IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2015] NZIPT 501546**

AT AUCKLAND

Appellant:	**GROBLER, Maria Alida**
Before:	V J Shaw (Member)
Counsel for the Appellant:	A McClymont
Date of Decision:	5 March 2015

DEPORTATION (NON-RESIDENT) DECISION

---

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

THE ISSUE

[2] The appellant is an 80-year-old widow. The primary issue in the appeal is whether her dependence on her New Zealand-resident children gives rise to exceptional humanitarian circumstances in terms of the statutory test.

[3] For the reasons that follow, the Tribunal allows the appeal.

BACKGROUND

[4] The appellant has three adult children. One daughter lives in South Africa. Her second daughter is a New Zealand citizen and her son became a New Zealand resident in 2012.

[5] The appellant also has three siblings living in South Africa.

[6] Between 1998 and 2009, the appellant regularly came to New Zealand and would stay with her daughter for around six or seven months each visit.

[7] The appellant last entered New Zealand in February 2009. She held visitor visas for the first year after which, when her status became unlawful, she lodged a humanitarian appeal to the former Removal Review Authority (RRA). The basis of her appeal was that her older daughter with whom she had lived for the previous 15 years in South Africa was no longer in the position to accommodate and support her because of the breakdown of the daughter's marriage. The appellant requested that she be able to remain with her two children in New Zealand and lodge a residence application under the Family (Parent) category.

[8] In a decision dated 21 May 2010, the RRA granted the appellant's appeal finding that the absence of any immediate family member able to provide accommodation and other support in South Africa made it unjust or unduly harsh for the appellant to have to leave New Zealand prior to the determination of her residence application.

[9] In accordance with the RRA's direction, the appellant was granted a visitor visa valid until 26 November 2011.

[10] The appellant had lodged her residence application in August 2009. However, at this time her son held only a work visa. Immigration New Zealand declined the application in May 2011 as the son still had not become a resident.

[11] The appellant was granted further visitor visas as an exception to policy between December 2011 and April 2013.

[12] Immediately following her son being granted residence in May 2012, the appellant lodged another residence application under the Family (Parent) category.

[13] Changes to the Family (Parent) instructions, including the introduction of the two tier categories now meant that there were significant delays of several years in the finalising of applications under the Family (Parent) category in reliance on the centre of gravity (tier two). The appellant's son, although earning sufficient income to support an application under the tier one category, is not an eligible sponsor for the appellant until May 2015.

[14] In June 2013, Immigration New Zealand declined to grant the appellant a further visitor visa for the purpose of awaiting the outcome of her residence

application. She had exceeded the maximum entitlement of a visit to New Zealand and it was beyond the 18 months directed by the RRA. There were no exceptional reasons why she could not return home and await the outcome of her residence application offshore.

STATUTORY GROUNDS

[15] 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.

[16] 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].

[17] 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

[18] The appellant's case is set out in counsel's submissions and can be summarised as follows:

(a) Prior to coming to New Zealand in 2009, the appellant was financially dependent on her older daughter with whom she had been living as her government pension was insufficient to live on.

(b) Following the breakup of her daughter's marriage in 2009, the daughter was left without a home, assets and with only minimal income. She was no longer in a position to support the appellant. The appellant's three siblings are also pensioners with limited financial means to offer the appellant support.

(c) In New Zealand, the appellant lives with her younger daughter and her son-in-law. She is entirely dependent on them for all her needs. Neither her daughter nor her son could financially afford to maintain the appellant in safe accommodation in South Africa.

(d) The appellant's uncertain situation is already causing her extreme anxiety and having to return to South Africa would likely lead to a deterioration in her mental and physical health.

(e) The appellant's son will become an eligible sponsor in May 2015 and should be able to support a tier-one parent application. The appellant is highly likely to meet health requirements.

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

(a) Psychological report prepared by Gustavo Restivo, registered clinical psychologist, (22 February 2010) and an updated report prepared by clinical psychologist Malcolm Falconer (24 July 2013). Mr Falconer describes the appellant as fit and healthy for her age but she has experienced stress connected to the immigration process which has exacerbated her sense of vulnerability. She is fearful of what would happen to her in South Africa which is the origin of her depressed and anxious mood. The appellant has a stable home in this country and it is Mr Falconer's opinion that if she had to return to South Africa she would experience deterioration in her mental health which would impact on her physical health.

(b) Letter (16 July 2013) from the appellant's general practitioner to the psychologist describing the appellant's history of acute stress and depression, for which she was taking anti-depressant medication. Her physical health is stable but her doctor has concerns for her

mental health if she has to return to South Africa where she would be without the support required to maintain good health.

(c) Affidavit (18 February 2013) from the appellant's elder daughter explaining her current situation and the reasons for her inability to provide for her mother in South Africa.

(d) Affidavits (February 2013) from the appellant's three siblings in South Africa similarly explaining their personal circumstances and inability to provide support for the appellant.

[20] In response to the Tribunal's invitation for updated information, the Tribunal has been provided with a copy of the appellant's son's recent payslip confirming that he earns more than the minimum $65,000 per annum required for an acceptable sponsor for the purposes of a tier-one parent application.

ASSESSMENT

[21] 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 various applications.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[22] When it allowed the appellant's appeal in May 2010, the RRA was satisfied that there had been an unforeseen change in the older daughter's circumstances, namely the breakup of her marriage, which made it impossible for her to accommodate and support the appellant as she had done in the past. It was also anticipated that the appellant had a pathway to residence in that her son would soon obtain residence, thereby allowing for the appellant's outstanding residence application to be successfully finalised.

[23] Unfortunately, when in May 2011 Immigration New Zealand determined the appellant's residence application, the son had still not obtained residence. In consequence, her application was declined. However, Immigration New Zealand continued to grant the appellant further visitor visas to allow her to stay in New Zealand pending her son obtaining residence. He did so in May 2012, and the appellant promptly lodged a further residence application.

[24] Soon afterward in July 2012 significant changes were introduced to the Family (Parent) category. Applications in reliance on the family centre of gravity (tier two) were now given low priority over applications based on the eligible sponsor meeting a certain income level (tier one). The delay in processing tier two applications was now anticipated to be as long as five years. The appellant's New Zealand-citizen daughter, it seems, did not have employment or sufficient earnings to support a tier one application and the son would not be an eligible sponsor until May 2015.

[25] In June 2013, Immigration New Zealand declined to renew the appellant's visitor visa. There was no prospect that her residence application under the centre of gravity would be finalised within a short time and she had already been granted visas beyond the 18 months directed by the RRA.

[26] In allowing the appellant's first humanitarian appeal, the RRA had not anticipated either the delay before the son obtained residence or the lengthy delays in the processing of what became known as tier two applications.

[27] The fact remains that the appellant was allowed to stay with her second daughter and her family in New Zealand and she has been living with them for six years. She is now aged 80 years. Her emotional dependence on her daughter and susceptibility to anxiety and fear about having to leave her current stable home and return to an uncertain future in South Africa, is acute as outlined by her doctor and in the psychological report.

[28] In South Africa, the elder daughter provided accommodation and financial support for the appellant over many years. This daughter's ability to provide for her mother was undermined by the breakup of her marriage and her husband's debts which led to loss of the family home and assets. The daughter had to re-enter the work force when aged 50 years. She has described in her affidavit the two low paid clerical positions she held, only to be made redundant, and her current commission-only employment. She says her earnings do not even cover her basic needs. She had already changed accommodation several times in recent years as she could not make ends meet and was about to do so again. One of the appellant's sisters assists her financially when possible. Finding affordable and safe accommodation is a struggle and she says she could not realistically provide care and support for her mother.

[29] The appellant has three siblings in South Africa, but they are elderly, living on pensions, partially reliant on their own children for support and have health

problems. They cannot offer long term accommodation and support for the appellant.

[30] If the appellant had to return to South Africa, her living arrangements would be uncertain and due to her age and dependent state she will experience acute anxiety and stress. It would not be conducive to her physical or mental health.

[31] The absence of immediate family support in South Africa, the appellant's dependence on family in this country and the risk to her well-being if she is required to return to South Africa, are exceptional humanitarian circumstances.

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

[32] The appellant's son will be an eligible sponsor for the appellant in May 2015. He is able to meet the income threshold required to meet the tier one category which has a streamlined processing time of six to nine months. The appellant has been found to be of an acceptable standard of health in the past. Her residence application has a good prospect of being successful.

[33] For the reasons discussed above, returning to South Africa would be detrimental to the appellant's well-being. It would therefore be unjust or unduly harsh for her to be deported prior to the determination of her residence application.

Public Interest

[34] There are no character issues.

[35] While she remains a visitor, the appellant is responsible for her own healthcare costs. She should not therefore be a burden on the public health system during the currency of a temporary visa pending the determination of her residence application.

[36] It would not, in all the circumstances, be contrary to the public interest for the appellant to remain in New Zealand

DETERMINATION

[37] For the reasons given, the Tribunal finds that the appellant has exceptional circumstances of a humanitarian nature which would make it unjust or unduly harsh for her to be deported from New Zealand.

[38] The Tribunal also finds that it would not in all the circumstances be contrary to the public interest for her to remain in New Zealand on a temporary basis.

[39] Pursuant to section 210(1) (b) of the Act, the Tribunal orders that the appellant be granted a visitor visa for a period of 12 months.

[40] The appeal is allowed on these terms.

"V J Shaw"
V J Shaw
Member

Certified to be the Research Copy released for publication.

V J Shaw
Member