IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2015] NZIPT 600045**

AT AUCKLAND

Appellant:	**O'BRIEN, Bio Talakatoa**
Respondent:	**THE MINISTER OF IMMIGRATION**
Before:	A N Molloy (Chair) J Donald (Member) M B Martin (Member)
Counsel for the Appellant:	R Woods
Counsel for the Respondent:	M Denyer
Dates of Hearing:	10 & 11 July 2014
Date of Decision:	2 June 2015

DECISION

INTRODUCTION

[1] The appellant is a citizen of Tuvalu. He appeals under section 104 of the Immigration Act 1987 ("the 1987 Act"), and seeks an order quashing the deportation order made against him by the Minister of Immigration ("the Minister") on 5 July 2010.

[2] The basis of the deportation order was the appellant's conviction for manslaughter under section 177 of the Crimes Act 1961, in September 2009. He committed that offence in April 2009, within two years after he was first granted a residence permit.

[3] In broad terms, the appeal turns upon whether the effect of the appellant's deportation on himself, his wife and, in particular, his primary-school-aged daughter would make it unjust or unduly harsh for him to be deported to Tuvalu.

[4] The Tribunal will first set out the jurisdiction under which it considers the appeal. It will then outline the jurisprudential history of the appeal before disposing of a preliminary application made by the appellant. We then outline in summary form the evidence given in respect of the appeal before undertaking the relevant statutory assessment required in order to determine the appeal.

JURISDICTION

[5] This appeal was lodged with the Deportation Review Tribunal (the DRT) on 29 July 2010, under the 1987 Act. That Act was repealed, and the DRT disestablished, on 29 November 2010. That coincided with the date of commencement of the Immigration Act 2009 ("the 2009 Act"), under which this Tribunal was established to perform the functions previously undertaken by the DRT. Section 446 of the 2009 Act provides that the appeal is to be determined by this Tribunal in accordance with the 1987 Act.

[6] Under section 105(1) of the 1987 Act, the Tribunal may quash the deportation order:

> "… if it is satisfied that it would be unjust or unduly harsh to deport the appellant from New Zealand, and that it would not be contrary to the public interest to allow the appellant to remain in New Zealand."

[7] That subsection gives rise to two sequential considerations; see *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [153]-[155]. The first step is to determine whether it would be unjust or unduly harsh to deport the appellant from New Zealand. The criteria relevant to that assessment are set out below. If it determines that it would be unjust or unduly harsh, then the Tribunal must move to the second step, which is to determine whether it would not be contrary to the public interest to allow the appellant to remain in New Zealand.

JUDICIAL REVIEW

[8] The appeal first came before a different panel of the Tribunal in July and October 2011. That panel of the Tribunal declined the appeal in a decision dated 29 March 2012 (see *O'Brien v Minister of Immigration* [2012] NZIPT 500073). The appellant sought judicial review of that decision in the High Court. In a decision dated 11 October 2012, Simon France J granted the application for judicial review

and remitted the matter to the Tribunal for reconsideration: see *O'Brien v Immigration and Protection Tribunal* [2012] NZHC 2599. His Honour found that:

> "[47] The applicant must succeed in his judicial review. The decision of the Tribunal declining to cancel the applicant's deportation order is quashed and the matter is remitted to the Tribunal for reconsideration. In undertaking that reassessment, the Tribunal must better consider what is involved in its conclusions that the best interests of the child would be indisputably served by Mr O'Brien not being deported. If, as appears to this court, there may be specific considerations and difficulties arising for the child if Mr O'Brien is deported, these should be identified and then weighed meaningfully in the balance.
>
> [48] It may then be necessary for the Tribunal to reconsider its public interest assessment, depending upon what conclusions have been reached in relation to the first limb."

APPLICATION TO PROHIBIT PUBLICATION

[9] At the outset of the appeal hearing, following the successful application for judicial review, counsel for the appellant sought an order under clauses 18 and 19 of the First Schedule to the Immigration Act 2009, directing that the hearing be held in private and prohibiting the publication of any evidence received by the Tribunal or any report or description of the proceedings relating to the appellant's appeal.

[10] Mr Woods submitted that the conviction and sentence of the appellant in September 2009 "attracted considerable publicity in the national media, notably in Auckland". He submitted that this publicity caused "considerable emotional and mental stress for the appellant's wife and also had an impact on their [then pre-school-aged] daughter". Mr Woods submitted that the publication of evidence considered by the Tribunal or the findings of the Tribunal could cause undue hardship to the wife or the daughter "and could even endanger their safety". He submitted further that any attempt to anonymise the proceedings (rather than withhold publication altogether) would be unsuccessful, given that the facts of the case are so well known.

[11] With respect to the media interest in the appeal, counsel provided the Tribunal with four references to press reports, copies of only two of which were supplied. Of these reports the first referred to the appellant and named him. Neither referred to his wife and, while the first referred to his daughter, it did not name her. The second article did not name or refer to his daughter.

[12] In response, counsel for the Minister submitted that the level of media coverage reflects the public interest in the case. He submitted that it is in the public interest to know whether or not someone who committed a serious criminal offence and becomes liable for deportation is in fact deported. If he is not deported, it is in the public interest to understand the reasons why, and to understand the process surrounding this decision.

Decision with Respect to the Appellant's Application

[13] While Mr Woods referred the Tribunal to the 2009 Act, in fact the application is to be determined under the 1987 Act. In the event, clause 6 of Schedule 3 to the 1987 Act is in similar terms to clauses 18 and 19 of Schedule 2 of the 2009 Act, and therefore little turns upon this.

[14] The basic premise discernible from clause 6 (and from clauses 18 and 19) is that the hearing of a deportation appeal is generally to be open to the public, and the decision reached by the Tribunal is to be published. Subject to those basic premises, the Tribunal "may" receive particular evidence in private, and "may" edit any decision, prior to publication, in such a manner as to prevent the identification of any persons other than "the parties to the appeal".

[15] It is not unusual for deportation liability to arise in the context of serious offending, involving elements of tragedy for people who are not in any sense culpable. That applies to the family of the victim of Mr O'Brien's offending, as it does to his own wife and child. Hearings of this nature frequently touch upon the lives of such people in some detail and it is inevitable that, attendant upon this, there are periods of heightened stress and anxiety. The Tribunal accepts that this has been and will be the case in respect of this appeal.

[16] Looking, however, at the history of this appeal, it is apparent that the offending, the first decision of the Tribunal and the decision of the High Court have all been aired in the open. The original hearing before the Tribunal was apparently open to the public, and the decision was published. Further, no order for confidentiality appears to have been sought by the appellant in connection with his hearings before the New Zealand Parole Board, or in connection with the decision of the High Court on judicial review.

[17] The Tribunal is not persuaded that it should withhold publication of this decision. Given that the earlier proceedings have been open to public scrutiny, we find that the public interest would best be served by publication of the decision.

That will provide a complete record of the proceedings as a whole, commencing with the original Tribunal decision, progressing to the decision of the High Court on review which ordered the matter to be referred back to the Tribunal, and providing the public with the opportunity of scrutinising the decision of the Tribunal following the High Court order. While this may give rise to some concern on the part of the appellant's wife, the Tribunal does not accept Mr Woods' submission that it would give rise to "undue" hardship, nor are we persuaded by his submission that publication may "endanger their safety".

[18] However, the name of the appellant's wife and child are not relevant to the outcome of the appeal and nor is there any public interest in publishing their names. Accordingly, this decision is published without reference to the daughter's name, age, primary school or any other potentially identifying characteristics. The appellant's wife will be referred to simply as "the wife". No discourtesy is intended to her by that reference and we acknowledge expressly that the emotional burden of proceedings such as this are often borne disproportionately by those who are not directly responsible for bringing them about.

THE APPELLANT'S CASE

[19] The Tribunal heard from the appellant, his wife, a psychologist, Amanda McFadden and from a member of the appellant's extended family in New Zealand, Tomasi Iopu. Letters in support of the appeal were received from his uncle, Mamasi O'Brien, and from the principal of the primary school the daughter attends, "AA". Their evidence is summarised below.

The Appellant

[20] The appellant is a married man in his early 30s. He was born in Tuvalu and is a citizen of that country. While his parents are now deceased, three of his four siblings remain there. His oldest brother works for the government in Tuvalu. He is married and has a large family. Another brother is divorced and has a child who is living with his former wife. He has a small printing business that enables him to support himself. A third brother is single and relies upon remittances the appellant sends from New Zealand. That brother looked after his parents after leaving school and has never been in formal employment. The appellant also has a sister who has lived away from Tuvalu since the late 1990s. She is currently living in Australia with her husband (a Samoan citizen) and their two children.

[21] The appellant came to New Zealand in 2000 to study, under a scholarship from the government of Tuvalu. He did not complete all of the units required for him to be awarded a Diploma in Civil Engineering. Having tried, unsuccessfully, to negotiate an extension of his scholarship, he moved to Auckland, to live with his father's brother, Mamani. He obtained employment as a welder and from that time has seldom been out of work.

[22] The appellant met his wife in 2005. They married the following year and have a daughter who is now at primary school. While the appellant and his wife have always loved each other, the early years of their marriage were blighted by their respective anger management difficulties and by psychological abuse. The appellant became the primary caregiver of the daughter when she was approximately one year old, in order to allow the wife to return to work. He developed a particularly close relationship with his daughter as a result.

[23] Toward the end of 2008, the appellant and his wife agreed that he should complete his engineering qualification. Her parents agreed to allow the family to live with them so that they could afford to take on a student loan. The appellant enrolled as a student at Unitech Institute of Technology during the first semester of 2009.

[24] The appellant's educational aspirations came to an abrupt end when, in April 2009, he committed the offence that led to the death of Jasmatbhai Patel. The incident occurred one morning, as the appellant was driving to Unitech. He took exception to Mr Patel's driving. Both drivers pulled to the side of the road, where the appellant pulled Mr Patel from his van. He manhandled Mr Patel and pushed him, causing him to fall backwards. Mr Patel hit his head on the kerb and lost consciousness. He was admitted to the intensive care unit at Auckland Hospital but died the following day as a result of the injuries he sustained in the fall.

[25] The appellant was charged with manslaughter. On 29 September 2009 he entered a plea of guilty. He was convicted and sentenced to a term of three years' imprisonment.

[26] For reasons beyond the appellant's control, he served his entire sentence. The New Zealand Parole Board had expressed the view that he should undertake the Medium Intensity Rehabilitation Programme (MIRP) before release. As a result of errors made within the Department of Corrections, the appellant did not secure a place on that course until near the end of his sentence.

[27] The appellant completed the MIRP in December 2011 and was released from prison in April 2012, following a further hearing before the New Zealand Parole Board in February 2012. The direction of the Parole Board was that he be released on standard and special conditions to last for six months after his release. In general terms, he was required to attend a family meeting at a time and place to be determined by his probation officer, to participate in and adhere to the rules of a departmental MIRP maintenance group as directed, to undertake the Living Without Violence Programme or the Pacific Island Safety and Prevention Project to the satisfaction of the probation officer and programme provider, to reside at an address approved by the probation officer, to undertake counselling for parenting skills as directed, to undertake relationship counselling as directed by the probation officer and not to have contact or otherwise associate with the family of the deceased without the prior written consent of the probation officer. For the first six months after his release he was required to live at the home of his wife's parents as a condition of his parole.

[28] There is no suggestion that the appellant failed to comply with any of the conditions imposed upon him.

[29] The appellant quickly found work and then undertook a course in Computer Aided Design (CAD) in 2013. He then took up a new position, using that qualification. While this new position initially attracted a lower salary, he believed that it provided him with a better long-term career pathway.

[30] The appellant realised that he needed to change the moment that he became responsible for ending Mr Patel's life. He has undertaken a number of courses that have helped him to understand what he can and cannot control. He has learnt how to assess the appropriate and proportionate response to any given situation, rather than just acting spontaneously, out of emotion.

[31] In the past the appellant's relationship with his wife had been loving, but volatile. It was marked by loud and prolonged arguments. It was common for some of the appellant's extended family to visit his home. They would drink excessively and outstay their welcome, which became a significant source of friction. The appellant now has better insight into this. The needs of the appellant's wife and daughter are now at the forefront of his focus and he has distanced himself from the people concerned.

[32] The wife has also participated in a number of courses and these interventions have helped them to make significant changes to the way they relate

to each other. They now make the effort to talk about and agree upon matters in advance rather than allowing issues to fester.

[33] Since his release from prison the appellant has revelled in his return to family life. He is responsible for the day-to-day care of his daughter. He spends time supervising her homework and is closely involved with her school. He has also become more involved with his extended family in constructive ways. He was appointed financial secretary of an incorporated society formed by the family to assist family members dealing with the costs of bereavement in New Zealand.

[34] The appellant wishes to remain in New Zealand with his wife and daughter. He has spent virtually his entire adult life in New Zealand and feels he has nothing to return to in Tuvalu, particularly now that his parents have died. He would have secure but rudimentary accommodation in his family home but believes that the local community would be aware of his conviction and that it would present a barrier to him obtaining employment, which is scarce in Tuvalu in any event.

[35] If the appellant were to be deported, he does not believe his wife and daughter would (or should) accompany him. They are New Zealand citizens and their lives are firmly rooted here. He took them to Tuvalu to see family in 2007, when the daughter was very young. The trip was difficult for the wife and the daughter, who quickly developed skin conditions. He does not believe they would cope in the physical environment and does not want his daughter to be deprived of the greater opportunities available to her in New Zealand.

The Wife

[36] The wife is a New Zealand citizen and has lived here all of her life. Her parents live in Auckland, and her five siblings live in and around Auckland. While she is of part-Tuvaluan ethnicity, she does not speak the Tuvaluan language. She has known the appellant since 2005. She acknowledges that they married young and, for many years, were naïve in the way that they dealt with each other. This often came to the fore when the appellant's extended family repeatedly turned up at their home. They would drink and eat and generally outstay their welcome, which she found intrusive. She was frustrated by the appellant's lack of response when she tried to discuss this, and it became a constant source of aggravation.

[37] The wife acknowledges that she contributed to the verbal and psychological abuse within the family home in the past, and that she also struck out physically. She believed that this was, in part, a by-product of her own upbringing which,

while loving and supportive, featured strong maternal figures with a propensity for physical and verbal abuse. She believes that her upbringing also gave rise to difficulties with trust. She would provoke the appellant unfairly, accusing him of things without basis. This was a destructive element in the relationship.

[38] The wife noticed a substantial change in the appellant almost from the time that he was arrested and imprisoned. He accepted responsibility for his actions and for causing the death of Mr Patel. She has always admired his work ethic and she found that, from the time that she first visited him in prison, he expressed a desire to resume his responsibilities within the family and to relieve her of the pressure that she was under as a single parent caring for their child.

[39] The wife has undertaken personal and relationship counselling. These courses have given her significant insight into her relationships with her parents, her husband and her daughter. The counselling has enabled her and the appellant to communicate constructively and to discuss matters, rather than making unilateral decisions as they did in the past. If they have an intractable problem now, they can take it to Mamani, a member of the appellant's family for whom they both have respect. He listens to and supports both of them.

[40] The wife admitted that her work performance suffered because of the stress imposed upon her and her family as a result of her husband's offending, the subsequent separation resulting from his imprisonment and the ongoing possibility that he might be deported. She had to leave one position and her performance and confidence deteriorated.

[41] The wife's parents provided invaluable support while the appellant was in prison. They accommodated the family during his parole period and they have since provided a rental property for the family to occupy. However, she found living under her parents' roof to be stressful. She was relieved to move to her own home and she and her husband rely less upon her parents now.

[42] From the time the wife left school, she has worked in a number of roles with varying levels of responsibility. Her career has always been important to her and she found the transition to parenthood difficult. Shortly after the birth of their child she and the appellant agreed that he would take a break from work to allow her to resume her career. As the primary caregiver, the appellant bonded closely with the daughter during the first year of her life. That bond has remained strong and the wife stated that the daughter found it very difficult to be separated from him when he was arrested. She could not understand why her father suddenly

stopped coming home. Because she was so young at the time, the daughter was not told why her father had been imprisoned. She looked forward to her weekly visits to see the appellant in prison, and the wife was assiduous in maintaining those weekly visits.

[43] The appellant's return to the household after his release from prison relieved the wife of a considerable load of stress. His contribution to the household income was important and his positive attitude and work ethic has surprised and inspired the wife. He immediately resumed his significant role in his daughter's life and took over much of the responsibility for her care. While the wife tends to be responsible for getting her daughter ready for the day and for cooking the evening meal, the appellant looks after the daughter's personal needs. He spends time with her after school and provides her with structure that she responds to well, although she has difficulty sleeping and displays anxiety over her father's possible departure from her life again.

[44] If the appellant is deported to Tuvalu the wife and daughter would not accompany him. The wife loves her husband and is proud of the way in which they have coped with adversity to date, but she does not believe that she could cope with living in Tuvalu. She was unable to cope with the heat and the physical environment when she visited in 2007. She does not speak the language, she would be unlikely to find work there and she would be deprived of the support of her family and friends. Nor does she believe it would be fair upon her daughter, who would receive an inferior level of education to that available in New Zealand, and the daughter would be deprived of the company of her friends and the support of her extended family in New Zealand.

Evidence of Tomasi Iopu

[45] Mr Iopu is a distant paternal relative of the appellant. He too is a citizen of Tuvalu, and has been a New Zealand resident since 1995. He has become more involved with the appellant since his release from prison in 2012. Mr Iopu made various observations about the cultural difficulties some Tuvaluan males have when coming to New Zealand.

The Appellant's Uncle, Mamani O'Brien

[46] Mr Mamani O'Brien did not appear in person, but provided a letter dated 16 March 2014. He is a citizen of Tuvalu who has been working and living in New Zealand since 1997. He has been a permanent resident of New Zealand

since 2005. His letter provided information consistent with the appellant's biographical evidence.

Principal of the Daughter's Primary School, AA

[47] AA is the principal of the primary school the daughter attends. She provided a letter dated 12 March 2014 in support of the appellant's appeal. While she was willing to attend the hearing in person, neither the Tribunal nor counsel for the respondent wished to question her, given that her evidence was detailed and no issue as to her credibility arose. Accordingly, her attendance was excused.

[48] AA referred to the "significant progress and achievement" that the daughter had demonstrated in her learning. She confirmed that the appellant has been "actively involved in his daughter's learning" and confirmed that the appellant contributes in a significant way to the broader school community. She describes him as a "kind, caring and involved parent". He is conscientious about attending parent-teacher meetings and helps with school functions, fundraising and supports cultural events.

Amanda McFadden, Psychologist

[49] Ms McFadden is a clinical psychologist with more than 13 years' post-graduate experience in private practice in New Zealand. She is a member of the New Zealand Psychological Society and the New Zealand College of Clinical Psychologists. She has worked in criminal, civil and family court settings and is experienced in immigration-related work.

[50] Ms McFadden provided a comprehensive psychological assessment report dated 4 June 2014, after meeting with a number of people, including the appellant, his wife, their daughter and AA. That assessment enabled her to build on the content of previous reports, dated 16 March 2011, and 17 June 2011 that she provided in connection with the appellant and his family for the purposes of the appellant's first deportation appeal in 2012. Her familiarity with the family over that period has enabled her to provide the Tribunal with a clear analysis of the progress made by the family since 2011, the nature of the various interventions undertaken by the respective family members, and the significance of those interventions.

[51] Ms McFadden's evidence is discussed in more detail in the analysis of the appellant's circumstances and in consideration of the public interest factors relevant to the risk of the appellant reoffending.

Documents and Submissions

[52] The Tribunal was provided with a copy of the file originally prepared for the Minister. A significant amount of other information has also been made available for the purposes of the appeal hearing.

[53] Prior to the appeal hearing, the Tribunal received a copy of Ms McFadden's psychological assessment report dated 4 June 2014 under cover of a letter from Mr Woods to the Tribunal dated 5 June 2014. Mr Woods provided submissions in connection with the preliminary application on 23 June 2014 and subsequently lodged amended opening submissions dated 4 July 2014. He forwarded a statement from Mamani O'Brien by email dated 7 July 2014.

[54] On the first day of the appeal hearing the Tribunal was provided with a copy of the affidavit sworn by the appellant on 20 March 2014; a copy of the affidavit of the wife, sworn on 20 March 2014; an affidavit sworn by Samuelu Laloniu, and a letter (dated 5 June 2013) on the letterhead of Dr Tony Lowe in connection with the appellant's general health. The Tribunal has also received copies of a brief of evidence signed by Tomasi Iopu on 10 July 2014 and a letter dated 12 March 2014 from AA.

[55] Counsel for the Minister lodged submissions in connection with the application for prohibition on publication dated 1 July 2014, and opening submissions dated 4 July 2014.

ASSESSMENT

[56] The Tribunal must first determine whether it would be unjust or unduly harsh to deport the appellant from New Zealand, having regard to the statutory factors set out in section 105(2) of the 1987 Act:

> "**105 Tribunal may quash deportation order**
>
> …
>
> (2) In deciding whether or not it would be unjust or unduly harsh to deport the appellant from New Zealand, the Tribunal shall have regard to the following matters:
>
> (a) the appellant's age:

(b) the length of the period during which the appellant has been in New Zealand lawfully:

(c) the appellant's personal and domestic circumstances:

(d) the appellant's work record:

(e) the nature of the offence or offences of which the appellant has been convicted and from which the liability for deportation arose:

(f) the nature of any other offences of which the appellant has been convicted:

(g) the interests of the appellant's family:

(h) such other matters as the Tribunal considers relevant."

[57] The starting point for the Tribunal's consideration is the offence that prompted the deportation order and the sentence imposed; *M v Minister of Immigration* (HC Wellington, AP84/99, 17 August 2000) per Goddard J at [9]. The Tribunal then conducts a balancing exercise that requires it to weigh the seriousness of the offending giving rise to the deportation order, and any other offending, with the compassionate factors favouring the appellant remaining in New Zealand. It must have particular regard to the matters set out in section 105(2) above: *M v Minister of Immigration (supra)* at [9]; *Phillpott v Chief Executive of the Department of Labour* (HC, Wellington CIV-2005-485-713, 21 October 2005) per Ronald Young J at [69]-[70].

Whether Unjust or Unduly Harsh to Deport

The appellant's age

[58] The appellant is now 34 years old.

The length of the period during which the appellant has been in New Zealand lawfully

[59] The appellant came to New Zealand in 2000. Having spent the first 19 years of his life in Tuvalu, he speaks the language and is familiar with Tuvaluan culture. He has returned once on vacation and would be able to reintegrate to the way of life there if necessary. However, he has now lived in New Zealand for 15 years. He was in New Zealand lawfully until 2004, when his most recent student permit expired. He was then in New Zealand unlawfully for a period of approximately three years. In 2007 he was granted a permit under section 35E of the Immigration Act 1987, and he has lived here lawfully since. His wife and child are New Zealand citizens and he is well-settled here.

[60] In summary, the appellant has lived lawfully in New Zealand for 12 of the 15 years he has been here.

The appellant's personal and domestic circumstances

[61] The appellant's parents are deceased. His brothers live in Tuvalu and, at the time of the appeal hearing, his sister lived in Australia with her family. If he were to return to Tuvalu, the appellant would be able to live in his family home.

[62] The appellant has been married to a New Zealand citizen since 2007 and they have a daughter who was born here. They have a strong marriage and he is dedicated to his family. If he remains in New Zealand, he will remain in the family home. He has been closely bonded to his daughter since her birth, having been the primary caregiver during her infancy and this close emotional bond endures. He is actively involved in her daily care and Ms McFadden described him as "passionate" about his daughter's education.

[63] The wife's family has provided ongoing support for the appellant and his family throughout their relationship and he has, in turn, demonstrated an ongoing commitment to both his broader family and his immediate family in New Zealand.

[64] If the appellant were to return to Tuvalu he would do so alone. His wife and daughter would not accompany him. They are New Zealand citizens and they would remain in New Zealand. They do not speak Tuvaluan and have not previously lived there. The wife would be unlikely to obtain employment there and would not have the support of her family there. The daughter would have to leave her school, where she is settled, and would have to leave her friends and her wider family. The educational choices available there would be considerably narrower than they are in New Zealand.

The appellant's work record

[65] The appellant has undertaken a range of different tasks and occupations during the 15 years since he arrived in New Zealand. He has obtained qualifications in welding, sign writing and CAD.

[66] The appellant has a strong work ethic and a desire to improve himself. At the time of his offending in 2009 he had left the workforce for a short period in order to complete an engineering qualification, with a view to securing a better future for his family. He displayed a similar level of forward-thinking after leaving

prison. Having obtained work as a sign writer, he took it upon himself to obtain a CAD qualification. He obtained work in that field, taking a drop in salary in the short-term with a view to having better employment prospects in the long-term.

[67] If the appellant were to return to Tuvalu, he possesses the qualities and work ethic that would ensure that he sought work. The difficulties of finding work in Tuvalu are, however, a different matter. It is unlikely that he would easily find paid employment. The Tribunal also accepts that the local population in Tuvalu would be aware of the fact of his offending and that this may have a negative impact upon his ability to find employment, at least in the short term.

The nature of the offence of which the appellant has been convicted and from which the liability for deportation arose

[68] The appellant's offending can only be characterised as serious. In terms of its consequences, it could not be more serious. Mr Patel lost his life and his family have had to deal with the grief of prematurely losing their father and grandfather.

[69] The appellant entered a guilty plea to the charge of manslaughter. He appeared before Justice Potter for sentence on 29 September 2009. Her Honour noted that the assault was "sustained" and that Mr Patel was an elderly man of slight build. She took into account the fact that the offence took place on a public street during peak morning traffic, potentially within view of primary school children. Conversely, she accepted that the appellant's offending was not premeditated. She also accepted that his remorse was both immediate and sincerely felt, and noted that he entered a guilty plea at an early stage.

[70] Taking a starting point of four-and-a-half years' imprisonment, and allowing a discount of one-third in respect of the mitigating factors, Justice Potter sentenced the appellant to three years' imprisonment.

The nature of any other offences of which the appellant has been convicted

[71] The appellant has convictions arising out of a domestic incident with a former partner in 2001, when he was intoxicated. For this, he was sentenced to 150 hours' community service. He also has convictions in respect of three driving offences over the period 2004-2005; for operating a vehicle carelessly, failing to stop at a red light and driving a vehicle dangerously.

The interests of the appellant's family

[72] The appellant's immediate family comprise himself, his wife and his daughter. They wish to remain together as a family. For the reasons already outlined, that can only occur if the appellant remains in New Zealand. If he were to be deported, his marriage would effectively be brought to an end and the family will be permanently divided. His wife and daughter are not currently in a position to afford to travel to Tuvalu and their ability to do so in the future would be diminished further by the loss of the appellant's income. The Tribunal accepts that any such visits would be few, with an appreciable number of years in between.

[73] While the appellant and his wife love each other deeply, their relationship had a troubled history. During the early years, the appellant's tendency to express his anger in unconstructive ways, and the wife's tendency to be verbally and physically provocative, created a volatile environment.

[74] However, from the time of his offending, the appellant has changed his outlook. He has sought and taken advantage of opportunities to change the way he acts and thinks. So has the wife. The counselling she has undergone has helped her to change the way she acts and reacts under stress. Both have developed insights into their relationship and have developed coping strategies that enable them to interact more constructively than in the past.

[75] Ms McFadden confirmed the substantial progress made by the appellant and the wife and the positive impact this has had on each other and on their daughter. The appellant has contributed to better communication and has accepted responsibility for his past actions and for his role in the household. He and the wife have a joint commitment to raising the daughter in a positive manner.

[76] Ms McFadden said that when she first met the wife in 2011, the wife was severely clinically depressed. By 2014 her level of anxiety had declined. The relationship therapy and personal counselling that she had undergone had been of significant benefit. She had begun to understand the impact upon her of the environment of domineering maternal figures and the propensity for physical and verbal abuse in which she had been brought up. Entrenched patterns of psychological abuse that the wife had experienced within her own family setting have now been interrupted and she has begun to understand how her lack of trust had exacerbated the difficulties she was having in her relationship with the appellant, and has developed strategies for countering this.

[77] The changes made by the appellant and the wife have had a significant beneficial impact on their relationship with each other and upon their relationship with their daughter. Ms McFadden does not believe that these changes are transitory. In her view, the appellant and his wife have committed themselves to improving their relationship on an ongoing basis and to providing a stable platform for their daughter.

[78] Ms McFadden stated that the wife's mental health has improved significantly. However, having been through a depressive episode in the past, the wife is at a heightened risk of relapse in the future. There are particular stressors that might exacerbate that risk, particularly if the appellant were to be deported.

[79] These risks go beyond the profound sadness the wife would experience over the loss of her husband. They extend to her parenting of the daughter. Ms McFadden stated that, while some women would have the confidence to parent on their own if in a similar situation, the wife doubts her ability in that respect. She believes (and the wife confirmed) that it is likely that the wife would return to her family home. While she loves her parents and is close to her family, they have different ideas as to how children should be raised and the wife finds her family home to be an inherently stressful environment. While counselling has helped the wife to understand and modify her reaction to various events, she had not yet done anything to confront the dynamics within her family. This would heighten her stress.

[80] Ms McFadden's observation, supported by the views of professionals at the daughter's school, is that the daughter tends to internalise her concerns. Her anxiety over her past separation from the appellant, and the spectre of further separation, has manifested itself in ongoing sleep difficulties.

[81] Ms McFadden stated that the daughter had a stable attachment to her father until he went to prison when she was of pre-school age. Had the separation been permanent at that stage, the daughter would have experienced difficulties as a result, but would probably have adapted and compensated to some extent for the absence of her father. Having endured that disruption, the appellant and the daughter have now re-established their close and constructive relationship. Ms McFadden believes that it would be particularly detrimental to the daughter's development if the relationship were to be interrupted again, at the age she is now. It would aggravate the negative impact brought upon her by the previous separation that had been caused by the appellant's imprisonment.

[82] The daughter is emotionally close to the appellant and Ms McFadden believes that his influence and contribution to the family dynamic is positive. When she assessed the family unit in 2011, Ms McFadden regarded the appellant's presence as a protective factor in the context of the type of emotional abuse to which the daughter might be exposed in the wife's parental home. Despite the progress made by the wife in respect of her relationships with the appellant and the daughter, this remains a matter of concern to Ms McFadden.

[83] Ms McFadden noted the ability of the daughter to comment on the likely impact of further separation on her mother. She stated that this was consistent with the wife's emotional vulnerability and gave rise to risk that the daughter "would internalise her mother's distress" and "be placed in a parentified role where she felt responsible for comforting and caring for her mother".

[84] In Ms McFadden's view, the appellant's return to the family has brought stability to the home environment that is lacking when he is not there. He provides not just a positive influence as a father, but his focus on routine provides a protective influence against some of the wife's particular difficulties as a mother.

[85] Deportation would bring about the loss for the daughter of a loving and direct relationship with her father. While the daughter could remain in contact with him by various means, Ms McFadden pointed out that there is a fundamental qualitative difference in contact through telecommunications and media on the one hand and direct personal contact on the other. The daughter would feel strongly the loss of her father's support and the loss of the security that he brings to her life.

[86] Ms McFadden stated that the existence of a safe and functional family unit is profoundly important in respect of the daughter's development. It provides a fundamental building block in the development of her self-esteem, her sense of herself, her ability to relate to others, and her ability to discriminate between good and bad relationships. While it is difficult to predict the downstream consequences for the daughter if the appellant were to be deported, Ms McFadden stated that they could lead to self-harm and self-abuse.

[87] Ms McFadden's evidence was that it is generally in the best interests of a child of the daughter's age to be raised by both parents, and that that general statement applies to this particular child. In that context, it is in the best interests of the daughter, given her age, to be brought up within her family, in the presence of both parents. She stated that the daughter "currently has access to an intact,

natural and functional family unit". She had not been able to say the same thing in 2011. Interrupting the stable family dynamic that now exists would, in Ms McFadden's view, have significant psychological, familial, social and financial impacts upon all of the members of the appellant's family, and in particular upon the daughter.

Other relevant matters

[88] No other relevant matters were raised.

Conclusion on Injustice or Undue Harshness

[89] The Tribunal is required to weigh the offending which led to the deportation order, together with any other offences, against humanitarian factors that favour the continued presence of the appellant in New Zealand.

[90] There is no doubt that the appellant's offending was serious. In terms of its impact, it could not have been more so. It led to the death of his victim. Counsel for the Minister suggests that his previous offending illustrates a pattern of violence; however, the Tribunal does not agree. Justice Potter did not regard the appellant's conviction for assault, when he was 19, as relevant when she sentenced the appellant in 2009, and nor is it relevant for the purposes of this appeal, particularly given the extensive interventions the appellant has undergone since then.

[91] Balanced against the tragic outcome in 2009 is the fact that the appellant is a husband and father who has lived in New Zealand for 15 years; virtually his entire adult life. If he were to return to Tuvalu he would do so alone. His wife and daughter would not accompany him for the reasons outlined. His marriage would come to an end, and the daughter would, for the second time in her short life, lose the stability and protective influence of her father, as well as the love that she receives from him as a primary emotional presence in her life.

[92] The ending of the relationship would not only lead to inevitable sadness for the appellant and for the wife, it would increase the risk to the wife of a relapse of her depressive episode. That would further exacerbate the risk of emotional harm to the daughter. The particular risk to the mental health of the wife and the potential harm that would be caused to the daughter, both in terms of her short term needs and her development as a person, mean that deporting the appellant would be more than just harsh; it would be unduly so.

[93] Weighing the seriousness of the appellant's offending and his previous offending, against the humanitarian circumstances, the Tribunal finds that it would be unjust or unduly harsh for the appellant to be deported.

[94] Having reached that conclusion, we must turn our mind to the second limb of the statutory test and determine whether we are satisfied that it would not be contrary to the public interest to allow the appellant to remain in New Zealand.

Public Interest

[95] Various aspects of the public interest are relevant to this appeal. These include the need to protect the public from the consequences of future offending by the appellant and the public interest in maintaining the unity of families, which contribute to the well-being and stability of the community at large, as well as the public interest in ensuring that the best interests of the daughter are taken into account. In the context of this appeal, the ends sought by deportation also touch upon the maintenance of the integrity of the immigration system in the sense of ensuring that residence is granted to those deserving of it. We deal with each of these elements before considering the overall question of the public interest as a whole.

The risk of re-offending

[96] With respect to the appellant re-offending in a similar manner to that which gave rise to his liability for deportation, the Tribunal is satisfied that the risk is low. We rely in that respect upon the evidence of Ms McFadden. She has had the benefit of having monitored his progress over a long period. In her original reports in 2011 she was able to draw upon the July 2010 assessment of Frank Bauer (also a psychologist) and upon her own observations to that point.

[97] In her most recent report, prepared in June 2014, Ms McFadden considered afresh all aspects of the appellant's profile and made particular reference to the various risk factors identified in respect of the appellant in the past. She took into account the specific treatment and rehabilitation measures the appellant has undergone since her review in 2011, and also took into account the therapeutic measures undertaken by the appellant's wife, targeting relationship and interpersonal issues.

[98] In her most recent report, prepared in June 2014, Ms McFadden that the appellant impressed as "an articulate, motivated and open man". She stated that

"it was evident that he had benefitted from the wide range of interventions within prison and the community aimed at decreasing his risk of reoffending, improving his interpersonal skills and improving his ability to cope with stress and anger".

[99] Ms McFadden discerned evidence of "a deepened understanding" of the factors that had led to the appellant's offending. She stated that he continued to express remorse, sympathy for his victim and the family, and that "there was no evidence of him minimising or externalising his offending behaviour". She referred to "multiple examples" of him engaging in strategies on a day-to-day basis that are intended to manage his mood and relationships and to reduce the risk of him reacting on impulse out of anger.

[100] In Ms McFadden's assessment, the appellant's progress indicates that the improvements he has made are not transitory but are indicative of a fundamental shift in the areas of his life that made him susceptible to offending. Her conclusion, after careful analysis, is that he currently presents a low risk:

> "In summary, all formal risk measures (past and present) reported on within this assessment identify the risk of violent offending to be low. Factors, which have previously increased Mr O'Brien's risk of re-offending have been addressed by way of his completion of the MIRP programme, his completion of additional community-based violence prevention programmes, the couple's attendance of relationship counselling, as well as [the wife's] independent attendance of psychotherapy, the couple's emancipation from dependence on maternal family supports, Mr O'Brien's successful reintegration into the community including full-time employment and the absence of any risky or harmful behaviours over a nine year period."

[101] This summation preceded her expression of the view that the appellant currently presents a low risk of engaging in further violent behaviour. She believes that:

> "The absence of a well-defined history of serious violence, Mr O'Brien's behaviour within the prison setting, his responsiveness to therapies and his behaviour post-release provide further support to this analysis and illustrates his ability to maintain a pro-social lifestyle in the future."

[102] The Tribunal accepts and adopts her conclusion.

Family unity and the best interests of the child

[103] In the present circumstances the best interests of the child are to be considered in the context of family unity in general. As Hansen J held, in *Garate v Minister of Immigration* (HC Auckland, CIV-2004-485-102, 30 November 2004), at [41] (discussing section 63B of the 1987 Act), it is:

> "... in the public interest that a family with established roots in this country should be permitted to stay, and to stay together, and that international conventions directed to those ends are respected."

[104] Accordingly, there is public interest in family unity generally and also in New Zealand's adherence to such obligations under international law. The Tribunal must therefore have regard to relevant human rights instruments to which New Zealand is a state party.

[105] In the present context, regard must be had to Article 23(1) of the 1966 *International Covenant on Civil and Political Rights* (ICCPR), which provides for the entitlement of the family to protection as the fundamental group unit of society.

[106] The Tribunal must also have regard to Article 17 of the ICCPR, which provides that no one shall be subjected to "arbitrary or unlawful" interference with family unity. This means that even lawful interference should be "reasonable in the circumstances"; see United Nations Human Rights Committee *General Comment No 16*: *Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (8 April 1988).

[107] In order to be "reasonable in the circumstances", any interference "must be proportionate to the end sought and be necessary in the circumstances of any given case"; see *Toonen v Australia* (Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1994), at [8.3].

[108] In *Madafferi v Australia* (Communication No 1011/2001, UN Doc CCPR/C/81/D/1011/2001, 26 August 2004), the Human Rights Committee stated, at [9.8], that whether interference with family unity that arises from deportation is objectively justified must be considered:

> "... on the one hand, in light of the significance of the state party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal."

[109] With respect to the appellant's daughter, the Tribunal must have regard to Article 3(1) of the 1989 *Convention on the Rights of the Child*, which states that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[110] The New Zealand courts have considered Article 3(1) on a number of occasions. They have endorsed the approach taken in *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA), in which it was held that the best

interests of the child are a primary, but not the paramount, consideration. See also, in that regard, *Ye v Minister of Immigration* [2009] NZSC 76.

[111] Ms McFadden was clear in her view that it is in the best interests of the daughter to be raised in her family by both of her parents. She outlined the potential consequences for the child's short-term well-being and long-term development if her father, the appellant, were to be deported. She also outlined the potential impact that separation would have upon the mental health of the wife. While the first panel of the Tribunal had cause to doubt the long-term viability of the appellant's marriage, the evidence before the present panel was of a husband and wife who had taken great pains to improve their relationship with each other, both for their own sake and for the sake of their daughter. The concern expressed by the previous panel of the Tribunal has not been borne out.

[112] We find that separation would bring to an end a strong, stable and dedicated relationship. There is strong public interest in not separating from his family a father who is closely bonded to his daughter and there is strong public interest in the maintenance of a strong and stable relationship such as that between the appellant and the wife. The public interest is augmented further in light of the particular characteristics of the appellant's relationship with his family members. In that regard we refer specifically to the stability he brings to the family home, the protective aspect he provides to his daughter and to the beneficial impact his presence has on the mental health of his wife.

[113] Taking into consideration the state's reasons for seeking to deport the appellant, we note the finding, above, that he presents a low risk of re-offending. We do not overlook the fact that there is public interest in the denunciation and deterrence of serious crime, and in the maintenance of the integrity of the immigration system as a whole. However we do not regard either aspect of the public interest, whether individually or taken as a whole, to be so great as to outweigh the degree of hardship that the members of this family would experience were the appellant now to be deported.

[114] We therefore find that to deport the appellant would be disproportionate to the public interest in general. It would not be reasonable in the circumstances, in the sense referred to above, and it would therefore be arbitrary for the purposes of Article 17 of the ICCPR.

Integrity of the immigration system

[115] It is, of course, inherent in deportation proceedings involving serious criminal offending by a person whose right to reside here derives from a permit to do so, that the harm caused to the New Zealand community by the offending threatens, and can undermine, the integrity of the immigration processes by which the permit was granted.

[116] There is, accordingly, public interest in the deportation of persons who offend in a serious way, in order to protect and maintain the integrity of the immigration system.

[117] Having said that, every case must be considered on its own merits. In the circumstances of this appeal, we find that the need to maintain the integrity of the immigration system is of modest weight only, given the length of time that has passed without further offending, the clear rehabilitation of the appellant and the sincerity of his remorse and regret for a momentary lapse, the consequences of which went far beyond what he had intended.

Conclusion on Public Interest

[118] Weighing the adverse public interest considerations (a low risk only of re-offending in a like manner and a modest need only to protect the integrity of the immigration system) against the positive public interest considerations (the desirability of maintaining a strong, functioning family unit and, in particular, ensuring that the best interests of a New Zealand-citizen child are met), the Tribunal is satisfied that it would not be contrary to the public interest for the appellant to remain in New Zealand.

ORDER

[119] The Tribunal finds:

(a) it would be unjust or unduly harsh for the appellant to be deported;

(b) it is satisfied that it would not be contrary to the public interest for the appellant to remain in New Zealand.

[120] Pursuant to section 105(1) of the 1987 Act, the Tribunal quashes the deportation order against the appellant. The appeal is allowed.

"A N Molloy"
A N Molloy
Chair

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A N Molloy
Chair