

**IN THE DISTRICT COURT
AT WAITAKERE**

CRI-2008-090-001224

IMMIGRATION NEW ZEALAND
Informant

v

JUN SHI
Defendant

Appearances: C Hurran for the Informant
F Deliu for the Defendant

Judgment: 7 February 2008

ORAL DECISION OF JUDGE P RECORDON

[1] This is an application for a warrant of commitment in respect of Jun Shi. The matter has come in at 4.30 pm to a List day at Waitakere District Court following Waitangi Day. By my calculations there are about 30 matters left on our list.

[2] This sort of application is reasonably common. Many are not opposed. There is an element as far as the court process seems to be to rubber-stamping matters. Mr Shi is not unlike many who come to the Court after some years of remaining in the country after a visitor's or work permit or other permit has expired.

[3] Mr Shi came here in September 1996 on a visitor's permit which he was granted when he arrived. Towards the end of May 1997 he applied for refugee

status. This was declined 31 August 2000. He appealed. The Appeal was declined 17 November 2000.

[4] While that process continued he was granted a number of temporary permits in terms of what was the process at the time. In February 15, 2001 he made a representation to the Minister of Immigration. The Minister declined to intervene 20 March 2001. His temporary permit then expired on 19 May 2001 and there is no dispute that he has been here unlawfully since 20 May 2001.

[5] The application is made after Mr Shi was served with a removal order and formally taken into custody under s59 of the Immigration Act 1987 on 5 February. The affidavit tells me that there are difficulties in having Mr Shi removed as he does not have valid travel documents. He completed an emergency travel document but the Department is waiting for him to surrender his Chinese passport before they can submit the completed application to the Chinese Consulate for processing. If there is a stalemate, and he does not surrender his passport, the Department will proceed with travel document application based on the information they have.

[6] Mr Hurran on behalf of The Crown seeks a warrant of commitment today for a period of 5 days to 12 February.

[7] Mr Shi is married. It seems, from what I have been told, his wife is in a similar position to him and it may be that similar proceedings are taken in respect of her. The couple have a child who started school today.

[8] Mr Deliu on behalf of Mr Shi asks me to decline issuing a warrant. He says that I may refuse to issue a warrant. He has, here in court, judicial review proceedings he would have filed today had he not been here. He will file those tomorrow. That review process is to review the decision to remove Mr Shi. He says it will take some time and will need to wait, to an extent, on a Court of Appeal decision pending relating to illegal immigrant parents of New Zealand citizens (the couple's five year old was born in New Zealand). He says the delay in having that review heard, because of the wait for the Court of Appeal decisions, will likely be beyond 90 days and Mr Shi will have to be released anyway, so why keep him in

custody now? He says the couple have a business. He is not going to disappear and it is not in the public interest to lock Mr Shi up pursuant to the application. While the process continues, the removal process and the judicial review process, Mr Shi could well get on with his life in the community without being in custody, so Mr Deliu argues. He says I am not bound by law to effectively rubber-stamp the application. He has put forward a number of arguments, which I will not fully review here. I have considered his arguments including reference to international conventions on the rights of the child, human rights, and to our local New Zealand Bill of Rights Act. The thrust of his submission is that The Crown has to show that there is a reason to hold Mr Shi in custody, that it has to be in the public interest to do so.

[9] I have been referred to s60 of the Act and in particular s60(3) which reads:

“(3) A Judge may issue a warrant of commitment on the application of an immigration officer if satisfied on the balance of probabilities that the person in custody is the person named in the removal order and that any of the following applies:

(a) A craft is likely to be available, within the proposed period of the warrant of commitment, to take the person from New Zealand:

(b) The practical difficulties that meant that the person could not be placed on an available craft within 72 hours are continuing and are likely to continue, but not for an unreasonable period:

(c) The other reasons the person was not able to leave New Zealand within the 72-hour period are still in existence and are likely to remain in existence, but not for an unreasonable period:

(d) In all the circumstances it is in the public interest to make a warrant of commitment.”

[10] Each subsection, (a) to (d), needs to be considered. There are reasons Mr Shi cannot leave the country – there are no travel documents. That reason is likely to remain in existence. Subsection (c) adds, “but not for an unreasonable period”. Subsection (d) says, “In all the circumstances it is in the public interest to make a warrant of commitment.”

[11] The law must be applied and must be applied fairly. I have a discretion clearly set out in the text of s60. I have always been uncomfortable with being asked

to rubber-stamp this sort of application. Frequently persons such as Mr Shi are taken from family situations and held in custody for days, weeks or months before they can be deported. I have refused applications before and I do so again in this case.

[12] There is no argument but that Mr Shi has been living here illegally. Mr Deliu accepts that. There are steps being taken to legalise his, and presumably his wife's status here although there is no review application in respect of her because there is no removal order in existence as yet.

[13] There is a child, a New Zealand citizen, starting school. There is an application for review. There is a Court of Appeal decision, which may change the situation as far as this couple and their child is concerned. That change may be positive. It may not be. The couple run a business. There is no evidence that Mr Shi is going to take off. It is possible, of course, that he will disappear but unlikely in all the circumstances including the fact that his child has now started school. Continued detention serves no purpose in my view. There is no evidence he has absconded before or is likely to do so in the future. Above all else are the rights of the child.

[14] For all those reasons I decline the application. I reserve the right to alter this decision as to form but not substance.

P Recordon
District Court Judge

