IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CIV-2020-092-001094
[2020] NZDC 25917

BETWEEN	IMMIGRATION NEW ZEALAND Applicant
AND	FANAIKA TESIMALE Defendant

Hearing: 11 December 2020

Appearances: S Carr for the Applicant
M Mellin for the Defendant

Judgment: 11 December 2020

ORAL JUDGMENT OF JUDGE G T WINTER

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[1] Fanaika Tesimale appears today on 11 December on yet another New Zealand immigration application under s 316 of the Immigration Act 2009 for a warrant of commitment. This time, that he be held for a further seven days until 18 December pending his deportation from New Zealand. This is the fourth application by New Zealand Immigration under that section of the Act for a warrant of commitment.

[2] My sister, Judge Lovell-Smith, on 13 November 2020 in a comprehensive decision reviewed the history that has brought the defendant to this point. I adopt my sister's judgment in full as explaining the background circumstances and the reasoning behind my sister reaching a judgment that a further warrant of commitment should be granted to today's date. In short, nothing has changed since that judgment was delivered that would substantially alter the reasons for another warrant of commitment to be granted, particularly on this, the fourth occasion, for only a seven-day period until 18 December next. In this brief minute I wish to make some observations that may be helpful to advance this matter.

[3] The defendant has been detained under various warrants of commitment pending his deportation to Tuvalu. For reasons succinctly explained in my sister's judgment that now primarily relate to the impact of the COVID-19 pandemic, the applicant has been unable to secure his return to his birthplace, either by civilian or military flight, although attempts have been made for that to happen.

[4] Absent the pandemic and the emergency legislation that was passed removing consideration of these warrants, with reference to those who are detained for six months or longer under 323 of the Act, it would be likely in normal circumstances that the warrant of commitment would have resulted in a deportation many months ago. That has not happened, and so the various warrants of commitment have had to be made.

[5] Experienced counsel has formed the view that the defendant's position has been reached where clearly his human rights are impacted, that is, either under our New Zealand Bill of Rights Act, or more broadly under the principle of legitimate expectation created by the various conventions and treaties New Zealand has signed that protect applicants from arbitrary detention. Accordingly, learned counsel has tried to find a way to appeal the three previous judgments, ordering the defendant's continued commitment under s 316 of the Immigration Act 2009.

[6] It is common ground that this Act is a code establishing procedures and protocols for immigration matters in New Zealand. As a restrictive code, the Act prescribes when and how various appeals might be taken against the many decisions that can be made under the legislation. It is particularly relevant that s 316 of the Act does not specify a right of appeal. It is remarkable that an Act that codifies the processing of immigration applications from visa to refugee status and provides various avenues of appeal, nonetheless, does not specify right of appeal for decisions made about warrants of commitment.

[7] It is no doubt for that reason that learned counsel, when filing the recent appeal, latched onto s 124 of the District Court Act 2016. That provision, in relation to this Court's jurisdiction, provides that a decision of the Court is appealable to the High Court by any party to a proceeding. This is not an occasion to discuss whether

s 124 is broad enough to encompass a general right of appeal against decisions made under s 316, it is however an occasion to emphasize that the defendant has little avenues of redress to appeal decisions made about his ongoing commitment over the last six months.

[8] The appearances today have happened in the usual busy Manukau list court, and so I am making this minute to record a view that has been reached on the process of moving the defendant's situation forward while arrangements might be made for transportation of him to Tuvalu. Part of those discussions have revolved around the potential for learned defence counsel, in addition to relying on s 124 of the District Court Act, might bring an application for judicial review of the three earlier decisions, and backed on that application also file proceedings for habeas corpus. The senior courts, being of original jurisdiction, may therefore be able to interpret the absence of an appeal in s 316, in some way impacting on that judicial review and in some way meeting the need to provide some relief for the defendant in those proceedings. As I explained to counsel however, that is entirely a matter for him.

[9] Two things have resolved. First, there is a need for urgency. This defendant has remained in detention for over six months. That detention, although originally created by him, has not been extended because of any of his actions, the New Zealand immigration authority simply cannot return him back to Tuvalu, that is what necessitates his detention on a risk analysis under an ordinary consideration of s 316. It is the duration of the ongoing detention that affects his human rights.

[10] The second resolution is a recognition of the importance for everyone, that is, Immigration New Zealand, the defendant, and the senior courts, who may become seized of this matter that there be a finite decision against which any appeal sustained under s 124 of the District Court Act, and/or application for judicial review, and/or application for habeas corpus, can be measured. In my view, it makes no sense for there to be consecutive and opposed applications for warrant of commitment requiring separate consideration of the same grounds for relief.

[11] Accordingly, learned counsel has accepted the suggestion that for this and potentially another application for warrant of commitment, with great reluctance,

without accepting the state's right to detain him further and without prejudice, the defendant would accept the issue of a warrant of commitment as a practical outcome, thereby ring-fencing and enhancing his appeal, and/or judicial review rights, into the future.

[12] I have to say for myself, my approach, absent that very generous concession, would have been to ask the simple question: "What has changed?" In as much as a Judge reviewing a bail decision frequently asks on sequential applications to reconsider bail: "What has changed?" The answer to that question in terms of this defendant is nothing, and so adopting the reasoning of my sister Judge Lovell-Smith, and accepting the resolution now proposed, I grant the warrant of commitment for a further seven days until 18 December 2020 without prejudice to the defendant's rights of appeal, and/or judicial review, and/or application for habeas corpus, if that is what counsel wishes to pursue.

[13] The matter will be called in this court on 18 December at 10 am.

[14] Mr Tesimale, for the reasons I have explained, I have granted the warrant. It is only for seven days. The application will be reconsidered after an application made by the department next Friday. It will be called at 10 am. I will order your production that day.

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Judge G T Winter
District Court Judge

Date of authentication: 15/12/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.