8] On behalf of Mr [Booker], Mr Burke submitted that s 317 applies to Mr [Booker]'s circumstances, rather than s 323. He further submitted that the definition of "exceptional circumstances" under s 323(10) has no application under s 317, because it is drafted to restrict its operation to cases covered by s 323 (2) only.

[9] Mr [Booker]'s position must be outlined. He is a Brazilian national who arrived in New Zealand on [date deleted] November 2006, and was granted a visitor permit to 11 February 2007. He sought and was granted a work permit on 15 November 2008, and subsequent work permits were granted through to 8 October 2010. On 16 November 2010 he sought a visitor permit, which was granted to 21 May 2011. On 17 May 2011 he applied for a student visa, which was declined on 21 July. He was granted an interim visa to that date whilst his student visa application was pending. On 4 August 2011 he requested a student visa under s 61 of the Act. This was declined on 26 September 2011, and he was told to leave New Zealand. He had been unlawfully in New Zealand since 22 July 2011.

[10] Mr [Booker] was not located by the immigration authorities until [date deleted] February 2017. His travel documents have expired. Mr [Booker] confirmed his identity on [date deleted] February 2017, when interviewed by an Immigration officer.

[11] Following his detention on [date deleted] February 2017, Mr [Booker] sought refugee status. That request for refugee status was declined on 27 September 2017. On 6 October 2017 Mr [Booker] appealed to the Immigration Protection Tribunal, which declined his appeal on 19 December 2017. Mr [Booker] could not be deported until the statutory 28 day appeal period from the date of that decision expired, and the calculation of that period excludes a portion of the Christmas, New Year period. No appeal against that decision was ever filed.

[12] On 5 February 2018 a second claim for refugee status was notified by a new firm of solicitors acting for Mr [Booker], and that second claim was filed on 14 March 2018. I am advised that an initial determination of that second claim may be made towards the end of June 2018, and further appeal periods will run from such a determination, if that determination turns out to be adverse to Mr [Booker]'s claim.

[13] In practical terms then, Mr [Booker] has been in custody, confined in a New Zealand prison designed for and populated by convicted criminals, for over 15 months. Unsurprisingly, it has been a most unpleasant experience for him, as he is not a criminal. He wishes to be released on reasonable bail conditions pending the determination of his claim for refugee status.

[14] Mr Burke submits that on the proper construction of the term "exceptional circumstances" in s 317, the 15 month period of incarceration pending resolution of the refugee status claims can, and in this case does, amount to "exceptional circumstances". The term "exceptional circumstances" is not defined in s 317, and he points to the statutory recognition in s 317 (2) of the concept of an "unreasonable period". He contrasts that with the provisions of s 323, which does not mention "an unreasonable period". He submitted that the definition of "exceptional circumstances" under s 323(10) has no application under s 317, being restricted in its operation to cases covered by s 323 (2) only. He submitted that Mr [Booker]'s case can and should be determined under s317 alone.

[15] In relation to s 317, the Crown say that the provisions of s 317(5)(d)(i) and (ii) apply to Mr [Booker], and those provisions require that Mr [Booker] not be released on conditions without "special circumstances", because he has applied for refugee

status after his detention. The Crown say further that under s 317 (4) the Court must have regard to the need to seek an outcome that maximises compliance with the Act.

[16] In support of the Crown's case, it is submitted that the law as decided in the Higher Courts has established unequivocally that "exceptional circumstances" must be distinctly out of the ordinary, unusual or outside the common run of cases. The point was covered by William Young P in *Chief Executive of Department of Labour v Yadegary*.[1] It was there held that:

> …it is necessary to confine "exceptional circumstances" to situations that are outside the general run of cases that are prima facie subject to the default rule.

[17] In *Ministry of Business Innovation and Employment v T* the Immigration Protection Tribunal expressed the view that administrative delay would not "constitute an exceptional circumstance in terms of s 317(5)".[2] It was held in that case that a lengthy detention is not an "exceptional circumstance".

[18] The matter was further addressed in *Maritz v District Court at Auckland* where Toogood J held that the fact of detention does not prevent pursuit of a refugee status claim, and an outstanding refugee status claim cannot be considered as an exceptional circumstance (see [43]).[3] Justice Toogood there assessed the requirement for the Court to consider the public interest, finding that the public interest lay in favour of the issue of a warrant of commitment, placing reliance on the requirements of s 317(4), which specifically requires the Court to consider an outcome that maximises compliance with the Immigration Act 2009.

[19] Turning to the operation of s 323, the first question is whether or not s 323 applies at all. The title to the section, and its general tenor, indicate that it is designed to cover the case of detainees who are approaching or have exceeded 6 months in custody, in contrast to s 317, which appears to be aimed at detainees on their initial detention, or subsequent warrant applications leading up to 6 months detention.

[20] S 323 (1) relevantly provides:-

---

1 *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295 at [258].
2 *Ministry of Business Innovation and Employment v T* (CIV-2014-085-000863).
3 *Maritz v District Court at Auckland* [2018] NZHC 828.

> **323 Decisions on warrants of commitment where detention beyond 6 months**
> (1) This section applies where a person would, upon a successful application for a further warrant of commitment under section 316, be detained under consecutive warrants of commitment for a continuous period of more than 6 months following—
> (a) the person's initial detention under a warrant of commitment, where the person has exhausted all appeal rights under this Act at the time of that initial detention, or had no such appeal rights; or
> (b) where paragraph (a) does not apply, the later of—
> (i) the conclusion of any appeal proceedings brought by the person; or
> (ii) the expiry of any period for bringing such an appeal; or
> (c) the date when a claim for recognition as a refugee or a protected person is finally determined (within the meaning of section 128), if the claim was made only after the person—
> (i) was served with a deportation liability notice or order; or
> (ii) was arrested and detained for the purpose of deportation or turnaround.
> …
> (8) To avoid doubt, if a person to whom subsection (1)(c) applies makes a subsequent claim, the 6-month period must be treated as starting on the date the subsequent claim is finally determined.

[21] Clearly, in terms of subs (1)(a), Mr [Booker] has already been detained under consecutive warrants of commitment for a continuous period of more than six months. At the time of his initial detention under the warrant of commitment, he had exhausted all his appeal rights under the Act in relation to every prior decision on his applications, the last of which had been rejected in September of 2011. Nor did he have any extant appeal rights on those applications, by effluxion of time. Accordingly, he would seem to be caught by the operation of s 323(1)(a).

[22] For completeness sake, I turn to consider s 323(1)(b), which only applies to those not covered by s 323(1)(a). In reference to that provision, six months has not elapsed since Mr [Booker]'s initial refugee status appeal was determined, but if this application for a warrant of commitment is successful, the six month period will expire during the currency of such warrant, on 19 June 2018. Accordingly, he may fall within 323(1)(b)(i), as his appeal rights on his initial claim for refugee status expired 30 days after 19 December 2017, without any appeal being filed. However, he has made a subsequent and as yet undetermined claim for refugee status, which may be appealed, excluding this provision.

[23] Out of an abundance of caution, I turn to consider s 323(1)(c). In reference to that provision, Mr [Booker] has made two applications for refugee status, both being

made after he was detained. That requires consideration of whether his claim for refugee status has been finally determined under s 128.

[24] S 128 provides:-

> **128 Matter not finally determined until expiry of appeal period or when appeal determined**
> A matter under this Part must not be treated as finally determined until—
> (a) the expiry of the appeal period for any appeal relating to the matter; or
> (b) if a person lodges an appeal, the appeal is determined.

[25] Under that provision, one of Mr [Booker]'s claims has been finally determined, and one has not. Because the second application remains undetermined, under ss 8 the six month period specified in ss 1 has not yet commenced to run. Accordingly it is my view that s323(1)(c) could not apply.

[26] Because the subsections are specified to be disjunctive, if one or more subections capture Mr [Booker]'s circumstances, the provisions of s323 will apply.

[27] Subsection (2) of s 323 requires that a warrant of commitment be issued by a District Court Judge if satisfied "that the person's deportation or departure is prevented by some action or inaction of the person, and that no exceptional circumstances exist that would warrant release". For the purposes of subs (2), exceptional circumstances are defined in subs (10) as **not** including the period of time already spent in detention under the Act.

[28] I have concluded that s 323(1)(a) covers Mr [Booker]'s present circumstances. Under subs (10), time in detention cannot be considered as "exceptional circumstances", for the purposes of consideration of whether or not a warrant of commitment should be issued. No other ground was advanced, and Mr [Booker]'s opposition to the application cannot succeed under s 323.

[29] In case I be wrong in that determination, I turn to consider s 317. Accepting uncritically the submission advanced that the term "exceptional circumstances" can mean different things in s 323 and s 317 respectively, I consider that the same result must nevertheless obtain under s 317, for slightly different reasons. In my view, the absence of an equivalent provision to s323(10) is not material.

[30] Firstly, s 317(5) precludes release on conditions for any person claiming refugee or protection status where the claim was made after detention for deportation purposes, absent "exceptional circumstances". Where a claim is made, delay in determination of such proceedings is not exceptional, it is to be expected. When an appeal is filed, further delay is to be expected. If a second or subsequent application is made, further delay is to be expected. There is accordingly nothing about delay in resolution of successive claims for refugee or protection status which can fairly be described as "exceptional". Indeed, it is to be expected.

[31] Secondly, s 317 clearly contemplates the issue of a series of warrants. Under subs (5), there are two relevant circumstances. If a direct or indirect reason for the detainee being unable to leave New Zealand arises from any action or inaction occurring after detention, or a claim for refugee status is made after detention, a Judge must not release a detainee on conditions, absent "special circumstances".

[32] Mr [Booker]'s successive claims for refugee status have both been made after his detention. His pending claim is a direct reason precluding his deportation. That claim is an action taken by him after detention. He thus falls exactly within subs (5), the very purpose of which is to restrict or limit the release of detainees in such cases.

[33] Thirdly, I have borne steadily in mind the injunction at subs (3), that in relation to a discretionary determination of whether a warrant of commitment is to be issued, the public interest is to be considered. It is in the public interest that detainees not be incentivised to make repeated applications for refugee or protected person status in order that they might avoid deportation for lengthy periods, and be released on conditions, perhaps to disappear from view for a long period of time. That view is reinforced by the provisions of subs (4), which requires a Judge to have regard to the need to seek an outcome that maximises compliance with the Act.

[34] The policy of the Act is clearly to draw a distinction between those who apply for refugee status prior to their detention, and those who make application subsequent to their detention. I am satisfied that as a matter of law, under s 317, time spent in detention does not by itself amount to "exceptional circumstances" in consideration of an application for a warrant of commitment. The unavailability of transport, or other

factor unconnected to successive claims for refugee status may support a conclusion that unreasonable delay has occurred. But that is qualitatively different from what has occurred here. The delay since detention is due to Mr [Booker]'s actions, and in my view his claims have been and are on track to be resolved within a reasonable period.

[35] Accordingly, applying the interpretations of the statute referred to in the Crown submission, and considering the statutory framework as analysed above, I am satisfied that the term "exceptional circumstances' has essentially the same meaning s 317 as in s 323.

[36] For those reasons, I am satisfied that there are no exceptional circumstances in Mr [Booker]'s case, whether it is considered under s 317 or s323. The length of his detention is a direct result of his decision to claim refugee status, to appeal an adverse decision, and then make a second claim for refugee status. An appeal period for the second claim for refugee status may yet come into play, perhaps further precluding the operation of s323 (1) (c).

[37] I am satisfied that whether viewed under s 317 or s 323, the opposition advanced by Mr [Booker] to the issue of a further warrant of commitment is without any legal validity, and I accordingly determine that there are no grounds upon which I can avoid my obligations under the provisions of s 317(5) or s 323(2). I accordingly issue the warrant of commitment for a period of 28 days from 6 June, when the current warrant expires.

Judge TR Ingram
District Court Judge

Date of authentication: 01/06/2018
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.