

AT AUCKLAND

Appellant: CAO, Khanh Thi Phuong

Before: V J Shaw (Member)

Counsel for the Appellant: R Sathiyathan

Date of Decision: 28 July 2016

DEPORTATION (NON-RESIDENT) DECISION

[1] This is a humanitarian appeal by the appellant, a 37-year-old citizen of Vietnam, against her liability for deportation that arose after she became unlawfully in New Zealand. The appeal includes the appellant's three children aged 17, 13 and 7 years.

THE ISSUE

[2] The appellant and her children came to New Zealand in September 2013 to join her husband who held a work visa. The appellant says her husband has abandoned the family and she has now formed a new relationship with a New Zealand resident.

[3] The primary issue on appeal is whether the partner's serious health issues and the best interests of the children in maintaining stability and their home and schooling cumulatively amount to exceptional humanitarian circumstances that would make it unjust and unduly harsh for the appellant and her children to be deported.

[4] For the reasons that follow, the Tribunal allows the appeal and directs that the appellant and her children be granted work and student visas.

BACKGROUND

[5] The appellant's parents and brother live in Vietnam.

[6] The appellant married her husband in Vietnam in 1998 and the couple's three children were born in Vietnam.

[7] The husband entered New Zealand in January 2013 and he held a one-year work visa under the Vietnamese Chef special work instructions. His work visa was renewed up until 6 December 2015.

[8] When the appellant and the three children joined her husband here in September 2013 they held concurrent work and student visas as the partner and dependent children of a worker.

[9] On 18 July 2014, Immigration New Zealand declined to grant the husband's application for a variation of his work conditions. He was instead granted a one-month visitor visa valid until 18 August 2014.

[10] On 12 November 2014, Immigration New Zealand declined the husband's application for a further work visa under the Essential Skills work category and he became unlawfully in New Zealand on 13 November 2014.

[11] On 3 December 2015, the appellant lodged an application for a work visa under the Partnership category supported by her new partner who is a New Zealand resident born in Vietnam. The appellant claimed that earlier in 2015 her husband had abandoned her and their children.

[12] On 3 February 2016, Immigration New Zealand wrote to the appellant noting that as her dependent children were also applying for temporary visas and as their father was not included in the same application, evidence was required that the appellant had the right to remove the children from Vietnam.

[13] The appellant's counsel responded stating that a family lawyer would need at least 20 working days to arrange a parenting order and an extension to March 2016 was therefore granted. However, in a letter dated 22 February 2016, the family lawyer advised that a parenting application would take "several months".

[14] On 4 March 2016, Immigration New Zealand declined the appellant's application as there was no evidence of the appellant's legal custody of the two children aged under 16 years. She and the children became unlawfully in New Zealand from 5 March 2016.

[15] Immigration New Zealand records show that the appellant's husband has not departed New Zealand and he remains here unlawfully.

STATUTORY GROUNDS

[16] 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.

[17] 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].

[18] 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

[19] The grounds of appeal as set out in counsel's submissions can be summarised as follows:

- (a) The appellant's relationship with her husband turned sour and early in 2015 he left the home and never returned. This abandonment caused the appellant to fall into a depression.

- (b) The appellant turned to her New Zealand-resident aunt for support. Through the aunt she was introduced to her current partner. They became friends and the appellant was able to confide in him. Eventually this turned into a solid friendship and their feelings for each other became romantic. They made a decision to move in together. They have formed a functioning family unit and the children have settled into a life with the appellant's new partner as a father figure.
- (c) Deportation of the appellant would place immense stress on the couple and their three children.
- (d) The appellant does not yet meet residence living together requirements so at this stage she cannot lodge a residence application from offshore. Nor is it viable for her partner to accompany her to Vietnam as he currently requires haemodialysis. Deportation would therefore lead to the separation of the appellant and her partner. The partner heavily relies on the appellant for support.
- (e) It is not in the best interests of the children to be deported as this would be detrimental to their education and development. They have been attending school in New Zealand and would have to return to a different school system and medium of instruction.
- (f) The appellant would face socio-economic hardship in Vietnam as she would be a single mother of three children. She would also face the shame of returning to Vietnam without her husband.

[20] The appeal was supported by the following information:

- (a) Statement (undated) from the appellant and her current partner who state that the appellant's aunt had known the partner's family for some years. The two families had meals together. Early in 2015 the appellant's husband left home and the appellant does not know the reason for this. She has tried to contact him on his mobile phone but he does not answer and up to the present he has not come to see her or the children. She and her partner got to know each other and became friends. The partner is ill and they shared their sadness together. After a few months they found they were compatible and

decided to live together. The partner's family fully supports the relationship. They rent a place together. The appellant works while the partner stays at home and looks after the children. Their lives together are happy and they expect their love to last forever.

- (b) Statement from the appellant (24 June 2016) explaining the circumstances of her husband's abandonment and the attempts made to locate him.
- (c) Residential tenancy agreement (29 June 2015) in the name of the appellant and her partner.
- (d) Power accounts, vehicle registration and warrant of fitness checklist, joint bank account details, telephone account and other correspondence addressed to either the appellant or her partner to corroborate that they are living together at the same Auckland address.
- (e) Letter (10 November 2015) from a friend who states that she has known the appellant for two years and is currently her flatmate. She confirms the appellant and her partner are a happy couple.
- (f) Letter (28 October 2015) from the partner's aunt who confirms that the appellant and her partner live together at the same address and that the appellant works and her partner looks after the children. They are a happy family.
- (g) Letter (30 October 2015) from the partner's mother. Her son has kidney problems and she is very happy that he has been able to find a good wife who is very kind and looks after him very well.
- (h) Letter (undated) from a friend who also confirms the genuineness of the appellant's relationship.
- (i) Medical information about the appellant's partner. He is currently on renal dialysis and is being prepared for renal transplantation. He is also a carrier of hepatitis B and receiving treatment for presumed tuberculosis.

- (j) Confirmation (20 May 2016) from the principal of the primary school attended by the appellant's youngest child confirming that she is enrolled with the approval of the Ministry of Education.
- (k) Letter (18 May 2016) from the Family Court to the appellant advising that a case management review in respect of her application has been scheduled for 22 August 2016 explaining the procedure in respect of the application.
- (l) Letter (27 June 2016) from the family lawyer acting for the appellant, outlining the steps taken to date to progress the appellant's application to the Family Court for a parenting order and explaining the delays involved in having to obtain an order for substituted service because the whereabouts of the children's father is not known.
- (m) Photographs of the appellant with her partner and children.

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 temporary visa applications.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[22] The appellant and her three children came to this country in September 2013 to join the appellant's husband and father of the three children. In January 2015, the appellant says her husband abandoned the family and there has been no contact with him since. She has now formed a new relationship with a New Zealand resident and requests that she and the children are able to remain with him in New Zealand. Her partner's poor health does not allow him to accompany her and the children to Vietnam and it is in the best interests of the three children that they remain here in the care of both the appellant and her partner and continue at their current schools.

Appellant's new relationship

[23] The appellant's new relationship followed her husband's abandonment of his family in January 2015. The appellant has provided the Tribunal with an account of the circumstances. She says that after coming to New Zealand she and the children lived with her husband in a house in Papatoetoe. The only other person she knew in New Zealand was her aunt. Towards the end of 2014 their relationship was very unhappy. However, she tried to make peace with him for the sake of their children. In January 2015 there were bitter arguments and he walked out of the home not to be seen again.

[24] After waiting several days in the expectation that her husband was still angry with her, she tried to contact him on his phone but got no answer. Worried, she contacted his work colleagues, but was told he had not come to work. Her aunt also contacted her husband's workplace but received the same response. His boss assured her aunt he would inform her if the husband re-appeared. The appellant continued to wait thinking that he would surely come back to the children. She did not think to inform the police as she did not want to make him angrier or get him involved with the police. He had not told her that his work visa had earlier been declined.

[25] The appellant says that she had formerly relied on her husband totally so that, during the months following the abandonment, she lost her "spirit to live". She met her new partner as his family were good friends of her aunt and regularly invited her aunt and the appellant and her children to eat with them. Her partner was depressed with his health issues and the two found comfort in sharing their burdens.

[26] The appellant's partner, a Vietnamese national, is aged 35 years and he has been a New Zealand resident since 1994.

[27] In assessing the appellant's application for a work visa sponsored by her new partner, Immigration New Zealand was satisfied as to the genuine and stable nature of the relationship.

[28] The evidence provided to the Tribunal in the form of a tenancy agreement, utility and other accounts, joint bank statements, various correspondence from the children's school, health and government bodies, photographs and statements from people who know the couple also satisfies the Tribunal that the appellant and her partner are living together in a genuine and stable relationship.

Partner's poor health

[29] The appellant's partner has serious health issues. He has end-stage renal failure and is dependent on life-sustaining dialysis. According to his general practitioner he is also a carrier of hepatitis B and has been receiving treatment for presumed tuberculosis. He is currently being "worked up" for renal transplantation.

[30] In these circumstances the partner cannot be expected to leave New Zealand, even for a limited period. Therefore, if the appellant and her children are deported, they will be separated from the partner.

[31] The partner will also lose the support of the appellant at a critical time when he is hoping to be able to soon undergo a kidney transplant.

Best interests of the children

[32] The appellant's three children are aged 17, 13 and 7 years. Their best interests are a primary consideration for the Tribunal (Article 3(1) *Convention on the Rights of the Child*).

[33] The children have been living in New Zealand for almost three years and are now settled at their current schools. They have not been away from Vietnam for so long that they are not still familiar with living and attending school there and could therefore re-adapt to continuing their education in Vietnam.

[34] However, the children have already suffered a major shock in their father's recent abandonment of the family. It seems that they have accepted, and formed a bond with, their mother's new partner and over the last year a new family unit has been formed. If the children have to now return to Vietnam with their mother they will once again experience major disruption and instability in their lives. The older son is in his senior school year so he will be particularly affected.

[35] It would be possible for the appellant to lodge another application for a partnership-based work visa from Vietnam. There could though, be significant delay before any such application is determined, in particular, because the appellant will need to obtain a legal custody order in her favour unless her husband's whereabouts are established and he provides consent to the children returning to New Zealand.

[36] The appellant and her partner are hoping to make New Zealand their home. It is in the children's best interests that they have a stable home life with minimal disruption to their education. It is therefore in their best interests that they remain in their present family unit and at their current schools, at least until it is determined whether they can remain here permanently.

Conclusion on exceptional humanitarian circumstances

[37] The Tribunal finds that the appellant's partner's serious health issues which make it impossible for him to leave New Zealand, his need for the appellant's support and the best interests of the three children, cumulatively amount to exceptional humanitarian circumstances.

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

[38] The appellant and her children became unlawfully in New Zealand because Immigration New Zealand declined to grant the appellant a work visa based on her new partnership. This was because, although her partner was an eligible sponsor and there were no concerns about the genuine and stable nature of the new partnership, the appellant did not have the consent of the children's father to the two younger children staying in New Zealand and she had failed to speedily obtain a parenting order in her favour from the Family Court.

[39] Immigration New Zealand records indicate that the husband has not departed New Zealand and that he remains here unlawfully. However, the Tribunal is satisfied that the husband's whereabouts remain unknown to the appellant. She currently has an application for a parenting order before the Family Court, though there has been delay in progressing the application as the children's father cannot be served with the application because of his disappearance. Once the requirements for substituted service have been met, the application should be able to be determined.

[40] Taking into account this background, the Tribunal finds that the exceptional humanitarian circumstances arising from the appellant's New Zealand-resident partner's health and the best interests of the three children in remaining with their mother and her partner in New Zealand, would make it unjust and unduly harsh for the appellant and her children to be deported from New Zealand before she has had the opportunity to have her application for a parenting order determined.

Public Interest

[41] The appellant has a clear police record in Vietnam and this country.

[42] She and the children have previously been found to be of an acceptable standard of health.

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

DETERMINATION

[44] 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 and her children to be deported from New Zealand.

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

[46] Pursuant to section 210(1)(b) of the Act, the Tribunal orders that the appellant and her children be granted work and student visas for a period of 12 months. This will enable the appellant to have her application for the required Family Court order determined and to lodge a residence application sponsored by her New Zealand-resident partner which will be assessed by Immigration New Zealand in the normal manner.

[47] The appeal is allowed on those terms.

"V J Shaw"

V J Shaw

Member

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V J Shaw
Member