

AT AUCKLAND

Appellant: **SCHUTTE, Susanna**

Before: Judge P Spiller

Representative for the Appellant: S Ng

Date of Decision: 13 July 2016

DEPORTATION (NON-RESIDENT) DECISION

[1] This is a humanitarian appeal by the appellant, a 79-year-old citizen of South Africa, against her liability for deportation which arose when she became unlawfully in New Zealand.

THE ISSUE

[2] The primary issues on appeal are whether the appellant's age and dependence on family in New Zealand, and the absence of support systems for her in South Africa, give rise to exceptional humanitarian circumstances that would make it unjust or unduly harsh for her to be deported from New Zealand; and whether, in view of her health condition, it would not be contrary to the public interest to allow her to remain in New Zealand.

[3] The Tribunal allows the appeal for the reasons that follow, and orders the grant of a resident visa.

BACKGROUND

[4] The appellant was born in South Africa in 1936. She married and had three sons, born in 1959, 1962 and 1965. She worked as a secretary until 1995. Her husband died in 1998.

[5] In June 2007, the appellant's eldest son and his two children came to New Zealand, and he held a work visa. He and his family were granted residence status in October 2007, and became New Zealand citizens in February 2013. He lives with his wife in New Zealand, and his two daughters are married to New Zealanders.

[6] In August 2009, the appellant's second-eldest son and his family came to New Zealand, and he held a work visa. He and his family were granted residence status in May 2010 and permanent residence status in October 2013. He lives in New Zealand with his wife and two children, the older of whom is married.

[7] In recent years, the appellant lived in South Africa with her youngest son and his two children. In April 2015, she lodged an Expression of Interest under the Family (Parent) category with Immigration New Zealand, and in November 2015 she was invited to apply.

[8] In November 2015, the appellant arrived in New Zealand with her youngest son's wife, with the intention of visiting her family here for a short period. The appellant held a visitor visa, and this was valid to February 2016. She stayed with her second-eldest son and his family.

[9] While the appellant was in New Zealand, her youngest son and his wife decided to move to New Zealand, in view of a security incident in South Africa which affected them. As a consequence, in January 2016, the appellant applied for a further visitor visa. She was granted an interim visa.

[10] In February 2016, the appellant's youngest son and his family came to New Zealand, and he and his wife held work visas. He was granted residence status in May 2016, and is now settled with his wife and two sons in New Zealand.

[11] On 21 February 2016, a respiratory physician who examined the appellant (in relation to her visitor visa application) reported that she had been diagnosed with likely cancer in her left lung and required further investigations and then treatment for this. In light of this report, on 29 March 2016, Immigration New Zealand's medical assessor reported that she was not of an acceptable standard

of health, and that she was likely to impose significant health costs or demands on New Zealand's health services during the period of her intended stay in New Zealand.

[12] On 6 May 2016, Immigration New Zealand declined the appellant's application. This was because it was not satisfied that she had an acceptable standard of health.

[13] The appellant became unlawfully in New Zealand on 7 May 2016.

[14] The appellant's two sisters live in South Africa but she has had no recent contact with them.

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 the appeal form and submissions lodged with the Tribunal on 16 June 2016, and subsequent submissions lodged on 29 and 30 June 2016. The case can be summarised as follows:

- (a) The appellant is elderly and has overwhelming dependence on her sons and their family in New Zealand, who support her financially with accommodation and daily living costs. She is close to her children and grandchildren.
- (b) The appellant has no children living in South Africa, and her only two relatives there are her sisters with whom she has no contact. Her only financial support in South Africa is a pension equivalent to about \$200 per month. She fears going back to South Africa to live on her own.
- (c) The appellant is currently active and healthy according to her estimation. She is financially supported by her family here and this is expected to continue.

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

- (a) A statement (28 June 2016) by the appellant stating that she is an elderly woman whose entire family is permanently in New Zealand. The first time that she was aware that she had a "mass in her chest" was when she had the recent medical examination, in South Africa. Her six-monthly health check-ups had not revealed this issue. She is fit and walks to the library regularly and her health is as it has been for the past 10 years. Her age and her gender make her a direct target for the violence in South Africa. She is wholly dependent on the support of her family for her support, transport and safety. Her sons have always contributed to her day-to-day existence. She has nowhere to go to in South Africa.
- (b) A medical report (21 February 2016) by a respiratory physician in New Zealand, who examined the appellant. The physician reported as follows:
 - (i) the appellant looks well and she is of slim build;

- (ii) there is no clubbing (a disease of the heart and lungs) or lymphadenopathy (a disease affecting the lymph nodes);
 - (iii) breath sounds are unremarkable, with normal intensity equal bilaterally and no wheezes, crackles or localising signs;
 - (iv) heart sounds are dual with a mild systolic murmur suggestive of mitral incompetence;
 - (v) there are two possible primary cancers (left upper lung lobe and left breast) and significant emphysema, and so there are important concerns about the potential costs to New Zealand; and
 - (vi) at this time “malignancy has not been confirmed as the necessary investigations have not been performed” (physician’s emphasis); ideally she would undergo a bronchoscopy, PET CT scan, mammography and biopsy of the left breast lump.
- (c) A medical report (25 February 2016) by a cardiologist who examined the appellant. The cardiologist reported that she has low probability of requiring surgery over the next five years. She does not require any further cardiac investigations at the moment. She should undergo a further echocardiogram two years from now.
- (d) A statement by the appellant’s eldest son (undated) stating that his mother has no family or friends remaining in South Africa that can assist her with daily living. She remains physically active and presently lives with her family in a safe environment.
- (e) A statement (31 May 2106) by the appellant’s eldest son’s wife stating that the appellant has no family members left in South Africa that have the capacity or inclination to support her in her last phase of life. Whilst she is active and engaged, she will not be able to withstand the inhospitable place that South Africa has become. If she has to go back, she has literally nowhere beyond the airport to return to.
- (f) A statement by the appellant’s second-eldest son (undated) outlining conditions in South Africa and his reasons for settling in New

Zealand. His mother's recently diagnosed spot on the lung was unknown to anyone before this was noticed in a medical examination in New Zealand. She had had regular full physical examinations by South African doctors, and she was never in any discomfort or pain, or immobilised in any manner. The son notes that she is the last member of their immediate family to come to New Zealand, and the family hope that she will be granted the opportunity of finding peace and tranquillity.

- (g) The appellant's chronology and history (undated and unsigned). This noted that the appellant's youngest son and his wife decided to come to New Zealand in late 2015 after he and his sons averted the latest in a series of attacks on them in South Africa. This prompted the appellant to apply to stay in New Zealand as she would have no-one in South Africa to look after her. The appellant is a fit, healthy and active person, who walks to town a few times a week unaided.
- (h) Letters in support from the appellant's grandchildren and friends, describing her settlement in New Zealand, where she leads an active life walking, reading, cooking and gardening. She now has great-grandchildren in New Zealand. Her family and friends fear for her future if she has to return to South Africa.
- (i) Copies of the passport and birth certificate of the appellant, the birth certificates and passports of her sons, her husband's death certificate, and her South African police clearance certificate; documents showing the settlement of her family in New Zealand; and correspondence with Immigration New Zealand.

[20] The appellant requested that the Tribunal consider an oral hearing, but no reasons were provided in support of this. In terms of section 233(2) of the Act, the Tribunal may, in its absolute discretion, provide an oral hearing in an appeal against liability for deportation of a person without residence status in New Zealand. In view of the considerable evidence provided by the appellant in support of her appeal, and the absence of reasons given in support of a request for an oral hearing, the appellant's request is declined.

ASSESSMENT

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

Whether there are Exceptional Circumstances of a Humanitarian Nature

[22] The appellant, a 79-year-old widow from South Africa, came to New Zealand eight months ago to visit her family in New Zealand and was granted a visitor visa. Six months ago she applied for a further visitor visa. Two months ago, Immigration New Zealand declined her application, because she was found by its medical assessor not to be of an acceptable standard of health. The appellant has appealed to the Tribunal on the basis of her age, her dependence on family in New Zealand, and because she will have no support systems in South Africa if required to return there.

[23] The Tribunal acknowledges that the appellant is of advanced years, and she is dependent on her family in New Zealand. All three of the appellant's children and their families are now settled in New Zealand: her eldest son and his family are New Zealand citizens, her second-eldest son and his family are permanent residents, and her youngest son and his family have residence status. The appellant lives with the second-eldest son and his family, and is almost entirely dependent financially on her three sons in New Zealand. She now has no support system in South Africa. The home that she had there with her youngest son and his family has ceased to exist. Her only close relatives in South Africa are two elderly sisters with whom she has no contact.

[24] The appellant is presently enjoying good health and an active lifestyle. However, she has been diagnosed with possible cancers in her left lung and left breast, and further medical tests and monitoring are required. The possible fragility of her medical condition increases her sense of dependence on her only sources of support, all of whom are now in New Zealand.

[25] The Tribunal must consider whether the appellant has exceptional circumstances of a humanitarian nature. The appellant's age and possible health problems, her dependence on her family in New Zealand, and the absence of a home in South Africa and family there to take care of her day-to-day needs, are exceptional circumstances of a humanitarian nature.

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

[26] According to the Supreme Court in *Guo v Minister of Immigration* [2015] NZSC 132 at [9], this assessment is to be made “in light of the reasons why the appellant is liable for deportation and involves a balancing of those considerations against the consequences for the appellant of deportation”.

[27] The Tribunal notes the reason why Immigration New Zealand declined the appellant’s application for a further visitor visa. This was because she was diagnosed with likely cancer in the left lung and required further investigations and then treatment for this. She was found not to be of an acceptable standard of health, and she was likely to impose significant health costs or demands on New Zealand’s health services during the period of her intended stay in New Zealand. This diagnosis was based upon an earlier medical examination which found that there were two possible primary cancers (left upper lung lobe and left breast) and significant emphysema, which raised important concerns about the potential costs to New Zealand’s public health system.

[28] However, the Tribunal notes that the earlier medical examination stressed that malignancy has not been confirmed, as the necessary investigations had not been performed. The examination also confirmed that in many respects the appellant was in good health. The appellant and her family report that she is presently leading a healthy and active lifestyle. The Tribunal also accepts the evidence of the appellant and her family that she came to New Zealand not knowing of the possible cancerous growth, as this had not been revealed in her regular examinations in South Africa. The Tribunal therefore accepts that the appellant did not consciously intend to subvert New Zealand’s immigration system.

[29] In relation to the consequences for the appellant of deportation, the Tribunal notes that, at the age of 79 years and with uncertainty about her future medical condition, she will be required to return to South Africa without a home, family, or support systems. All her close relatives, comprising her children, grandchildren and great-grandchildren, on whom she is emotionally and financially dependent, will be a considerable distance away in New Zealand. The Tribunal shares the concerns of the appellant and her family as to her vulnerability to harm and deprivation if she is required to return to South Africa alone. To require her to return to South Africa in these circumstances would be unjust or unduly harsh.

[30] On balance, the Tribunal finds that the appellant’s exceptional humanitarian circumstances would make it unjust or unduly harsh if she is deported from New

Zealand. She has shown a level of hardship beyond that which is acceptable in order to preserve the integrity of New Zealand's immigration system.

Public Interest

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

[32] The Tribunal acknowledges that medical diagnosis raises important concerns about the potential costs of the appellant to New Zealand's health system. The appellant has been diagnosed with two possible primary cancers (left upper lung lobe and left breast) and significant emphysema.

[33] However, medical diagnosis has not confirmed malignancy of her cancer condition, and the potential costs are uncertain. At present, the appellant leads a healthy existence and is not imposing costs on the health system, and she is supported financially and emotionally by her three sons and their families.

[34] There is no evidence to indicate that the appellant has issues relating to her character, and her South African and New Zealand police certificates are clear.

[35] The Tribunal finds that the appellant's potential burden on the New Zealand health system is outweighed by the humanitarian factors in this case, which include the age and vulnerability of the appellant, her strong nexus to New Zealand and the continuity of family relationships with her New Zealand children on whom she is dependent.

[36] The Tribunal therefore finds that it would not, in the particular circumstances of this case, be contrary to the public interest to allow the appellant to remain in New Zealand.

DETERMINATION

[37] The Tribunal has considered the circumstances of the appellant. It finds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for her 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 her to remain in New Zealand on a permanent basis.

[38] 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 to be granted a resident visa.

[39] The appeal is allowed on those terms.

"Judge P. Spiller"
Judge P Spiller
Chair

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Judge P Spiller
Chair