IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2005-485-1617

UNDER	Section 115A of the Immigration Act
IN THE MATTER OF	an appeal from the decision of the Removal Review Authority appeal AAS45984 dated 9 August 2005
BETWEEN	HARMON LYNN WILFRED Appellant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF LABOUR Respondent

CIV-2005-485-2270

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a decision of the Removal Review Authority no. AAS45984 dated 9 August 2005
BETWEEN	HARMON LYNN WILFRED Applicant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF LABOUR First Respondent
AND	THE REMOVAL REVIEW AUTHORITY Second Respondent

Hearing: 14-16 August 2006

Appearances: P F Whiteside and J V Ormsby for Appellant/Applicant
I C Carter and S V McKechnie for Respondent/First Respondent
The Second Respondent abides

Judgment: 21 September 2006

RESERVED JUDGMENT OF GENDALL J

[1] This is an appeal under s115A of the Immigration Act 1987 ("the Act") from a decision of the Review Removal Authority ("the Authority") delivered on 9 August 2005. The Authority's decision declined the appeal of Mr Wilfred made under s47 of the Act. The appellant was unlawfully in New Zealand, and entitled to appeal to the Authority against the requirement that he leave the country.

[2] A decision of the Authority is final except, pursuant to s115A, a party may appeal to the High Court on the grounds that the Authority's determination was erroneous in point of law. No right of appeal exists on any ground other than a question of law.

[3] Separately, an application was filed seeking judicial review and an order quashing the decision of the Authority pursuant to the Judicature Amendment Act 1972. That pleads essentially the same errors of law. A further cause of action, an allegation of breach of natural justice, is pleaded.

[4] Pursuant to s47(3) of the Act where there is an appeal to the Authority against a requirement to leave New Zealand:

> "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."

Preliminary issue

[5] The Authority's decision was delivered on 9 August 2005. The notice of appeal was filed on 16 August 2005. The separate proceedings for judicial review were filed on 7 November 2005. Subsequently, in 2006, seven affidavits were filed. They are said to be in support of the judicial review proceedings and also "in the matter of a decision of the Removal Review Authority appeal". The deponents in

those affidavits are the appellant, his wife, his counsel at the time of the appeal to the Authority, and four other persons who support the appellant and provide factual information and opinions, as to why he should stay in New Zealand. Those affidavits and exhibits encompass a total of about 75 pages.

[6] Counsel for the respondent contested the admissibility of such affidavit evidence in both the judicial review and appeal proceedings. He said that they comprise an attempt to introduce further evidence since the decision of the Authority, supplementing an already huge amount of material filed with the Authority, "for the purpose of casting doubt on the substantive reasonableness of the decision in question". As such the evidence ought not be admitted.

[7] I accept the submission of Mr Carter that such material contained in the affidavits, which was not already before the Authority, is not admissible or relevant to the Court's consideration of any point of law to be determined on the appeal. I refer to the remarks of the Court of Appeal in ***Schier and Lerner v The Removal Review Authority and The Chief Executive of the Department of Labour*** CA123/98 7 December 1998. In that case a couple who were German citizens and had lived in New Zealand for nine years, with three daughters born in New Zealand, and therefore all New Zealand citizens, failed in their efforts to remain as residents in New Zealand. The High Court refused an application for new evidence to be received on an appeal from the Authority. On further appeal it was contended that reliance upon R9 of the High Court Rules or the Court's inherent jurisdiction could enable the High Court to consider new evidence on an appeal based solely on a question of law. The Court of Appeal said (at 4):

> "In an appeal on a point of law the alleged error must be found in the reasoning of the Authority based on the evidence before it. A form of procedure *is* prescribed by the Rules for appeals on law only and R9 cannot apply. As well it would be inconsistent with the Rules and the limited character of appeals confined to errors of law to apply the inherent jurisdiction to consider the admission of new evidence, in the absence at least of very special circumstances."

[8] The Court also referred to the statutory provision (s63D) at the time, and said it:

> "makes it clear not only that the Authority is to hear the appeal on the papers and with reasonable speed, but also that it is in general not to consider information relating to matters arising after the date on which the removal order was served."

[9] A somewhat similar provision now exists in s60 of the Immigration Amendment Act 1999. Information relating to matters arising after the date the appeal was lodged may not be considered unless the Authority "is satisfied that there are exceptional circumstances that justify the consideration of such matters". Accordingly, the Court of Appeal ruled that the High Court did not err in law in refusing to admit the further evidence.

[10] The affidavit material sought to be introduced in this case is not so much new matters later arising, but further particulars, opinions and matters available at the time the Board dealt with the appeal. The three volumes, encompassing 1,196 pages of evidence, submissions, authorities, articles and correspondence, provided the Board with a wealth of material. Some of it is duplicated in the new affidavits. Seeking to supplement that material on the appeal is not permitted.

[11] The impediment that was obvious to counsel, was sought to be avoided by filing the affidavits in the judicial review proceedings. It has to be kept squarely in mind that those proceedings also are concerned with reviewable error of law being established – either in procedure or the content of the decision.

[12] The position is, or ought to be, well understood. As the Court of Appeal said in ***Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd*** [1997] 1 NZLR 650, 658:

> "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."

[13] And I adopt with respect the remarks of Randerson J in ***Northcote Mainstreet Incorporated and Westfield (NZ) Ltd v Northshore City Council and Discount Brands Ltd*** HC AK CIV-2003-404-5292 5 February 2004 at paras [67]-[68]:

> "[67] It should not need to be reiterated that judicial review is a fundamentally different process from a general appeal….The judicial review is concerned with the lawfulness of the process by which the impugned decision is reached. It does not concern itself with the general merits of the decision attacked, except for the very limited extent that decisions may be challenged for *Wednesbury* unreasonableness.
>
> [68] More importantly, judicial review generally proceeds on the basis of the evidence available to the decision maker at the time of the decision. It follows that further evidence, whether of fact or opinion, which was not before the decision maker before the time of the decision, is normally irrelevant and inadmissible in proceedings of this kind. The attempted introduction of material after the event, especially for the purpose of casting doubt on the substantive reasonableness of the decision in question is generally inappropriate."

[14] With those cautions in mind I have received the additional evidence only in the judicial review proceedings, wary of the limited assistance, if any, it may be in determining whether reviewable errors of law arose. On many occasions, in proceedings such as these, it has been said that it is not the function of this Court to revisit or reach factual decisions unless it can properly be contended that no probative evidence existed to enable a particular finding to be made, in which case an error of law may have occurred. The Court cannot proceed on a basis that would impugn any of the Authority's findings of fact unless such findings were legally flawed through there being no evidence to support them, or were arrived at by a failure to take into account relevant considerations, or the taking into account of irrelevant considerations. *Wednesbury* unreasonableness, it may be added, will be heavily informed by the material before the decision-maker at the time of decision.

Background

[15] This has been exhaustively covered in the wealth of material presented in three volumes to the Authority. Also the appellant's affidavit filed in the judicial review proceedings itself, with annexures, totals something in excess of 330 pages, much, but not all, of which was before the Authority. I record some of the background, summarised as best I can.

[16] Mr Wilfred was born in Kentucky, USA in 1949 and is now aged 57 years. He and his first wife adopted a son who was born in 1987. That child is now aged 18 years. After his first marriage was dissolved, the appellant married again on

11 December 1990. Two children were born in 1991 and 1993, they now being aged 14 and 12 respectively. In 1991 the appellant and his then wife moved to live in Colorado where he remained until 1997. In about June of that year the appellant met his present wife in Canada. After his marriage broke down, and based upon what he says was legal advice, the appellant removed the children from his wife's custody and went with them to Canada. This was in October 1997. Their mother obtained an interim custody order, ex parte, at a Court hearing in Colorado. It was not until February 1998 that the Canadian authorities removed the children from the appellant's then home in Canada and returned them to the appellant's wife in Colorado. The appellant was arrested by Canadian authorities. He was divorced on 27 April 1998. On 14 May 1998 he was released on bail.

[17] On 1 June 1998 an extradition hearing was held in Ontario in relation to a charge of extortion that had been brought against the appellant in Colorado. That charge it seems arose from actions of an associate of the appellant in writing to the appellant's wife or her solicitor. An order for extradition was made, and upon the lodging of an appeal by the appellant, he was released on bail. He married his present wife, Carolyn Dear-Wilfred, who is a Canadian citizen, in Ontario on 2 August 1998.

[18] The appeal against the extradition order was abandoned and the appellant was returned to the United States where he was arrested. He said it was in breach of an agreement reached with the District Attorney in El Paso County, Colorado. He and his counsel contended that his remand in custody in Colorado was illegal, and on 6 April 2000, having pleaded not guilty, he was released on bail and returned to Canada pending a pre-trial hearing challenging the charges. In May 2000 he returned to Colorado to attend a pre-trial hearing in relation to the extradition matters and was then arrested on charges, later withdrawn. He says that he was thereafter re-arrested and held illegally in respect of a Family Court charge. He was released from custody on 30 May 1998 on condition that he return for a financial examination in relation to family support matters. The end result was that the appellant had his passport returned to him and he returned to Canada. He said he had been denied the opportunity to file a motion for dismissal of the charges for which he was extradited.

He returned to Canada on 31 May 2001 and has not since returned to the United States.

[19] For reasons to which I will return, the appellant contends that if he was required to return to the United States he is liable to be persecuted in the sense of illegally arrested, detained, and mistreated by the law enforcement authorities in the District Attorney's Office in the relevant County of Colorado. He says the history of all matters involving his dealings or interaction with those law enforcement authorities support the view that he is likely to be subject to legal processes and mistreated. At this stage, I make it clear, however, that he does not assert through his counsel that he is not able to be subject to protection through the judicial process and Courts of the United States.

[20] The appellant also asserts fears for his safety. He asserts that because in 1994 and 1995 he complained to authorities, including the FBI, about a fraudulent operation of a pension fund in El Paso County, Colorado which resulted in embarrassment to the District Attorney's Office and other officials, persons at that office deliberately caused difficulties for him in relation to the Family Court matters. Further, he asserts that between 1996 and 1998 he was instrumental in a number of people being charged with wide-scale fraud, in what was called the "Mitsubishi transaction", and that he received threats to his life from persons he says he knew to be connected with the CIA if he was to reveal his knowledge of such dealings. He said that such knowledge had been acquired by him when his services were engaged on behalf of the CIA in 1996. The relevance of that belief is simply that the appellant contends that a risk to his life or safety remains if returned to the United States of America.

[21] After returning to Canada on 31 May 2000 Mr and Mrs Wilfred decided to travel to New Zealand and did so in August 2001. At that time the appellant's wife had the benefit of considerable inherited wealth and she transferred an amount in excess of $3,668,000 to a bank account in Christchurch on 21 December 2001. The appellant and her husband were granted visitors' permits on 11 November 2001. Thereafter the appellant was granted a series of subsequent work permits, the last of which expired on 1 November 2004. The appellant's wife also obtained a series of

work and visitors' permits and at present has the benefit of a long-term business visa until 2008. Companies were incorporated by the appellant in which he and his wife or other companies or interests controlled by them, were shareholders.

[22] Up until about August 2004 the appellant was involved in setting up investment opportunities for the use of his wife's inherited funds. The actual "employer" of the appellant is not altogether clear although it may have altered or evolved over time, as circumstances changed. In his application on 11 June 2002 for a visa it was said that he was to be employed by Super BT of Waterloo, Ontario, Canada and sought the visa for secondment to work in a consortium on a joint venture with other companies. His then solicitor, Mr Rutherford, said to NZIS that he had assisted the couple in the purchase of a "vacation" home in Christchurch and would be encouraging them to consider further investment opportunities in New Zealand.

[23] It seems that when the work visa and permit expired, Mr Wilfred and his wife went to Germany. According to his solicitors (when applying for further work and visa permits on 20 April 2004):

> "Mr Wilfred has previously resided in New Zealand under a business secondment work visa and permit. That expired on 9 September 2003 at which time he and his wife moved to Germany due to work commitments. The applicant has since been offered direct employment in New Zealand through an offer of employment by Combined Technology Ltd, that Mr Wilfred has been instrumental in establishing over the past two years."

In that application the appellant gave his employer as Super BT Canada.

[24] A letter was submitted by Mr Rutherford "Director of Operations" of Combined Technology said to be an offer of employment of Mr Wilfred to expand company markets internationally. It offered a salary of $100,000 (pa) and "repatriation":

> "Should your employment not be extended beyond one year, CTNZ will provide for your repatriation to Canada or equivalent."

[25] The appellant said, on 22 December 2004 in a document forwarded to the Family Support Division of a Colorado Court, that his employer was "'La Famia

Trust' employed as an Investment Adviser" with a salary of $50,000 per annum. That may be the vehicle through which he receives remuneration from his wife through managing her investments as, in the appellant's statement to the United States State Department, he said that after arriving in New Zealand until April 2002 he was unemployed (eight months) and from April 2002:

> "I have managed my wife's estate in New Zealand for the amount of $50,000USD per year from which $42,000 has been paid annually towards child support and the balance of $8,000 has been for my basic living expenses."

[26] The La Famia Trust was created on 18 October 2004 with the appellant and his wife being the settlors. The position may well be that the appellant became employed by a charitable trust known as La Famia Foundation (NZ) settled by his wife and registered on 7 April 2005. That charitable trust is described as being "established to provide funding and expertise toward the nurturing and strengthening of the human family, one family in one community at a time". The application for incorporation was dated 1 April 2005, the trustees being the appellant, his wife and Ms M Gibson.

[27] The appellant is a director of Combined Technology (NZ) Ltd, the sole shareholder being Wilfred Investments Ltd, and he and his wife are the directors of that company. From the bank statements, and Inland Revenue Department employer monthly schedules, the first named company appears to have two employees only, S Rutherford ($4,750 per month gross) and R Rutherford ($6,667 per month gross). (The gross monthly figures I have taken from the Inland Revenue Department employer monthly schedule). It is hard to see how the appellant is employed by Combined Technology (NZ) Ltd, but in the end it is of little moment because clearly he has been able to earn income through managing his wife's investments, including being involved in the management of the company.

[28] After the appellant became subject to a statutory obligation to leave New Zealand he lodged, through his then solicitors, his appeal to the Authority. It was filed on 10 December 2004. On that day a company called Lumina Diem Ltd was registered, in which the appellant was sole director, and he, his wife and a trustee company shareholders. On 19 January 2005 the appellant was appointed

director of another company, Light of Day (NZ) Ltd, which had the same shareholders.

[29] On 1 March 2005 the appellant took a dramatic step. He renounced his United States citizenship. His passport did not expire until December 2006 but it seems that he had applied to renew it on 17 August 2004. This was declined because of "hits" the United States Consulate advised were on the passport. These were the result of unresolved Court matters in Colorado. The passport had been retained by the Consulate, it was said, until such restrictions were withdrawn. However, the appellant was advised that he could be issued with a temporary passport to enable him to travel to the United States to settle the unresolved matters. He was not prepared to do this as he believed – or had been told – that he was liable to arrest if he returned.

[30] But now, it is hard to see how he may be entitled to a United States passport, temporary or not, because he became an "alien" when renouncing citizenship. He said:

> "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 to renounce my citizenship on principle."

[31] The appellant executed an Oath of Renunciation sworn before a Consulate General in Auckland in which the following statement of understanding is recorded and acknowledged:

> "1. I have a right to renounce my United States citizenship.
>
> 2. I am exercising my right of renunciation freely and voluntarily without any force, compulsion, or undue influence placed upon me by any person.
>
> 3. Upon renouncing my citizenship I will become an alien with respect to the United States, subject to all the laws and procedures of the United States regarding entry and control of aliens.
>
> 4. ….

> 5. My renunciation may not affect my liability, if any, to prosecution for any crimes which I may have committed or may commit in the future which violate United States law.
>
> 6. If I do not possess the nationality of any country other than the United States, upon my renunciation I will become a stateless person or face extreme difficulties in travelling internationally and entering most countries.
>
> 7. The extremely serious and irrevocable nature of the act of renunciation has been explained to me by …. Vice-Consul, at the American Consulate General at Auckland and I fully understand its consequences."

[32] Although it came some months after the appeal was lodged, the Authority was aware of the renunciation of the appellant's United States citizenship when the decision was delivered on 9 August 2005. The appellant's counsel, Mr Mancko, had requested, and been given permission, to make additional submissions in mid-March. The Authority refers to the renunciation in the decision at para [27]. Those submissions also included background country information in relation to the United States, and the submission that the appellant's "human rights and freedoms", as well as his right to justice, was severely restricted while he was resident in the United States. The submission was that should the appellant return to the United States he would be detained, incarcerated and again absorbed into a system where he would effectively have no right to freedom or justice and contended:

> "8. Counsel submits that the background information illustrates, via a bona fide authority that injustices and corruption exist and is prevalent within the US Constitutional and Justice System.
>
> 9. Counsel respectfully submits that the appellant is a victim of such a circumstance, as illustrated in our previous submissions to the RRA and that these equate to "*exceptional circumstances of a humanitarian nature*", which are unjust and unduly harsh."

[33] Additional particulars were submitted to the Authority on the renunciation of citizenship, and a press release intituled "Outraged American Whistle Blower to Renounce his US Citizenship" had apparently been placed on a website by, or on behalf of, the appellant. That press release is dated 9 February 2005. It includes, amongst other things, the statement that the appellant:

> "says he will formally renounce his US citizenship on 1 March 2005 to dissasociate himself forever with the United Stages Government and its policies.

> Harmon Wilfred says he has been considering the value of his US birthright for many months and made a final decision to renounce his US citizenship shortly after the inauguration of President George W Bush for a second term of presidency. However, he says his decision which is permanent and irreversible, is far more than a political gesture.
>
> > 'I was raised to believe – and believed further – that the United States is the land of the free and the home of the brave. But the actions of the United States Government in recent years, and my own personal experience, have undermined my respect for the US to the extent that I no longer want to be an American.'
>
> Wilfred plans to make a statement of renunciation before a US Consular officer in Auckland, New Zealand and will live as a 'stateless individual' while he and his Canadian wife, Carolyn, are being considered for New Zealand residency."

[34] The release refers to the involvement in various business and projects on behalf of the estate of his wife in New Zealand, and that the appellant was currently working with several charitable trusts. It goes on to state:

> "Wilfred says he is confident his record of achievement in business and community support will make him and his wife strong candidates for New Zealand citizenship but plans to also offer himself to the world at large as an 'honest and productive citizen'."

[35] There then follows a number of opinions, that the appellant holds, critical of the United States Government and concludes:

> "'I can no longer be a party to this kind of lawlessness, dishonesty, waste and hiprocrisy'. Wilfred's hope is that the irrevocable renouncing of his US citizenship on principle will become a wake up call to all Americans."

[36] After the renunciation there was a later press release on the same website dated 9 March 2005. It is headed "Whistle Blower and former US Citizen elated to be free at last". That material was provided to the Authority along with a further submission dated 18 April 2005 from counsel. He forwarded copies of those press releases, and a submission that the appellant disputed charges which he said were currently in existence in the State of Colorado said to arise out of arrears of family support payments. There was also correspondence in July 2005, placed before the Authority, from the Child Support Services of Colorado. This advised that that office was not allowed to address arrears that may have accrued, but the tone of the letter suggested or contemplated possible settlement. According to that letter, however, current arrears shown in the records were of a very high level. Whatever

the truth, or otherwise, of that position, the essence of counsel's submission to the Authority was that the appellant ran the risk of being arrested if he returned to Colorado despite being advised that extradition proceedings were not to be sought by United States authorities.

[37] The appellant now deposes that he would be very concerned if he were to return to the USA:

> "Because I will incarcerated until I can completely clear my name, which would take some years, I will be unable to provide any child support for my children."

[38] He further says that:

> "It was not possible for me to return to the USA because of the physical danger. There are people whom I have exposed in the Government and within the CIA who would want to exact retribution. There would also undoubtedly be further difficulties with the authorities in Colorado which could result in me being detained for charges which would ultimately be again dismissed or withdrawn."

He says he is confident that he would be illegally mistreated as had been the case in the past and that it is not an option for him to return to "a country where the Authorities have violated my rights". He says:

> "I have every reason to believe that further spurious charges will probably be fabricated and laid against me which could lead to another extended period of incarceration."

[39] Whilst those statements are contained in the affidavit filed in this Court, essentially the same submissions were made by, or on behalf of, the appellant to the Authority.

The decision of the Authority

[40] This spans 18 pages and 38 paragraphs. After referring to the background facts the Authority records in detail the grounds for appeal. It records having received three separate submissions from counsel, with an accompanying two folders described as the "Wilfred Case History" Books comprising 30 sections.

[41] The Authority then summarises counsel's submissions and the material placed before it including the circumstances, which are described as "unique", placed by the appellant on a website which extensively outlines his position. The Authority then summarises the case history contained in the voluminous material placed before it. Reference is made at some length to the appellant's dealings with the United States Consulate, and the judicial and law enforcement bodies in the United States. The Authority then refers to the arguments that principles of fundamental justice and the rule of law had been violated; that they amount to exceptional circumstances of a humanitarian nature, and the belief of the appellant that if he were to return to the United States he would be arrested and returned to the Colorado district so as to cause physical, emotional and economic harm to him, and to his wife. The decision also refers to the emotional and financial support given to the appellant by his wife and the contention that a flow on effect may arise for his children because of cessation of child support payments. The Authority refers to other submissions made by counsel, regarding it not being contrary to the public interest for the appellant to remain in New Zealand, and discusses the claimed effect on Combined Technology NZ Ltd, its employees and its productivity. Finally, the Authority notes that the appellant's wife had made an application for a long term business visa.

[42] The Authority refers to documents, letters and references lodged in support of the appeal and notes that further submissions were made as to the renunciation of the appellant's United States citizenship, and further documents were supplied. The Authority noted there was additional background information as to the appellant's family history prior to his present marriage and the difficulties that earlier arose in respect of custody and child support issues, and that counsel in New Zealand had been endeavouring to resolve any outstanding matters.

[43] The decision then sets out the legislation, well known to the Authority, and refers in particular to ss47 and 50. The decision then follows in the next 16 paragraphs. The Authority observed that the appellant and his counsel had gone to considerable efforts to place all material which had a long history dating back to 1988, before the Authority. Events that affected the appellant and his efforts to resolve difficulties with his former partners in custody and child support matters are

recorded, and the Authority refers to some of the statements that the appellant made as to his concern about the unjust treatment that had been handed out to him. The decision records that the appellant's personal concerns can be seen through his statements and that:

> "The difficulties incurred by the appellant both as to his incarceration in both Canada and the United States of America and his other concerns centring around public officials of the United States of America are clearly deeply felt by this appellant. These are certainly factors that I take into account in determining this appeal."

[44] The Authority then refers to the renunciation by the appellant of his United States citizenship and the issue of press releases. The Authority says:

> "Why the appellant found it necessary to take this very serious step of renouncing his citizenship is not clear to me. Counsel for the appellant in his submission of 13 May 2005 notes that the Colorado District Attorney would not be initiating extradition proceedings for the appellant to be brought back to the United States as they did not deem the matter serious enough. However it is possible that the appellant has simply had enough of the various matters in the United States of America.
>
> [25] Clearly the appellant has issues in the United States of America. I do not consider those issues, which are mainly of a legal nature, fall within the ambit of the test that I have to apply in determining this appeal. It is not for this Authority in this case to determine the rights and wrongs of any judicial proceedings in another country such as appear to exist with this appellant over the various battles that he has had and continues to have in the United States of America. The appellant clearly is not satisfied with the way matters developed over a period of years. Those issues simply cannot be explored by this Authority. They are matters properly dealt with in his country of birth."

[45] The Authority went on to say:

> "The appellant and his wife have no nexus to this country other than their employment through the appellant's initial secondment to Super BT. Clearly the appellant is a resourceful and well educated man who has skills particularly in the technology field as set out in the various letters of support that I have referred to earlier in the Background part of this decision."

[46] The Authority refers to the argument of counsel that the appellant was a "stateless person" and says:

> "That was a voluntary step that the appellant took no doubt with the full knowledge of what he was doing. I note the renunciation was made with his own solicitor present. I do not consider that that step elevates this

> appellant's case to the high test that I have to apply in determining this appeal."

[47] The Authority then acknowledges a number of the cases referred to by counsel and sets out the well known tests and observations expressed in ***Rajendra Patel v Removal Review Authority*** [2000] NZAR 200 at 204, ***Prasad v Chief Executive, Department of Labour*** [2000] NZAR 10 at 23 and ***Ronberg v Chief Executive, Department of Labour*** [1995] NZAR 509 at 526-527. The Authority deals with the reference by counsel to the preamble and Articles 12 and 13 of the International Covenant on Civil and Political Rights, and said that it cannot be the function of the Authority to override or criticise orders of another judicial system and:

> "There are avenues applicable to any such person as the appellant to have corrected any injustices. It is not for this Authority to determine whether there are any injustices arising out of matters pertaining to this appellant and the United States of America."

[48] The decision says:

> "There is a risk of detention if he returns to the United States of America. If that detention is subsequently found to be unlawful, he may have appropriate remedies."

[49] The Authority then records that he has studied other material submitted on behalf of the appellant, as to opinions expressed by writers on systems in the USA and goes on to say:

> "I am not satisfied that these are matters that place this appellant at risk to a degree that reaches the test of exceptional circumstances of a humanitarian nature. Again they are one of the factors that I have considered in determining this appeal."

[50] Reference is then made to the effect on the appellant's wife in the event of the appeal being dismissed, the Authority acknowledging that some emotional impact and adjustments would have to be made, but as a Canadian citizen she could "return to her home country with or without her husband".

[51] In the end, the Authority says:

> "I have given most anxious consideration to all aspects of this appellant's personal circumstances and indeed those of his wife. I have considered the totality of the grounds of the appeal, the material supplied. The totality of the circumstances do not satisfy me that there are exceptional humanitarian circumstances or that it would be unjust or unduly harsh for the appellant to leave New Zealand."

Submissions on behalf of Appellant/Applicant

[52] In lengthy submissions counsel contended that the Authority erred in law by failing to properly deal with the information and submissions put before it and that it failed to carefully examine the impact that the appellant's removal would have upon his wife; the couple's economic status; the appellant's physical security; his status as a stateless person; and the effect upon other persons lawfully in New Zealand.

[53] In summary, it was submitted that the Authority erred because it was 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. Counsel submitted that the decision was flawed because of mistake of fact by the Authority; that it failed to take into account relevant considerations; that its decision was unreasonable; and that there was a breach of natural justice. I will now set out these grounds of challenge in greater detail.

[54] Counsel for the appellant further submitted that the Authority erred in failing to consider the extent of economic and emotional harm that would be caused to the appellant's wife. In this regard, counsel submitted that the decision failed to recognise the devastating effects of separation on the family unit. He further argued that anxiety and harm caused to the appellant's wife was exacerbated by physical dangers said to be posed to the appellant if he returned to the United States and that harm could result to the appellant's children if he were removed from New Zealand. Counsel submitted that these matters, along with the physical, emotional and economic matters affecting the appellant, comprised exceptional circumstances of a humanitarian nature.

[55] Counsel for the appellant next submitted that the Authority erred in law by failing to consider harm that would result to Combined Technology (NZ) Ltd and its employees, and possibly those of an allied company in Australia, if the appellant was removed. He said that the New Zealand company would likely be liquidated in the event of the appellant's removal. He further submitted that New Zealand charities and the charitable foundation of La Famia would suffer because they would be unable to do charity work for the benefit of families in New Zealand. Counsel emphasised that these were not matters which had been addressed by the Authority. Accordingly, counsel submitted that the Authority erred in law in holding that Mr Wilfred and his wife had "no nexus to this country other than the employment through the appellant's initial secondment to Super BT".

[56] It was then submitted that the Authority erred in law 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 USCIA 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" were not issues that fell within the ambit of the test under s47(3) of the Immigration Act 1987. Counsel submitted that the test required the Authority to examine all the exceptional circumstances of a humanitarian nature and the Authority erred in failing to consider the impact of those circumstances upon the appellant. In this regard, counsel went to considerable lengths to set out the facts, claims or relevant evidence to substantiate those matters which support the opinions or beliefs of the appellant.

[57] Counsel further argued that the Authority was wrong in law by not concluding that the fact that the appellant was a stateless person was an exceptional circumstance of a humanitarian nature. He submitted that as a stateless person the appellant is denied a universal right to citizenship of his nation state and rights associated with that, including the right of residency in such a nation state. Counsel submitted that s9 of the Citizens Act 1977 recognises that statelessness is an exceptional circumstance and the Minister may grant citizenship to any person who would otherwise be stateless.

[58] Counsel further submitted that the Authority breached the requirements of natural justice by failing to give sufficient reasons for its decision and also by failing to take into account the relevant considerations. He submitted that this failure required the decision to be set aside in the judicial review proceedings because "the Authority has not made any legal findings that the High Court can examine on appeal". In support of this submission, counsel argued that the Authority did not deal with most of the facts set out in the submissions, particularly those concerning the beliefs of the appellant as to physical danger (i.e. threats to him and the prospect of his being unlawfully imprisoned).

[59] In his conclusion, counsel argued that 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". Counsel said that this Court ought to exercise its powers under s115A to substitute its own decision and grant residency to Mr Wilfred, with the Court being as able as the Authority to review the facts and determine that the legal criteria set out in the Immigration Act had been met. Alternatively, counsel submitted that the Court should grant relief in the judicial review proceedings even if it meant the matter being referred to the Authority for re-determination.

Submissions for the Chief Executive

[60] Apart from challenging the admissibility of the affidavit evidence, which I have already dealt with, the respondent's argument, in summary, was that the Authority, well versed in applying the statutory test, correctly balanced all factors and material put before it. The appellant was simply asking the High Court to reconsider the evidence, draw different factual inferences and weigh factors in the appellant's favour in a way different to the Authority. Counsel submitted there were no questions of law to be determined but instead a challenge to factual findings and conclusions disguised as matters of law. In this regard, counsel emphasised the high threshold necessary to succeed in an appeal, noting that it was for the appellant to establish that his circumstances were exceptional and not of a humanitarian nature. Counsel also emphasised that the Authority is recognised as a specialist body with real expertise in the immigration area, and that mere difference of opinion as to

weight to be accorded to a factor between the Authority and an appellant will seldom if ever amount to error of law.

[61] The manner in which the material is now presented differs significantly from the way in which it was presented to the Authority. For example, the argument as to the economic and emotional impact on the appellant's children was not an argument presented to the Authority. Nonetheless, counsel submitted that the Authority had considered the position of the appellant being "stateless" as well as the significance of the economic and emotional impact on the appellant's wife upon his removal". To this end, counsel noted that there would be some emotional impact and adjustments required but such arose not from the removal itself but from the legal state of affairs that existed prior to the appellant and his wife arriving in New Zealand.

[62] Counsel pointed out that the evidence before the Authority was that the appellant's wife was an extremely wealthy woman with significant financial resources and in a relatively strong position to deal with any disruption that should arise. Any impact to Combined Technology (NZ) Ltd, its employees, as well as to charitable works, were matters that were submitted to the Authority in the context of the second element of the two limb test, namely that these were positive reasons why it would be in the "public interest" to allow the appellant to remain in New Zealand. As the Authority found that the appellant did not satisfy the first limb of the test under s47(3), counsel submitted that the Authority was not required to go on to consider the second (public interest) limb. Nevertheless, counsel said that the possibility of seven employees (in New Zealand and Australia?) losing their employment, or relocation of the business or cessation of charitable donations, was not sufficient to satisfy the composite test and that it would have been open to the Authority to make his determination on that basis. Moreover, counsel submitted that it did not necessarily follow that the business would be sold or closed down nor that a New Zealand based charity would cease to exist if the appellant was not physically present in New Zealand.

[63] Counsel further submitted that the proposition, or submissions, as to risk of physical, economical or emotional harm to the appellant if returned to the

United States was considered by the Authority. He argued that the mere fact of possible arrest in a country of origin could not possibly be sufficient to constitute exceptional circumstances of a humanitarian nature. It is settled law in the refugee context that a fear of persecution must be objectified; subjective belief alone will not bring someone within the terms of the Refugee Convention (see the decision of the RSAA in ***Refugee Appeal No. 72668/01*** 5 April 2002). Counsel submitted that the Authority was entitled and correct not to closely examine the United States judicial system in relation to the appellant's claims as to unfair treatment. This was because the Authority only had the appellant's accounts and criticisms of the United States justice system to go on. It had neither the resources or the legal power to investigate allegations made by the appellant about the United States. In this regard, counsel submitted that it was not the role of a New Zealand administrative tribunal or Court to embark, in immigration proceedings, on an analysis and critique of the United States justice system.

[64] Counsel submitted the Authority did, however, take into account the difficulties experienced by the appellant with public officials in the United States in applying the composite test under s47.

[65] Despite a challenge to the way in which the Authority expressed itself in para [36], counsel argued this was simply a stylistic abbreviation of the statutory language. The Authority had set out in full the section and that stated exceptional circumstances of a humanitarian nature had not been established nor would it have been unjust or unduly harsh to remove the appellant. Counsel submitted that on a fair reading of the decision as a whole the Authority was not satisfied that any of the parts of the composite test had been met.

[66] Counsel next submitted that the Authority correctly considered the principles of international law as referred to it by the appellant's counsel involving Articles 12 and 13 of the ICCPR ("Freedom of Movement" and "Right to Enter One's Own Country"). He contended that the argument advanced in this Court, namely a claim to a right to family life was not advanced before the Authority but that in any event there is no right recognised in New Zealand law to be looked after by one's family

and the possible separation of family members, following the removal of one, did not of itself satisfy the composite test.

[67] Counsel then submitted that the Authority gave adequate and sufficient reasons as to why the appellant did not satisfy the composite test and said that the Authority was not required to give individual reasons for each separate ground advanced by analysing each factual finding in minute detail. In this regard, counsel submitted that the reasons given in the decision were more than sufficient to enable the appellant to understand the basis upon which the decision was reached, and that the reasons need not be lengthy provided that the essential reasoning was apparent.

[68] Finally, counsel submitted that the degree of "nexus" with New Zealand and the impact of removal upon the appellant's wife did not comprise mistakes of fact. He submitted they were matters principally for the judgment of the Authority, to be balanced with other factors. They are not correctly characterised as questions of fact. Counsel submitted that the taking of a view more unfavourable to the appellant or preferring one available view of the facts over another, were not mistakes of fact. There had to be some material mistake of fact which had a material bearing on the Authority's decision, or formed a condition precedent to the exercise of its powers, or which could be said to have resulted in a decision that was unreasonable, before this Court would intervene. In this regard, counsel submitted that the appellant had the fullest opportunity to put his case (he was legally represented throughout) and that there was no failure to observe any principles of natural justice.

Discussion

[69] What amounts to "exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh" for a person to be removed from New Zealand requires a fact based "normative" judgment. Appellants who seek to rely upon the statutory language are unlawfully in New Zealand, seeking exemption. The wording is stringent:

> "…using strong words [it] 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 (*Nikoo v Removal Review Authority* [1994] NZAR 509 at p519)."

Patel v Removal Review Authority and The Chief Executive of the Department of Labour CA180/96 29 July 1997 at p6.

[70] In one case, a single humanitarian circumstance may be "exceptional"; in another case there may be a combination of circumstances which separately do not fit into that category, but when viewed cumulatively amount to exceptional circumstances of a humanitarian nature. There is no fixed absolute; circumstances are very nearly always susceptible to degrees. Accordingly, the Authority must decide each appeal on its merits, against the standard stated by Parliament, and upon all relevant circumstances.

[71] In ***Sale and Sale v Removal Review Authority and Secretary of Labour*** HC AK M1471/93 26 October 1993, Hammond J made observations on the statutory language as follows (pp9-10):

"(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 wellbeing of others and respect for their particular circumstances.

(2) The categories of humanitarian response could not ever be closed.

(3) A reviewing authority or 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 a normative judgment. How *ought* one group of human beings behave towards another human being or beings?

(5) The use of the word 'exceptional' suggests that the particular humanitarian concern must be something more than an ordinary concern.

(6) A humanitarian concern might be actual or prospective.

(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 other parties. (A good illustration of the principle is to be found in *Singh v Immigration Appeal Tribunal* [1986] 2 All ER 721 (HL)).”

Those remarks provide a useful guide.

[72] At the same time, this Court has to be cautious that it does not fall into the error, or trap, of deciding the crucial issue on the factual merits in the absence of any error of law. In ***Butler v Removal Review Authority*** [1998] NZAR 409 at 412, Giles J said:

> “At the outset, 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 case to revisit facts unless it can be properly contended that findings of fact lack probative evidence such that an error of law has occurred (see *Edwards v Bairstow* [1956] AC 14; [1955] 3 All ER 48).”

[73] His Honour then observed that, despite their factual flavour, he proposed to deal with the questions as if they did pose legitimate questions of law. He was influenced in this regard by the grave human consequences for the appellants that the case bore, as well as his wish that the appellants would not feel as if they had failed on technical grounds. Nevertheless, Giles J warned (at p412):

> “But a word of caution is necessary to the profession at large to be weary of seeking, by the skilful use of language, to disguise as questions of law what are plainly non-reviewable questions of fact.”

[74] Fisher J made similar observations in ***Singh v Legal Aid Review Authority*** [1997] NZAR 414 at 416:

> “…it is so easy for appeals of this sort ostensibly brought on a question of law to slide into what is in substance an appeal on the merits.”

and in many of the appeals that come before this Court from the decisions of the Authority, appellants, although couching as they must their grounds of appeal as being “questions of law”, they are in truth challenging the exercise of the Authority’s discretion in factual findings.

[75] I have already set out in some detail in paras [52] – [59] the contentions on behalf of the appellant as to why the Authority erred in law in a number of individual

respects. If the Authority misinterpreted or misapplied the statute or came to a conclusion without evidence, or upon evidence which could not reasonably support it, or failed to draw from unchallenged facts an inference favourable to the appellant when such was the only one reasonably open, then the Court may intervene on the basis of error of law.

[76] In this case the Authority had before it voluminous material as to the proceedings involving the appellant in the United States and Canada; material relevant to the economic position of the appellant and his wife in New Zealand; facts or contentions as to the appellant's physical security; the position of the business in New Zealand and elsewhere; and the fact that the appellant had chosen to be a stateless person. All of those matters are touched upon by the Authority in the decision. There are other matters now put before this Court in affidavit form which were not known to the Authority at the time, but the legislative provisions place upon the appellant the responsibility of placing all relevant material, information and submissions before the Authority. I have to determine, however, whether individually or cumulatively the Authority erred in law in its assessment of the circumstances and the weight given to each particular circumstance placed before it.

[77] The appellant and his wife had a home in Canada. They described it as their home. He gave his home address, in his application of 11 June 2002 as "Stratford, Ontario". The appellant's wife was, and remains, wealthy. He decided to come to New Zealand, although it was said initially to work on secondment, the acquisition of a home and the later establishing of a business might suggest otherwise, although the application of 11 June 2002 states:

> "It is our intention to return to Canada upon expiration of our one year work visa and permit status."

[78] Obviously, the intention was not fulfilled because the appellant and his wife pursued the investment activities in the business, and otherwise. They contributed to the community, as well as charities. It could be said that they were good citizens. However, the appellant knew that he was not entitled to permanent residence but he may have hoped that that might arise. In the application of 11 June 2002,

Mr Rutherford, when supporting the application for the one year work visa, stated that his company would fund Mr Wilfred's repatriation to Canada or equivalent if there were no approved extensions or change to his immigration status. He said, in a letter of 10 June 2002:

> "Mr and Mrs Wilfred have financially supported themselves during their stay in NZ to date without a local sponsor, and I also confirm their ability to independently continue to do so by their own financial capacity and through the continued employment of Mr Wilfred by Super BT Canada until their proposed departure date of June 14, 2003. I have advised them that beyond the completion of Mr Wilfred's 12 month work visa, absent a submitted application for residency, they may not remain in New Zealand without renewal of their status."

[79] In the application of 20 April 2004 seeking a work permit and a work visa the appellant gave his residential address and his home country as an address in Germany and his employer as Super BT Canada. As had occurred in June 2002 Mr Rutherford advised the NZIS on 18 April 2004 in essentially similar terms as follows:

> "Mr and Mrs Wilfred have financially supported themselves during their stay in NZ to date without a sponsor, and I hereby confirm their ability to independently continue to do so by their own financial capacity and through the employment of Mr Wilfred under CTNZ until their proposed departure date of May 1, 2005. I also confirm their independent financial ability and intent to repatriate themselves to Canada or equivalent upon expiration of Mr Wilfred's one year Multiple Journey Work Visa. I have advised the Wilfreds that beyond the completion of this requested one year Multiple Journey Work Visa, absent a submitted application for residency, they may not remain in New Zealand without renewal of their status.

[80] Apparently, the appellant remained subject to some bail conditions imposed in the United States and there were ongoing difficulties with family support issues. He has endeavoured to resolve those outstanding financial commitments, although it seems that he has not been entirely successful at this stage. The concern or fear expressed by the appellant as to what might occur to him if he should return to the United States was a major feature of the arguments presented to the Authority and this Court. Obviously, if a person has a well-founded fear of persecution based on one of the enumerated grounds so as to meet the test that he or she will be a refugee under the 1951 Convention, they will be granted refugee status and not forcibly returned to the country of nationality or, in the case of stateless persons, their country of former habitual residence.

[81] That was not how the case was argued. This case, of course, is not a refugee case. Nevertheless, I recognise and accept that if there is a real chance of harm being inflicted upon the appellant if deported, through persecution or mistreatment in the country to which he is sent, then that is a factor which falls to be weighed in the balance in determining whether the statutory test to be applied by the Authority was met.

[82] In this case the Authority acknowledged the appellant's statement that he feared risk of arrest if returned to the United States and that the law enforcement authorities there had mistreated him in the past and were likely to do so in the future. However, the Authority observed correctly that the appellant, if unlawfully treated, had appropriate remedies in that country. It was acknowledged in this Court that no criticism was or could be made about the United States judicial system. With a democratic country such as that, it would require cogent country information for a New Zealand Court or the Authority to assume that a person would not be given anything other than proper judicial treatment in the United States. The remarks of MacGuigan JA in ***Satiacum v Canada (Minister of Employment and Immigration)*** (1999) NR 171 (FCA) at para [19], a case which involved a United States indian who had fled to Canada whilst on bail, are apt:

> "With respect to the judicial process, it seems to me the fundamental principle may be deduced from the words of La Forest J relating to an extradition matter in *Republic of Argentina v Mellino* [1978] 1 SCR 536 at 558, 76 NR 51 at 72:
>
> > 'The Courts may intervene if the decision to surrender a fugitive for trial in a foreign country would in the particular circumstances violate the principles of justice. But...it does not violate such principles to surrender a person to be tried for a crime he is alleged to have committed in a foreign country in the absence of exceptional circumstances. Our Courts must assume that he will be given a fair trial in the foreign country.'
>
> In the absence of exceptional circumstances established by the claimant, it seems to me that in a Convention refugee hearing, as in an extradition hearing, 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 in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself."

[83] As to the appellant's fear of physical harm if he should return to the United States, it is clear that the Authority considered this in its decision. The Authority talks about "other concerns centring around public officials" which are "deeply felt" by the appellant. It says:

> "These are certainly factors that I take into account in determining this appeal."

[84] I do not accept that any error of law arose out of the manner in which the Authority dealt with these submissions.

"Statelessness"

[85] Statelessness can arise in many circumstances far removed from persecution in the refugee context. The voluntary renunciation of citizenship by the appellant has brought about his "statelessness". He is, as described in the United States' documentation, an "alien". Whilst counsel for the respondent advised the Court, in his memorandum, that "It is Mr Wilfred's evidence that he is eligible to receive a (temporary) travel document", suggesting that such would be granted by the United States Government, it is by no means clear that is the case. For myself I cannot see how an alien is entitled to a USA passport, temporary or otherwise. However, I would not have thought that, if required to leave New Zealand, the appellant must only return to the USA as he came to New Zealand from Canada, then described by him as his "home". As an "alien" vis-à-vis the USA, he has no automatic right to be admitted over its border.

[86] Counsel argued that the appellant was denied the universal right to citizenship of his nation state and the rights associated with it, including the right to establish residence in it. Article 15 of the Universal Declaration of Human Rights 1948 provides that everyone has the right to a nationality and no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. But it is a "right" which an individual may voluntarily give up as happened here. An individual is not entitled to be granted nationality of a state simply because he would be otherwise stateless. Voluntary expatriation is usually linked with simultaneous acquisition of another nationality by naturalization, and one commentator has said:

> "only a singularly thoughtless citizen would surrender his citizenship without securing another."
>
> Boudin, *Involuntary Loss of American Nationality*, 73 Harv. L. Rev. 1510, 1515 (1960).

[87] What is sought here is that the appellant remain resident in New Zealand, and not be subject to removal, because of his statelessness (along with other factors). I think the position is correctly stated in ***Bouianova v Canada (Minister of Employment and Immigration)*** (1993) 67 FTR 74 by Rothstein J at para [12]:

> "…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. This would then render unnecessary those provisions of the definition of convention refugee that require that a person demonstrate an inability or unwillingness by reason of a well-founded fear of persecution to return to the person's country of former citizenship."

[88] An example of the consequences that may arise where a person of United States nationality voluntarily renunciates it so as to become stateless can be seen in ***Jolley v Immigration of Naturalization Service***, 441 F.2d 1245 (5th Cir), 404 US 96 (1971) and the discussion in (1972) 46 Tul. L. Rev. 984.

[89] The appellant's actions in renouncing his US citizenship, and the consequences of such actions, cannot avail him in his challenge to the Authority decision.

[90] I do not accept that the Authority erred in law in the approach it took to the issue of the appellant having voluntary acquired statelessness. It specifically refers to this fact in the decision. Therefore, the appellant's acquisition of that status did not elevate his case, in itself, to meeting the high statutory test.

Effect of removal upon the appellant's wife, children, and other persons

[91] In the material before the Authority the appellant says that his wife employs him to manage her estate and investments in New Zealand and elsewhere. In his electronic communications he says:

> "If New Zealand will not grant ultimate residency and citizenship, are there other countries globally who will accept Harmon and Carolyn as citizens personally along with the placement of Carolyn's global based businesses and investments."

and refers to he and his wife "seeking residency and citizenship in New Zealand or elsewhere if turned away."

[92] The wife's investment material was before the Authority as it related to the company Combined Technology (NZ) Ltd and its Australian arm. It stated that the company had an office in Germany with distributors in 14 countries throughout the world. The company in Australia employs, it seems, five persons, and there are two employed in New Zealand, one being Mr Rutherford the managing director. The appellant is director only but described as being very much involved in the development of the company as "Director of New Business Development". In the September 2004 Business Plan there is reference to the company having its first year of trading commencing in mid-2002 with distributors in excess of 18 of the world's major trading companies but that having its "Head Office located in New Zealand makes a great deal of sense."

[93] There was material before the Board relating to the appellant's wife having international investments, and the appellant is quoted in an exhibit (attached to his affidavit in this Court) as saying:

> "Carolyn and I are investors in international and national companies but as I ordinarily stay out of the operational side of those organisations, I have time for charities I am passionate about. We really care about issues to do with children and family. We decided that this one [Champion Centre Charity] was worthwhile and Carolyn really encouraged me to personally get involved."

[94] It was said that the company might have to be liquidated if the appellant was required to be removed. Clearly, if the appellant and his wife were not in New Zealand practical difficulties may arise, but their interests as shareholders could remain, and the company continue to operate with its present managing director and employees. Funding could still come from the appellant's wife, if that was her choice. The Authority considered the impact the decision would have upon the appellant's wife, accepting that there would be some emotional impact, but noting

that she was an extremely wealthy woman with large financial resources and in a relatively strong position to deal with the disruption of the removal of her husband from New Zealand. The Authority also considered the economic harm to the company and its employees as well as charitable work in the context in which such were advanced, namely that they were positive reasons why it would be in the public interest to allow the appellant to remain in New Zealand. But given that the appellant could not satisfy the first limb of the test under s47(3) the Authority was not required to consider the second public interest test as was confirmed by the Court of Appeal in ***Mwai v Removal Review Authority*** CA147/98 24 June 1998.

[95] I accept the submission on behalf of the respondent that the possibility of seven employees losing employment or relocation of the business, and any disruption to charitable donations or work, were not in the circumstances sufficient to satisfy the composite test, and it would have been open to the Authority to have made a determination on that basis.

[96] The appellant's wife has a visa up until 2008 which entitles her to remain in New Zealand, but that could not of itself require a decision that the appellant remain. In ***Schier v Removal Review Authority*** (supra) when dealing with the entitlement of children who were New Zealand citizens to remain in this country being affected by the removal of their parents who were overstayers, the High Court, upheld by the Court of Appeal, observed that there was nothing in the applicable international human rights instruments which entitled children to have parents remain in New Zealand when their parents could lawfully be deported. That may bear some parallel with the situation of a person who may be entitled to remain in New Zealand pursuant to a particular visa, as such entitlement does not itself lead to the spouse, unlawfully in the country, being free from removal in the interim.

[97] Accordingly, I do not accept that it has been shown that the Authority erred in law in the manner in which it approached these considerations.

[98] The argument in relation to effects upon the appellant's children is unusual to say the least. The children reside in the USA and have the benefit of family support payments, at the moment, made by the appellant. The payments are derived through

income he earns in managing his wife's investments. It seems that arrears accrued at least while he was in Canada. It is hard to see that he would not be able to continue to manage those investments after removal, wherever he resides. The international investments remain. It is speculative, and surmise, to say that he will default in his obligations to the remaining dependent children who may not have been the subject of child support payments during some of the time the appellant was in Canada. I cannot see that removal of a parent either to the country of residence of that parent's children, or to an adjacent country from which the parent came to New Zealand, would cause harm to such a high degree that the stern composite test was satisfied. No error of law has arisen in this respect.

[99] It was argued that the Authority erred by stating that the appellant and his wife had "no nexus" to New Zealand, given that a home had been acquired, a company and business established, trusts created and there was extensive involvement in charities. However, the Authority's comment was made in the context of how the appellant and his wife came to initially be in New Zealand, namely through employment pursuant to the initial secondment to Super BT. They had no family relatives, initial investment or other originating link with this country. It was simply a place to which they wished to come because of its various attractions. I do not consider that the Authority erred in law in expressing itself in that way, although it may have been better to elaborate to make it clear that the connection to the country arose only through the initial secondment to Super BT for a one year period and no other family, investment, social or other connection existed. The remark, however, was something open to the Authority to make on the material before it.

[100] Before completing this judgment I issued memoranda to counsel seeking their advice as to the policy that the NZIS may adopt when removing persons unlawfully in New Zealand, namely whether deportation requires the person to return to the country from which he or she came, or whether that person may elect a particular destination. I did so because the appellant appeared to have initially come to New Zealand from Canada and because, now being stateless, he may have no right to enter the USA.

[101] The response from the respondent set out understood policy. The response from the appellant's counsel proceeded to make further submissions on matters of fact, now contending that both Canada and the USA "pose significant economical, emotional and physical risks for him". The Court did not request submissions in that regard.

Removal to where?

[102] The appellant's argument to the Authority, and pursued in this Court, faces a difficulty because of the actual facts. The contention has always been that persecution or unlawful treatment at the hands of law enforcement authorities and others would occur if the appellant was returned to the USA. That is how it is pleaded in the judicial review statement of claim. It is how it is described in the Notice of Appeal (Grounds 1 f, 2). It was how counsel argued in this Court. I am not able to accept the new submission sought to be advanced on behalf of the appellant in para [3] of counsel's memorandum of 13 September 2006. It was not responsive to the question posed, nor was it advanced before, whether in the pleadings or in argument. It does not relate to any point of law. Moreover, the bald assertions of counsel on the appellant's instructions does not accord with the appellant's statement in his application of 11 June 2002 to which I have already referred in para [77].

[103] The appellant has given his home country as Canada, or Germany – although given the residence in Canada after leaving the United States, and his wife's nationality, it seems that he has a closer connection with the former. His only connection now with the United States is that his children reside there. Once he chose to become stateless whilst his appeal was before the Authority, he brought about a situation where he is, in terms of the United States Immigration procedures, "an alien". He does not have a US passport, permanent or temporary, and cannot enter the United States other than as "an alien". He is just as likely to be transported back to the "home country" where he resided with his wife before coming to New Zealand, namely Canada. The claimed fears of arrest and persecution may be illusory, given that extradition to the USA, whether from Canada or New Zealand, is

not to happen, and there appears no need or requirement that the appellant return to the USA unless he chooses to do so, and is granted admission.

[104] It is apparent that whatever concerns the appellant has regarding physical risk, nothing occurred after his "whistle blowing" in the mid 1990's and during his 15 months' residence in Canada up until August 2001, and it is speculative to contend that physical risk to bodily harm exists.

[105] Irrespective of the foregoing remarks this is a matter that was known to, and considered by, the Authority, and no point of law arises.

[106] Although New Zealand is not yet a signatory to the Convention relating to the Status of Stateless Persons (though it may accede to it in the near future) it is possible that it may adopt the procedures for the issue of travel documents to stateless persons as a matter of practical assistance. In this regard, I simply note that Article 28 of that Convention provides:

> "The Contracting States shall issue to the stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require….[they] issue such a travel document to any other stateless person in their territory. They shall in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence."

[107] To reiterate, the self-created condition of statelessness does not assist the appellant in the circumstances of this case.

Insufficiency of reasons

[108] The Authority is not required to give reasons for each ground of challenge individually because the decision in applying the statutory test is a composite decision. Of course, the Authority must give reasons for the decision which are sufficient to enable the person affected to understand the basis upon which the decision is reached; ***Butler v Removal Review Authority*** [1998] NZAR 409 at 420-421. The reasons need not be lengthy provided they are sufficient to tell the appellant why his appeal has succeeded or failed; ***Lewis v Wilson & Horton Ltd***

[2000] 3 NZLR 546 at 566; ***Chief Executive of Department of Labour v Taito*** CA225/04, CA54/05 8 February 2006 at [24]. In this case, I do not consider that the Authority erred in not referring to every item of evidence or matter contained in the huge amount of material before it. It made clear what were the essential reasons for the decision. They included the history as given by the appellant of United States events, family issues and child support payments, his concerns over treatment by the United States authorities, matters of statelessness, the effect on the appellant's wife, matters concerning the company and activities in New Zealand. When it is viewed as a whole I am satisfied the reasons given support and explain the decision, namely that the composite test was not satisfied.

Mistakes of fact

[109] It is alleged that the Authority made mistakes of fact sufficient to invalidate the decision. Matters such as the impact upon the appellant's wife and reference to absence of "nexus" were such mistakes. These were matters of judgement, to be weighed along with other factors by the Authority. They are not mistakes of fact.

[110] As was said in ***Attorney-General v Moroney*** [2001] 2 NZLR 652 at 668:

> "But it is clear that in order to make out the ground [error of fact] 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.'"

Conclusion

[111] It is not a mistake of fact for the Authority to prefer one view available from the facts over another (***New Zealand Fishing Industry Association Inc v Minister of Agriculture & Fisheries*** [1998] 1 NZLR 544 at 552). Skilful minute semantic analysis of the Authority's decision has been presented to this Court in an attempt to create points of law out of matters of fact. Yet when the decision is read as a whole,

and against the statutory context, no error of law is disclosed and no issue of *Wednesbury* "unreasonableness" arises. Neither individually or cumulatively have errors of law been identified.

[112] The intricate analysis of separate parts of the Authority's decision has been an endeavour to extract errors or imperfections which can be elevated into propositions of law, but it is the content of the decision as a whole which has to be looked at. I adopt, with respect, the remarks of Gallen J in ***Panthongkum v Chief Executive, Department of Labour*** HC WN AP158/97 12 March 1998 at pp13-14:

> "Understandably the decision of the Authority, which is commendably and fully detailed, has been subjected to a minute analysis. In cases of this kind where the consequences are of such very great importance to the persons involved, that is to be expected. At the same time there are risks that when the decisions of those people who have the expertise which leads to their appointment as Authorities are subjected to a minute analysis semantically and logically, the overall basis of the decision may be lost sight of. The wood may not be seen for the trees. In the end the real question is whether the criteria which Parliament and the Executive have considered appropriate for determination of matters of this kind, have been considered and applied in an appropriate way. That can best be gathered by an overall consideration of the decision under appeal."

[113] None of the appellant's contentions as to individual, or cumulative, errors of law are sustained. The Authority took into account the difficulties the appellant had experienced and that might arise to him, his wife and others, upon his removal, and his conclusion that the composite circumstances did not meet the high statutory test was open to him based on the extensive material he had. Likewise, in respect of the judicial review proceedings, there has been no error of law, nor breach of natural justice through the failure to give adequate reasons. Nor has there been mistake of fact so as to invalidate the decision. The law does not provide a general right of appeal in immigration matters and has often said parties should keep in mind and recognise that judicial review in immigration matters is largely focused on the process by which the decision was reached, and not the merits of the decision.

[114] It is open to the appellant to return to Canada provided he retains authority to enter that country. It was designated by him as his home prior to his initial entry into New Zealand. He does not have to return to the USA.

[115] Although it is not necessary for the disposal of these proceedings, I add the following. It will be obvious from the content of this judgment, and my assessment of all the material, that even if I had found there had been error on a point of law on the part of the Authority, and had acceded to the request of the appellant's counsel to decide the issue afresh, I would independently have reached the same conclusion as the Authority. It has not been made out that there were exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be removed from New Zealand.

[116] There may be other avenues open to the appellant to explore, if he wishes, including a long-term business visa application under certain rigorous investment conditions, and of course the Minister always retains the ultimate, albeit highly discretionary, power to give a "special direction" in respect of any permit or visa. But the appellant cannot succeed in the appeal or judicial review proceedings in this Court.

[117] For the foregoing reasons the appeal is dismissed, as is the application for judicial review. The first respondent is entitled to costs in respect of the appeal and the judicial review proceedings. These are fixed on a Category 2B basis.

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J W Gendall J

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