IN THE SUPREME COURT OF NEW ZEALAND

SC 17/2008
[2008] NZSC 44

AHMAD ZANZOUL

v

THE QUEEN

Court: Blanchard, Tipping and McGrath JJ

Counsel: T Ellis for Applicant
A M Powell for Crown

Judgment: 10 June 2008

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant pleaded guilty to a charge, laid indictably, under s 31(1)(f)(ii) of the Passports Act 1992 that without reasonable cause he was in possession of an Australian passport that he knew or had reason to suspect was falsified. On 4 August 2006 he was sentenced in the High Court to 15 months imprisonment. That sentence, in respect of which he had leave to apply for home detention, has long since been served.

[2] Notwithstanding his guilty plea, the applicant appealed against conviction as well as against the sentence. On 6 December 2006 his appeal was dismissed by the

Court of Appeal. His application to this Court for leave to appeal against the Court of Appeal's decision was not made until 22 April 2008, some 16 months out of time.

[3] The charge related to the circumstances in which the applicant sought to enter New Zealand in March 2004. He was travelling on a Syrian passport, apparently validly issued, on which he had left Syria. But at the New Zealand border, when spoken to by Customs and Immigration officials, he produced a false Australian passport.

[4] The applicant subsequently sought refugee status in this country. This was declined and his appeal to the Refugee Status Appeal Authority (RSAA) was dismissed. The Court has been informed that that decision is presently under appeal to the High Court. But of course unless and until it is set aside, it stands. We must therefore approach this application on the basis that the applicant has not established that he is a refugee and consider whether the criteria for leave have been met. We are satisfied that they have not been.

[5] On the applicant's behalf, Mr Ellis has outlined five proposed grounds of appeal and, subsequent to the filing of his written submissions, has drawn our attention to a very recent decision of the House of Lords, to which reference will be made later.

[6] The first proposed ground is that the conviction and sentence was a nullity. This assertion is made on the basis of criticisms recorded by the Court of Appeal, and earlier articulated in *R v Webber*,[1] of the "unnecessarily complex and confusing procedural provisions" by which the applicant came to be convicted indictably and committed for sentence to the High Court. But plainly when the relevant statutory provisions are properly interpreted and applied, they lead to a valid conviction and sentence. The fact that they may be overly complex and difficult to apply to a particular situation does not make the conviction and sentence in any way invalid. Mr Ellis has not attempted to show that the Court of Appeal's analysis of the way in which the sections applied in this case was incorrect. His argument was that the offence of which the applicant was convicted was uncertain because of the

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1 [1999] 1 NZLR 662.

procedural requirements for entry of conviction and committal for sentence. That argument is quite untenable. There is no uncertainty about the ingredients of the offence itself, nor concerning the applicable penalty when the charge has been laid indictably.

[7] The second proposed ground is that the sentencing Judge should have treated the applicant as having been convicted summarily and that the maximum sentence which could have been imposed was thus one of three months only. For the reasons given by the Court of Appeal, we are satisfied that the applicant was deemed to be convicted on indictment when he was committed to the High Court for sentence and that the 15 month sentence was available. The contrary proposition is unarguable and, in any event, no appeal against the sentence can now be brought in this Court, since the applicant has completed serving the sentence.[2]

[8] The third proposed ground is that the conviction was based upon evidence obtained as a result of a breach of the applicant's human rights, including his rights guaranteed by the New Zealand Bill of Rights Act 1990. It is said that when he was "detained" at Auckland airport he was not advised of his right not to incriminate himself and of his rights to silence and to consult and instruct a lawyer. Also, it is said, when he was detained he was not advised of his rights under the Refugee Convention and under Article 36 of the Vienna Convention on Consular Relations (whereby he could obtain advice as to his status as a refugee). The answer given by the respondent, which is so obviously correct as to make the proposed ground unarguable, is that questioning at a border does not involve a detention. He elected to produce the false passport to the authorities before making any claim to refugee status. The officials cannot be obliged to give any advice about refugee status to someone arriving in New Zealand until and unless that status is claimed.

[9] The fourth proposed ground is that the RSAA hearing was unlawful and "as a consequence" the applicant's appeal has been "unlawfully delayed". This argument on delay appears to be advanced only in respect of the present proposed appeal to

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[2] Section 383A(3) of the Crimes Act 1961 and *R v Condon* [2007] 1 NZLR 300 at paras [1] – [4].

this Court. (It would obviously be unavailable in relation to the appeal to the Court of Appeal which delivered its judgment only four months after the sentence was imposed.) The applicant has explained the 16 month delay in making his present application by saying that it is only now appreciated that the RSAA was not an independent and impartial tribunal and consequently his status as a refugee has yet to be determined and his guilty plea was entered "under a mistake of law". But the delay resulting from the applicant's failure to put forward this argument can provide no reason at all for setting aside the conviction.

[10] The last of the proposed grounds of appeal set out in the submissions of Mr Ellis is that the Court of Appeal erred in saying that there was nothing to link the possession by the applicant in New Zealand of a false Australian passport with his claim for refugee status. It is submitted that, in order to enter New Zealand to claim that status, the applicant could not use his Syrian passport, which he had used to leave Syria and at various points between there and New Zealand. The judgments below all record, however, that in coming to New Zealand the applicant was travelling on his Syrian passport. It is now said that he needed to produce the Australian passport because he did not have a visa to enter New Zealand. The Court of Appeal was obviously correct to reject this argument. The applicant had travelled here on his Syrian passport and could simply have claimed refugee status at the border. He had no need to rely on the Australian passport for that purpose. The matter would then have been dealt with as required by the Refugee Convention and the Immigration Act. His reliance on the decision of the House of Lords in *R v Asfaw*,[3] a judgment delivered on 21 May 2008, is quite misplaced. The appellant in that case was accepted to have been a refugee in transit in the United Kingdom on her way from Libya to the United States. She used a false passport in order to try to exit the United Kingdom for the purpose of flying to the United States. As a refugee she had, under a provision of United Kingdom law which has no equivalent in New Zealand, a defence to certain crimes. The House of Lords, by majority, held that it was in those circumstances an abuse of process to prosecute her on a different charge, to which she had no statutory defence, based on the same set of facts.

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3 [2008] UKHL 31.

[11] The differences between that case and the present case are very clear. The applicant does not have the status of a refugee. New Zealand law does not provide any express defence to charges by reason of refugee status. We are nonetheless prepared to assume that by reason of Article 31 of the Refugee Convention it might be an abuse of process to charge a refugee with a passport offence where the passport has been used as a means of putting the refugee in the position to claim refugee status. However, the applicant had no such need to use the false passport in order to claim refugee status, having already used the Syrian passport to get to the point where his refugee claim could be advanced.

[12] None of the proposed arguments has any prospect of success.

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