

# MEMORANDUM

**To:** [REDACTED], MBIE

**COPIES TO:** Aaron Martin

**FROM:** [REDACTED]

**OUR REF:** MBIE001/342

**DATE:** 8 July 2021

**SUBJECT:** Samsudeen – Warrant of Commitment

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1. This memo records further advice concerning whether Immigration New Zealand (INZ) can seek to detain Mr Samsudeen under Part 9 of the Immigration Act 2009 pending completion of his appeal and his deportation to Sri Lanka. This advice is based on recent conversations with INZ officials and should be read alongside our memorandum of 7 May 2021.
2. In our memorandum of 7 May 2021, we advised that INZ could exercise its powers of arrest and detention under Part 9 of the Immigration Act for the purpose of detaining Mr Samsudeen pending the making of a deportation order, including during the completion of any appeal (under both ss 310(b)(i) and (d)(i) of the Immigration Act).
3. At the time that advice was provided, INZ's position was that there was no impediment to Mr Samsudeen's deportation on the basis of him being a refugee or protected person. This was based on the decision of a Refugee and Protection Officer, dated 1 February 2019.

- [REDACTED]
5. It is, accordingly, likely that the Immigration and Protection Tribunal will find that Mr Samsudeen is a protected person, under ss 130 and / or 131 of the Immigration Act 2009. Given its position on the facts, INZ would not be able to oppose such a finding. If that is the case, Mr Samsudeen would not be able to be deported to Sri Lanka. No realistic option for deportation to a third country exists. Accordingly, INZ now considers the prospect of Mr Samsudeen being deported to be slim to non-existent.

6. We consider that INZ could only properly seek to detain Mr Samsudeen, under s 313 of the Immigration Act, for the purpose of making a deportation order, if making such an order is a realistic prospect. If INZ no longer considers deportation is a realistic prospect, it would not be proper to seek to detain Mr Samsudeen for this purpose.
7. In making an application for a warrant of commitment, under s 316 of the Immigration Act, an Immigration Officer would need to make a statement on oath setting out the reasons why Mr Samsudeen should be subject of a warrant of commitment. The reason for detention would need to be based on one of the purposes of detention provided for in s 310 of the Act. If the Immigration Officer does not believe that Mr Samsudeen can or will be deported, we do not consider they could swear an oath stating that the purpose of detention is to detain him pending the making of a deportation order.
8. Any counsel appearing for MBIE for the application for a warrant of commitment would need to fulfil their obligations as an officer of the Court. In our view, this would include an obligation to inform the Court, and Mr Samsudeen's counsel, of INZ's assessment of the prospect of deportation. It is likely that a Court would not issue a warrant of commitment for the purpose of detention pending the making of a deportation order, if it considers the making of such an order is not a realistic prospect. Accordingly, given the assessment noted above, it is unlikely that a Court would issue a warrant of commitment even if INZ were to apply for one.

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Crown Counsel