

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV 2005 485 001617 &
CIV 2005 485 002270**

UNDER the Judicature Amendment Act 1972

IN THE MATTER of a decision of the Removal Review
Authority Appeal No. AAS45984 dated
9 August 2005

BETWEEN **H L WILFRED**
Applicant and Appellant

AND **THE CHIEF EXECUTIVE OF THE
DEPARTMENT OF LABOUR**
First Respondent

AND **THE REMOVAL REVIEW AUTHORITY**
Second Respondent

**SUBMISSIONS OF COUNSEL FOR THE APPLICANT AND APPELLANT
Friday the 21st day of July 2006**

Next Event Date: 13 August 2006
Judicial Officer: Gendall J

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MAY IT PLEASE YOUR HONOUR:

Preliminary

1. This is an appeal under Section 115A of the Immigration Act 1987 against the decision of the Removal Review Authority (W Olphert, Senior Member) dated 9 August 2005. That decision dismissed the Appellant's appeal under Section 47 (3) of the Immigration Act 1987. There is also an application for judicial review of that decision under a Statement of Claim filed by the Applicant dated 3 November 2005.
2. The Appellant appeals against a requirement that he be removed from New Zealand under Section 47 (3) of the Immigration Act 1987.
3. Section 47 (3) of the Immigration Act allows a person in New Zealand to appeal to the Removal Review Authority against a requirement to leave New Zealand if there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the Appellant to be removed from New Zealand.
4. The Removal Review Authority's decision dismissed the Appellant's appeal and held that the circumstances of the Appellant are not exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the Appellant to be removed from New Zealand.
5. In reaching that decision the Removal Review Authority held that:
 - The Appellant had deeply held feelings against his return to the United States of America; **RRA 24**
 - Issues in the United States of America are mainly of a legal nature and do not fall within the ambit of the test set out in Section 47 of the Immigration Act 1987 **RRA 25**
 - Issues relating to judicial proceedings in another country cannot be explored by the Removal Review Authority and the Removal Review Authority cannot determine whether there are any injustices arising out of matters pertaining to the Appellant in the United States of America; **RRA 25**
 - The Appellant and his wife have no nexus to New Zealand other than their employment through the Appellant's initial secondment to Super BT, a Canadian company; **RRA 26**

- The Appellant's renunciation of his citizenship does not elevate his circumstances to a level whereby they satisfy the test set out in Section 47 of the Immigration Act 1987;
 - There will be some emotional impact on Mrs Wilfred if Mr Wilfred is removed from New Zealand but she can return to Canada.
6. The Appellant has appealed under section 115 A of the Immigration Act 1987 based on errors of law made by the Removal Review Authority in reaching its decision. Section 115A only allows an appeal based on a question of law. **Notice of Appeal 15 August 2005**
7. The Appellant has also applied for a review of the Removal Review Authority's decision based on, inter alia, errors of law, mistake of fact, and failure to take into account relevant considerations. The right to take judicial review proceedings, and the grounds, on which the judicial review proceedings can be based, are not restricted. **Statement of Claim 3 November 2005**
8. The Appellant also seeks relief under the New Zealand Bill of Rights Act 1990.
9. There are two main issues:
- Whether or not the Authority was wrong in law not to determine 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.
 - Whether or not the Court's discretion should be exercised so as to grant relief under the remedy of judicial review.

Background Facts

10. The Appellant, Harmon Lynn Wilfred, arrived in New Zealand with his wife, Carolyn Dare Wilfred, in August 2001. Mrs Wilfred is presently in New Zealand on a long-term business visa. **RRA 2**
11. Since arriving in New Zealand, Harmon and Carolyn have been lawfully in New Zealand on visitors' permits, visas, and work permits. Mr and Mrs Wilfred migrated to New Zealand for a fresh start and to avoid exceptional circumstances that had arisen in the United States. **RRA 2 HW 5**

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| 12. | Mr Wilfred has 3 children from previous marriages. | <p>RRA 3</p> <p>HW 6</p> <p>Appeal</p> <p>Bundle</p> <p>(“AB”) pgs</p> <p>29 & 30</p> |
| 13. | Mr Wilfred’s history in the United States is highly relevant to why he moved to New Zealand and to why he cannot return to the USA. It is set out in full in his affidavit sworn in the judicial review proceedings together with supporting documentation. | |
| 14. | In 1992 Mr Wilfred was employed by commercial real estate contractors to support the renovation and sale of commercial properties in Colorado owned by the El Paso County Pension Fund. In the process of leasing, restoring and selling these properties on behalf of the El Paso County Pension Fund, Mr Wilfred discovered that the Fund Administrator, Mr Michael Whitty, and other contractors were embezzling significant amounts of Pension Fund moneys. | <p>HW 7</p> |
| 15. | In 1994 Mr Wilfred reported this information to the District Attorney’s office which declined to conduct an investigation. As a result of the District Attorney Office’s failure to take action, Mr Wilfred reported the matter to the Federal Bureau of Investigation. This led to an investigation and the subsequent imprisonment of Mr Whitty and conviction of others involved in the scheme. | <p>HW 8</p> <p>Exhibits A & B</p> <p>AB pgs 30,</p> <p>173 - 217 &</p> <p>230</p> |
| 16. | As a result of Mr Wilfred’s actions and the embarrassment of the District Attorney’s Office, the District Attorney’s Office subsequently caused difficulties for Mr Wilfred in later matters to be dealt with by the Colorado Courts that involved Mr Wilfred. | <p>HW 9 – 11,</p> <p>Exhibit C</p> <p>AB pgs 218 &</p> <p>247</p> |
| 17. | Following his work for the El Paso County Pension Fund Mr Wilfred commenced work as an international finance consultant. This work led to the incorporation of Arcore International Funding LLC in early 1996. | <p>HW 12</p> <p>AB pgs 31,</p> <p>262 & 273</p> |
| 18. | During 1996 the US Central Intelligence Agency engaged Mr Wilfred to act as an intermediary in an international financing transaction. | <p>HW 14</p> |

19. Mr Wilfred's responsibility was to transact Mitsubishi Bank Certificate Number 47029. In order to transact this bank note, Mr Wilfred engaged two large European trusts, the Alpha and Omega Trust and the Bay State Trust, which had expertise in these types of transactions. **HW 13**
20. The Securities and Exchange Commission ("SEC") obtained knowledge of the transaction when the bank certificate was introduced to the US Federal Reserve for processing. This resulted in a public investigation. The SEC asserted that the note was not legitimate. **HW 18, Exhibit E AB pg 280**
21. Mr Wilfred assisted the SEC in this investigation. **HW 18, 23 & 36, Exhibit F AB pg 339**
22. Mr Wilfred's assistance led to him receiving serious threats to his life. Email correspondence indicates that Mr Wilfred was advised that if he screwed up, the CIA would go so far as to "eliminate the problem". **HW 19, 22 & 23, Exhibits G – K, AB pgs 326, 327, 336, 351 & 352**
23. During the same period as the SEC investigation, Mr Wilfred was experiencing difficulties in his personal life. His second wife, Dearna Wilfred was physically abusing their children. In mid October 1997, on the advice of his lawyer, Mr Wilfred filed for divorce against Dearna Wilfred and took the children and relocated to Stratford, Ontario, Canada. **HW 25 & 28, Exhibit L AB pg 620**
24. During the process of relocation, Dearna Wilfred obtained an emergency Court hearing without Mr Wilfred's knowledge, due to which Mr Wilfred could not attend. The Judge granted Dearna Wilfred temporary custody of the children at this hearing. This resulted in Mr Wilfred being automatically deemed to be in violation of a custody order. **HW 30 – 31**
25. Mediation took place between Dearna Wilfred and Mr Wilfred through a family friend and professional mediator, Mr Philip Freytag. The mediation was unsuccessful and Dearna Wilfred, through her solicitor, pressed charges for criminal extortion as a result of the mediation. **HW 32 – 33**

26. The El Paso County District Attorney's Office, which was the same office referred to in paragraphs 15 & 16 of these submissions, facilitated the prosecution of these charges. As a result of these charges being laid, the children were seized from outside Mr Wilfred's home in Canada and returned to their mother in the USA. **HW 33 – 34
AB pgs 31 & 361**
27. The District Attorney's office initiated extradition proceedings against Mr Wilfred who was incarcerated, pending the hearing of those proceedings. In the midst of these proceedings he married his wife Carolyn Dare Wilfred on 2 August 1998. **HW 39 – 40 & 57, Exhibit M
AB pg 478**
28. As a result of an agreement reached with the District Attorney Mr Wilfred agreed to end his resistance to the extradition proceedings and return to the USA. As set out in Mr Wilfred's affidavit, upon the withdrawal of Mr Wilfred's appeal, the District Attorney breached the agreement reached with Mr Wilfred. **HW 43 – 45, Exhibits O & P,
AB pgs 628, 631 & 632**
29. On 5 April 2000 Mr Wilfred was taken by US Federal Marshall escort from the underground Waterloo maximum security prison and transported by air to El Paso County Colorado. Upon arrival Mr Wilfred was incarcerated in the Colorado jail on the subject extradition matters and then illegally ordered to transfer to Arapahoe County on other family court matters. When he produced a copy of the letter from his Canadian attorney detailing the extradition laws, the transfer order was rescinded. On 6 April 2000 Mr Wilfred was taken before a Judge, pleaded not guilty and released on a cash bond of \$10,000.00 on the condition that he paid the full costs of his extradition. Mr Wilfred reluctantly agreed to this stipulation but was denied the opportunity to present his evidence with a motion for dismissal of the charges. Mr Wilfred returned to Canada to await the pre-trial hearing to challenge the charges in May 2000. **HW 46, Exhibit Q
AB pgs 642 – 644**
30. The terms of the US - Canada Extradition Treaty also stipulated that a person being extradited can only be detained for the extradition offences and not for any other cause.

31. In May 2000 Mr Wilfred returned to Colorado on his own volition to comply with a Court order to attend a pre-trial hearing to finally address the extradition matters and file a motion for dismissal. However, upon his return to the USA, in violation of the US – Canada Extradition Treaty Mr Wilfred was charged with new offences. Initially he faced charges before courts in Denver, Colorado while incarcerated without bail. Eventually the Federal Courts ordered that the charges be withdrawn and Mr Wilfred released from incarceration. His friend and mediator, Mr Freytag, also charged with the original family court related criminal extortion charge, had his charges withdrawn for insufficient evidence. **HW 48 – 51, 39, Exhibits R – T CW 13 AB pgs 645 – 710**
32. After the order was issued by the Federal Judge to release Mr Wilfred without further detention. He was immediately rearrested and escorted by Federal Marshals to the Denver City Jail where he was illegally held over the four day weekend holiday without charges being laid against him. This was despite the Federal release order. **HW 53, Exhibit U AB pgs 645 – 710**
33. On 30 May 2000 Mr Wilfred was transferred to the Arapahoe County Jail on another family court charge for a Rule 69 financial examination. Mr Wilfred was again released from custody and eventually this charge was also ordered to be withdrawn by the Court. Because Mr Wilfred had been charged with multiple offences in Federal and County courts in violation of the US – Canada Extradition Treaty during this second return to the US from Canada, he was again unable to challenge the original charges for which he had been extradited. **HW Exhibits V & W AB pgs 645 – 710**
34. After Mr Wilfred's release from the charges laid in Arapahoe County which had again led to his unlawful detention, Mr Wilfred's passport was returned to him. Mr Wilfred returned to Canada, never having been convicted of any offence. He had again been denied the opportunity to file a motion for dismissal of the charges for which he was extradited. In total he, his new wife Carolyn Dare, and Carolyn's family spent CAN \$400,000.00 to deal with these various court matters. **HW 55 CW 14**

35. In total Mr Wilfred spent 144 days incarcerated on charges, which were dismissed, withdrawn or not proceeded with. This resulted from the unlawful actions of County and Federal enforcement authorities and, on occasion, the judiciary. **HW 56**
36. Mr and Mrs Wilfred decided to move to New Zealand for a new start. **CW 15**
HW 59 – 60
37. At that stage, after having had so many ordeals with the authorities as Mr Wilfred attempted to clear his name of the various charges that were brought, and after having spent so much time in prison only to have the charges dismissed, withdrawn or not proceeded with, it was not possible for him, either physically or financially, to continue to return and resolve all outstanding family related matters in Colorado. **HW 60**
38. There are no outstanding Family Court criminal matters against Mr Wilfred in the USA at this time that have not been dismissed, withdrawn or expired due to the statutory limitation by inaction. Although Mr Wilfred understands that the District Attorney in Colorado may still wish to pursue allegations that he allegedly breached custody orders that were in place in 1997, this relates to the original extradition charges. **HW 59**
39. Mr and Mrs Wilfred were introduced to business and local political leaders in New Zealand, and after completing an assessment of the investment opportunities, decided to settle in Christchurch, New Zealand. **HW 61**
40. Mrs Wilfred, with her brothers and father, owns a controlling share of Dare Foods Incorporated, a large North American food manufacturer with an annual turnover in excess of \$350,000,000.00. Before moving to New Zealand Mrs Wilfred received a partial payout from her family estate. **HW 63**
41. Mr and Mrs Wilfred have established the following companies and charitable organisations in New Zealand: **HW 63,**
Exhibits Z –
FF
CW 21
- a. Combined Technology NZ Limited. ("CTNZ");
- b. Wilfred Investments Limited;

- c. La Famia Foundation NZ Trust; ("La Famia")
 - d. Lumina Diem Limited;
 - e. Light of Day Limited; and
 - f. Powerline Communications Limited
42. Mr and Mrs Wilfred have invested in excess of NZ\$3.6 million dollars from Mrs Wilfred's estate into the New Zealand economy, primarily through CTNZ, and Wilfred Investments Limited. **CW 23 – 24**
HW 65
43. They have made significant financial contributions to charitable organisations, including the Champion Centre, and their own charitable trust, La Famia, in excess of \$160,000.00. **HW 80 – 84,**
Exhibit NN
CW 24
44. In 2004 Mr Wilfred sent his passport to be renewed to the American Consulate so that he could apply for a long-term business visa. **HW 88 – 89**
45. The American Consulate notified Mr Wilfred that his passport would not be renewed and that it would not be returned. This was the result of a routine check, which revealed that there were unresolved matters arising out of custody and Family Court issues in Colorado. **HW 90**
46. By 1 March 2005 Mr Wilfred had become so outraged with his personal treatment and with US foreign policy that he made the decision to end his connection with the United States of America and renounce his citizenship on principle. Mr Wilfred is now a stateless person. **HW 92,**
Exhibit VV
47. The removal of Mr Wilfred from New Zealand would result in Mr and Mrs Wilfred losing in excess of \$2 million through his forced departure and the forced sale of their business. The employees of Mr and Mrs Wilfred's companies would also lose their livelihood. **HW 98**
CW 23 & 26
48. Mr and Mrs Wilfred would lose their business and it would be an end to their charitable work in New Zealand. The emotional and economic impact on Mrs Wilfred would be devastating and it would result in her abandoning her long-term business visa and her business interests in New Zealand. **HW 63 – 100**
CW 23 – 27

Analysis of the Decision of the Removal Review Authority

49. Mr Olphert as the Removal Review Authority (the “Authority”) did not consider that the high test of exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for Mr Wilfred to be removed from New Zealand had been met in this case. **RRA 36**
50. The reasoning reveals a number of findings that resulted in Mr Olphert’s determination that the test under Section 47 (3) of the Immigration Act 1987 had not been met.
- That it is not for the Authority to determine the rights and wrongs of any judicial proceedings in another country or to determine whether there are any injustices arising out of matters pertaining to the Appellant in the United States of America. **RRA 25 & 31**
 - That the Appellant and his wife have no nexus to New Zealand other than their employment through the Appellant’s initial secondment to Super BT. **RRA 26**
 - That the Appellant’s renunciation of his citizenship does not elevate the Appellant’s case to exceptional circumstances of a humanitarian nature. **RRA 27**
51. Mr Olphert appears to reach this view because the renunciation was a voluntary step, which the Appellant took with full knowledge of what he was doing. The Authority considered the fact that Mr Wilfred’s solicitor was present as relevant. **RRA 27**
52. It also appears that Mr Olphert only considered the emotional impact on Mrs Wilfred of her husband being removed from New Zealand. However, Mr Olphert opined that Mrs Wilfred could return to her home country and that any separation would, he hoped, be of a temporary nature. **RRA 34**
53. An analysis of the decision made by the Authority indicates that the Authority failed to properly deal with the information and submissions that were put before it.
54. The focus on Mr Wilfred’s history in the USA and the potential for further Court proceedings resulted in the Court failing to carefully examine the impact Mr Wilfred’s removal from New Zealand

would have on:

- Mrs Wilfred;
- Other persons lawfully in New Zealand;
- Mr and Mrs Wilfred's economic status;
- Mr Wilfred's physical security;
- Mr Wilfred's status now as a stateless person.

55. Because Mr Olphert took the view that matters in the USA were not matters that the Authority could look at, he also failed to distinguish between Mr Wilfred's treatment by US authorities and whether or not Mr Wilfred would receive a fair trial. Mr Wilfred has not taken the position that he could not receive a fair trial eventually in the USA.

56. The decision of the Authority was wrong in law because:

- The Authority is required in law to determine whether or not the process of judicial proceedings in another country has given rise to exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the Appellant to be removed from New Zealand.
- Mr Wilfred's application did not require the Authority to make findings that indict the United States Justice system.
- The Authority is required to determine whether or not the combination of Mr Wilfred's circumstances in the United States of America and New Zealand are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for him to be removed from New Zealand, regardless of whether or not those circumstances arise from the action or inaction of certain individuals, officials, or state organs.
- The Authority ought to have recognised 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.

57. The issues for this Court on appeal are:

- Whether or not the Authority was wrong in law to determine that exceptional circumstances of a humanitarian nature did not exist that would make it unjust

or unduly harsh for the Appellant to be removed from New Zealand:

- Whether or not the decision is flawed by reason of mistake of fact by the Authority such that the decision should be set aside;
- Whether or not the Authority failed to take account of relevant considerations such that the decision should be set aside;
- Whether or not the Authority decision was unreasonable;
- Whether or not there has been a breach of natural justice.

58. As the Appeal and Application for Judicial Review share similar pleadings and cover the same facts, it is convenient to make submissions without distinguishing between the two consolidated proceedings. These submissions are made in support of both the appeal and the claim in judicial review. Generally the appeal can be seen as being founded on the submissions made on errors of law. The claim in judicial review overlaps in this respect. Other grounds such as mistake of fact, breach of natural justice, and failure to take into account relevant considerations also comprise part of the claim in judicial review.

Section 47 of the Immigration Act 1987

59. Section 47 of the Immigration Act 1987 provides:

“[47. Appeal against requirement to leave New Zealand—

- (1) A person who is unlawfully in New Zealand may appeal to the Removal Review Authority against the requirement for that person to leave New Zealand.
- (2) The appeal must be brought within 42 days after the later of—
 - (a) The day on which the person became unlawfully within New Zealand; or
 - (b) The day on which the person received notification under section 31 of the confirmation of the decision to decline to issue a permit, in the case of a person who, while still lawfully in New Zealand, had lodged an application under section 31 for reconsideration of a decision to decline another temporary permit.

- (3) An 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.
- (4) 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
- (5) The following persons may not appeal under this section:
- (a) A person who is unlawfully in New Zealand by reason of having returned to New Zealand while a removal order is in force in respect of the person:
 - (b) A person who is unlawfully in New Zealand by reason of the expiry of a limited purpose permit:
 - (c) A person who is unlawfully in New Zealand following the revocation of their residence permit being confirmed by the Deportation Review Tribunal:
 - (d) A person unlawfully in New Zealand to whom section 63 applies (which section relates to persons granted temporary permits for the purposes of the Mutual Assistance in Criminal Matters Act 1992); or
 - (e) A person unlawfully in New Zealand to whom section 114K(4)(b) applies (which provision relates to a person in respect of whom a security risk certificate has been confirmed).]"

60. There is extensive case law on the ambit of the test in Section 47 (3) of the Immigration Act 1947.

61. The ambit of the test set out in Section 47 is discussed in *Sale and Sale v Removal Review Authority and Secretary of Labour* (High Court, Auckland Registry, M1471/93, 26 October 1993, Hammond J). In that case Hammond J stated: CB Tab 2

1. *Clearly the term "humanitarian" reflects the social fact that we all belong to a race of persons. We can*

communicate with each other. We share certain understandings, which we believe all members of the human race ought to respect. The difference between humans and non-humans is that humans are not alone. A humanitarian concern is a concern for the well-being of others and respect for their particular circumstances.

2. *The categories of humanitarian response could never be closed.*
3. *However, reviewing an authority, the Court will always have to commence with a fact based enquiry.*
4. *Ultimately, however, it has to be acknowledged that the term “humanitarian” does involve an element of judgment: how ought one group of human beings behave towards another human being or beings?*
5. *The use of the word “exceptional” suggests its particular humanitarian concern must be something more than an ordinary concern.*
6. *A humanitarian concern might be actual or perspective.*
7. *It might include physical, emotional or economic harm.*
8. *The relevant humanitarian concern need not necessarily arise out of the particular circumstances of the applicant. It might also extend to the considerations of the impact of removal on the parties ...”*

62. This approach was cited with approval in *Yusuf v Chief Executive, Department of Labour* (High Court Wellington, CIV 2002-485-192, 9 September 2003, Gendall J). **AB pg 914**
63. The case is authority for the proposition that physical, emotional or economic circumstances will all be relevant to determining whether or not it is unjust or unduly harsh for the Appellant to be removed from New Zealand.
64. The authorities are also clear that such humanitarian circumstances may arise from the circumstances of not only the Appellant, but also others that would be affected by his removal. In *Patel v Removal Review Authority* (CA Wellington CA180/96) at page 6 Richardson P stated: **AB pg 870**

“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.”

Error of Law – Protection of Family Unit (Economic / Emotional Harm to wife) / Mistake of Fact – Nexus to New Zealand / Economic Harm to Wife

65. The decision of the Removal Review Authority failed to consider the extent of the economic and emotional harm that would be caused to Mrs Wilfred as a result of Mr Wilfred’s removal from New Zealand.
66. At paragraph 26 of the decision the Removal Review Authority wrongly determined that Mrs Wilfred had no nexus to New Zealand. **RRA 26**
67. Similarly, at paragraph 34 of the decision, the Removal Review Authority acknowledged that there will be *“some emotional impact”* on Mrs Wilfred but goes on to decide that Mrs Wilfred can return to Canada with or without her husband. **RRA 34**
68. The decision fails to recognise:
- a. The protection that should be accorded by society and the state to the family unit and the devastating effects of separating that unit;
 - b. The significant economic harm that would result to Mrs Wilfred.
69. In *Tevita Lisiate v The Department of Labour*, the High Court referred to New Zealand’s obligations under Article 23 of the International Covenant on Civil and Political Rights 1966 and Article 16 (3) of the Universal Declaration of Human Rights 1948. **CB Tabs 3, 6 & 7**
70. Article 16 (3) of the Universal Declaration of Human Rights 1948 provides:
- “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state”.*
71. The Court held in relation to a young man with no family of his own, that such a person is entitled to the comfort and support of

as many relatives as he can gather around him. The High Court held that to ask him to live separately from either part of his family was unduly harsh and unjust to him. The Court considered these were exceptional circumstances of a humanitarian nature that would justify a review of the decision.

72. The Authority did not consider the present circumstances of Mr and Mrs Wilfred in New Zealand and the resultant effect on Mrs Wilfred if Mr Wilfred was removed from New Zealand.

73. Mrs Wilfred, as a Canadian citizen, has no right to reside in the United States of America. Upon Mr Wilfred's removal from New Zealand and return to the United States, it is likely that he will be incarcerated pending a hearing. During the previous hearings in Colorado Mrs Wilfred's estate expended over CAN\$400,000.00 in dealing with the extradition proceedings and other charges, only to have all matters either dismissed, withdrawn or not proceeded with. Mrs Wilfred deposes that: **CW 14**

"We had hoped that horrible part of our lives was behind us, and this was the primary reason why we decided to commence a new life for ourselves in New Zealand once Harmon's passport was returned by the US authorities the last time we went through this outrageous harassment." **CW 15**

74. In addition to the great distress and anxiety which will be caused to Mrs Wilfred and the emotional impact of having her husband removed from New Zealand, Mrs Wilfred deposes that:

"If Harmon is removed from New Zealand and deported to the US, then I will be forced to abandon my New Zealand home, business and charitable work to return to the US and reside (if possible) close to him during what I believe to be further incarceration and harassment until all matters are resolved." **CW 26**

75. Mrs Wilfred would be forced to abandon her long-term business visa. The commitment that Mrs Wilfred has made to her business ventures in New Zealand and to New Zealand society is exceptional. The Removal Review Authority was wrong to determine that Mrs Wilfred did not have a nexus to New Zealand.

76. Mrs Wilfred has funded the establishment of 5 companies. One of those is a significant entity in which she has invested in excess **CW 21, 24 & 26**

of NZ\$ 2 million. In addition, she continues to work, together with Mr Wilfred, of La Famia, to which they have already contributed in excess of NZ\$40,000.00 to establish. Mrs Wilfred deposes in her affidavit:

"I cannot, nor can anyone else within our companies and charitable organisations, carry on in New Zealand without Harmon's strong personal and professional qualities that organise and lead our current businesses and estate investments. If Harmon is sent from New Zealand, then I would remain by his side as much as possible and would therefore have to abandon my long term business visa and our home. I would be obliged to sell, close or relocate our New Zealand businesses and take the entirety of what remained of my assets and estate/investments with me. We would stand to lose in excess of \$2,000,000.00 through his forced departure and a possible forced sale of the business or hasty attempt to move its operations offshore. We would not be able to continue operating in New Zealand and would likely never recover our loans to the company. Our employees would lose their jobs and our contractors would suffer, as would the professionals involved in our charitable work. Moreover, as Harmon would be incarcerated, I would no longer be able to rely on his advice and decision making skills to run the companies and make investment decisions in relation to my New Zealand or off-shore assets. This is at a time when the company is beginning to show a consistent profit that will provide me a return on my estate's investment." **CW 26**

77. Mr and Mrs Wilfred have their home in Sumner, Christchurch where they have resided for the past five years.

78. Mrs Wilfred makes it clear in her affidavit that neither she nor anyone else can carry on the businesses that she and Mr Wilfred have established in New Zealand without Mr Wilfred's strong personal and professional qualities.

79. In addition to that she and Mr Wilfred would be forced to separate from their whanau and friends that they have now associated with in New Zealand for nearly 5 years. Mr Wilfred is the godfather of one of Mr Rutherford's daughters. **CW 27**
DR 15

80. It must be remembered that Mr Wilfred's passport was not returned to him by the American Consulate for charges which the District Attorney does not wish to pursue by having Mr Wilfred extradited. If Mr Wilfred had retained his passport then he would have formed part of Mrs Wilfred's long term business visa application, and, given the success of Mrs Wilfred's application and the prior suggestions from Immigration NZ that Mr Wilfred should apply for such a visa, it seems likely the visa would have been granted. **AM 3 & 5**
HW 90 – 91
81. The anxiety caused to Mrs Wilfred is exacerbated by the physical dangers posed to Mr Wilfred through his return to the United States. As Mrs Wilfred deposes: **CW 28**
- “I am also extremely concerned that Harmon would face physical danger and further political retribution from certain US agencies and covert organisations involved in the Federal Mitsubishi Note Transaction, and the corrupt legal authorities and politicians connected to the Colorado Pension Fund embezzlement scheme, all of which he has blown the whistle on with documented evidence included in this appeal. This concern is significantly exacerbated by my very real concern that the US authorities involved will file more spurious charges which could ultimately take years and hundreds of thousands of dollars to resolve while I am separated from Harmon because of his likely further incarceration. We would have to expend many thousands of dollars and lose significant time and money which would otherwise be invested in New Zealand.”*
82. There is also evidence of harm that could result to Mr Wilfred's children as a result of his removal from New Zealand. **HW 85 – 87**
CW 6
83. It is submitted that these circumstances are exceptional circumstances of a humanitarian nature.

Error Of Law – Harm To Persons Lawfully In New Zealand / Mistake of Fact – Nexus to New Zealand

84. The authorities to date have not yet dealt with the unique situation of an appellant that has established a significant business enterprise in New Zealand and which provides significant benefits to persons lawfully in New Zealand.
85. The affidavit of Mr Rutherford details Mr Wilfred's significant involvement in the management of the New Zealand company, CTNZ. That affidavit deposes that Mr Wilfred's involvement with CTNZ is critical to its success to date and its continued survival. **DR 1 – 15**
86. Information about Mr and Mrs Wilfred's significant business enterprise was before the Authority. If the Authority had examined Mr Wilfred's websites then further detail was also available. The Authority declined to view the websites.
87. Mr and Mrs Wilfred have provided funding to CTNZ in excess of NZ\$2 million since its inception. In November 2005 shortly before the filing of Mr Rutherford's affidavit, the company had had its most successful month in business, with sales exceeding \$170,000.00 for that month. The company has employees who are reliant upon the company for their continued employment and income. **DR 12, Exhibit B**
88. Mrs Wilfred's affidavit makes it clear that the company would almost certainly have to be shut down if Mr Wilfred is removed from New Zealand. This would result in the death of the company and the loss of jobs for its employees. **CW 24 & 26**
89. Mr Wilfred's position is also exceptional in that he has a demonstrated history of contributing to significant humanitarian trusts in New Zealand. Mr Dudley's affidavit outlines Mr Wilfred's experience and dedication to the Christchurch Early Intervention Trust (The Champion Centre) and La Famia. His commitment to the Champion Centre ultimately led to his appointment to the Board of Trustees and then to the position of Chairman of the Trust. **BD 1 – 12**

90. As set out in the affidavits of Ms Gibson, and Mr Wilfred, the Wilfreds have made contributions to the Champion Centre of in excess of NZ\$120,000.00 to fill gaps in funding for that charitable enterprise. That Trust specialises in early intervention treatment for challenged children. Mostly the children have been born with physical or mental challenges such as Cerebral Palsy or Down's Syndrome. **MG 6**
HW 81
91. As detailed in the affidavits of Mr Gillanders, and Mr and Mrs Wilfred, the Wilfreds are now heavily involved in the establishment of La Famia. The evidence discloses that La Famia is a New Zealand IRD Charitable Trust designed to establish a support organisation to provide family management and family support services for families in need. **JG 2**
HW 82 – 84
CW 24
92. Mr and Mrs Wilfred have made significant financial contributions to this Trust and are trustees for the organisation which also engages the services of four experts to assist with the Trust operations. Mr and Mrs Wilfred, as trustees, have made presentations to significant Government and community organisations to obtain further funding.
93. The Authority failed to consider the harm that would result to persons lawfully in New Zealand as a result of the Appellant's removal from New Zealand. As a result it was wrong in law, not to decide that exceptional circumstances of a humanitarian nature exist that would make it unjust or unduly harsh for the Appellant to be removed from New Zealand because:
- Significant harm would result to CTNZ and its employees;
 - La Famia would be unable to continue its charitable work for the benefit of families in New Zealand;
 - Mr and Mrs Wilfred would be unable to continue making philanthropic contributions to New Zealand charities.

Error of Law – Ambit of Section 47 (3) Immigration Act 1987

94. It is submitted that the Second Respondent breached its obligation to act in accordance with the law and erred in law at paragraphs 25 and 31 of its decision in deciding that the circumstances of the Appellant in relation to:
- a. The United States justice system;

- b. As a former financial contractor with the US CIA and other matters arising in the USA;
- c. Evidence of the injustice which would result to the Appellant upon his return to the United States of America;

are not issues that fell within the ambit of the test under Section 47 (3) of the Immigration Act 1987.

- 95. In *Canada (Ministry of Employment and Immigration) v Satiacum* 99 NR 171 the Court considered its ability to look at judicial process in another country. It was recognised that exceptional circumstances could justify an examination of judicial process in foreign jurisdictions.
- 96. Similarly, the statutory test set out in Section 47 (3) of the Immigration Act 1947 requires the Authority to examine all exceptional circumstances of a humanitarian nature, regardless of whether or not those circumstances arise from matters intertwined with the judicial proceedings existed or may occur if Mr Wilfred returns to the United States of America.
- 97. This error appears to have had a pervasive effect on Mr Olphert's decision. It resulted in the Authority failing to consider the impact of the actions of County officials towards Mr Wilfred, the totality of circumstances that resulted from the illegal actions of various persons in the United States of America towards Mr Wilfred and others, and Mr Wilfred's position as a former financial contractor to the CIA.
- 98. While the New Zealand Courts may presume that Mr Wilfred will eventually obtain a fair trial in the United States of America in his Family Court and custody matters, there is overwhelming evidence of an abuse of Mr Wilfred's rights and the potential for such abuse to continue if Mr Wilfred is forcibly removed from New Zealand to the United States of America.
- 99. Relevant evidence includes:

- The District Attorney's office was clearly displeased after Mr Wilfred involved FBI officials to investigate embezzlement by County officials who the District Attorney's office initially refused to prosecute. This displeasure is evidenced by the letter to Mr Wilfred dated 14 August 1995. Despite that letter, an investigation resulted from FBI involvement and Mr Whitty, a high ranking County official was sentenced to 18 years in prison. **HW 9, Exhibit C**
 - It was the same District Attorney's office that charged Mr Wilfred and his mediator, Mr Philip Freytag, for extortion resulting from Mr Wilfred's mediation with his wife over custody. The office also charged Mr Wilfred for being in breach of custody orders. These charges resulted in the District Attorney's office bringing extradition proceedings against Mr Wilfred. **HW 33**
 - After initially spending 89 days in an Ontario prison and then two years resisting the extradition proceedings, Mr Wilfred agreed to return to the United States subject to an agreement with the District Attorney's office that he would return to Colorado to appear before the Court without escort or incarceration with the understanding that he would be permitted to present his evidence and submit for a dismissal of the charges. However, despite the agreement, the District Attorney's office reneged on the agreed terms of Mr Wilfred's return by: **HW 36, 45 & Exhibit M**
 - i. Ordering Mr Wilfred's re-arrest in Canada to prepare for extradition;
 - ii. Having a Federal Marshall escort Mr Wilfred to Colorado in handcuffs and belly chains;
 - iii. Seeking costs against Mr Wilfred for his extradition;
 - iv. Re-incarcerating Mr Wilfred at the El Paso County jail with an order to transport him to another County jail on matters unrelated to the extradition.
100. While eventually the Courts did order these other charges against Mr Wilfred to be withdrawn, these abuses cannot be ignored.

101. In the meantime the Courts had thrown out the same charge for extortion against Mr Philip Freytag.
102. After having the additional charges withdrawn, Mr Wilfred returned to Canada and then voluntarily returned again to Colorado to face the original extradition charges. Mr Wilfred was again unable to face these charges because he was charged by Federal Marshals with new charges upon returning to the USA. Again these charges were eventually withdrawn, but Mr Wilfred was unable to deal with the original charges for which he was initially extradited.
103. The officials who had extradited him returned his passport to him and did not proceed with the charges at that time.
104. These charges are now beyond the statute of limitations, and the District Attorney's office in Colorado advises that they are not going to seek extradition of Mr Wilfred. Despite this, the Consulate has refused to renew Mr Wilfred's passport, which would enable him to remain in New Zealand.

Error of Law – Stateless Person

105. It is submitted that the Second Respondent was wrong in law not to determine that the status of the Appellant as a stateless person was not an exceptional circumstance of a humanitarian nature because, as a stateless person, the Appellant is denied:
 - a. The universal right to citizenship of a nation state;
 - b. The rights associated with citizenship of a nation state, including the right to establish residence in such a nation state.
106. It appears from the decision of the Authority that it did not consider Mr Wilfred's status as a stateless person to be an exceptional circumstance of a humanitarian nature because his statelessness resulted from his voluntary renunciation of his US citizenship.
107. It is submitted that this can only be correct in law if the renunciation was undertaken for a collateral purpose such as attempting to manipulate the decision of the Authority.

108. In contrast, the evidence as to why Mr Wilfred renounced his citizenship shows clearly that he did so as a matter of principle. **HW 92**
Mr Wilfred states in his Affidavit:

“By 1 March 2005 I had become so outraged both with US foreign policy in Iraq and elsewhere in the world, and also with the way I personally had been treated by my country of birth, that I made the decision to end my connection with the United States of America and renounce by citizenship on principle.”

109. Mr Wilfred’s renunciation resulted from his previous treatment in the United States of America, the attempt by the Consulate to force his return to the United States and to deny him the ability to renew his permit so that he could remain in New Zealand, and his outrage with United States foreign policy. Mrs Wilfred’s evidence is compelling on this point:

“Harmon then discussed with me that because of the extreme violations of his rights by authorities in the USA, the refusal of the USA to renew his passport, and our opposition to what we considered to be an unwarranted war in Iraq, he had decided to renounce his US citizenship on principle. As a Canadian, given the abuse of Harmon’s rights that I had witnessed, I completely supported and agreed with his decision.” **CW 20**

110. The Authority accepted that such feelings against the US and his treatment by the authorities are deeply felt. **RRA 23 & 24**
111. The evidence also makes it clear that it was simply not possible for him to return to the United States because of the physical danger he would face.
112. Section 9 of the Citizenship Act 1977 recognises the exceptional circumstance of being stateless. Section 9 provides that the Minister of Internal Affairs may grant citizenship to any person who would otherwise be stateless. **CB Tab 5**

113. The Convention on the Status of Stateless Persons likewise recognises the need to avoid the effects of statelessness by conferring rights on those who are stateless. One of the key rights attached to citizenship of a nation state is the right to reside in that nation state. Mr Wilfred has no right to reside in any nation state. His circumstance is an exceptional circumstance of a humanitarian nature.

114. Article 15 (1) of the Universal Declaration of Human Rights 1948 recognises that everyone has the right to a nationality. **CB Tab 6**

115. It is therefore submitted that the Removal Review Authority is wrong in law not to recognise that Mr Wilfred's status as a stateless person is an exceptional circumstance of a humanitarian nature.

Breach of Natural Justice / Failure to take into account relevant considerations

116. In making its decision the Removal Review Authority had an obligation to act in accordance with the principles of natural justice and to give sufficient reasons for its decision.

117. Section 51 (1) of the Immigration Act 1987 provides that as soon as practicable after coming to a decision on an appeal, the Authority must notify both the Appellant and the Chief Executive in writing of its decision and the reasons for that decision.

118. The scheme of the Act makes this necessary because Section 115 A provides for an appeal on any question of law from the decision of the Removal Review Authority.

119. It is submitted that natural justice and the Act require the Removal Review Authority to give sufficient reasons for its decision. This failure has resulted in additional anxiety and stress to Mr Wilfred and his wife and the need to bring judicial review proceedings. It is a matter for which Mr and Mrs Wilfred should be properly compensated.

120. It is submitted that the Authority was required to so act and give such reasons because the decision determined whether or not Mr Wilfred could remain in New Zealand or would be made subject to a removal order. Such reasons are necessary to analyse whether or not the Authority has properly applied the legal test in determining whether or not there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for Mr Wilfred to be removed from New Zealand.
121. Mr Olphert failed to provide any reasoning relating to:
- The circumstances of the Appellant's children;
 - The harm that would result to persons lawfully in New Zealand;
 - The economic harm that would result to Mrs Wilfred;
 - The prevention of the Appellant from continuing with significant charitable contributions to New Zealand society and charitable trusts;
 - The risk of the Appellant suffering physical danger, or economic or emotional harm by being removed from New Zealand.
122. It is submitted that the failure to give such reasons is a breach of natural justice and the decision should therefore be set aside because the Authority has not made any legal findings that the High Court can examine on appeal. Alternatively, the High Court on appeal can proceed to make its own determination in light of the affidavit evidence and the fact that it is not controverted by the decision of the Removal Review Authority.
123. The points made in paragraph 119 of these submissions also demonstrate that the Authority failed to take into account relevant considerations. This failure to take into account such relevant considerations means that the Authority has not properly turned its mind to whether or not the legal test set out in Section 47 (3) of the Immigration Act 1947 has been satisfied. Despite documentation supporting these submissions being before the Authority, it simply did not deal with most of the facts set out in these submissions. Accordingly it is submitted that the decision should be set aside.

Physical Danger

124. Mr Wilfred's affidavit details physical harm that has been occasioned to him, together with serious threats to his life as a result of his involvement as a financial contractor with the US CIA and his blowing the whistle on the County Pension Fund embezzlement scheme. **HW 19 – 24**
125. These very serious threats are outlined in paragraphs 19 – 24 of Mr Wilfred's affidavit. They reveal correspondence that includes an implicit threat to Mr Wilfred that he would be killed if he revealed information that he did subsequently reveal in the investigation carried out by the SEC. Mr Wilfred is still genuinely concerned that he will face retribution and physical danger if he is removed from New Zealand and sent to the United States. Exhibits G – K outline the physical threats to Mr Wilfred. **HW Exhibits G – K
AB pgs 326, 327, 336, 351 & 352**
126. In addition, as a result of Mr Wilfred's treatment by the District Attorney's office, and upon the request of Federal Marshals, Mr Wilfred has, on a number of occasions, been seized and imprisoned unlawfully. Given the circumstances outlined in Mr Wilfred's affidavit, there is a real apprehension that such physical harm would be occasioned to Mr Wilfred again on his return to the USA.

Conclusion

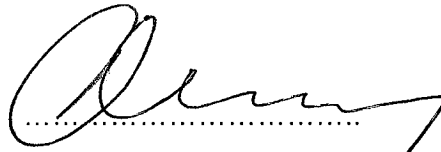
127. It is submitted that the appeal should be allowed because the Authority was wrong in law not to recognise that exceptional circumstances of a humanitarian nature exist that would make it unjust or unduly harsh for the Appellant to be removed from New Zealand.
128. There is power in this Court under Section 115A to substitute its own decision and to grant residency to Mr Wilfred. It is submitted that the Court is as able as the Authority to review the facts and determine that the legal criteria set out in the Immigration Act has been met. If such a determination is made it is submitted that the Court should grant Mr Wilfred residency.

129. Alternatively it is submitted that the Court should grant relief in judicial review, even if the result is to send the matter back to the Authority for further determination. The grounds supporting judicial review are:

- Errors of law;
- Breach of Natural Justice;
- Mistake of Fact;
- Failure to take into account relevant considerations.

130. It is submitted that the mistake of fact, in analysing Mr Wilfred and his wife's nexus to New Zealand is integral to the decision, and that the failure to take into account relevant considerations highlighted in these submissions are of such importance that the Authority should be required to examine them in light of the statutory test.

DATED at Christchurch this 21st day of July 2006.



P F Whiteside / J V Ormsby

Counsel for Applicant & Appellant