

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2005-485-001617

IN THE MATTER of the Immigration Act 1987

AND

IN THE MATTER of an appeal under s 115A of the Immigration Act 1987
from a decision of the Removal Review Authority

BETWEEN HARMON LYNN WILFRED

Appellant

AND

THE CHIEF EXECUTIVE OF THE DEPARTMENT
OF LABOUR

Respondent

CIV 2005-485-2270

IN THE MATTER of the Judicature Amendment Act 1972

BETWEEN HARMON LYNN WILFRED

Applicant

AND

THE CHIEF EXECUTIVE OF THE DEPARTMENT
OF LABOUR

First Respondent

AND

THE REMOVAL REVIEW AUTHORITY

Second Respondent

OUTLINE OF RESPONDENT'S SUBMISSIONS IN:

(1) APPEAL

(2) APPLICATION FOR JUDICIAL REVIEW

28 July 2006

Next event: Hearing, 14 and 15 August, 2004, 10.00 a.m.

Judicial officer: Gendall J

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SEPARATE APPEAL/JUDICIAL REVIEW

1. This is an appeal to the High Court on questions of law under s 115A of the Immigration Act 1987 (“the Act”)¹ from a decision of the Removal Review Authority (“the RRA”) dated 9 August 2005. There is a parallel application for judicial review raising substantially the same issues.
2. The RRA dismissed the appellant’s appeal under s 47 against the requirement to leave New Zealand. An unlawfully present person such as the appellant/applicant is under a statutory obligation to leave: s 45.
3. The appeal to the High Court is confined to questions of law under the Act from the decision of the RRA. Parliament has deliberately not given a right of appeal on fact from the RRA. Most of the submissions in this outline address the appeal.
4. The application for judicial review does not raise materially different issues to those arising on the appeal. The application for judicial review is addressed at the end of this outline.
5. In accordance with the statutory direction in s 146A(2) of the Act, this appeal and application for judicial review are being heard together. However, they are not “consolidated” as asserted by counsel for the appellant/applicant. Care is required to keep separate and distinct the appeal and the application for judicial review. In particular, any affidavit evidence that may be admissible in the judicial review is not relevant to, and may not be referred to in the appeal limited to questions of law.

PRELIMINARY ISSUE – AFFIDAVITS FILED IN JUDICIAL REVIEW ARE INADMISSIBLE/IRRELEVANT

6. The applicant’s affidavits filed in the application for judicial review cover matters, which were not before the RRA. They purport to add to and recast in a different way submissions and information before the RRA, at the time it made its decision. This is not relevant and is not admissible.
7. The affidavits are:

¹ All section references are to sections of the Act unless otherwise stated.

- 7.1 Harmond Lynn Wildred, 24 February 2006;
- 7.2 Carolyn Dare Wildred, 24 February 2006;
- 7.3 Allan David Manco, 24 February 2006;
- 7.4 Damon John Rutherford, 24 February 2006;
- 7.5 Meri Gibson, 24 February 2006;
- 7.6 James Russell Gillanders, 27 February 2006; and
- 7.7 Brett Adamson Dudley, 24 April 2006.
8. None of this goes to the RRA's decision-making process.
9. The limited role of the Court in judicial review needs to be kept firmly in mind. When commenting on evidence not in existence at the time of a challenged decision, the Court of Appeal, in *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd*² delivering the judgment of the Court, observed that:

“What is under review is a challenge to the integrity of the earlier decision-making process, on which the new material does not impinge in any significant way. New opinion evidence, not presented to the decision-maker, can seldom help to demonstrate that a decision on what is essentially an evaluation exercise was unreasonable when made. It is not appropriate to allow in this material which was not before the decision-maker, and was largely brought into existence after the impugned decision was made, and to do so essentially for the purpose of casting doubt on the substantive reasonableness of the decision.” (at page 658)

10. Williams J summarised the basic principles applicable to judicial review in the immigration context in *Sing v Minister of Immigration*.³

“Judicial review, as the House of Lords held in *Chief Constable of the North Wales Police v Evans* [1982] 1 WR 1155, 1173 (as endorsed by the Privy Council in *Mercury Energy Ltd v Electricity Corp of NZ Ltd* [1994] 2 NZLR 385, 389):

is concerned not with the decision but the decision-making process. Unless that restriction on the power of the Court is

² [1997] 1 NZLR 650, Richardson P

³ HC Auckland, 9 February 1998 M.1561/97

observed, the Court will, under the guise of preventing the abuse of power, be itself guilty of usurping power'

Broadly put, on judicial review the Court may only intervene if the decision or the decision-making process exceeds the Authority's power, is procedurally unfair or is based on a misunderstanding of the facts, or discloses an error of law, or if it has taken irrelevant matters into account or it is unreasonable and no rational authority could reach it."

11. Attempting to introduce further evidence that was not before the decision-maker is "normally irrelevant and inadmissible."⁴ Introduction of material after the event, "especially for the purpose of casting doubt on the substantive reasonableness of the decision in question is inappropriate".⁵ There is a limited exception to these general rules where it is alleged that an opportunity to be heard was denied by a decision maker and a summary of the broad nature of evidence that might have been given may be advanced in the reviewing court (as in the *Northcote Mainstreet* case). But that limited exception has no application here.
12. The applicant was legally represented before the RRA. The Act provides that an appellant's case must be fully developed at the time he lodges his appeal to the RRA. A significant body of material was filed with the RRA in support of the appeal and the applicant has already had ample opportunity to advance his case to the RRA. The RRA itself has no power to consider information lodged outside strict time limits unless it exercises an "exceptional circumstances" discretion: s 50(4)(b).
13. To the extent that the applicant's affidavit evidence is admissible at all, which is expressly denied, it may be admitted in the application for judicial review alone and has no relevance whatsoever to the appeal on questions of law.

SUMMARY OF RESPONDENT'S ARGUMENT ON APPEAL

14. The RRA is an expert body with considerable expertise in determining numerous difficult cases. It is well versed in applying the two-limb statutory test. The weight accorded to the various considerations is a matter for the

⁴ *Northcote Mainstreet Inc v North Shore City Council* (High Court Auckland, CIV-2002-404-5292, 5 February 2004), Randerson J, para[68].

⁵ *Northcote Mainstreet Inc v North Shore City Council* (High Court Auckland, CIV-2002-404-5292, 5 February 2004), Randerson J, para[68].

RRA. The RRA correctly applied and balanced the factors required by the statute and came to a conclusion that was open to it.

15. In reality, the appellant is inviting this Court to reconsider the evidence and facts, draw different inferences and weigh various factors in the appellant's favour to a greater extent than the Authority was prepared to do. This is not possible on an appeal on questions of law. The inferences and conclusions the appellant seeks to draw are not the only inferences and conclusions that can be drawn. The inferences and findings by the RRA were open to it on the evidence.
16. There is no error in law on the part of the RRA in any of the ways alleged by the appellant.

GROUND OF APPEAL

17. The notice of appeal contains four grounds, alleging that the decision was "erroneous in law":
 - 17.1 The RRA was wrong in not determining that exceptional circumstances of a humanitarian nature existed that would make it unjust or unduly harsh for the appellant to be removed from New Zealand. The appellant in effect contends that the RRA could not have reached any conclusion other than that exceptional circumstances of a humanitarian nature existed, rendering removal unjust or unduly harsh. This proposition is advanced on the basis of the:
 - 17.1.1 fact that the appellant is a stateless person;
 - 17.1.2 economic and emotional impact on the appellant's children;
 - 17.1.3 economic and emotional impact on the appellant's wife;
 - 17.1.4 economic harm to Combined Technology New Zealand Limited and its employees;
 - 17.1.5 impact on the present charitable works of the appellant;

- 17.1.6 physical danger and economic and emotional harm of being returned to the United States as a result of the United States justice system, the appellant's role as a former financial contractor to the Central Intelligence Agency and the evidence of injustice.
- 17.2 The RRA erred in law at paragraph 25 of the decision in deciding that three factors (listed in paragraph 17.1.6 above) were not issues which fell within the ambit of the test under s 47(3) of the Immigration Act 1987.
- 17.3 The RRA erred in paragraph 37 of its decision by asking itself whether there are exceptional humanitarian circumstances *or* whether it would be unjust or unduly harsh to the appellant to leave New Zealand.
- 17.4 The RRA erred in law in paragraph 31 of the decision by failing to take proper account of the appellant's rights under the International Covenant in Civil and Political Rights ("ICCPR") and international law.

GROUND OF JUDICIAL REVIEW

18. The majority of the issues raised in the application for judicial review are, in substance, the same as those raised in the appeal. The respondent adopts all of the submissions made in the appeal for the application for judicial review.
19. Further grounds for review are also advanced, with a number of similarities to the grounds for appeal:
- 19.1 an alleged breach of natural justice by the decision-maker in making the decision by failing to provide sufficient reasons;
- 19.2 two alleged mistakes of fact;
- 19.2.1 deciding that the applicant and his wife having no nexus to New Zealand;

- 19.2.2 deciding that the wife of the applicant would not suffer significant economic and emotional harm if the applicant were removed; and
- 19.3 the applicants' rights to natural justice as recognised by s 27(1) of the New Zealand Bill of Rights Act 1990 were breached by the decision.

FACTUAL BACKGROUND

20. The appellant's immigration history is accurately summarised in the RRA's decision, paragraphs [2]-[5]. Key points are:
- 20.1 the appellant entered New Zealand on 11 August 2001 together with his Canadian born wife, Carolyn Ruth Dare-Wilfred, and each was granted a visitors permit current to 11 November 2001;
- 20.2 the appellant was subsequently granted a series of work permits. His last permit was a visitors permit, granted to him by the New Zealand Immigration Service on 1 May 2004, current to 1 November 2004. The appellant has been unlawfully present in New Zealand and under a statutory obligation to leave since 2 November 2004;
- 20.3 the appellant's wife also received a series of work permits and is presently on a long term business visa, valid to October 2008;
- 20.4 the appellant currently holds no valid passport from any country, following his deliberate and voluntary renunciation of US citizenship.

STATUTORY SCHEME

The Scheme of the Immigration Act 1987

21. The challenged 9 August 2005 decision of the RRA was determined under the Act as amended by the Immigration Amendment Act 1991 ("the 1991 Amendment") and Immigration Amendment Act 1999 ("the 1999 Amendment").
22. The right of appeal to the RRA was first introduced by the 1991 Amendment. The 1991 Amendment in its long title, reflected the legislature's desire to:
- “(a) Provide for independent review of certain immigration decisions; and

- (b) Ensure a high level of compliance with immigration laws; and
 - (c) Ensure that persons who do not comply with immigration procedures and rules are not advantaged in comparison with persons who do so comply.”
23. The removal procedures were substantially amended by the 1999 Amendment, with effect from 1 October 1999. The post-1 October 1999 provisions apply to the appellant because he appealed after 1 October 2000.
24. The 1999 Amendment further tightened immigration procedures and rules, especially removal procedures. This is clear from the detail of the new rules and from paragraph (a) of the long title to the 1999 Amendment. This describes the amending legislation as:

“An Act to –

- (a) Improve the effectiveness of the removal regime for persons unlawfully in New Zealand by streamlining the procedures involved, so ensuring –
 - (i) A higher level of compliance with immigration laws; and
 - (ii) That persons who do not comply with immigration procedures and rules are not advantaged in comparison with persons who do comply ...”
25. ~~Under s 4(1), a person who is not a New Zealand citizen may be in New Zealand only if that person is the holder of a permit granted under the Act or is exempt under the Act from the requirement to hold a permit. Section 4 falls under the heading “Basic Rules”. It is a basic premise of the Act that a non-citizen must have a permit or be exempt from having a permit in order to be lawfully in New Zealand.~~
26. If a person does not have a permit or an exemption, that person is deemed to be in New Zealand unlawfully.⁶ In the present case, the appellant's legal status changed to being unlawfully in New Zealand after 1 November 2004. A person who is unlawfully in New Zealand is under a statutory obligation to

⁶ Section 4(2).

leave whether or not the person is aware of the obligation or of the implications of not meeting it.⁷

27. The overall thrust of the legislation is to require non-exempt persons and non-New Zealand citizens to have a current permit. If a permit granted to such a person has expired and cannot be renewed the person is encouraged, by various statutory mechanisms, to depart voluntarily from New Zealand. Otherwise, the person is subject to a coercive removal procedure and a 5-year ban from return to New Zealand.

Scope of the appeal to the RRA – s 47

28. Section 47(1) of the Act provides that a person who is unlawfully in New Zealand may appeal to the RRA against the requirement for that person to leave New Zealand.
29. Section 47(3) provides that the appeal may be brought only on the grounds that:

“... there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.”

30. This language makes it clear that s 47(3) is intended to set a high threshold. The appellant must demonstrate that there are circumstances of a humanitarian nature, which must be exceptional. In addition, it must be demonstrated that it would be unjust or unduly harsh to remove the person and finally that it would not be against the public interest to allow the person to remain in New Zealand. The test in s 47(3) will be referred to in these submissions as the “composite test”.
31. Section 47(4) reinforces the high threshold set by the s 47(3) inquiry. In recognition of the fact that individuals subject to s 47 are in New Zealand illegally, s 47(4) provides that the test in s 47(3) will not be satisfied simply because those individuals might meet government residence policy requirements as at the date of appeal to the RRA. Section 47(4) declares that:

⁷ Section 45.

“For the purposes of subsection (3), the mere fact that a person's circumstances are such that the person would meet any applicable Government residence policy requirements for the grant of a residence permit does not in itself constitute exceptional circumstances of a humanitarian nature.”

32. The appellant here does not meet government residence policy as he:
- 32.1 has no passport or other travel document (although offered a temporary travel document by the United States Consulate);
 - 32.2 failed to disclose outstanding United States criminal matters on a permit application form and cannot meet standard character requirements without a discretionary waiver;
 - 32.3 has been charged with criminal offences in the United States and cannot meet standard character requirements without a discretionary waiver.
33. Section 50 of the Act provides certain procedural requirements for appeals to the RRA. In particular:
- 33.1 Appeals are required to be determined *on the papers* with all reasonable speed⁸ - there is no oral hearing.
 - 33.2 It is the appellant's responsibility to ensure that all information, evidence and submissions the appellant wishes to have considered in support of his or her appeal are received by the RRA within the 42 day period for bringing the appeal and the RRA is not obliged to consider any information supplied outside that period except by way of rebuttal or comment.⁹
 - 33.3 The RRA may not consider any information which relates to matters arising after the date the appeal was lodged unless it is satisfied that there are exceptional circumstances that justify the consideration of such matters.¹⁰

⁸ Section 50(1).

⁹ Section 50(2)(a), (b) & (c).

¹⁰ Section 50(4)(b).

34. Section 47 provides for an appeal against the requirement to leave New Zealand, which, if unsuccessful, means that, seven days after the declined decision has been notified to an appellant, he or she becomes liable for removal. Once a removal order is served (on an adult) it remains in force for five years after the date the person named in it is removed from New Zealand.
35. Section 47(3) is not otherwise materially different from its statutory predecessors, s 63B(2) (repealed on 1 October 1999) and s 63(3) (repealed on 18 November 1991). Cases decided under those statutory predecessors therefore remain relevant¹¹.
36. Section 115A provides that where any party to an appeal to the RRA is dissatisfied with any determination of the RRA as being erroneous in point of law, that party may appeal to the High Court on that question of law. Subject to a s 115A appeal, and subject to judicial review, the decision of the RRA is final.¹²

Approach of the Courts : what constitutes “exceptional circumstances”?

37. It is well-established that an appellant has a high threshold to overcome to succeed in an appeal against the requirement to leave New Zealand.
38. It is for the appellant to prove that his/her circumstances are humanitarian and exceptional. In *De Borja v RRA*¹³ Gendall J referred to *Faavae v Minister of Immigration*¹⁴ with approval when he held:

“The responsibility of ensuring that all information, evidence and submissions is before the Authority is squarely placed on the appellant by reason of s 63C(2)(a). Whether it is described as an “onus” or not, does not really matter. It is a responsibility on an appellant to provide sufficient information to satisfy the Authority that exceptional circumstances of a humanitarian nature exist. The appellant carries a risk that if he/she cannot produce or point to sufficient evidence necessary to satisfy the Tribunal, he/she would lose.”

39. This reflects the statutory direction in s 50(2).

¹¹ *Tupou v RRA* (High Court Auckland, M1926-SW00, 23 February 2001, Baragwanath J), para 10

¹² Section 51(2).

¹³ [1999] NZAR 471, 477.

¹⁴ High Court, Auckland, M 1434/96, HC 122/96, 9 May 1997, Fisher J.

40. The Court of Appeal has described the test under s 63B (the predecessor to s 47(3)) as follows:

“Section 63B appeals start from the premise that the appellants are in New Zealand unlawfully and are seeking an exemption. The stringent statutory wording, “exceptional circumstances of a humanitarian nature ... unjust or unduly harsh”, using strong words imposes a stern test. In its natural usage, “exceptional circumstances” sets a high threshold necessarily involving questions of fact and degree. Associated in the test under the paragraph is that it be “unjust or unduly harsh” to remove on that account. It is a composite test and the whole picture is to be viewed, both circumstances and effects; and as part of that whole picture, the effects on others as well as the person removed may require consideration ...”¹⁵

41. There are a large number of cases in the High Court that analyse the s 63B (s47(3)) statutory test. Many are summarised in *Butler v RRA*¹⁶. Giles J in *Butler* accepted that the test will often connote “serious harm” but this is not an exclusive or determinative requirement.
42. Not every circumstance of a humanitarian nature will qualify as exceptional circumstances. Trivial issues are not to be considered¹⁷. The strong words and stern test of “exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh” make it clear that, as McGechan J observed in *Ronberg v Chief Executive of Department of Labour*¹⁸:

“It was not intended New Zealand house the world.”

43. In this case, the RRA concluded that the appellant did not satisfy the high s 47(3) test. The respondent’s case, in a nutshell, is that this conclusion was reasonably open to the RRA on the material before it.

¹⁵ *Rajendra Patel v RRA* [2000] NZAR 200 at 204

¹⁶ [1998] NZAR 409, 417-418.

¹⁷ *Sale and Sale v RRA*, High Court Auckland M1471/93, 26 October 1993, Hammond J, page 10., *Rahman v Minister of Immigration*, High Court Wellington, AP56/99, 26 September 2000, McGechan J, at 13-14.

¹⁸ [1995] NZAR 509, 529.

ERROR OF LAW

44. What is an error of law was succinctly described by Wild J in *V v Minister of Immigration*,¹⁹ which may be summarised, for the purpose of this appeal, as:
- 44.1 A wrong legal test;
- 44.2 With only limited incursions allowed into the factual area;
- 44.3 Where a conclusion has been reached without any evidence to support it or where it could not reasonably support the conclusion; or
- 44.4 Where on the unchallenged primary facts an inference favourable to the appellant is the only reasonable one open;
- 44.5 A Court cannot under the guise of a question of law enter into the merits of a case.
45. Generally as to error of law, see also: *Butler v Removal Review Authority*²⁰, *Auckland City Council v Wotherspoon*²¹ and *Edwards v Bairstow*²².
46. The RRA has been recognised as a specialist authority with real expertise in its specialist area.²³
47. The restriction to questions of law limits the scope of inquiry in the High Court. The High Court may not stray into the territory of a general *de novo* appeal on fact. There is no such right of appeal. As Giles J held in *Butler v RRA*²⁵:

“it has to be stressed that the jurisdiction of this Court on appeal is quite confined. The legislature has not conferred a right of general appeal but limits an appellant to an appeal on points of law only. It is not the function of this Court to revisit facts unless it can be properly contended that findings of fact lack probative evidence such as that an error of law has occurred (see *Edwards v Bairstow* [1956] AC 14; [1955] 3 All ER 48).” (page 412)

¹⁹ (High Court Wellington, AP246/97, 18 September 1998), pages 2-3.

²⁰ [1998] NZAR 409, pages 412, 425 and 427.

²¹ [1990] 1 NZLR 76, page 86.

²² [1956] AC 14, pages 35 and 36.

²³ *Butler* (above), page 421.

²⁴ [1998] NZAR 409, 417-418.

48. A mere difference of opinion as to weight accorded to a factor, between the RRA and an appellant, where the decision-maker exercises a discretion open to it, will seldom, if ever, amount to an error of law.²⁶ Young J stated in *Esau v The Minister of Immigration*²⁷ that:
- “... the High Court must be astute to ensure that the Deportation Review Tribunal and the Removal Review Authority do address appeals in accordance with the tests laid down by Parliament and consistently with international conventions to which New Zealand is a party.... But this is not a licence for the High Court to assume the jurisdiction conferred by Parliament on the Deportation Review Tribunal and Removal Review Authority.”
49. In *Schier and Lerner v Removal Review Authority and Anor*,²⁸ the Full Court noted that in respect of issues of fact it was open to the RRA to “... have taken a view more unfavourable to the appellants than they believed to have been justified....”²⁹ and ultimately, “the decision on the merits was one for her and not for this Court”.³⁰
50. As indicated in cases such as *Faavae*³¹, if there is a factual basis for a decision, a difference of opinion as to the conclusion to be drawn from the facts does not make out an error of law.

RESPONDENT’S ANSWERS TO GROUNDS OF APPEAL/REVIEW

51. The thrust of the appellant’s submissions is to invite this Court to reconsider the evidence and facts, draw different inferences and weigh various factors more in the appellant’s favour than the RRA was prepared to do.
52. Such an examination is not permitted on an appeal on questions of law. This is not a case where the RRA acted without any evidence or on a view of the facts that could not reasonably be entertained or the inference drawn from primary facts could not be justified. The inferences and conclusions the appellant seeks to draw are not the only inferences and conclusions that can be

²⁶ See *Butler* (above), esp. page 427 (also pages 420 and 425).

²⁷ (High Court Wellington, AP 320/98, 5 October 2000) paragraph [54].

²⁸ [1998] NZAR 230.

²⁹ Page 239.

³⁰ Page 240.

³¹ [2000] NZAR 177 (CA), page 183.

drawn. The inferences and findings by the RRA were open to it on the evidence before it.

53. It is not the role of the High Court to substitute its assessment of the weight to be given to different factors. The weight to be given to evidence is entirely a matter for the RRA. The weight accorded to a factor and evidence will depend on the facts of each case.³² It is not for the High Court to substitute its view of the weight to be attached to any particular piece of evidence for the RRA's view.³³
54. Degree of weight may exceptionally amount to an error of law where a tribunal has given little or no weight or has given excessive and manifestly unreasonable weight to a relevant factor.³⁴ The various matters advanced on the appellant's behalf to the RRA, were taken into account and were given proper, but not excessive or manifestly unreasonable, weight by the RRA.
55. Nor is it the role of the High Court to undertake a microscopic assessment of parts of the decision. The High Court has warned against an "intricate, detailed and semantic analysis of separate parts of the decision" of the RRA that seeks "to extract from individual words used some error or imperfection which can be elevated into a proposition of law".³⁵ Microscopic analysis of the RRA's decision may expose "purported defects", but the decision of the RRA must be looked at as a whole.³⁶ Finally the Courts have warned against minute and detailed analysis of the facts and second-guessing findings of fact.³⁷

³² *Mohamud* (above).

³³ *Butler v RRA* [1998] NZAR 409, 424-425, 427.

³⁴ *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA), 407 per Thomas J; *Rahman v Minister of Immigration* High Court Wellington, AP56/99, CP49/99, McGechan J, 26 September 2000, paragraph 48; *Waikato Regional Airport Ltd v Attorney-General* [2001] 2 NZLR 670 at [108] per Wild J.

³⁵ *Fa'atafa v Chief Executive of the Department of Labour* AP120/97, High Court Wellington, 26 April 1999, Gendall J at 7.

³⁶ *Butler v RRA* [1998] NZAR 409, 420.

³⁷ *Amosa v Chief Executive of the Department of Labour*, HC Wellington, AP 208/98, 3 April 2000, Gendall J pages 9, 10 & 20, see also *Butler* (above) pages 419-420.

ANSWERS TO SPECIFIC GROUNDS OF APPEAL

First Ground: Decision of RRA was one open to it

56. The first ground of appeal repeats a number of the factual bases relied on by appellant before the RRA to establish exceptional circumstances of a humanitarian nature.
57. The appellant in effect invites this court to make fresh assessment of these factual elements and, through giving different weight to them, find that there are exceptional circumstances. As noted above, a minute and detailed analysis of the facts and second-guessing of the facts is not the appropriate role of the court in this context. It is not for the court “under guise of a question of law to concern itself of whether the Tribunal was right or wrong in its conclusion ie with the merits of the case”.³⁸ As Giles J notes in *Butler v Removal Review Authority*;
- “Care is deserved to ensure that challenges to the exercise of the discretion or as to factual findings do not become disguised as questions of law by careful use of language.”³⁹
58. The RRA is the specialist decision-maker. A mere difference of opinion as to the weight accorded to a factor, where the decision-maker exercises a discretion open to it, will seldom, if ever, amount to an error of law.
59. A number of grounds were put before the decision-maker by the appellant to satisfy the composite test. Counsel for the appellant filed three sets of submissions⁴⁰. A substantial volume of additional written material was also filed (including three full east light folders) but little guidance was offered to the RRA of what the appellant intended the RRA to take from it.
60. The manner in which this material is now presented differs significantly from the manner in which it was presented to the RRA. Some matters are given much greater prominence and emphasis in this court than was the case before the RRA.

³⁸ Wild J in *Mohamud & Ors v Minister of Immigration* (High Court, Wellington Registry, AP21/98, 5 October 1998, as cited and accepted by Gendall J in *Amosa v Chief Executive of the Department of Labour* High Court, Wellington Registry, AP208/98, 3 April 2000) at para 16.

³⁹ [1998] NZAR 409, p 420.

⁴⁰ Record, Volume 3, pages 789-811, 968-973, 996-999.

61. A number of factual assertions are advanced on behalf of the appellant in support of the argument that the only conclusion open to the RRA was that there were exceptional circumstances of a humanitarian nature, which would make it unjust to remove the appellant. They are addressed below.

That the appellant is a stateless person;

62. The appellant's evidence before the RRA was that he voluntarily became "stateless". He was accompanied by his lawyer at the time of the renunciation of his nationality. The RRA expressly considered this⁴¹ and decided that it was not sufficient to satisfy the high test required by the composite test.
63. This is consistent with common sense and with the jurisprudence of other related areas of law, which consider the impact of statelessness. Statelessness imposed by an individual's state of origin, beyond the control of the individual, is quite different to statelessness acquired by an individual's choice.
64. For statelessness to have the legal effect which the appellant argues for, it cannot be voluntary. The principle is explained in *Tatiana Bouianova v Minister of Employment and Immigration*⁴²:

In my view, the status of statelessness is not one that is optional for an applicant. The condition of not having a country of nationality must be one that is beyond the power of the applicant to control. Otherwise a person could claim statelessness merely by renouncing his or her former citizenship.

65. New Zealand has not ratified the Convention Relating to the Status of Stateless Persons (1954). But even if it had done so the obligations in that Convention would not require New Zealand to grant the appellant an immigration permit of any kind. The obligations in general do no more than require that stateless persons be accorded the same treatment as is accorded to aliens generally (Article 7(1)).
66. The circumstances by which the appellant become "stateless" are clearly such that he should not attract legal protection.

⁴¹ Paragraph [27]

⁴² [1993] FCJ No 576; (1993) 67 FTR 74 (FC:TD) (Rothstein J). As discussed in Refugee Status Appeals Authority, *Appeal No. 72635/01*. The RSAA decision also contains a summary of the authorities.

67. The RRA was right to decide in these circumstances that voluntary and deliberate acquisition of “statelessness” does not establish an exceptional circumstance of a humanitarian nature.

The economic and emotional impact on the appellant’s children;

68. This argument is simply not open in the High Court as it was not presented to the RRA. The appellant’s children are resident in the United States with their respective mothers. The appellant’s children were mentioned briefly before the RRA in paragraph 28 of the first submission⁴³ but only in relation to an argument about economic consequences to the appellant of his likely arrest in the United States. It was suggested that the appellant’s detention might prevent the appellant from making child support payments. It is difficult to see that this would necessarily occur given the appellant’s considerable financial means.
69. In any event, where a family is affected by a removal decision, removal will always have some impact. However, by no means all removals that affect family members have sufficient impact to satisfy the statutory test.⁴⁴ Many of the cases that have considered the impact on families of removal involve circumstances where children will be removed from New Zealand as a result of their parents’ unlawful immigration status.⁴⁵
70. The appellant’s argument is a novel one in the immigration area – that removal of a parent to that parent’s country of origin, which is also the country of residence of that parent’s children – will cause harm to such a degree that the difficult composite test is satisfied. Removal of the appellant from New Zealand on the face of it presents greater potential for reunification of the appellant with his United States based children, as distinct from the current separation (even allowing for an initial period of detention on the appellant’s return to the United States).

⁴³ Record, Volume 3, page 810.

⁴⁴ For example in *Schier* the appellants were West German nationals (subject to removal) and had three New Zealand born children (not subject to removal).

⁴⁵ See *Puli’uwa v The Removal Review Authority* Court of Appeal, CA236/95, 24 May 1996, Richardson P, Gault J, Keith J.

The economic and emotional impact on the appellant's wife

71. The impact on the appellant's wife and the significance of that impact was a matter of weight for the RRA.
72. Economic impact or economic disadvantage is generally not sufficient to constitute exceptional circumstances. As McGechan J observes:
- “It is absurd to maintain that New Zealand has agreed to accept anyone who has stepped onto its shores... because removal would mean that person or his or her family would have a less than adequate standard of living if compelled to leave”.⁴⁶
73. The RRA considered the impact that the decision would have on the appellant's wife.⁴⁷ The RRA accepted there would be some emotional impact on the appellant's wife and that adjustments would be required.
74. In any event, the potential emotional impact of removal of the appellant to the United States arises not from the removal itself but from the legal conundrum relating to the appellant in the United States. This state of affairs existed prior to the appellant and his wife arriving in New Zealand.
75. The evidence before the RRA was that the appellant's wife is an extremely wealthy woman with significant financial resources. On any view she is in a relatively strong position to deal with any disruption that would arise if her husband is removed from New Zealand. It was open to the RRA to conclude that the possible impact of removal on the appellant's wife did not satisfy the difficult composite test.

The economic harm to Combined Technology New Zealand Limited and its employees. The impact on the present charitable works of the appellant

76. These two grounds were put to the RRA in the context of the second, “public interest”, element of the two-limb test. They were advanced by counsel as positive reasons why it would be in the “public interest” to allow the appellant to remain in New Zealand.⁴⁸

⁴⁶ *Rahman v Minister of Immigration*, High Court Wellington, AP56/99, 26 September 2000, McGechan J, pg 19 para [62].

⁴⁷ RRA decision paragraph [34].

⁴⁸ RRA decision paragraph [7(7)].

77. The RRA found that the appellant did not satisfy the first limb of the test under s 47(3). In these circumstances, the RRA was not required to consider the second (public interest). The Court of Appeal has confirmed this position, well established in the High Court:

“It was, of course, accepted that were a decision to go against the appellant under paragraph (a) there would be no need for the RRA to go on to paragraph (b).”⁴⁹

78. But even if these two points had been advanced in relation to the exceptional circumstances first limb (which it was not) the *possibility* of 7 employees losing their employment, relocation of the business or the cessation of charitable donations to a New Zealand charity, are not of themselves sufficient to satisfy the composite test and it would have been open to the RRA to make its determination on that basis. Further, the appellant’s evidence before the RRA does not establish that these effects would necessarily flow from the appellant’s removal from New Zealand. For example, sale of the business may be possible with employees’ positions preserved and continuing support for a New Zealand based charity would remain at least possible if the appellant was not physically present in New Zealand.
79. It was open to the RRA to decide that these impacts do not satisfy the composite test.

The physical danger and economic and emotional harm of being returned to the United States as a result of the United States justice system, the appellant’s role as a former financial contractor to the Central Intelligence Agency and the evidence of injustice.

80. The appellant made a number of allegations before the RRA in relation to his previous treatment by the United States judiciary and law-enforcement authorities. He considers that he was the victim of bias and injustice. He clearly has a negative perception of the treatment that he will receive if he returns to the United States.
81. The RRA considered all of this⁵⁰ and recognised that there was a risk that the appellant may be detained when he returned to the United States. If that

⁴⁹ *Mwai v Removal Review Authority* (Court of Appeal, CA 147/98, 24 June 1998).

⁵⁰ Paragraphs [23],[24], [25], [31], [32].

- detention was subsequently held to be unlawful, he may have appropriate remedies⁵¹.
82. The mere fact of possible arrest in the country of origin cannot possibly be sufficient to constitute exceptional circumstances of a humanitarian nature. There is a clear distinction between prosecution and unlawful or illegitimate persecution.
83. For example, refugee status cannot be invoked by an individual “solely on the basis that she is at risk of legitimate prosecution or punishment for a breach of the ordinary criminal law”.⁵² The Canadian decision of *Louis-Paul Mingot* considers that “[f]ear of being legally prosecuted before the regular courts...[cannot] *in se* and *per se*, constitute a fear of persecution as defined in the Convention”.⁵³
84. The RRA was perfectly correct not to closely examine the judicial system of the United States to determine whether the appellant had been previously tried fairly and whether he would be tried fairly in future dealings with the United States justice system. Quite apart from anything else the RRA has only the appellant’s account and criticisms of the United States justice system. The RRA has neither the resources⁵⁴, nor the legal power to investigate, confirm or counter the numerous allegations made by the appellant about United States procedures.
85. The appellant cites *Satiacum*⁵⁵ in support of the proposition that courts may explore and assess the adequacy of judicial processes of another country. But that decision goes on to consider that in the absence of exceptional circumstances:

“Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic state, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process

⁵¹ RRA decision paragraph [32]

⁵² Hathaway, *The Law of Refugee Status*, Butterworths (1991), p. 169.

⁵³ (1975), 8 I.A.C. 351 at 356, per Houle P.

⁵⁴ *Taito*.

⁵⁵ *Canada (Ministry of Employment and Immigration) v Satiacum* 99 NR 171.

in the relevant part of the country, or the independence or fair mindedness of the judiciary itself.”⁵⁶

86. This decision itself relies on the earlier Canadian Supreme Court decision of *Republic of Argentina v Mellino*.⁵⁷ Justice La Forest considered that:

“Our Courts must assume that he will be given a fair trial in a foreign country. Matters of due process generally are to be left for the Courts to determine at the trial there as they would be if he were tried here.”⁵⁸

87. Justice La Forest was concerned that such an approach of considering the quality of justice in another jurisdiction would be in conflict of international law:

“The assumption by a Canadian Court of responsibility for supervising the conduct of the diplomatic and prosecutorial officials of a foreign state strikes me as being in fundamental conflict with the principal of comity on which extradition is based.”⁵⁹

88. These same concerns identified in an extradition context, apply equally in an immigration/removal context. It is not the role of a New Zealand administrative tribunal or court to embark on an analysis and critique of the United States Justice system.

Second Ground: No substantive determination regarding United States justice system matters

89. The appellant alleges that in paragraph [25] of the decision, the RRA determined that three matters were not within the ambit of the test under section 47 and accordingly, the decision-maker erred in law. These matters are listed as the United States Justice System, the appellant’s status as a former financial contractor to the CIA and the injustice to the appellant that would result if he were returned to the United States.
90. The appellant has misunderstood the RRA’s statement in paragraph 25. That paragraph refers to the judicial proceedings and periods of detention, which

⁵⁶ At para 19.

⁵⁷ [1987] 1 S.W.C.R 536.

⁵⁸ At page 27.

⁵⁹ At page 21.

have resulted from those proceedings. These were detailed in the appellant's evidence before the RRA.

91. The RRA stated in paragraph 25 that:

“It is not for the authority in this case to determine the rights and wrongs of any judicial proceeding in another country...those issues simply cannot be explored by this Authority”.

This approach is correct.

92. At paragraph [23] the RRA refers to the difficulties with incarceration and the public officials in the United States. The RRA explicitly states:

“These are certainly factors that I take into account in determining this appeal”

93. In so far as these matters are relevant to the composite test they were expressly considered by the RRA.

Third Ground: Legal test correctly stated

94. The appellant alleges that the RRA erred in paragraph [37] in its formulation of the legal test.

95. There was no misstatement of the composite test in this paragraph.

96. Paragraph [37] is a stylistic abbreviation of the statutory language. The relevant section of the Act, s 47, is set out in full at paragraph [15]. The leading authorities on the application of the test are summarised at paragraphs [27]-[29]. The RRA correctly directed itself as to the correct formulation and application of the statutory test.

97. Paragraph [36] is simply a statement by the RRA that neither exceptional circumstances of a humanitarian nature have been established and nor would it unjust or be unduly harsh to remove the appellant. It is clear from a fair reading of the RRA decision as a whole that the RRA was not satisfied that any of these parts of the composite test had been met.

Fourth Ground: No relevant role for the International Covenant on Civil and Political Rights and international law in this context

98. The appellant alleges that the RRA erred in law in failing to take proper account of the appellant's right under the ICCPR and international law. The only principles of international law that the appellant's counsel referred the RRA to were Articles 12 and 13 ICCPR (freedom of movement/right to enter own country). The RRA expressly addressed the preamble and Articles 12 and 13, at some length in paragraphs [30]-[32].
99. The ICCPR Articles were relied on by the appellant's counsel in the RRA only insofar as they related to the purportedly inevitable arrest of the appellant on his return to the United States.⁶⁰
100. The RRA correctly noted that the right of liberty of movement referred to in Article 12, can be properly abrogated or restricted where a judicial process requires detention. Lawful detention does not breach the protections of the ICCPR.
101. There is no general obligation on those exercising power in the RRA to refer specifically to any particular relevant source of legal obligation.⁶¹ Not advanced before the RRA but now relied on in the High Court (appellant's submissions paragraph 68-72) is a claimed right to family life and an alleged breach of that right. However, the recent decision of the Court of Appeal in *Chief Executive of Department of Labour v Taito*⁶² makes it clear that there is no right recognised in New Zealand law to be looked after by one's family and that possible separation of family members, following removal of one, does not of itself satisfy the composite test. In this particular case the RRA accepted that removal of the appellant might cause some disruption to the appellant's wife but this did not come close to satisfying the composite test.

⁶⁰ Submissions No. 2, Record Volume 3, page 997, paragraphs 6-7.

⁶¹ *Puli'uvea v The Removal Review Authority* (Court of Appeal, CA236/95, 24 May 1996, Richardson P, Gault J, Keith J).

⁶² CA225/04 and 54/05, 8 February 2006.

ANSWERS TO SPECIFIC GROUNDS OF REVIEW

RRA reasons sufficient

102. The allegations of failure to take into account relevant considerations has been revealed in the appellant's submissions⁶³ as an argument that the RRA's reasons were inadequate.
103. Six grounds are listed and the applicant alleges that insufficient reasons were given for each was not an "exceptional circumstance of a humanitarian nature". In essence, six "decisions" in relation to a different ground are alleged to have been made with insufficient reasons.
104. The RRA here gave sufficient reasons for its decision that the appellant does not satisfy the composite test in *toto*. The RRA is not required to give reasons for each ground individually. To analyse each factual finding in minute detail risks each of them being taken out of context and it is not necessary for the RRA to traverse every single aspect of the evidence in a decision.⁶⁴
105. The focus of the decision-maker in giving reasons for a decision is whether "what is required is sufficient to enable the party affected to understand the basis on which the decision was reached".⁶⁵ There is no "inflexible rule of universal application".⁶⁶ The authorities emphasise the importance of informing the parties affected by the decision why it was made. The reasons must be sufficient to tell the appellant *why* his or her appeal has succeeded or failed.⁶⁷ The reasons should identify the findings critical to the decision.⁶⁸
106. Reasons need not be lengthy.⁶⁹ The reasons may be abbreviated and in some cases, they will be evident without express reference.⁷⁰ Not every piece of

⁶³ Paragraphs 116 – 123.

⁶⁴ *Butler v RRA* [1998] NZAR 409, 420.

⁶⁵ *Butler v RRA* [1998] NZAR 409, 420.

⁶⁶ *R v Awatere* [1982] 1 NZLR 644 at pp 548-9, affirmed in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 567.

⁶⁷ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 566; *Chief Executive of Department of Labour v Taito* CA225/04, CA54/05, 8 February 2006, para [24].

⁶⁸ *Sharma v New Zealand Customs* (CRI-2005-404-242, 19 December 2005, High Court Auckland, Courtney J) para [9].

⁶⁹ *Department of Labour v Taito* (CA225/04, CA54/05, 8 February 2006, Chambers J), at para [24].

⁷⁰ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 566.

evidence needs to be referred to.⁷¹ An element of common sense is to be applied.⁷²

“There has to be an acceptance of the fact that where an Authority such as this refers to specific documents and evidence, it can be taken that they have been carefully reviewed and assessed.”⁷³

107. Rather than every piece of evidence being addressed in the decision, the decision maker “must make clear what the essential reasons for the decision were”.⁷⁴
108. Here the RRA states that he has “carefully read” the “considerable material and submissions”.⁷⁵ The RRA traverses a significant number of grounds which were advanced in submissions and the legal arguments advanced from paragraphs [21] to [35].
109. At paragraph [36] the RRA notes that he has given “most anxious consideration to all aspects of this appellant’s personal circumstances and indeed those of this wife” and concludes that “the totality of the circumstances do not satisfy me that there are exceptional humanitarian circumstances”.
110. A number of claims arising from the appellant’s situation with the law enforcement authorities in the United States are discussed:
- 110.1 The history of the appellant in the United States and its toll on the appellant, [20].
- 110.2 The history of the family issues and child support payment dispute in the United States and his present payments, [21].
- 110.3 The appellant’s “deeply felt” concerns regarding his treatment in the United States “judicial or otherwise”, his concerns regarding public officials and his incarcerations, [23].

⁷¹ *Sharma v New Zealand Customs* (CRI-2005-404-242, 19 December 2005, High Court Auckland, Courtney J) para [9].

⁷² [1998] NZAR 409, p 421.

⁷³ [1998] NZAR 409, p 421.

⁷⁴ *Sharma v New Zealand Customs* (CRI-2005-404-242, 19 December 2005, High Court Auckland, Courtney J) para [9].

⁷⁵ Paragraph [20].

111. The RRA considers that the issues that arise from the appellant's "issues in the United States" are mainly of a legal nature and that it is not for him to determine the rights and wrongs of those matters. As submitted above, the RRA's approach is correct.
112. There are a number of factors put forward as flowing from the purportedly imminent arrest of the appellant on his return to America. These include the allegations regarding the standard of justice he will receive. In many ways, they are linked arguments to the allegations made about the past behaviour of law enforcement officials.
113. In this context, the ICCPR and the appellant's human rights and freedoms, as they may be affected by his arrest in the United States, are considered.⁷⁶ The decision-maker notes that legal detention does not breach the protections of the ICCPR and concludes that if the detention is subsequently found to be unlawful, there may be remedies in the United States.
114. The standard of justice in the United States, as outlined in the material by Judge Napolitano, did not satisfy the RRA that the appellant was at a degree of risk, which met the composite test.⁷⁷
115. The renunciation of citizenship, "statelessness" and its effects are discussed at paragraphs [24] and [27]. The voluntary nature of the renunciation and the legal advice that the appellant received are properly emphasised by the RRA in arriving at the conclusion that these matters do not satisfy the composite test.⁷⁸
116. The effect on the appellant's wife was considered.⁷⁹
117. Taken together, these reasons support and explain the decision of the RRA⁸⁰ that the appellant did not satisfy the composite test. The extent and detail of the consideration of the evidence and the reasons given satisfy the common sense test of informing the appellant of the reasons for the decision against him.

⁷⁶ RRA decision paragraph [30]-[32].

⁷⁷ RRA decision paragraph [33].

⁷⁸ RRA decision paragraph [27].

⁷⁹ RRA decision paragraph [34].

⁸⁰ At paragraph [36].

No mistake of fact by the RRA

118. It is alleged that the RRA made two mistakes of fact in making his decision in relation to the applicant.
119. Both of these kinds of matters (extent of nexus and impact on the applicant's wife) are matters principally for the judgment and weighing by the decision-maker, to be weighed with other factors. They are not correctly characterised by describing them as questions of fact, as the decision-maker considers them in the wider context of applying the composite test.
120. In *Schier and Lerner v Removal Review Authority and Anor*⁸¹, the Full Court noted that in respect of issues of fact it was open to the RRA to "... have taken a view more unfavourable to the appellants than they believed to have been justified...."⁸² and ultimately, "the decision on the merits was one for her and not for this Court".⁸³
121. The principles relating to mistake of fact in judicial review were succinctly summarised in *Attorney-General v Moroney*⁸⁴ in the following terms:

"The precise scope of judicial review for error of fact is still uncertain: see the comments of Elias CJ in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at para [92]. But it is clear that in order to make out the ground the error must be sufficiently material to be described as the basis or the probable basis of the decision: *Glaxo Group Ltd v Commissioner of Patents* [1991] 3 NZLR 179 at p 184. Or, as was said in *Lewis* at para [92] in response to an argument that would have permitted any conclusion of fact to be reopened on application for judicial review:

'The supervisory jurisdiction does not go so far, except where the decision of fact is a condition precedent to the exercise of power or where the error of fact results in a decision which is unreasonable. In such cases, the decision-making process will have miscarried.'

I note also that it is not a mistake of fact to prefer one available view of the facts over another: *New Zealand Fishing Industry*

⁸¹ [1998] NZAR 230.

⁸² Page 239.

⁸³ Page 240.

⁸⁴ [2001] 2 NZLR 652, 668.

Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544 (CA) at p 552.”

122. Here there was no mistake by the RRA which had any material bearing on its decision, or which formed a condition precedent to the exercise of its powers or which could be said to have resulted in a decision that was unreasonable.

No breach of s 27(1) of the New Zealand Bill of Rights Act 1990

123. There was no failure to observe principles of natural justice by the RRA. The legally represented appellant was given the fullest opportunity to put his case and the appellant’s counsel took full advantage of that opportunity.

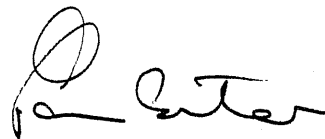
APPEAL AND JUDICIAL REVIEW SHOULD BE DISMISSED

124. Both the appeal and the application for judicial review should be dismissed.
125. In the alternative, if this Court finds any error of law, remission back to the RRA, as the specialist decision maker, for reconsideration in the light of up to date information and the directions of this Court would be the only appropriate remedy.

COSTS – APPEAL AND JUDICIAL REVIEW

126. As provided for in the Minute of Gendall J dated 11 October 2005, the appropriate costs Category is 2B.
127. In the event the appeal and application for judicial review are dismissed, the respondent seeks costs in both.

DATED 28 July 2006.



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for judicial review