

IN THE SUPREME COURT OF NEW ZEALAND

SC 38/2005

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **PIMTHONG UDOMPUN**

Appellant

AND **MINISTER OF IMMIGRATION AND
NEW ZEALAND POLICE**

Respondents

Hearing 3 February 2006

Coram Elias CJ
Blanchard J
Tipping J

Counsel O Woodroffe (via video link from Auckland) for Applicant
C Gwyn and B Keith for Respondents

APPLICATION FOR LEAVE TO APPEAL

10.03 am

Elias CJ Hello Mrs Woodroffe. This is the first time we've used one of these links so I hope, we may have some technical hitches, but I hope not. You appear with?

Woodroffe I appear with just a law clerk to help me.

Elias CJ I see, she's not appearing, she's just.

Woodroffe She's not admitted, she's not appearing.

Elias CJ No, thank you.

Woodroffe I'm just appearing alone Your Honour.

Elias CJ Thank you Mrs Woodroffe. And Ms Gwyn?

- Gwyn May it please the Court, I appear with Mr Keith for the respondents.
- Elias CJ Thank you. Alright, Mrs Woodruffe we've read your submissions and you may wish now to enlarge upon them or summarise them as you wish.
- Woodruffe Thank you Your Honours. May it please the Court, what I present today will be a summary of what already has been presented. My submission is that the appeal before you falls under the ambit of s.13, paragraph 2(a) and (b). There are three subcategories that I submit are relevant under (a). Under each of those subcategories I will raise issues which I submit verify or justify the appeal being heard. Under category (b) there are two subcategories which again I will use the same method as the first one.
- I now turn to my first point which is a matter of general and public importance that this appeal be heard. Bill of Rights Act places an affirmative obligation on the judicial branch of the Government of New Zealand to affirm, protect and promote human rights and fundamental freedoms in New Zealand as is set out in the preamble of the Bill of Rights Act 1990, hereafter referred to as Bill of Rights Act. It is a matter of public and general importance that the Supreme Court addresses the question whether, I quote, is it a requirement under Bill of Rights Act that a person's right is satisfied without that person being spoken to individually before a decision is made.
- Paragraph [91] of the Court of Appeal, the Court of Appeal decision says that individual did not necessarily have to be questioned individually and an opportunity to explain individual circumstances can be provided in other ways. In paragraph [91] the Court of Appeal's concern seems to be focused on how to deal with large groups. This appellant came out of a plane with her husband and three others. The question is, is that a group large enough to deny individuals from being spoken to individually?
- Elias CJ What.
- Woodruffe I submit that.
- Elias CJ Mrs Woodruffe sorry, what is the principle that you say under New Zealand Bill of Rights Act is in issue in this? This is your first point is it? This is your first point?
- Woodruffe Yes. This is my first point and my first point is that under the Bill of Rights, for a person to receive rights guaranteed, that individual must be spoken to individually in order for her or him to understand the questions and to understand her rights of reply.
- Elias CJ Yes.

Woodruffe May I proceed Your Honour?

Elias CJ Yes.

Woodruffe Thank you.

Tipping It's Justice Tipping speaking. Before you do Mrs Woodruffe, is it your argument that the principle is that in all circumstances, in all circumstances, this individual speaking to has to take place?

Woodruffe No Sir, that is not my argument. My argument is that if the Bill of Rights provides a guarantee, if that is not available in our law, there must be some other way to make sure that the individual is not denied of rights. And in my submissions I have come up with possible solutions in other jurisdictions when faced with similar problems. So I am certainly not advocating that each and every person has to be provided by an interpreter because of understanding that has to be determined and taken into account.

Tipping J So it depends, does it, on the facts of the particular case what has to be done?

Woodruffe That is correct Sir. But it appears, apparently, in New Zealand that the focus of the Court of Appeal in this case was predominantly concerned about the cost and administrative difficulty rather than addressing the issue of whether there is a solution like other jurisdictions when faced with similar problems. And I advocate that the time has come Sir that this question be addressed in New Zealand to ensure that justice is accorded to people who may need the service.

Tipping J Yes I understand, thank you.

Woodruffe Thank you Sir. Well, as I have advocated, it's a matter of general and public interest for the Supreme Court to rule on a question of whether a person's right is affirmed and protected under Bill of Rights Act without that person being spoken to before a decision adversely affecting that person is made. In other jurisdictions there are cases this issue has been determined. In *Regina v Iqbal Begum* it's a 1985 Court of Appeal, referred to in page 5 of a decision in the bundle of **Regina v West London Youth Court (ex parte)** ([2000] 1 WLR 2368) in my bundle, case 5. The Court considered a wife's appeal against conviction for murder of her husband for which she entered a guilty plea. Her appeal was allowed and, in substituting her conviction to manslaughter, the appeal Court found that her silence in the face of many questions over a number of interviews was because she was not spoken to in the language she understood.

The Court of Appeal decision in Ms Udompun's case predominantly focused, as I've said earlier, on presumed administrative difficulties

and costs of having interpreters available at airports. There was no data before the Court of Appeal to show how many businesses come to New Zealand who may require such a service. It's my submission therefore that it is a matter of public and general importance for the Court to determine that if there is a law that prima facie protects human rights and fundamental freedoms which the public in New Zealand cannot rely on its utility because it may be too difficult or too costly to apply.

I demonstrate this point further by saying it makes no difference at an airport to an Immigration officer whether a plane load of 400 people arrive in a group or as individuals. 400 passengers will each have to be processed. And I come to my point, it would be highly.

Elias CJ Could you just pause, sorry could you just pause a moment Mrs Woodruffe.

Woodruffe Yes.

Elias CJ I'm trying to understand if you say that it depends on the facts of the particular case. In this case the Court of Appeal referred to a number of facts which made it impractical for there to be an interpreter present, including the fact that this was on a public holiday. You're talking about the Christchurch matter aren't you?

Woodruffe Yes, I'm talking about the Christchurch and I'm also talking about the denial of her rights when she was imprisoned at Papakura Your Honour. The same question arises. Whether her circumstances in my submissions were not fully considered by the Court of Appeal; rather the decision appears to be substantially weighted on considerations of policy and considerations of cost and without reliance on actual facts. From the number of people for instance, the number of people who may come through the airports in New Zealand without them speaking English and may require translators.

And furthermore, the Court of Appeal had before it one evidence of an expert in this area, Dr Sabeen Fenton. And I will demonstrate later in my argument Your Honour that the Court of Appeal appear not to have taken that into consideration whereas His Honour Justice Heath took the affidavit of Dr Sabeen Fenton into account and put weight to that. An approach by Justice Heath similar to an approach by a UK Court in an effort to find a resolution when faced with a problem of a young Bosnian girl, youth, who was convicted. I'm referring to that case in the bundle too and I'll come to it. In that particular case there was no translator to be found who was able to translate the Bosnian's girl's particular dialect. The Court was faced with a dilemma and in an effort to find a solution they invited evidence from a doctor who was a linguist and person who is an expert in translations and interpretations. Starting with that starting point, the Court then look at ways and found that double interpretation was a solution in that particular case.

Elias CJ Yes carry on.

Woodruffe As I was saying about my common sense example of 400 visitors may arrive on a plane load, all have to be processed whether they are in a group or whether they are travelling individually. And in my submission it would be highly unlikely that each of the 400 passengers will need an interpreter. Which appears in my reading that that was the substantial or weight factor that was given emphasis by the Court of Appeal.

It is in my respectful submission a matter of public and general importance for the Supreme Court to determine the question of what are acceptable options in situations where no interpreters are available. As I earlier said, the question is what are alternative ways that will satisfy the rights in the Bill of Rights of an individual being questioned by a Government official.

The Court of Appeal in paragraph [91] referred to other ways but failed to specify criteria and limits of criteria. In my submission.

Tipping J Mrs Woodruffe could you just pause. Wasn't the evidence that the particular member of the group chosen as the interpreter in the absence of a formal interpreter, was particularly competent in English and there was no suggestion that she wasn't capable of properly translating.

Woodruffe That was far from the case. I beg to differ Sir. The facts were completely the opposite. First.

Tipping J But that was an assessment that's been made by the Court of Appeal hasn't it? I mean it's not suggested that there was a failure adequately to communicate. It's a question of assessment in the individual case. That's what, we can never lay down a general rule. If an interpreter is not present then what happens must be assessed in the individual case mustn't it?

Woodruffe Yes I agree Sir. And the suggestions here is that there are alternatives that are acceptable that will satisfy the protection of rights and freedoms of individuals affected under the Bill of Rights. For example a use of a tape recorder that.

Tipping J I don't want to debate all the possible alternatives.

Woodruffe Yes.

Tipping J What I'm worried about is that the Court of Appeal has said, in these particular circumstances what happened was alright. Now that's a very case-specific decision.

Woodruffe The Court of Appeal, sorry.

Tipping J It doesn't involve any general principle. It's just an application of the Court of Appeal's view to these particular facts.

Woodruffe It's my submission Sir that the Court of Appeal made a broad policy decision without looking at the specific or looking clearly at the specific facts of this case. For example, in Christchurch Ms Udompun was never spoken to personally. Ms Udompun was a Thai woman in the same nationality as a person elected, not by Ms Udompun but elected by the Immigration officer. She, Ms Udompun, did not have a choice or being asked whether she agreed to the use of this other passenger as her interpreter. In fact no measure of checks was in place for the Immigration officer to find out the level of competency of English of this interpreter and the level of her ability to translate from English to Thai language to the other fellow passengers. Therein, in my submission, lies the injustice that I'm advocating that needs to be addressed for the future and the public interest which I submit needs to be addressed by this issue being looked at in detail.

Elias CJ But Mrs Woodruffe, you can't say that the Court of Appeal didn't look at the issue in detail because it did address itself to the facts of the particular case. What you need to convince us of is that the public interest, that it is a matter of public interest, for us to reconsider the assessment of the facts made by the Court of Appeal.

Woodruffe Thank you Your Honour.

Elias CJ And you've said that it's not a question of saying that in all circumstances there is some standard to be applied. You must look at the circumstances of the particular case. I'm struggling to find any point of principle that is in issue here. The test is not in any doubt. It is effective, it's effective delivery of natural justice. But what natural justice requires in the circumstances must depend on the facts. So what is the public interest in our reconsidering those facts when the Court of Appeal has directly addressed them? You are rehearsing with us the arguments that you put to the Court of Appeal which didn't convince it.

Woodruffe The public interest comes, the public interest that is required to be reassessed by the Supreme Court in this case goes to a similar fact situation in this appeal. And the similar fact situation was assessed by the Court of Appeal with respect with specific focus on the policy of whether it is practical and what is the cost rather than looking at assessing the needs of an individual whose rights under the Bill of Rights must be assessed. So I come.

Elias CJ Sorry, pause a moment please.

Woodruffe Yes.

Elias CJ So do you say that costs and matters of administrative convenience are always irrelevant?

Woodruffe No, Your Honour. I'm advocating that they are part and parcel of the equation to be considered.

Elias CJ Yes.

Woodruffe However, what I'm advocating Your Honour is that in other jurisdictions where faced with this sort of problem, they have put down some guidelines or policies that avoid the, you know, leaving it entirely to an individual who may not appreciate the extent of the problem to make that decision. And I come to the earlier cases I mentioned where tape recorders and double interpreters were used. That's what I'm advocating Your Honour.

Elias CJ Thank you.

Woodruffe I wonder if I may proceed.

Elias CJ Yes.

Woodruffe Thank you. In similar jurisdictions such as in the UK it was held it is plain that asylum decisions are of such importance that only the highest standard of fairness will suffice. That is recorded in page 5 of a decision referred to as Regina, also known as Dirshe against the Secretary of Home Department (**R (on the application of Dirshe) v Secretary of State for the Home Department** [2005] EWCA CIV 421). A decision in 2005 of the Court of Appeal, civil decision which refers to a decision.

Elias CJ Sorry which number? Oh thank you.

Woodruffe Bundle case 6 Your Honour. Which refers to a decision of Lord Justice Bingham in SSHD and Thiracuma(?) 1989 immigration case, where that is where that quote comes from. And my submission is that seeking asylum has parallels to seeking an entry permit notwithstanding that a visitor's permit is only for a defined period.

 To clarify the point further, the question is that when reading the Court of Appeal decision, other public questions come to mind. It is a matter of public and general importance for the Court to determine whether there is a separate standard for Immigration officers under Bill of Rights Act. And I'm asking that question because of what the Court of Appeal said in paragraph [90]. The other matter.

Elias CJ Just pause a moment. Yes thank you.

Woodruffe Thank you. And likewise referring to the same paragraph [90] Your Honour, paragraph [90], again I submit it's a matter of public and

general importance to determine whether there is a lesser duty imposed on Immigration officers under Bill of Rights Act. I reiterate the words of.

Elias CJ Sorry, can I just. I'm getting a little confused about where this is going to. This Court of Appeal decision is a challenge to an immigration decision. You're not challenging - so it's in that context that it seems to me that there's reference to the need to keep a record if someone has interpretation difficulties.

Woodruffe Yes.

Elias CJ We're a mile away from that here. You're not challenging directly, as I understand it, the decision that was made to refuse a visa in Christchurch. You are simply saying that she was denied natural justice.

Woodruffe I think the root of the challenge, of what I'm saying about the natural justice, arises from the fact that the submission made before the High Court which was accepted, was there was a denial of the process, or procedure used in Christchurch was effectively a denial of her rights. She was not personally spoken to. Instead her answers were answers of somebody else who was in her words not her choice, or not a person who was known to her intimately was picked as an interpreter. And as a result she was turned around effectively without being spoken to.

Elias CJ Yes.

Blanchard J So your point Mrs Woodruffe is that as a matter of principle, natural justice requires that there be an individual dialogue with each person who is seeking to enter New Zealand and needs a permit.

Woodruffe Well I go further than that. My point Sir is yes, if a person requires an interpreter, there must be a personal dialogue with that person to alleviate the question of, which is governed under my submission for fairness, the question of independence of the interpreter. The question of whether the answers, whether the person who is affected understands his or her rights and whether her answers would effectively be reflected if she was not spoken, if he or she was not spoken to personally.

Blanchard J Right, well I understand the point thank you.

Woodruffe Thank you.

Elias CJ Does that conclude really the submissions you want to address to us on the first point Mrs Woodruffe?

Woodruffe Yes, that is the point. And just to sum up, I reiterate that there was before the Court of Appeal Dr Fenton's evidence which in other

jurisdictions was the starting point to finding the solution but for some unexplained reason it was not referred to. And Dr Fenton's affidavit is helpfully attached at bundle 6 of the Crown's bundle.

I think the main, if I may add here, that the main reason why I'm advocating that this appeal be heard is that to demonstrate, in bundle case 9, in the case of **Beherea v State of Orissa** ([1993] INSC 153), a 1993 case, that is bundle case 9, I quote from Lord Denning's lecture which I believe and submit is relevant. And in here he said no-one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do.

Elias CJ Sorry. Mrs Woodruffe, I'm sorry, I'm behind you in this. You're addressing now the second point are you?

Woodruffe I'm summing up the first point.

Blanchard J Well I think we've understood the point. You've only got to demonstrate what the point is to us. You don't have to argue it.

Woodruffe Thank you Sir. Okay, the second public interest issue relates to the question of fairness when using interpreters or translators. The question at issue is whether using a friend as an interpreter is a fair standard. Court of Appeal in paragraph [103] said we do not consider that there was a breach of natural justice at Christchurch airport. In any event, they said, even if she was spoken to individually through an independent interpreter, the outcome would all likelihood have been the same. I submit that that assertion was not based on fact. And in fact quite contrary to the facts of the case that were before Justice Heath who heard the facts of the case.

Tipping J What exactly is this second point? Can you state the proposition that you say you want us to uphold in a sentence?

Woodruffe The proposition Sir is it is not a fair standard to use any person who may speak a language or refer to in some cases as a friend as an interpreter.

Elias CJ Does that mean to say, sorry, does that mean to say that you must always have an independent and perhaps professional interpreter?

Woodruffe The requirement is high. Yes, the requirement requires some form of training as has been demonstrated in the earlier case where a woman was convicted or entered a guilty plea of a murder of her husband. That demonstrates that if a person is.

Tipping J Just excuse me. We really do have to try and focus this.

Woodruffe Okay, thank you.

Tipping J Is your proposition that fairness always requires a trained interpreter? Is it that or is it not that?

Woodruffe Yes, it is.

Tipping J Thank you. And the third point is what?

Woodruffe That fairness, excuse me, I think my first point is covered, that an unqualified interpreter does not meet the requirement. The other point which is raised in this, is whether checking the accuracy of the interpretation is a fair standard. And in the case of **R v West London Youth Court**.

Blanchard J I'm sorry, I didn't understand that proposition.

Woodruffe Okay. There is a requirement under natural justice, under Bill of Rights, if somebody's rights is protected, that the accuracy of interpretation must be checked. The mere fact of interpretation does not in my respectful submission meet a fair standard.

Tipping J Checked by whom and when?

Woodruffe Checking, my example here is in the case that I've just referred to. In the case of the Court.

Tipping J What is your proposition of law? Never mind what other Courts may have decided. By whom and in what circumstances is this checking that is mandatory to take place?

Woodruffe Okay. By whom? By the person who is having, who is authority and who is doing the questioning.

Blanchard J How do they check?

Woodruffe And who is making.

Blanchard J How can they check that if they don't speak the language concerned?

Woodruffe Well the way that is checked is that it's carefully, whatever is being said and the answers must be carefully recorded. If that is the case and then those answers and recordings must be made available to the person whose rights are affected and then it's up.

Tipping J Are you saying there's got to be a tape recording or some other recording of the interview?

Woodruffe It has been used to alleviate.

Tipping J Are you saying that that is a requirement of natural justice?

Woodruffe Yes, yes.

Tipping J Alright. And what's the next point?

Woodruffe To sum up that second point, is that in my submission it is in the interests of the public of New Zealand to find ways addressing the problem of providing proper qualified independent interpreters and find acceptable alternatives to satisfy the requisite standard of fairness afforded to the public under Bill of Rights Act against misuse of state power.

I then turn to the first limb under the public issue. First and last limb under the public issue is the question of whether appropriate quantum of damages, whether the quantum of damages awarded in this case and the value of women's rights appropriate. In this case, as Your Honours know, there was a finding in the High Court and the finding by the Court of Appeal that there was a serious violation of her dignity pursuant to s.23(5). The question is whether the taking away of a substantial award and the denial of her costs in the Court of Appeal and so forth is an appropriate public message to a violation of a woman's dignity that was held by both Courts to be of a high level. It's my submission that the serious breach has been accepted and that the \$4,000.00 was inappropriate.

A further consideration that was before both Courts but not mentioned in the Court of Appeal is the fact that with anybody who is deported, there is a long term effect when you travel. Your Honours are aware that every time on the aeroplane you enter a new country there is a form where you have to fill whether you have been deported or refused entry in any country.

Elias CJ But doesn't this, if you are saying that this consideration should have augmented the damages, aren't you, don't you have to establish that but for the breach, but for breach of natural justice, she would have been granted a visa? Because otherwise the effect will still be that she's deported.

Woodruffe Yes thank you.

Tipping J What you're saying is.

Woodruffe I submit that but.

Tipping J Just a moment. This argument is not a process argument. This is an argument that the compensation for the breach was inadequate. It's got nothing to do with the validity or otherwise of the ultimate decision.

Woodruffe It's a separate limb Sir of the public interest.

Tipping J Yes.

Elias CJ Aren't you inviting us Mrs Woodruffe to say that the reason why the damages is inadequate is that it should have reflected the consequence to her of being denied a visa?

Woodruffe Yes that effectively is my submission.

Elias CJ Well my point is, I don't know that we can take that into account. Because it's a different consideration than the basis upon which damages has been assessed in this case which is for affront to her dignity.

Woodruffe Okay. In that case I will focus on the fact that the \$4,000.00 awarded for affront to her dignity as a woman was inadequate, having regard to the circumstances, in particularly having regard to the fact that her pleas for help were actually answered but were denied by the Police. I'm referring here with the Police refused to give her what her family brought to prison. So she.

Elias CJ Well that's really quite intemperate to describe that as her pleas for help. Because one of the questions that was canvassed in the Court of Appeal judgment was the fact that she didn't actually make a plea for help. And I know that there are reasons that you've put forward for that but I'm just pointing out that that's really over-egging it a bit Mrs Woodruffe.

Woodruffe I beg to differ Your Honour because in this particular case we must not lose sight of the fact that this particular woman was not detained as a prisoner for a crime.

Tipping J Look, you're arguing about the facts of this individual case. Let's get onto something that's more likely to get you leave. Are you saying that no properly directed Court could have come up with a figure as low as \$4,000.00 for what had happened? That's the essence of your argument isn't it?

Woodruffe Yes that's the essence, true enough.

Tipping J Well don't let's do it as a jury. Let's just focus on what the essence of what your point is. Can it be stated more than that? That is what you want leave to argue.

Woodruffe Thank you Sir.

Tipping J You don't have to warm us up any more than that.

Woodruffe Thank you Sir.

Tipping J It is an unreasonably low sum, that's what you want to argue. And the question is (a) is that arguable, and (b) is this the right case for us to embark on a general exercise on quantum for bills of rights breaches of this kind? That's the end of it.

Woodruffe Thank you.

Tipping J The Crown will no doubt say the opposite. But we have to make up our minds. So could we move onto the next point?

Woodruffe Thank you.

Elias CJ That's the last point?

Tipping J Was that the last point?

Woodruffe Yes this is the last point.

Tipping J The Crown has very helpfully endeavoured to isolate from your written material all the points it thought you were trying to argue. Now if you assure us that this is all you're arguing, that's fine. We'll just deal with the, I've made it four points. Natural justice requires this individual specialised interview, must be a trained interpreter, interpretation must be checked by recording and the quantum of damages. Those are the four points I've got noted. Does that fairly capture your client's matters she wants to raise here?

Woodruffe Yes Sir, under the public interest.

Tipping J Oh, we've got more to come under a different heading have we?

Woodruffe Well just briefly under miscarriage of justice. If the appeal is not heard.

Tipping J Right.

Woodruffe My argument is that the Court of Appeal made broad policy decisions which impacted on this particular applicant's rights, and failed to look at the consideration of each of the effective facts situations of her particular case. And I refer here to support that is a case of Moon and Film Literature Board of Review which Your Honours all presided on and had considered that rather than taking a broad view, there must be some consideration of the individual facts before a decision is made. Basically those are my words but to sum up a lengthy and well-considered decision that all three of Your Honours presided on. So the point here is I'm arguing that in her case, in essence, the limits were placed on her rights which are guaranteed by Bill of Rights Act and the limits, there was no consideration of the justified limits. No consideration of the facts to see whether the limits placed were justified.

So I'm inviting the Court to look at the question of a person in her circumstances, whether the limits accepted by the Court of Appeal were, in your consideration, justified limits on her rights to the Court of Appeal.

Elias CJ I didn't understand.

Woodruffe Her rights sorry, under Bill of Rights Act.

Elias CJ Sorry, I didn't understand the Court of Appeal to be dealing with the question of justifiable limits. I thought the case was disposed of on whether there was breach of the Bill of Rights Act.

Woodruffe Yes that was the focus Your Honour. But in reading the decision in totality, and taking the overwhelming background or factual situation that the Court of Appeal placed emphasis on, I submit that in so doing there has been an injustice because there was not a consideration or a fair weight put to her, any justified limits on these particular facts. And I submit that that is a public interest question that the Supreme Court needs to resolve.

Elias CJ Well again, I just don't understand that we're in the area of justifiable limits here. We're in an area where on most of the grounds that you ran, the Court of Appeal decided that there wasn't breach of the Bill of Rights Act. In respect of the affront to dignity aspect of somebody in custody, they accepted that there was a breach and then it was just a question of how that breach should be redressed or the right vindicated.

Woodruffe Yes. It's my submission that the Court of Appeal erred in assessing the facts pertaining to the translator both at Christchurch and at the Papakura Police when looking at whether the limits they say were, whether what happened in her case were justifiable limits which led to their decision that there were no breach under various sections of the Bill of Rights. For instance s.23(1), that was one of the sections that we argued. So it's a question of whether there was sufficient weight given to the special fact situation and specifically to do with the translation and interpretation when she was faced with the problem in Christchurch and in the airport.

Elias CJ Thank you.

Woodruffe And in the prison at Papakura, sorry. Having said that, I conclude by submitting respectfully to the Honourable Court that there are issues of general public importance in this case which need the eye of the Supreme Court to hear the full appeal. And there are issues pertaining to this particular applicant as the category 2(b) that I invite respectfully the Court to hear it by way of a full appeal. Those are my submissions with respect.

Elias CJ Thank you Mrs Woodruffe. Perhaps you could just explain, because we don't have before us either the judgment of the High Court Judge or any pleadings.

Blanchard J I do.

Elias CJ Oh do you? Oh yes I do, yes, sorry, yes I do. We don't have the pleadings. What I wanted to know is, am I right in thinking that your claim was only for Bill of Rights Act damages? You weren't seeking to have any decisions quashed were you?

Woodruffe Oh in the High Court Your Honour?

Elias CJ Yes.

Woodruffe Again, I don't have my submissions before me.

Elias CJ Maybe the Crown can help me on that.

Woodruffe Thank you.

Elias CJ Thank you.

10.52 am

Elias CJ Yes Ms Gwyn. Mrs Woodruffe, would you tell us if you can't hear Ms Gwyn speaking because then we can adjust the microphone levels.

Woodruffe Thank you Your Honour, I will.

Gwyn May it please the Court. As a matter of introduction, the respondent's general submission is that neither 13(2)(a) nor (b) of the Supreme Court Act are satisfied by the applicant's application. And while this case undoubtedly touches on some questions of general or public importance within the terms the Act, what the applicant is seeking to do here is to challenge the application of established principles of law to the particular facts of her case rather than to raise questions as to how principles of law regarding matters of general or public importance are formulated.

And in the respondent's submission the application is really focused on the correctness of the decision sought to be appealed. In essence it's a request for a rehearing of the appeal to the Court of Appeal.

Elias CJ Mrs Woodruffe, can you hear?

Woodruffe Yes I can thank you.

Elias CJ Thank you.

Gwyn And while the questions of compensation and the associated questions of cost and interest in Bill of Rights Act cases are areas where principles are still being developed, in my submission those questions are not germane to the disposition of this case and the facts of this case do not provide a sufficient basis for the development of general principles in this area.

And what I propose to do, with the Court's leave, is to address the particular issues that my learned friend Mrs Woodruffe has covered this morning. That is the natural justice requirement under s.27(1) and then the question of compensation for breach of s.23(5). But if Your Honours have questions in regard to other aspects which are canvassed in the respondent's written submissions, then I am happy to deal with those.

Elias CJ Yes thank you. I wonder whether you could help me in respect of the claim, the question that I asked Mrs Woodruffe about what the basis of the claim was.

Gwyn The statement of claim I'm advised by Mr Keith was only for relief under the Bill of Rights Act.

Elias CJ It didn't seek to quash the determination in Christchurch or?

Tipping J It didn't involve matters pertaining to judicial review. It involved only compensation for what was perceived to be breaches of the Bill of Rights?

Elias CJ Yes.

Gwyn Yes I think that's correct Your Honour.

Elias CJ That's what I had assumed but.

Gwyn There were no concurrent causes of action and nor were declarations sought as I understand it.

Elias CJ Yes thank you.

Gwyn In relation to the alleged breach of natural justice under s.27(1) of the Bill of Rights Act, Mrs Woodruffe has raised a number of points both in her application and submissions and in her submissions this morning. And the first point I would make is that none of those points go to any overarching question of principle about whether natural justice principles are applicable at the border. That was accepted to be so by the Crown although the content of that right of course was the subject of argument.

Rather the essence of the question posed for this Court is what does that natural justice obligation require of Immigration officials in this

particular case. And as I understand my learned friend's four points this morning, the essence of that requirement is that natural justice requires, and required in the case of Mrs Udompun, that she be provided with an interpreter. And the two sub-points if you like, that that person must be a trained interpreter and that the exchange must be recorded, flow from that assertion that natural justice requires the provision of an interpreter.

In my submission that proposition cannot warrant leave for two reasons. First, contrary to the applicant's submission, there isn't an unqualified right to an interpreter, or there isn't presently an unqualified right to an interpreter in the context of border entry decisions, in contrast to the kinds of cases that my learned friend cited from other jurisdictions, for example in relation to persons facing criminal charges where such a right is provided in s.24G of the Bill of Rights Act. Or to refugee status claimants where such a right is accorded.

Elias CJ What's the policy reason though for the distinction given the, what possible basis could there be for a distinction? You're just saying because they're specifically provided for?

Gwyn I'd go further than that Your Honour and say that in relation to the legislative scheme that's in issue here in this particular case where we're concerned with a decision on a temporary permit application. And under the Immigration Act there are generally fewer procedural protections and it is submitted obligations than under decisions, than other decisions made under that Act. While the Immigration Act provides for reconsideration or appeal rights for certain categories of permit, particularly where the permit holder's a resident, there isn't reconsideration or appeal rights in respect of temporary permits.

In fact s.9(1) of the Act expressly provides that no person is entitled as of right to a permit and that the grant of a permit is a matter of discretion. And the Court of Appeal has previously noted in **Attorney-General v E** the importance of the relative simplicity and swiftness of procedures for refusal of entry at the border. So in my submission Your Honour in this particular context under the Immigration Act and in the context of an application for a temporary permit, there are if you like policy reasons why along with those other procedural, fewer procedural protections, it's not appropriate that there be an absolute right to an interpreter.

Tipping J Wouldn't the principle really be that there must be a reasonable interpretation facilities be made available and the Court of Appeal has found that these ones were reasonable in the circumstances. I mean you couldn't sort of cast people into an interpreter as well and no-one's suggesting that. It's just an assessment as to whether what happened here was reasonable.

- Gwyn Indeed Sir and that would be my second point, that on the facts of this case, the Court of Appeal in some detail went through the particular facts in arriving at the decision that the procedure as a whole was fair. So it had a very detailed look at the context. And reached the conclusion that in that context the solution that was arrived at by the Immigration officer was fair.
- Tipping J I mean if we're going to start getting involved in training, we're going to have to say what sort of training. It's ridiculous. I mean it's just far beyond what natural justice considerations could have traditionally, it's always flexible.
- Gwyn And indeed Sir, as the Court of Appeal noted, in response to the assertion that there is an absolute right to an interpreter, the Court said that that principle admits of no exceptions so no matter how administratively difficult it might be to provide it, no matter what language that's spoken, it admits of no exception unless you introduce a reasonable requirement. But once you do that then the reasonableness requirement requires you to assess the facts of each case. And in this case for example a flight landed on a holiday weekend in what's a relatively small airport where the language involved wasn't one that's widely spoken. The immediate departure point of the flight had been Singapore and not Thailand which was the home of Mrs Udompun. So the Court of Appeal made exactly the point you make Your Honour, that if you have an inflexible rule that admits of no exceptions, then.
- Elias CJ Yes. Well as your first point has developed, it was almost as black and white as the converse point being developed by Mrs Woodruffe. The second fallback position that the interpretation for somebody who doesn't speak English must be reasonable in the circumstances is fine and then there's no point of principle. But if you're pitching it on the basis that natural justice doesn't require interpretation to be available to someone who is applying for a temporary visa before they can be fairly processed, then that's pitching it very high. And does seem to me to indicate a point of general principle. I wouldn't have thought you want to.
- Blanchard J Is that what the Court of Appeal said?
- Elias CJ No it's not but I wouldn't have thought it's what the Crown wants to argue here either.
- Gwyn And with respect Your Honour that's not quite how I would put it. My first proposition was that there isn't an unqualified right to an interpreter in the context of border entry decisions. And when one looks at.
- Elias CJ Well isn't it more that there's not an unqualified right to a particular method of communication?

- Gwyn Yes Your Honour and I simply formulate it in that way because that is the way in which the applicant has formulated it.
- Elias CJ Yes, yes.
- Gwyn That there is in effect, pursuant to the requirements of natural justice an unqualified right to an interpreter. And in my submission that can't be so. And that one of the factors relevant to a consideration of how the natural justice requirement might be satisfied, one of the factors that goes to that is that in this case we are talking about a decision made under s.9 which relates to a temporary permit. And what is relevant is the general procedural requirements that surround the s.9 decision.
- Tipping J I thought the Court of Appeal's approach to this in paragraphs [90] and [91], then in [92], they went on to consider the specific case, was entirely sensible and sound. That you don't lay down rigid rules and they actually gave the immigration people a bit of a hurry up in a sense. They made it quite clear, you know, that certain ideals were there. They wouldn't always have to be met. I can't see how that can be complained against myself.
- Gwyn Mm.
- Tipping J And I think the Crown would be wise just to simply say that, you know, you're happy with the way the Court of Appeal put it.
- Gwyn Indeed Sir.
- Tipping J If you are. Rather than take, as the Chief Justice's has said, a sort of counter extreme position. I'm not persuaded remotely that we should start laying down prescriptive rules for how natural justice is to be worked out in these sort of cases.
- Gwyn Indeed Sir and I wouldn't like my submission to be taken as being contrary to that. What I say in relation to the statutory context is simply in support of that position, that no rigid rules ought to be laid down as to what natural justice requires in a particular context.
- Blanchard J So therefore you say this is really just a case about its own facts?
- Gwyn It is a case about its own facts Your Honour. And it's clear from the Court of Appeal judgment that the Court went very carefully through the facts of the case to assess that the Immigration officer's reliance upon Ms Kumsastra as a spokesperson for the group was reasonable in all the circumstances. And I can take Your Honours through the relevant portions of the judgment if you wish.
- Tipping J Was there any suggestion at either venue from the present applicant that what was happening was not acceptable?

Gwyn If I might confer with my friend. (Counsel confer). I'm not sure that I quite understand your point Your Honour.

Tipping J No well I won't pursue it.

Elias CJ In Auckland of course she did challenge the matter and did get a visa didn't she?

Gwyn Subsequently yes.

Elias CJ Subsequently.

Tipping J Sorry, really my question was far too loose. It really should have been primarily focused on what happened in Christchurch vis a vis the interpretation issues.

Elias CJ Yes.

Tipping J I mean there she was part of a group. This member of the group was purportedly speaking for them all. And as I understand the background to the case, none of the others raised a murmur of protest or purported to say this wasn't happening fairly or they couldn't understand or anything.

Gwyn Not at the time.

Tipping J No.

Gwyn That's correct Your Honour.

Tipping J I mean, the case has a somewhat unreal aspect in the light of that.

Blanchard J What do you want to say about quantum of damages?

Gwyn As I understand my learned friend's general submission on quantum, it is that in the particular circumstances of the case, \$4,000.00 as an award for breach of the right to dignity is inadequate.

Tipping J She has to say more than that, that it's outside the range of any, you know, reason. It's really a sort of reverse appeal as if it was a quantum of damages where damages are at large.

Gwyn Mm.

Tipping J But we don't tinker. It has to be well outside the possible range.

Gwyn And in my submission Your Honour, that clearly is not so. The award is broadly consistent with awards made in other proceedings and in other jurisdictions. And by way of example, in the **Dunlea** case

(Dunlea v Attorney-General CA 396/98 [2000] 3 NZLR 136), the awards ranged from \$1,500.00 to \$18,000.00 but the higher awards there reflected deliberate and unlawful Police conduct, in contrast to the inadvertent errors here. And in the earlier submissions the Crown refers to awards made in respect of breaches of a right against cruel treatment under Article 3 of the European Convention, the equivalent to s.9 of the Bill of Rights Act and therefore obviously more serious, and an award of 3,000 Euros.

And the award arises from an assessment of the particular facts of the case. And as the Court of Appeal noted in **A-G v Taunoa** (CA 82/04, 8.12.05) this exercise is essentially an evaluative exercise which needs to be made, even when the principles are clear.

- Elias CJ Well I was, the Crown has conceded that damages was appropriate.
- Gwyn Yes.
- Elias CJ So, but in your argument, you say that there is a difference in principle between the Majority and the Minority which struck me as perhaps inconsistent with the argument that you were addressing to us. And I don't know what the difference in principle is.
- Gwyn I think on further reflection Your Honour, there isn't a difference in principle between the Majority and His Honour Justice Hammond. Although one might think so if one looks at all of the references to His Honour Justice Hammond's dissenting judgment that is set out in the application and submissions in support. The apparent difference in part concerns the finding by the Majority of an element of contribution by Mrs Udompun that ought to go toward the award. But when one looks at the.
- Elias CJ But it's not put forward in terms abatement of a proper assessment of damages as in a civil law claim. It's simply a, clearly it would have been an aggravating circumstance if she had unmistakably drawn to their attention her needs and they had ignored it.
- Gwyn Yes Your Honour and in fact in the Court of Appeal there was no difference between the Majority and His Honour Justice Hammond on that question of principle as to whether contribution might be relevant in particular circumstances. It was simply that His Honour Justice Hammond disagreed with the Majority on the facts and expressed the view that the Majority's judgment about.
- Elias CJ Well it's the evaluation really wasn't it?
- Gwyn Yes, about the extent of the contribution was somewhat harsh.
- Elias CJ Yes.

Gwyn So again it was about the evaluation of the quantum rather than about a question of principle.

Tipping J And that dimension removes the apparently stark difference, it wasn't all that stark, between the two amounts.

Gwyn It does Your Honour.

Tipping J Frankly it's a very, it's a relatively minor difference in the sum of things. But it's ameliorated that by that contribution point.

Gwyn Yes Sir and while His Honour Justice Hammond goes on to discuss another aspect, which is the question of the public dimension that's required to be vindicated.

Elias CJ There's no suggestion that the Majority were applying any other approach.

Gwyn No.

Blanchard J Justice Hammond doesn't identify a problem of principle as he saw it.

Elias CJ No.

Blanchard J With what the Majority did. He just thought that this, what they came out with at the end was not quite enough.

Elias CJ Yes.

Gwyn I agree Your Honour and while he does canvas in his decision cases such as the Privy Council decision in **Ramanu** where there's some kind of extra dimension, there's no suggestion that there is that extra dimension of high handed behaviour or deliberate illegality in this case.

Elias CJ No.

Gwyn So if that were a matter of principle, it's not relevant to the facts of this case.

Elias CJ No. The only matter which is a bit of an oddity in the Majority judgment is their reliance in terms, what they describe as contribution. Not on her failure to draw matters to the attention of the people at Papakura but on the fact that she hadn't furnished herself with sanitary towels, apparently, on the plane some 72 hours earlier. And I must say I struggle to find how that really could have been the circumstance which mattered at all. It seemed quite irrelevant to me to her present need, her then present need when in custody in Papakura.

Gwyn I think Your Honour that it's correct that the relevant period, as I understand the Majority, the compensation was awarded on the basis of the relevant period being the point from which.

Elias CJ The cousin came to the.

Gwyn Mrs Udompun's cousin made the request of the Police and so it was some 18 hours and that that's the relevant period.

Elias CJ Yes. So there is an oddity there. But again, I don't see a point of principle that arises out of it.

Tipping J This was the one area, or one where the Court wasn't entirely in agreement.

Elias CJ Yes.

Tipping J The level of contribution if you like. But I can't really see that as being, that's wholly case specific.

Gwyn I agree Your Honour and certainly in the Crown's submission that point, that sub-point of the question of compensation doesn't raise an issue of general principle in this case.

Tipping J I mean no-one's trying to argue that either it always is or it always, they're not arguing any point of principle in relation to what one might call contributory conduct are they?

Gwyn No Sir.

Tipping J They're just arguing for the weight of it in this particular case.

Gwyn Indeed Sir. His Honour Justice Hammond did accept, as did the Majority, that at a level of principle, contribution may be relevant. And then it became a question of what weight do we give it in this particular case, and that's where they differed.

Tipping J There's no argument against you that it can never be relevant?

Gwyn Certainly there is no argument that's been made by the applicant in this application.

Tipping J No.

Gwyn And in my submission that argument would be inconsistent with, certainly with jurisprudence in the European context for example.

Tipping J Quite.

Elias CJ I wonder really, although in these circumstances, whether it is contribution or really whether that is an aspect of the absence of an aggravating circumstance such as high handedness in the face of knowledge of the difficulties she was encountering. But it is odd that they referred to something which seems to be irrelevant.

Gwyn In respect of the previous period Your Honour?

Elias CJ Well in respect of apparently on the aircraft she could have spoken to the air hostess or something like that about getting some sanitary products.

Gwyn Well I suppose Your Honour it is relevant in the sense that what the Court said on the facts was that Mrs Udompun did have an opportunity on those earlier occasions, both on the aeroplane and at the airport, where she could have spoken to someone who spoke both Thai and English and made her request. And that if she had done so then she would not have been in the dilemma she ultimately was.

Elias CJ Well she might have been.

Gwyn She may have been.

Elias CJ She might well have been.

Gwyn Mm.

Elias CJ Yes.

Tipping J Yes I agree with the Chief Justice, it is a little odd, but I don't think it's an appeal point.

Elias CJ No.

Gwyn In relation to the particular quantum of the award, in my submission it's true that with this decision, as with other decisions such as Dunlea, the Court does in a de facto sense provide a yard stick for other cases. But in my submission that guidance is already present. And unless the decision about quantum is plainly wrong, it doesn't require a further decision of this Court. And it isn't a matter of general principle. And although the applicant doesn't put her case in this way, nor is it submitted that any question of the development of general principles governing the assessment of compensation ought to arise or does arise from this case.

Elias CJ Well the Crown hasn't sought really to put the general questions in issue in this case.

Gwyn No Your Honour.

Elias CJ So it is just a question of the evaluation of what is adequate to vindicate the right.

Gwyn In the particular circumstances of this case.

Elias CJ Mm.

Gwyn I don't have anything further to say on the matter of quantum Your Honour.

Elias CJ Ms Gwyn, is there a, the costs matter was sent back to the High Court. Is that still live on this? It is?

Gwyn Yes it is Your Honour.

Elias CJ We didn't hear any argument on it but yes, there is reference in the submissions to it. So that completes?

Gwyn Those are my submissions thank you Your Honours.

11.19 am

Elias CJ Mrs Woodruffe, do you want to be heard in reply?

Woodruffe Yes Your Honours. One factual point that is of concern to Counsel is the question raised by one of Your Honours saying that in this particular case none of the others raised any complaints except this one particular woman. The point is that.

Elias CJ I don't think that was being put. I think it was being put that there was no complaint made at the time in Christchurch that matters were not being understood.

Woodruffe Okay. That was the core of the case of the applicant at the High Court Your Honour about the level of understanding and inability to speak which was put before the High Court. Okay, that being the issue, I apologise, I did misunderstand that point.

Elias CJ That's fine.

Woodruffe It is important to know that we accept under the Immigration Act, getting a visitor's permit is a privilege, not a right. However, my submission is that those who seek visitors' permits actually have the right to seek from the Minister, pursuant to s.130, a reconsideration. They also have the right to seek judicial review from the High Court if a decision proves to be unfair. So it's not quite correct to make a blanket statement that s.9 takes away all rights of those who seek a visitor's permit. It's a point in this appeal that we are not saying there is an unqualified right to an interpreter. But what is the minimum standard of interpretation that should be laid down for all immigrants

who do not speak English. It's a matter of public interest in a society like New Zealand where our society is now full of people of different races. Miscarriage of justice was in this case because Ms Kumsastra was never qualified as an interpreter and our client never chose her to be an interpreter.

It's a matter of public interest, winding up, and in addressing the issues by the Crown that when the Court of Appeal looked at this case, they suggested the Crown suggested that to ensure that justice is done, suggested that all immigrants bring with them their own translators and interpreters. The question at issue is do all immigrants that come in have to ensure that they have an interpreter with them of their choice, otherwise they wouldn't be governed or protected under the New Zealand Bill of Rights. To me, if that interpretation is put to it, then Bill of Rights Act or some sort of qualification to that effect must be put to Bill of Rights Act for immigrants so that at least immigrants are quite clear of what is required and what their rights are in this country. That is a result from the Court of Appeal's decision and in my submission it goes against natural justice principle of right to be heard.

As to the question of quantum, there is the issue of the irrelevant considerations being taken in. And again the weight, insofar as the issue that Your Honour Chief Justice raised about her not addressing the issue from when it happened on the plane. Indeed in the facts in the High Court, she did address the issue by self help at the very onset of her period. But later on, when it was so bad that she sought help from relatives but that help wasn't given to her because of rules within the Police at Papakura. It is a relevant consideration, it's a compounding issue. But the general public issue is that this case goes to the violation of a very important right, a right of all women, not particularly of Ms Udompun. Menstruation is something that happens to all women, the question is that what makes this violation less valuable in comparison to awards to prisoners who have violated criminal law of New Zealand.

Those are my further submissions with respect.

Elias CJ Thank you Mrs Woodruffe. We're going to take some time to consider what we do about the leave application. So we'll reserve our decision. Thank you Counsel for your assistance.

Gwyn As the Court pleases.

Court adjourns 11.25 am