IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2024-485-200
[2024] NZHC 834

BETWEEN	STANLEY SAW First Applicant
AND	HLA AYE Second Applicant
AND	SU DALI THAN Third Applicant
AND	WIN TUN Fourth Applicant
AND	SWAM MYAING Fifth Applicant
AND	MINISTER FOR IMMIGRATION First Respondent
AND	CHIEF EXECUTIVE OF MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Second Respondent

Hearing: 16 April 2024

Appearances: S M Lowery and J Suyker for the Applicants
A L Martin, E G R Dowse and F J Richards for the Respondents

Judgment: 17 April 2024

JUDGMENT OF PALMER J
(Reasons)

Solicitors:
Russell Legal, Auckland
Crown Law, Wellington

What happened?

Myanmar

[1] On 18 and 19 April 2024, New Zealand is hosting the ASEAN (Association of Southeast Asian Nations) New Zealand Dialogue. The Dialogue is an annual consultative meeting of New Zealand and ASEAN senior officials. ASEAN expects all member states to be invited to participate in such events and activities. To deny representation could jeopardise the conduct of the meeting, impact members' willingness to participate, and detrimentally impact New Zealand's standing with ASEAN. So New Zealand has invited Myanmar to nominate representatives to attend.

[2] This would be the first time a Myanmar official has been hosted in New Zealand since the February 2021 coup d'etat by the military junta in Myanmar. The evidence before me indicates the junta is responsible for well documented, widespread and systematic human rights violations and crimes against humanity. Immediately after the coup, New Zealand announced a package of restrictions limiting future diplomatic engagement with the junta. That included targeted travel bans on individuals who were involved in, or associated with, the coup and/or have direct responsibility for human rights violations in Myanmar. New Zealand has since issued a number of statements expressing concern about the situation in Myanmar. On each anniversary of the coup, New Zealand has imposed further travel bans on current and former members of the Myanmar State Administrative Council.

[3] There is understandable concern about the situation in Myanmar amongst the Myanmar community in New Zealand. Mr Stanley Saw, the first applicant, came to New Zealand from Myanmar in 1977. His evidence is that the possibility a representative of the junta will come to New Zealand has caused an outcry amongst the Myanmar communities in New Zealand. There have been protests. The concern is that admitting representatives of the junta would legitimise the junta.

The applications for judicial review and interim orders

[4] On Monday 15 April 2024, Mr Saw, and the other four applicants who are all refugees from Myanmar, filed an application for judicial review. They sought to

review what they understood to be a government immigration decision, or imminent decision, to grant visa(s) to representative(s) of the Myanmar junta to enter New Zealand to attend the Dialogue meeting. They challenged the decision on the grounds it is unlawful, fails to consider relevant considerations, and is unreasonable.

[5] The applicants also applied for interim orders that "any decision [by the respondents] to grant a visa or entry permission to any representative of the Myanmar Government shall not be given effect until this proceeding is determined". The application was supported by an affidavit from Mr Saw. The application was made without notice but was served on the Crown. The Court convened an urgent hearing on the afternoon of Tuesday 16 April 2024.

The evidence of the decision

[6] Shortly before the hearing, the Crown filed its notice of opposition to the application for interim orders, supported by two affidavits:

(a) A Senior Technical Adviser in Immigration New Zealand explained that a visitor visa application was received from the individual to attend the ASEAN dialogue on 21 March 2024. On 16 April 2024, the Risk Assessment Team in Immigration New Zealand provided an assessment as to whether s 16 of the Immigration Act 2009 (the Act) applied. On that basis, Immigration New Zealand determined that s 16 does not apply. The Senior Technical Adviser is satisfied the individual meets the requirements of immigration instructions for the grant of a visa. In light of the proceedings, he paused formally confirming that and entering a visa in the system.

(b) The Deputy Chief of Protocol in the Ministry of Foreign Affairs and Trade explained:

(i) New Zealand has maintained limited diplomatic relations with Myanmar since the coup in February 2021. Diplomatic relations were not severed, in accordance with art 45 of the Vienna Convention on Diplomatic Relations (the Convention).

(ii) The person intending to travel to New Zealand as Myanmar's representative at the ASEAN-New Zealand dialogue meeting is Head of Mission in a third country and accredited as a diplomat to New Zealand. As a diplomat accredited to New Zealand, they are entitled to diplomatic privileges and immunities in New Zealand under the Diplomatic Privileges and Immunities Act 1968 and the Convention.

(iii) Accordingly, under art 25 of the Convention, New Zealand "shall accord full facilities for the performance of the functions of the mission" which includes providing a visa to enable the diplomatic agent to enter New Zealand to carry out their role. If they are not granted a visa, the diplomatic agent is effectively made "persona non grata" under art 9 of the Convention. That could result in visas for New Zealand diplomats being similarly declined or revoked.

The relevant immigration law

[7] Under s 14 of the Act, a person who is not a New Zealand citizen may only enter New Zealand if they hold a visa, or a visa waiver applies, and has been granted entry permission. Sections 16 and 17 of the Act provide, relevantly:

> **16 Certain other persons not eligible for visa or entry permission**
>
> (1) No visa or entry permission may be granted, and no visa waiver may apply, to any person who—
>
> (a) the Minister has reason to believe—
>
> …
>
> (iv) is, or is likely to be, a threat or risk to the public interest; or
>
> **…**
>
> (2) This section is subject to section 17.

> **17 Exceptions to non-eligibility for visa or entry permission**
>
> …
>
> (2) Despite sections 15 and 16,—
>
> …
>
> (b) a visa and entry permission must be granted to a person who is for the time being entitled to any immunity from jurisdiction by or under the Diplomatic Privileges and Immunities Act 1968 (other than a person referred to in section 10D(2)(d) of that Act) or the Consular Privileges and Immunities Act 1971.
>
> …

The submissions

[8] At the hearing, Mr Lowery, for the applicants, maintained their application for interim orders but requested that the Crown explain the evidence that had just been filed. He accepted that, if s 17(2) of the Act applies, there is no effective discretion to be exercised that can be challenged. However, he questioned whether the accreditation of the diplomatic agent was valid and when and why it had been granted. He suggested that, if accreditation had been granted that afternoon to avoid going through the s 16 analysis, that may have been an improper exercise of the accreditation power.

[9] Mr Martin, for the Crown, explained the Crown's evidence, as outlined above. He added that the accreditation was a pre-existing arrangement which dated to 2022 and had not been put in place to meet this application. He submitted that, because the person intending to travel is an accredited diplomat, and entitled to diplomatic privileges and immunities under the Diplomatic Privileges and Immunities Act and the Convention, s 17(2) of the Immigration Act requires a visa and entry permission to New Zealand to be granted. Even if it did not, he submitted that the Immigration New Zealand analysis explains why s 16(1)(a) of the Act does not apply to prevent a visa or entry permission being granted.

[10] In light of the Crown's evidence and submissions, Mr Lowery sought to amend his application for judicial review to challenge the decision in 2022 to accredit the person intending to travel to New Zealand. Mr Lowery frankly acknowledged he did

not know whether there was a proper basis for granting the accreditation and had no evidence that it was not properly made. He also submitted Immigration New Zealand's s 16 analysis was arguably incorrect. Accordingly, he submitted that the proper thing for the Court to do in the interim was to preserve the position by ordering that the diplomatic accreditation not be given effect.

[11] Before the end of the afternoon of Tuesday 16 April 2024, I advised counsel that the Court declined to grant the amended application for interim orders and that reasons would follow. This judgment contains those reasons.

Why should interim orders not be made?

[12] Section 15(1) of the Judicial Review Procedure Act 2016 empowers the Court to make an interim order if it considers "it is necessary to do so for the purpose of preserving the position of the applicant". The Court has a wide discretion to consider all the circumstances of the case, including the apparent strength of the underlying claim and all the public and private repercussions of granting interim relief.[1] In *Auckland Pride v Minister of Immigration,* Gendall J recently emphasised that the Court should consider the private and public repercussions of granting relief in judicial review of the entry into New Zealand of Ms "Posie Parker".[2]

[13] In some circumstances, preservation of a position can extend to restoring an applicant to a position they would have been in but for the alleged unlawfulness.[3] In *Chief Executive of Ministry of Business, Innovation and Employment v Nair*, the Court of Appeal stated the questions to be decided in the context of interim orders in judicial review of a deportation decision:[4]

---

1 *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430.

2 *Auckland Pride v Minister of Immigration* [2023] NZHC 758, [2023] 2 NZLR 651 at [31], citing *Minister of Fisheries v Antons Trawling Company Ltd* [2007] NZSC 101, (2007) 18 PRNZ 754 at [3].

3 W*hiskey Jacks Rotorua Ltd v Minister of Internal Affairs* HC Wellington CIV-2003-485-1901, 11 September 2003 at [40]; *Greer v Chief Executive, Department of Corrections* [2018] NZHC 1240, [2018] 3 NZLR 571 at [22]–[26].

4 *Chief Executive of Ministry of Business, Innovation and Employment v Nair* [2016] NZCA 284, [2016] NZAR 836 at [10] citing *Carlton & United Breweries Ltd v Minister of Customs*, above n 1, at 430. See also *Singh (Kulbir) v An Immigration Officer* [2016] NZCA 435, [2016] NZAR 1419 at [32].

> Those questions are, first, whether the adverse consequences of deportation before the judicial review application is determined are such it is necessary to preserve his status in the interim and, secondly, whether there is a respectable case for judicial review.

[14] The applicants here were necessarily unaware of the legal basis on which the diplomatic agent was to enter New Zealand and understandably amended their application for judicial review in the light of the evidence. The application for interim orders now effectively asks the Court to prevent someone, who the Crown says is an accredited diplomat, from entering New Zealand on the basis that there is a legal problem with their accreditation.

[15] But there is no evidence to support the existence of any problem with the accreditation. Articles 4, 5 and 6 of the Convention relate to accreditation of diplomats between states. The only evidence before the Court about this accreditation is the formal evidence of the Deputy Chief of Protocol for the Ministry of Foreign Affairs and Trade that the diplomatic agent is accredited as a diplomat to New Zealand consistent with art 6 of the Convention and is therefore entitled to diplomatic privileges and immunities. Section 17(2) of the Act requires the government to issue a visa to such a person and allow them entry.

[16] It is not necessary to make the interim orders to preserve the applicants' position. Section 17(2) governs their position. The Court cannot proceed on the basis that the applicants should be restored to a position they would have been in but for the alleged unlawfulness regarding accreditation, when there is no evidence to support that alleged unlawfulness. At this stage, the amended application for judicial review lacks any evidential foundation and is entirely speculative. It cannot be said to be respectable. Accordingly, the overall justice of the case lies compellingly against granting the interim orders sought.

[17] None of this mitigates the understandable concerns of the Myanmar community in New Zealand, and the New Zealand government, about the human rights abuses by the military junta in Myanmar.

Result

[18] The application for interim orders is declined.

[19] The applicants did not know the legal and factual basis for the decision until the Crown explained it immediately before the hearing. Accordingly, I am inclined to let costs lie where they fall for the application for interim orders. If either party objects to that, they should file a memorandum of up to five pages within 10 working days of this judgment and the other party may file a memorandum of the same length within five working days of that.

[20] In addition, the applicants should file a memorandum of counsel within 15 working days about whether they propose to pursue the substantive application for judicial review, amending the statement of claim if necessary.

Palmer J