

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

**CRI-2010-404-000453**

**LU ZHANG**  
Appellant

v

**MINISTRY OF ECONOMIC DEVELOPMENT**  
Respondent

Hearing: 7 March 2011

Counsel: F Deliu for Appellant  
N Whittington for Respondent

Judgment: 17 March 2011

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**JUDGMENT OF ASHER J**

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*This judgment was delivered by me on Thursday, 17 March 2011 at 1pm  
pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors/Counsel:

F C Deliu, PO Box 68559, Newton, Auckland 1145. Email: [fdeliu@amicuslawyers.co.nz](mailto:fdeliu@amicuslawyers.co.nz)

Meredith Connell, DX 24063, Auckland 1140. Email: [nick.whittington@meredithconnell.co.nz](mailto:nick.whittington@meredithconnell.co.nz)

## **Introduction**

[1] On 4 November 2010 Lu Zhang, having pleaded guilty to 74 charges of making false statements contrary to s 377 of the Companies Act 1993, was convicted and discharged on each charge without further penalty.<sup>1</sup> Ms Zhang now appeals against that sentence. It is submitted on her behalf that she should have been discharged without conviction.

## **Background**

[2] Ms Zhang came to New Zealand from China in August 2001. She is presently lawfully in New Zealand but is not a New Zealand citizen. While in New Zealand she has obtained a diploma in business. She met her present husband in 2003. He is also of Chinese origin having lived in New Zealand since 2000. They married in 2009. She appears to have worked hard while in New Zealand and has no previous convictions. She can be regarded as of good character.

[3] In 2010 she was employed by a company, Global Fin Net Ltd, as an office manager. Global Fin Net Ltd was owned by a Geoffrey Taylor who resides in Australia and whose sons, Michael Taylor and Ian Taylor, were employed in the business.

[4] Ms Zhang would incorporate companies as part of her duties. Part of the business of the company was to sell companies offshore. Ms Zhang was the nominated local director for these companies. On instructions she would fill in the necessary documentation. She would fill in the form prescribed by the Companies Act for the consent and certificate of a director of a proposed company. There is a box in the form that must be filed with the Companies Office which has on it "Director's residential address". Ms Zhang would fill in an address which was not her residential address, but rather the business address of Global Fin Net Ltd, being level 5, 369 Queen Street, Auckland 1010. She did this on instructions from the

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<sup>1</sup> *Ministry of Economic Development v Zhang* DC Auckland CRI-2010-092-5131, 4 November 2010.

Taylor. Ms Zhang completed the forms showing this address on 74 occasions in relation to 74 companies.

[5] One of these companies was called SP Trading Ltd. Without any knowledge on the part of Ms Zhang, control of this company was passed on by Global Fin Net Ltd to a person or persons who were involved in arms shipments. The company was used to lease Ilyushin-76 cargo aircraft, registered in the Republic of Georgia. The sole shareholder of the company was Vicam (Auckland) Ltd which, from 8 September 2009 until 12 July 2010, was solely owned by an entity called GT Group Ltd.

[6] The aircraft was forced down while travelling over Thai airspace. When investigated in Bangkok it was found to contain 35 tonnes of North Korean weaponry including rocket-propelled grenades, missile and rocket launchers, missile tubes, surface to air missile launchers, spare parts and other heavy weapons to an estimated value of US\$18 million. In the extensive publicity of the incident that followed there was considerable focus on the fact that the lessee of the plane was a New Zealand registered shell company. Ms Zhang was of course the sole director of that company, although she knew nothing of its activities and was not in the slightest way implicated in the passage of weapons.

[7] Ms Zhang has been the only person prosecuted for the events connected to the flight. There were 74 charges of knowingly making a false statement with respect to a document required by or for the purposes of the Companies Act. A person convicted of an offence under s 377 of the Companies Act is liable under s 373(4) for a term of imprisonment not exceeding five years or to a fine not exceeding \$200,000. Section 377(1) provides:

**377 False statements**

- (1) Every person who, with respect to a document required by or for the purposes of this Act,—
  - (a) *Makes, or authorises the making of, a statement in it that is false or misleading in a material particular knowing it to be false or misleading; or*

- (b) Omits, or authorises the omission from it of, any matter knowing that the omission makes the document false or misleading in a material particular—

commits an offence, and is liable on conviction to the penalties set out in section 373(4) of this Act.

(Emphasis added.)

[8] In the District Court, Judge Kerr accepted that there was no victim in relation to the offending and noted that “apparently the type of offending is not normally prosecuted”. He noted that instead “please explain” letters are usually sent to suspects. He also noted that there was no effort on the part of Ms Zhang to conceal where she was and that she was easily traceable through the address given. He also accepted that she acted at the direction of her employer and that she was remorseful and of good character. She had been subjected to a great deal of attention from the news media. He noted a conviction could have an adverse effect on her immigration status in New Zealand.

[9] In the end the District Court Judge convicted and discharged Ms Zhang without further penalty. He declined to discharge her without conviction, noting the period of time over which the offending occurred and the number of offences that were undertaken.

## **Approach**

[10] Section 106 of the Sentencing Act 2002 confers jurisdiction on a court to discharge an offender without conviction. Section 107 provides:

### **107 Guidance for discharge without conviction**

The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[11] In *R v Hughes* the Court of Appeal held that the decision as to whether the test under s 107 has been met is not a matter of discretion.<sup>2</sup> It is a matter of fact requiring judicial assessment and is subject to normal appellate principles. Those

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<sup>2</sup> *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [11].

appellate principles are set out by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.<sup>3</sup> The appellate Court must give judgment in accordance with its own opinion, even where that opinion is an assessment of fact and degree and entails a value judgment.<sup>4</sup> In this appeal it must assess for itself whether the test under s 107 has been met. However, the decision subject to appeal is relevant and will be carefully considered and the view expressed taken into account.

[12] The courts have adopted a three-step approach to the test under s 107 and the analogous provisions that have preceded it. First, the Court must consider the gravity of the offending. Secondly, it must consider the direct and indirect consequences of a conviction. Finally, it must carry out a balancing exercise, determining whether the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending. See *Fisheries Inspector v Turner*<sup>5</sup> and *Police v Roberts*.<sup>6</sup>

[13] Section 107 refers to the gravity of the “offence” and not the offending. However, an offence should not be considered in the vacuum of the statutory elements of the offence and its penalty. It is necessary to look at the offending itself and assess culpability: *Delaney v Police*<sup>7</sup> and *Kohere v Housing New Zealand*.<sup>8</sup> The reaction of the offender to the offending can also be relevant.

[14] In relation to a conviction affecting an offender’s immigration status, or indeed ability to travel overseas, the courts often conclude that it is appropriate for the consequences of conviction to be resolved by the appropriate authorities, rather than the Court attempting to pre-empt that decision-making process by a decision to discharge without conviction: *R v Fook*,<sup>9</sup> *Liang v Police*<sup>10</sup> and *Steventon v Police*.<sup>11</sup> There is nothing that requires the courts to intervene to try and impose their perception of what the right immigration consequences should be. That is best left to

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<sup>3</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

<sup>4</sup> At [16].

<sup>5</sup> *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) at 241–242.

<sup>6</sup> *Police v Roberts* [1991] 1 NZLR 205.

<sup>7</sup> *Delaney v Police* HC Wellington CRI-2005-485-22, 22 April 2005 at [29].

<sup>8</sup> *Kohere v Housing New Zealand* HC Auckland CRI-2007-404-2, 26 April 2007 at [20].

<sup>9</sup> *R v Fook* [2000] 1 NZLR 641 (CA) at [39].

<sup>10</sup> *Liang v Police* HC Wellington AP38/02, 16 April 2003 at [20].

<sup>11</sup> *Steventon v Police* HC Auckland A108/01, 2 November 2001 at [22].

the immigration authorities. But a Court's assessment of culpability in the sentencing exercise may assist those authorities. And there will always be occasions where in a finely balanced case a discharge may be warranted on these types of grounds: *R v Hemard*.<sup>12</sup> The case for discharge may not be so strong where the details of the offending will be known and closely examined by the relevant authority in any event, than where the query will be only as to prior convictions, for instance in an application for professional certification.

[15] In assessing consequences, it is not necessary for the Court to be satisfied that the identified direct and indirect consequences would inevitably or probably occur. It is sufficient if the Court is satisfied there is a real and appreciable risk that such consequences would occur: *Iosefa v Police*<sup>13</sup> and *Alshamsi v Police*.<sup>14</sup>

[16] The section refers to the consequences being out of "all" proportion to the gravity of the offence. The addition of the word "all" before proportion emphasises that in the proportionality exercise the direct and indirect consequences of a conviction must clearly outweigh the gravity of the offending.

### **This application**

#### *Gravity of offending*

[17] Ms Zhang over a period of time, on 74 separate occasions, knowingly made a false statement. The maximum penalties of a lengthy period of imprisonment or a very significant fine indicate this is a serious charge. It involves a mens rea element, namely knowing the statement made to be false or misleading. If the statement is not made knowing it to be false or misleading, there is no offence. So by definition this is a serious offence.

[18] As to culpability, the box Ms Zhang filled in with an address other than her residential address clearly states "residential address". She undoubtedly knew the

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<sup>12</sup> *R v Hemard* HC Christchurch T30/03, 11 April 2003 at [16].

<sup>13</sup> *Iosefa v Police* HC Christchurch CIV-2005-409-64, 21 April 2005 at [34].

<sup>14</sup> *Alshamsi v Police* HC Auckland CRI-2007-404-62, 15 June 2007 at [20].

information she was providing was false (as indeed is reflected in her guilty pleas). Even within the context of this serious offence, the offending cannot be regarded as at the absolute bottom end of the scale. It did not occur just once or twice. It took place on 74 occasions.

[19] Of course there are significant factors which assuage this culpability. She was acting on instructions. There was no culpable deception in the sense that there was no deliberate mis-statement aimed at achieving a specific advantage for the maker. Indeed, there was no advantage that she would have been aware of in her giving her work address rather than her residential address, other than obeying her employer. It would have been fairly obvious on the face of the document that the address provided, which was shown as “level 5” was likely to be a work address. There was nothing close to criminal fraud.

[20] Also, Ms Zhang was not remotely involved in any way in the transport of the arms, and that transport would have occurred whether she gave her residential address or her work address.

[21] However, the fact that an employee was blindly obeying instructions, and there were no direct adverse consequences, is not a complete answer to culpability. The employee always has the option of refusing to carry instructions such as these, and on these occasions it should have been obvious to Ms Zhang that what she was instructed to do was to not comply with what the form required her to do. In a general sense the whole point of shell companies, of the type it appears were formed by her employer, was to remove the identity of those actually involved from the legal structure as it appeared on its face. In a small way putting in a work address rather than a residential address assists in adding to that distance between those behind the company, and those who are named in the company documents. But that must be balanced against the fact that Ms Zhang did not know the end use of the company she was creating, and I have no doubt would have put in her own address if asked to do so.

[22] In summary, the offences of which she has been convicted are serious offences rather than offences of a regulatory or minor type, and involve an element

of deliberateness and knowing wrongdoing. The culpability is not at the lowest end of the scale as the offence was not isolated, but repeated on many occasions over a period of time, but is at the bottom end in terms of overall culpability.

### *Consequences*

[23] I must now assess the direct and indirect consequences of the conviction for Ms Zhang. She will have a criminal record should the convictions stand. This may have some effect on her immigration status. It will have no certain effect as there is no bar to her residence as a consequence of the conviction. The relevance of the conviction will be a matter for the discretion of the immigration authorities.

[24] It is difficult to see how the entering or not entering of a conviction on these offences should be conclusive or indeed highly influential in the immigration process. The facts of the offending stand for themselves and will be able to be assessed by the immigration authorities. It has to be assumed that the fact that this low end offending by Ms Zhang is linked to a very high profile international incident where the use of shell companies in New Zealand has attracted international criticism, will not be turned to Ms Zhang's disadvantage. It can be said with certainty that the transport of the arms would have occurred with or without Ms Zhang's willingness to provide the wrong address. The Courts must assume that immigration authorities will behave fairly and rationally, and it would be unfair and irrational to punish her for this highly public event as distinct from her limited error in wrongly filling in the forms.

[25] Whether there is a conviction or not, Ms Zhang's actions in relation to the filling in of the forms will be considered by the immigration authorities. So there is a real and appreciable risk of it being a factor in the consideration process, but that arises whether there are convictions or not. I am not satisfied that there is a real and appreciable risk that she will lose her attempt to reside permanently in New Zealand solely because of her actions in filling the forms, or because she is convicted and discharged rather than discharged without conviction.



*Proportionality assessment*

[26] On the one hand the offence for which Ms Zhang is convicted is a grave offence. It carries a lengthy maximum term of imprisonment and a very significant maximum fine. The offending occurred on 74 occasions and involved an element of deliberateness. The proportionality exercise often results favourably to a defendant where the offence is a minor regulatory-type of offence or where there has been an innocent mistake, or where the offending is an impulsive and spur of the moment action or reaction. Such offending may not be regarded as serious. But none of these features are present here. Like the District Court Judge, I cannot ignore the fact that offending occurred on 74 different occasions.

[27] As against that it has not been shown that the convictions will result in Ms Zhang failing in her ambition to stay in New Zealand. I accept that there is a real and appreciable risk that the convictions may be taken into account by immigration authorities in their assessment of Ms Zhang's status, but so too will the relatively minor nature of her wrongdoing and the fact that she acted on instructions, her good character and openness, and her personal circumstances. It is difficult to see why a rational immigration officer knowing all the facts would take a significantly more adverse view of Ms Zhang because of the fact of a conviction and discharge, rather than a discharge without conviction.

[28] When these consequences are balanced against the gravity of the offending, I do not consider the direct and indirect consequences of conviction to be out of all proportion to the gravity of the offence.

[29] That being so the appeal must be dismissed.

**Summary**

[30] The appeal is dismissed.

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**Asher J**