IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2015] NZIPT 501793**

AT AUCKLAND

Appellant:	**CHAND, Sudesh Nandni**
Before:	Judge P Spiller
Counsel for the Appellant:	A McClymont
Date of Decision:	11 February 2015

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellant, a 27-year-old citizen of Fiji, against her liability for deportation which arose when she became unlawfully in New Zealand.

THE ISSUE

[2] The primary issue on appeal is whether the nature of her married relationship and the health issues affecting her infant son amount to exceptional humanitarian circumstances that would make it unjust or unduly harsh for her to be deported from New Zealand, and whether it would not in all the circumstances be contrary to the public interest to allow her to remain in New Zealand.

[3] For the reasons that follow, the Tribunal allows the appeal, with the grant of residence status.

BACKGROUND

[4] The appellant was born in Fiji in 1987. She arrived in New Zealand in January 2011 on a visitor visa which was renewed to October 2011.

[5] Around March 2011, the appellant began a relationship with her partner, a New Zealand citizen of Fijian descent born in 1976. He had previously been married twice and had sponsored both spouses for residence in New Zealand.

[6] In September 2011, the appellant married her partner. In October 2011, the appellant applied for a work visa under the Family (Partnership) category. She was granted an interim visa which expired in 2012.

[7] On 20 October 2011, Immigration New Zealand declined the application as it found that the appellant's husband had sponsored two previous partners under the Partnership category. The appellant subsequently submitted three consecutive requests for a visa under section 61 of the Immigration Act 2009, but these were declined.

[8] In August 2013, the appellant gave birth to a son, a New Zealand citizen. Shortly after birth, the child suffered from neonatal seizures which required medical supervision and medication. Paediatric advice is that vigilance be maintained over his ongoing condition.

[9] In December 2013, the appellant lodged a request for a visa under section 61. In January 2014, Immigration New Zealand granted the appellant a one-day visa to lodge an appeal to the Tribunal.

[10] The appellant's parents and a sister live in Fiji and she has another sister in New Zealand.

STATUTORY GROUNDS

[11] The grounds for determining a humanitarian appeal are set out in section 207 of the Immigration Act 2009 (the Act):

> (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that-
>
> > (a) There are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
> >
> > (b) It would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

[12] The Supreme Court stated that three ingredients had to be established in the first limb of section 47(3) of the former Immigration Act 1987, the almost

identical predecessor to section 207(1): (i) exceptional circumstances; (ii) of a humanitarian nature; (iii) that would make it unjust or unduly harsh for the person to be removed from New Zealand. The circumstances "must be well outside the normal run of circumstances" and while they do not need to be unique or very rare, they do have to be "truly an exception rather than the rule", *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34].

[13] To determine whether it would be unjust or unduly harsh for an appellant to be deported from New Zealand, the Supreme Court in *Ye* stated that an appellant must show a level of harshness more than a "generic concern" and "beyond the level of harshness that must be regarded as acceptable in order to preserve the integrity of New Zealand's immigration system" (at [35]).

THE APPELLANT'S CASE

[14] The appellant's case is set out in the appeal form lodged with the Tribunal on 10 March 2014, counsel's submissions dated 7 March 2014, and counsel's responses to questions posed by the Tribunal dated 21 and 29 January 2015. The case can be summarised as follows:

(a) The husband's first marriage (1996-2009) produced three children (born 1997, 2000 and 2003) who are New Zealand citizens. This marriage ended after he suffered a bad work injury which left him unable to work, and his wife abandoned him. His second relationship (2009-2011) ended after his wife became abusive and violent. The husband entered each of these relationships with the intention of forming a life partnership, but they ended despite his best efforts and for factors beyond his control. The appellant and her husband are now in a genuine and stable married relationship, and she has formed a close bond with her husband's three children from his first marriage (he shares custody with his first wife).

(b) The appellant and her husband have the right to maintain the sanctity of her family unit under article 23 of the International Covenant on Civil and Political Rights. If the appellant returns to Fiji without her son, he will be deprived of his mother's care at a crucial stage of his life; if the appellant returns with her son and without her husband, the family unit with her husband will be broken; and if the appellant returns with her son and husband, he will have to abandon

his parenting responsibilities in relation to his three children from his first marriage.

(c) The appellant's son suffered from undiagnosed seizures after birth which require continued medical supervision and medication. While the son is responsive to his current medication, his parents are required to be vigilant concerning his medical condition and require ready access to their local hospital. There is the possibility of further seizures and no clear diagnosis has been given. If the appellant is deported with her son, there is a risk that the child will be deprived of adequate health services that would provide meaningful care in his situation. Medical facilities for the child in Fiji will be expensive and of a lower standard than in New Zealand.

(d) As a New Zealand citizen, the appellant's child is legally entitled under ratified international obligations to an adequate standard of care and should not be deprived of this. In particular, deportation would be contrary to article 24 of the Covenant on the Rights of the Child, which places an obligation on states to ensure that children receive the best standard of health care that is necessary.

[15] In support of her appeal, the appellant provided the following documents:

(a) evidence of the relationship between the appellant and her husband: a relationship history written by the husband, photographs, a letter explaining the son's medical condition, copies of the appellant's and her husband's marriage certificate and documentation of the dissolution of his first marriage, copies of support letters from the appellant's family and friends testifying to her good character and the genuineness of her marriage, and letters, bills and bank statements as evidence of the shared address and financial interdependence of the appellant and her husband; and

(b) medical records which show 22 visits by the appellant's son to doctors during 2014, as evidence of the continued vigilance that the parents are required to show in relation to the son's medical condition.

ASSESSMENT

[16] The Tribunal has considered all the submissions and documents provided by the appellant. It has also considered the appellant's Immigration New Zealand file in relation to her visa applications.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[17] The appellant has been in New Zealand for four years, having arrived on a visitor visa. Shortly after her arrival, she began a relationship with a New Zealand citizen and they married six months later. Immigration New Zealand declined the appellant's application for a work visa under the Family (Partnership) category because the appellant's husband had already sponsored two previous partners under this category. The appellant's grounds of appeal relate to the genuineness of her married relationship to a New Zealand citizen and their right to family unity; and to the medical condition of her son, also a New Zealand citizen, and his right to the best health care in New Zealand.

[18] The Tribunal must consider whether the appellant has exceptional circumstances of a humanitarian nature. The High Court has stated that circumstances of difficulty, hardship and emotional upset do not suffice unless the circumstances themselves or their consequences can legitimately be characterised as exceptional (*Nikoo v Removal Review Authority* [1994] NZAR 509 (HC) at 514). The High Court has noted that the stringent statutory test of "exceptional circumstances of a humanitarian nature" cannot be equated with "compassionate factors", circumstances that are more than simply "routine", or "genuinely concerning circumstances". The High Court has also noted "the high threshold for a finding of exceptional circumstances of a humanitarian nature" (*Minister of Immigration v Jooste* [2014] NZHC 2882 at [45]).

[19] The fact that the appellant is in a relationship with a New Zealand citizen does not, of itself, constitute exceptional circumstances of a humanitarian nature. However, the Tribunal takes account of the following circumstances of the appellant's family in New Zealand. First, the appellant has been married to a New Zealand citizen for nearly three and a half years and their marriage appears to be genuine and stable on the evidence available. Secondly, the appellant has the primary day-to-day care of the couple's son now aged 18 months. The son has medical issues and this makes the appellant's vigilance as a mother all the more important. Thirdly, the effect of immigration instruction F2.10.10.a.i (effective 1 April 2014) makes it impossible for the appellant's husband ever successfully to

sponsor the appellant's residence application (because he has acted as a partner in more than one previous successful residence class visa application). Fourthly, the appellant’s husband has shared custody in relation to his three older children (now aged 17, 14 and 11 years), and he would have to abandon much of his parental support if required to accompany his wife and their child to Fiji.

[20] The Tribunal is also required to take account of the best interests of the appellant’s child. The appellant’s son suffered from undiagnosed seizures after birth which require continued medical supervision and medication. His parents are required to be vigilant concerning his medical condition and require ready access to medical facilities. The Tribunal finds that it would be in his best interests for the appellant to remain in New Zealand.

[21] The Tribunal finds that, cumulatively, the above circumstances constitute exceptional circumstances of a humanitarian nature.

Whether it is Unjust or Unduly Harsh for the Appellant to be Deported

[22] In considering whether it would be unjust or unduly harsh for the appellant to be deported from New Zealand, the Tribunal bears in mind the above circumstances of the appellant, her husband, and their infant son. In particular, the best interests of the appellant’s child must be a primary consideration for the Tribunal.

[23] The Tribunal recognises the valid reasons which caused Immigration New Zealand to decline the appellant’s application for a visitor visa. This decision was correctly taken in light of the fact that the appellant’s husband had earlier sponsored two previous partners under the Family (Partnership) category. However, the effect is to leave the appellant and her husband in limbo for the rest of their lives, given that there is no discretion for Immigration New Zealand to get around the residence instructions disqualifying him as a valid sponsor.

[24] On balance, the Tribunal finds that the appellant’s exceptional humanitarian circumstances would make it unjust or unduly harsh for her to be deported from New Zealand. The appellant has shown a level of harshness beyond that which is acceptable in order to preserve the integrity of New Zealand’s immigration system.

Public Interest

[25] The Tribunal turns finally to the question of public interest. The appellant

has a clear criminal record in New Zealand and Fiji. She appears to be in good health and no medical concerns have been recorded.

[26] The Tribunal recognises the public interest in ensuring that people do not try to circumvent immigration objectives by entering marriages simply to obtain residence. However, the Tribunal notes the reasons that the appellant's husband has given for the breakdowns of his former marriages. They appear to have been entered into by him with genuine intention and their demise appears to have been beyond his control (and certainly not the responsibility of the appellant and her child). Furthermore, the relationship between the appellant and her partner appears, on the evidence before the Tribunal, to be genuine and stable. The appellant is an important support to her husband and their child, both of whom are New Zealand citizens. There is a public interest in the preservation of a family unit.

[27] In light of the above factors, the Tribunal finds that it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

DETERMINATION

[28] The Tribunal has considered the circumstances of the appellant, her husband and their child. It finds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand. The Tribunal further finds that it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand on a permanent basis.

[29] The appellant has met both limbs of the test in section 207(1) of the Immigration Act 2009. Pursuant to section 210(1)(a) of the Act, the appellant is granted a resident visa.

[30] The appeal is allowed on these terms.

"Judge P Spiller"
Judge P Spiller
Chair

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Judge P Spiller
Chair