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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 965, 968, 970/2006

BETWEEN : 1. 'AIVI PULOKA
2. MELE TEUSIVI 'AMANAKI
3. MALAKAI LOMU

- Plaintiffs

AND : THE KINGDOM OF TONGA

- Defendant

BEFORE THE HON. CHIEF JUSTICE FORD

Counsel : Mr Clive Edwards for the plaintiffs and the
Solicitor General for the defendant

Date of hearing : 19 December 2006

Date of judgment : 20 December 2006

INTERIM JUDGMENT

Introduction

[1] There are occasions, albeit rare, when the court must act swiftly in order to avoid injustice and on such occasions strict adherence to the rules of practice and procedure cannot always be complied with. This is such an occasion. The three cases before the court were filed on Monday 18 December. The court closes for the Christmas vacation today and does

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file

not reopen until 4 January 2007. The cases call for urgent consideration and urgency was duly accorded. The court is obliged to counsel for co-operating at such short notice. I have included the three cases in the one judgment.

[2] The plaintiffs claim that they have been unjustly deprived by the defendant of their basic rights of freedom because their names have been included on what was described in the pleadings as a "secret list of persons who are blacklisted or prohibited from going to certain areas of Tonga or leaving the country" ("the list"). The list was drawn up by the defendant pursuant to the Emergency Powers (Maintenance of Public Order) Regulations ("the regulations") which in turn were made pursuant to section 2 of the Emergency Powers Act (Cap 45). It is claimed that in each case, military personnel, in reliance on the names included in the list, have made orders prohibiting the plaintiffs' freedom of movement and travel.

[3] The plaintiffs challenge the legality of the list and the decisions made in reliance on it. Although they commenced their actions by writ and statement of claim, counsel accepts that they should properly have proceeded by way of application for judicial review based on the recognised grounds applicable to review applications. I met with counsel in chambers on the day the first writ was filed and agreed to treat each case as an application for review and I granted leave to proceed on that basis. An interim injunction is the immediate remedy sought in each case.

Background

[4] The regulations were issued on 17 November 2006, the day after the infamous riots which left a large part of the centre of Nuku'alofa destroyed. They were initially in force for 30 days but on 12 December 2006 it was publicly announced that the emergency powers had been extended for another month until 16 January 2007.

[5] The regulations extend significant powers to any person authorised by Cabinet and every member of the Tonga Police Force and the Tonga Defence Service to act "for the purposes of preserving public order and securing the public safety." It is those powers which the defendant relies upon for imposing the restrictions on the movements of the plaintiffs.

The plaintiffs' case

CV 965/06 --- 'Aivi Puloka

[6] The plaintiff in this action, 'Aivi Puloka, is a medical practitioner employed in the Ministry of Health at Viola Hospital. Her husband is also a doctor employed by the Secretary of the Pacific Community based in Noumea, New Caledonia. They have four children aged between 16 and seven years. The plaintiff is also the President of the Public Service Association.

[7] The family planned to fly out from Tonga on 13 December 2006 to attend a get-together at the plaintiff's mother's home in Auckland and then spend the Christmas and New Year period in Nouméa. On or about 5 December 2006 the plaintiff was made aware, from an article in the Taimi newspaper that the army held the list and she was one of the persons named in the list. She checked the matter out and wrote to the Police Commander requesting his assistance in having her name removed.

[8] On 12 December 2006, the Police Commander, Sinilau Kolokihakaufisi, wrote to the Commander of the Tonga Defence Services as follows:

"Dear Sir,

Re: Approval for overseas travel -- Mrs 'Aivi Puloka

I hereby inform that there is no reason to hinder the travel of Mrs 'Aivi Puloka from Tongatapu to New Caledonia.

Your consideration and appropriate action is respectfully sought.

S. Kolokihakaufisi
POLICE COMMANDER"

The Police Commander also wrote to the Manager of the New Zealand Immigration Service on the same day certifying that the plaintiff had no security or criminal record.

[9] On the morning of Wednesday 13 December the plaintiff and her family travelled to Fua'amotu Airport to catch the Air New Zealand flight leaving at 11 a.m. They were stopped by Army soldiers at a roadblock

outside the airport and the plaintiff was told that her husband and children could proceed to the airport and travel to New Zealand but she could not do so. In the end, the children travelled alone on the flight to New Zealand. Mr Puloka stayed in Tonga with his wife. They have consequently lost their air fares.

[10] The plaintiff deposed in a supporting affidavit:

"19. I have never been or likely to be involved in any subversive activities against the government nor did I counsel or insight anyone to commit the offences which took place on 16 November 2006.

20. That I have not and do not consort or associate with criminals or people planning to break the peace, public safety or public order."

CV 968/06 -- Mele Teusivi 'Amanaki

[11] The plaintiff in this action, Mele 'Amanaki, is a solo mother with two daughters aged nine and six. They reside at Tu'i Road, Kolofo'ou with a dependent aunty aged 65 and a housemaid. The plaintiff is a Principal Food Technologist in the Ministry of Agriculture, Food, Forests and Fisheries. She is also the interim Secretary of the Public Service Association and Secretary of a Government Committee responsible for advising Cabinet on food safety and consumer protection.

[12] Up to the fifth day of December 2006 the plaintiff resided at her Kolofo'ou home with her family. Each day she would check in at the military checkpoint at Vaha'akolo Road to go to and from her work. As she was returning home on the 5th of December the soldiers at the checkpoint advised her that she was prohibited from going past the checkpoint to her home as her name was on the list of prohibited persons. She then telephoned a senior officer in the army who spoke to the soldiers on the checkpoint and she was able to return home that night but on the 6th of December she was stopped again and she has not been able to return to her home since then. She deposed that her two little girls miss her very much and they can only see her when they are brought to her on weekends.

[13] The plaintiff says that she has suffered greatly in a number ways and she does not understand why she has been treated like a criminal as

she has never committed a criminal offence or been party to any unlawful offence and she was still working in a senior position in the Ministry. Through her lawyer she wrote to a senior Cabinet member asking for her situation to be reviewed and pointing out that she was the only resident on her street excluded by the officers at the checkpoint. She received no response to that letter.

CV 970/06 -- Malakai Lomu aka Viliami Lafu Sika

[14] The plaintiff in this action is a company director and owner of Five Star Finance Limited. He is 69 years of age, married with nine adult children. In early 2006 he was diagnosed with suspected prostate cancer. He has had regular medical appointments with a specialist in Auckland since then and had another appointment booked with his specialist for 12 December 2006. His wife flew to Auckland on 3 December and the plaintiff was booked to depart on 7 December. He deposed:

"11. I went through the checkpoint outside Fua'amotu Airport after they checked my passport and air ticket. When I was inside the Terminal Building to check in my luggage and ticketing two soldiers from the Tonga Defence Force (Ministry of Defence) approached me to check my papers again.

12. Whilst the two soldiers were looking at my passport and air ticket, one of them said that my name was on the list of the "kau hia" (criminals). They told me that I cannot leave the country and escorted me out.

13. I was very upset, and felt sick, humiliated and highly embarrassed when the soldiers said I was on the list of criminals as well as being escorted out."

[15] The plaintiff further stated: "I have not been involved in any criminal activities or associated with the looting or burning of the town on the 16 November 2006. I and my sons have a catering business, construction business and finance business operated under the name of Five Star Finance Ltd."

The defence

[16] The list in question is said to have been compiled pursuant to regulation 4 (VIII) which reads:

"4. Any person authorised by Cabinet, and every member of the Tonga Police Force and the Tonga Defence Service, shall for the **purposes of preserving public order and securing the public safety**, have power to:

(I) . . .

(VIII) prohibited person or class of persons from entering a place or building."

(emphasis added)

[17] In an affidavit filed on behalf of the defendant in the Puloka case, Lieutenant-Colonel Aleamotu'a case stated that after the events of 16 November 2006, the Tonga Defence Services were given power under the regulations to work for the purposes of preserving public order and securing the public safety. The officer went on to depose:

" 2. THAT we have analysed videotapes of speeches, correspondence and footages from these tapes which have confirmed to us active participants who incited or encouraged people on 16 November 2006 and prior to this date to carry out destructive work on 16th November, or directly carried out damages or destruction to property in Nuku'alofa and other places.

3. THAT the plaintiff in this matter is one of the active participants in inciting and encouraging through speeches, people who supported the pro-democracy movement and the destruction of the 16 November 2006.

4. THAT the plaintiff as an active participant at Pangaisi'i prior and after the riots, has not denounced the violence that was used to destroy properties in Nuku'alofa and the loss of lives during the 16th of November 2006.

5. THAT criminal investigation pertaining to people who were involved directly or indirectly in the events of 16th of November and the lead up to that date is not final yet.

6. THAT the national security risk is still high up to today according to evidence that we have received and assessed to be accurate.

7. THAT in consideration of national security and our endeavour to preserve public order and secure public safety we have secured and control (sic) the public entry to six National vital installations, which included the Fua'amotu International and Domestic Airport.

8. THAT the control of people from entry to these National vital installations is to ensure that the destruction which occurred on 16th November, will not occur again and destroy these National vital installations.

9. THAT the control of people from entry to the Fua'amotu International Airport is also to ensure that the security of the airport is guaranteed to the international carriers, thus ensuring that they maintain their services to the Kingdom.

10. THAT the Services received a letter from the Commander of Police on the 12th of December advising that there is no reason to hinder the plaintiff's travel to New Caledonia.

11. THAT after the letter was received on the 12th of December, the plaintiff was also informed by phone on the same day that her travelling overseas is not prohibited by the Defence Services, and however her participation in Pangaisi'i prior to the breakout of violence and after the violence prohibited her from entering any National Vital Installation for security reasons.

12. THAT the only concern showed by the plaintiff on receiving the Defence Services advice, is (sic) to ask when the Emergency will end.

13. THAT the plaintiff on the 13th December tried to enter the Fua'amotu International Airport and was denied entry through the military checkpoint.

14. THAT the Defence Services have not received any contacts or request from the plaintiff to reconsider her security status up to this date.

15. THAT we consider each case individually and regularly and we use this discretion generously.

16. THAT we have not considered the plaintiff's case and we have not made a decision on this matter.

17. THAT all the contents of this affidavit are true and correct."

[18] The Solicitor General confirmed that the thrust of what is deposed to in this affidavit would apply also, with appropriate modifications, to the case of each other plaintiff. Specifically, she confirmed that the Services had no objection to Mrs Puloka and Mr Sika travelling overseas but the reality was that, for the reasons stated in the affidavit, the military checkpoint close to Fua'amotu Airport denied them entry to the airport terminal. Referring specifically to the letter issued by the Police Commander dated 12 December 2006, relating to Mrs Puloka, the Solicitor General submitted that no weight should be given to the letter because it did not address the fact that ongoing criminal investigations are, at this date, still being carried out.

Submissions

[19] Mr Edwards challenged the validity of the regulations and claimed that they were ultra vires. The basis of his submission was that the powers set out in paragraphs (I) two (XVI) of the regulations are not authorised powers under section 2 of the Emergency Powers Act. He also contended that they were powers which the Governing Authority already held under the Public Order (Preservation) Act (Cap 38).

[20] The Solicitor General responded that the latter Act dealt with threats to the public order and the need to restore public order but it did not deal specifically with the need to provide regulations securing the public safety which is one of the stated objectives of the Emergency Powers Act. She also relied on the general provisions at the end of section 2 (3) of the Emergency Powers Act which authorise the making of, "such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purposes of the said regulations.

[21] The other matter touched upon in submissions was the allegation by the plaintiffs that the decisions in question were unreasonable because they were not based on any security risk to the public safety or public order. In response, the Solicitor General drew attention to, and relied upon, paragraphs 15 and 16 of Lieutenant Colonel Aleamotu'a affidavit.

Comment

[22] At that point in her submissions, the court interrupted the Solicitor General and asked how long it would take the Services to make a decision on these three cases. The reply was, "two to three days." For the reasons stated at the outset of this judgment, that timeframe was unacceptable and the court ordered that the Services were to make a decision and advise the court accordingly by 4 p.m. yesterday. At 4 p.m. the Registrar was informed that the Services would allow Mr Sika to travel to New Zealand but they sought an extension of time until 9 a.m. this morning to make a decision in relation to the other two plaintiffs. Mr Edwards agreed to that request and so it was granted. I will come back to this aspect of the case.

The law

[23] A cursory examination of the authorities, in the short time available, indicates that the courts are reluctant to criticise or comment on the wisdom or expediency of steps taken by the authorities to deal with a perceived state of emergency situation. The courts, nevertheless, retain the power by way of the remedy of judicial review, to ensure that officials act within their legal powers and exercise any discretionary powers on reasonable grounds after following a proper process.

[24] In the present cases, the court is concerned to ensure that any authorised person exercising one or other of the extraordinary powers granted under the regulations holds a genuine belief based on reasonable grounds that the circumstances require the invocation of the particular emergency power relied upon. If the court concludes that the decision under challenge is such that no person properly directing himself on the relevant law and acting reasonably could have reached, then it will, pursuant to its judicial review powers, quash that decision.

[25] The Solicitor General in helpful written submissions referred to a passage from Lord Diplock's judgment in **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935, 951 where his Lordship referred to certain decision-making discretionary powers of the executive which need to be weighed against one another, and commented, "a balancing exercise which judges by their upbringing and experience are ill-qualified to perform." I agree with that observation and it would have particular application, of course, to a decision such as whether, in a given factual situation, a state of emergency did exist. I am not concerned with that type of decision in the present cases, however. The issue before me is whether the particular decisions made by Defence Services personnel which resulted in the restrictions complained of were "so outrageous in their defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." In relation to that scenario, Lord Diplock in the same case (951) said:

"Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

Conclusions

[26] These conclusions are necessarily interim conclusions. Apart from the injunctions, other relief is claimed in each case including damages and so at some stage there will need to be a full substantive hearing. In the meantime, however, I am not persuaded that the ultra vires argument advanced by the plaintiffs is sound. It seems to me that the Executive, for obvious reasons, does have extensive powers for dealing with emergency situations by way of regulation and the regulations in question clearly fall within the ambit of those powers. They can be seen as a supplement to the existing statutory powers provided for in the Public Order (Preservation) Act.

[27] Similarly, I see nothing unlawful in the Services having a list of persons who could probably be described as falling within a moderate to high risk category. It is how that list is administered, as evidenced in the present cases, which gives rise to concern. It seems quite irrational to conclude that a professional woman travelling to the airport with her husband and children intending to leave the country on a Christmas vacation could seriously be seen as a threat to public order or public safety. It seems difficult to reconcile the Services, on the one hand, having no objection to her flying out of the country and yet, on the other hand, denying her access past the military roadblock to enable her to enter the International terminal, meaning effectively that she has no way of catching an outgoing flight. The same observations apply to Mr Sika's situation.

[28] Likewise, in relation to Mele 'Amanaki, the decision to restrict her from travelling to her home and being with her two small daughters, whilst at the same time allowing her to carry on working in a senior government post appears, on the surface, to be quite irrational. If, as the affidavit filed on behalf of the Services, would suggest, the decision to restrict Ms 'Amanaki's freedom of movement was made without any close consideration of her personal situation but simply because she was a name on the list, then that merely aggravates the situation and reinforces the irrationality and unreasonableness of the preemptory decision.

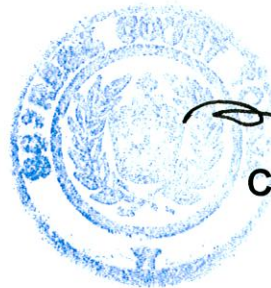
[29] The Defence Services deny (paragraph 16 of the affidavit) that they had considered the case of the respective plaintiffs or that they had made a decision but the reality is that they had indeed made a decision in each case which restricted the plaintiffs' freedom of movement or travel but, on

their own admission, that decision had been made without any consideration of the case before it. In plain terms, a decision made on that basis can properly be described as unreasonable and irrational.

[30] The plaintiffs have made out a strong prima facie case for judicial review and, in the circumstances, they are entitled to the interim relief they seek. This morning at 9 a.m. the court was informed by the Solicitor General that the Defence Services had agreed to allow Mrs Puloka to go to New Zealand but further time was required for the Army Commander to meet with Mele 'Amanaki. The Solicitor General added that she was sure that Ms 'Amanaki would also be free to go. The court is grateful for that advice and, given the final observation made by the Solicitor General, it will not be necessary for me to make any formal orders.

[31] The court is mindful, however, that the emergency regulations and the list are going to remain in place over the Christmas/New Year holiday period when the court office will be closed. Therefore, notwithstanding the fact that I do not propose to make any formal orders in these particular cases, I am nevertheless taking the opportunity of releasing this interim judgment. It is important that those officials charged with administering the extraordinary powers provided for in the regulations should have a proper appreciation of what the law demands and expects.

NUKU'ALOFA: 20 DECEMBER 2006



A handwritten signature in black ink, appearing to read "Sam C3", is written over the right side of the seal.

CHIEF JUSTICE