

AT AUCKLAND

Appellant: AL (United Kingdom)

Before: S Pearson (Member)

Counsel for the Appellant: K Partington

Date of Decision: 15 March 2017

DEPORTATION (NON-RESIDENT) DECISION

[1] This is a humanitarian appeal by the appellant, a 57-year-old citizen of the United Kingdom, against her liability for deportation which arose when she became unlawfully in New Zealand.

THE ISSUE

[2] The essential issue on appeal is whether the appellant's emotional reliance on her only family members, who are in New Zealand, and her distinctive personal circumstances, amount to exceptional humanitarian circumstances. For the reasons that follow, the Tribunal is satisfied that, in combination, the appellant's situation amounts to exceptional circumstances of a humanitarian nature. For the same reasons, the Tribunal finds that it would be unjust or unduly harsh to require the appellant to return to the United Kingdom and that, in all the circumstances, it would not be contrary to the public interest to allow her to remain in New Zealand. The appellant is to be granted a resident visa.

BACKGROUND

[3] The appellant is a single woman, from a small close-knit family originally from the United Kingdom. She arrived in New Zealand on a six-month visitor visa

in September 2009 to join her parents and her only sibling, her sister, who had previously migrated to New Zealand. The appellant was granted a further three-month visitor visa, then was approved a three-year visa under the Long Term Business Visa (LTBV) category.

[4] The appellant established an IT business and was granted a further LTBV for three more years. The appellant lodged an application for residence under the Entrepreneur category. This was declined on 26 July 2016 as her business was not trading profitably and did not add the significant benefit to New Zealand which was required by the instructions, although the appellant had been self-employed in the business for two years, and met the health and character requirements for residence.

[5] The appellant's last LTBV work visa expired on 17 September 2016 and she subsequently became unlawfully in New Zealand. Her humanitarian appeal against deportation was lodged on 21 September 2016.

THE APPELLANT'S CASE

[6] The appellant's case is set out, in the appeal form lodged with the Tribunal on 21 September 2016, and can be summarised as follows.

[7] The appellant is a transsexual woman who suffered persecution in the United Kingdom because of her transexuality. The appellant realised she was different from other boys when she was about seven years of age. Attending an all-boys' grammar school in England resulted in her becoming reclusive, although she succeeded academically and subsequently attended a polytechnic in Britain gaining a qualification in Electrical and Electronic Engineering. During her student days, the appellant adopted strategies to enable her to avoid the prevailing attitudes of "gay and tranny bashing".

[8] The appellant worked in a large multinational company in the IT support department and became increasingly withdrawn. It was not until she was 42 years old that she reached the point where she felt she had only two choices: to transition to become a woman, or to commit suicide. In September 2002, she consulted her general practitioner, who referred her to the local mental health team. A psychologist confirmed that she was transsexual and was suffering from gender identity disorder. At that point she finally told her parents and her sister of her condition, and found they were completely supportive of her.

[9] The appellant's gender reassignment surgery was completed in 2005, after a 12-month "real life test" when she lived and dressed as a woman. She was then able to complete the legal aspects of her transition and have her birth certificate reissued under the Gender Recognition Act 2004. This confirmed her to be a female, for all purposes.

Workplace Discriminatory

[10] Although the appellant had prepared her workplace from mid-2003 onwards about her transition, it was not supportive, and she experienced overt discrimination. She was regarded as a "freak" by many of her colleagues. Her work tasks were downgraded and she was assigned tasks that could not be completed without the co-operation of members of the IT team, which was not forthcoming. As a result, the appellant became too depressed to function and left that company.

[11] It was two years before the appellant had recovered sufficiently from her depression to be able to work again. The appellant then worked part-time as a database development and network support officer in more accepting employment.

Hostility from the Public

[12] The appellant experienced overt hostility and verbal abuse as a "freak" from the public. She resorted to supermarket shopping between midnight and 3.00 am when there would be very few customers in the store, parking as close to the store exit as possible. She minimised her contact with the public, but was frequently the target of strangers coming up to her and asking "what are you?". Such people would grab her breasts to see if they were "real" and touch her face and throat to check if she had "male characteristics".

Police Support Inadequate

[13] Some of the attacks the appellant experienced in the street resulted in physical injury and, when she reported these to the police, nothing ever came of it, even when her property was also damaged and she received threats that she would be killed.

Societal Intolerance

[14] The appellant cited incidents, in recent years, where high profile media personalities have outed, attacked and harassed transsexuals, sometimes driving them to suicide. She detailed the strategy she adopted in order to keep herself safe in the event that she needed to leave her home.

Only Family in New Zealand

[15] It was not until she came to New Zealand that the appellant told her parents what she had experienced since she had transitioned. They had migrated to New Zealand in 2006 in order to assist their other daughter, who was in a violent and abusive marriage and needed help to separate safely from her then husband. Her family initially consisted of her parents, her sister and her sister's two children, but her father died suddenly in May 2010 and her sister died in 2015. Her remaining family members are her mother, and her sister's two children, who live in New Zealand and Australia respectively. She has no connections, that is, no family, no home and no employment, outside of New Zealand, apart from her niece in Australia.

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

- (a) Her personal statement and letters of support from her mother, her late sister's second husband, and her nephew and niece.
- (b) A psychological report (21 November 2016) written for the appellant and her mother addressing the exceptional circumstances of a humanitarian nature that are relevant to the appellant's appeal.
- (c) A copy of the appellant's passport and her United Kingdom medical records, which indicated her past history of medication for depression and anxiety.
- (d) Copies of the appellant's recent New Zealand bank account statements.

[17] Also produced on appeal are 20 articles, relating to "transphobic hate crimes" and statistics that indicate that these are rising in the United Kingdom. Articles about the increase in attacks on gay and transgender people in Britain and Europe and the low rate of prosecution for such crimes point to the lack of trust in the police which results in some 35,000 "LGBT" hate crimes going unreported in

the United Kingdom each year. By contrast, two articles describe New Zealand as being a fairly safe place to be transgender.

[18] Also available to the Tribunal are the appellant's Immigration New Zealand files regarding her applications for temporary visas and for residence under the Business (Entrepreneur) category.

STATUTORY GROUNDS

[19] 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.

[20] 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].

[21] 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]).

ASSESSMENT

[22] 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 temporary and resident visa applications.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[23] The appellant details how her struggles with gender identity have affected her life since she was a child. She was not able to confide in her parents and sister until 2002, when she made the decision to commence the gender transition and underwent psychological assessments before gender reassignment surgery. This was partly because it took many years to understand her situation and she became desperate to seek treatment. She did not want to worry her parents who, at the time of her diagnosis of gender identity disorder, were planning to migrate to New Zealand in order to support their other daughter who was trapped in a violent marriage and needed help to separate from her then husband.

[24] The appellant's experiences as a transgender person resulted in her becoming reclusive from the time she was a schoolboy, attending an all boys' grammar school, which she found traumatic. She succeeded academically and completed a tertiary qualification in Electrical and Electronic Engineering and then became employed in a large multinational company in the IT support area. Unfortunately, this work environment was homophobic and overtly hostile to "tranny freaks". She realised she was regarded as a slightly odd reclusive man and, when she undertook the gender reassignment transition, she attempted to prepare her workplace for her new identity.

[25] When she commenced the 12-month "real life test" to live as a woman for 12 months, the workplace became overtly hostile and discriminatory. After complaining to the human resources department about a specific incident of bullying, the perpetrator confronted her and threatened that if she ever complained again he would "rip her head off".

[26] Although the appellant persevered and completed her transition with gender reassignment surgery, her work environment became intolerable because of the overt discrimination. She negotiated a severance deal through her union in 2005, and relied on a long-term disability benefit while she grappled with crippling depression. Details of her patient record between December 2004 and September 2009 have been provided. This traces her anxiety and depression and inability to cope in public.

[27] The letters from the appellant's mother attest to their mutual dependence. The appellant has lived with her mother since she came to New Zealand in 2009, and they own their house together. The appellant realises that New Zealand is a much safer place for her to live. She has not experienced any harassment and

discrimination and has been able to contribute to community activities in the small town where she lives. While the mother's health is good, she is in her late seventies and the appellant provides her with assistance and emotional support, particularly since the death of the appellant's father (2010) and her sister (2015).

[28] Statements from the appellant's brother-in-law (her late sister's second husband), and from her niece and nephew (her late sister's children), confirm the family's perception that they are a very small and mutually supportive group. They believe that if the appellant was required to return to the United Kingdom, this would have "drastic negative consequences for all members of the family". The appellant's niece and nephew state that since the death of their mother in 2015 from cancer, the appellant has provided "huge" support for both themselves and their grandmother.

Psychological assessment report

[29] The psychological report produced by Dr Rachel Irwin, Registered Clinical Psychologist and Neuropsychologist, for the appellant and her mother (21 November 2016) summarises the appellant's background. The family comprised the parents and two children. Both parents were only children. No family members remain in the United Kingdom.

[30] The appellant described her school-aged years as "violent, abusive and extremely traumatic". She had attended a single-sex grammar school from the age of 11 at a time when she was becoming increasingly aware that she felt different to other boys. The appellant described the strategy she employed in order to survive at the school. She became an electronic engineer, working in the IT industry.

[31] The appellant found her workplace, a big multinational company, to be strongly sexist and homophobic. She began to experience panic attacks from her mid-twenties. She observed another transsexual woman at work who was also persecuted, but she was afraid to open up to her or any of her colleagues about her gender identity issues. The appellant developed a significant obsessive-compulsive disorder in her late thirties as a result of feeling unsafe in public.

[32] At the age of 42, the appellant commenced the transition to become a woman. Unfortunately, her experiences at work and in public continued to involve significant and ongoing trauma, abuse and discrimination. She provided examples of being screamed at in the street, being stalked, getting pushed off pavements

and being beaten up physically on many occasions. Her severe panic attacks continued during this time. The trauma and discrimination continued and worsened following her gender reassignment surgery. She also became clinically depressed.

[33] The appellant left the United Kingdom in 2009 to escape from the trauma, abuse and discrimination she was experiencing in the United Kingdom and to be close to her parents and her sister and her sister's family. Although she had a significant fear of flying, she overcame this because of her extreme need to be with her family. She never wants to get on another aeroplane again.

[34] The appellant says she feels "safe, happy, settled and accepted" in New Zealand". She does IT work for people in the community and is actively involved in local activities and has made a number of friends. She and her mother have a mutually supportive relationship.

[35] The psychologist noted the following:

[The appellant] is actively opposed to returning to the United Kingdom. In addition to being petrified of flying, [the appellant] has no family, friends or support in the United Kingdom. Furthermore, she is gravely concerned about her safety, her psychological well being and her work opportunities if she has to return to the United Kingdom. She has no reason to assume people will treat her any differently to how they did before she came to New Zealand. [The appellant] would like to keep up her IT business but to also get into adult teaching at one of the local learning institutes if she remains in New Zealand.

[36] The psychologist also interviewed the appellant's mother who confirmed that the appellant is the only person who provides her with constant support and company. While the mother is engaged in some community activities, she does not discuss personal matters with her only close friend. The mother relies on the appellant for support and does not wish to need to use social services in the future. The appellant is the half-owner of her house and the sole beneficiary of her will.

[37] The psychologist summarised the appellant's exceptional circumstances of a humanitarian nature. It was her "strong clinical opinion" that the appellant has a number of exceptional circumstances of a humanitarian nature that include her history as a transsexual who has experienced repeated and significant abuse, trauma and discrimination in the United Kingdom as a result of her gender identity issues, and as a result developed severe clinical depression, panic attacks, obsessive-compulsive disorder and PTSD. The appellant did not feel "safe,

supported or accepted" in the United Kingdom and does not have any friends, family or support in that country.

[38] The psychologist stated that, by contrast, the appellant feels safe, happy, settled and accepted in New Zealand and has the support of her family here. She has not experienced any mental health issues since being in New Zealand and her previous mental health issues have all dissipated since she has been here. However, given that the appellant experienced significant psychopathology in the United Kingdom, it was highly probable that she would re-experience a deterioration in her mental health if she had to return to the United Kingdom. The appellant is a highly intelligent and skilled woman who has many skills and abilities that would be of benefit to New Zealand. The psychologist described the appellant as "a highly vulnerable woman who is at an extremely high risk of experiencing further trauma, abuse and discrimination if she has to return to the United Kingdom".

Conclusion on exceptional humanitarian circumstances

[39] The Tribunal is satisfied that when the above matters are taken into account on a cumulative basis, the appellant has exceptional circumstances of a humanitarian nature. This is because of her history of experience from childhood of repeated and significant abuse, trauma and discrimination as a result of her transsexual identity. The appellant was one of two children born to a British couple, neither of whom had any siblings. Her father and her sister have died in recent years. As a result, her whole family now comprises her mother, herself and a nephew and niece. The appellant has no familial nexus to the United Kingdom and has no link to that country through her previous employment there.

[40] The appellant is living in a mutually supportive environment with her mother. They own a house together. The appellant's mother is elderly and without the appellant's help is likely to reach a point where she cannot cope on her own. Since the appellant has been safely and happily settled in New Zealand her mental health issues have dissipated but would, in the opinion of the psychologist, redevelop if she was required to return to the United Kingdom. The psychologist describes the appellant as "a highly vulnerable woman" who would be unable to cope if she was required to leave New Zealand.

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

[41] The Tribunal is satisfied that it would be unjust or unduly harsh for the appellant to be deported. In the “strong clinical opinion” of the psychologist, if the appellant was to return to the United Kingdom, “she would be returning to the very same environment in which she experienced repeated and significant abuse, trauma and discrimination throughout her adolescent and adult life”. She would be returning to the very same, toxic environment, that resulted in her experiencing significant psychopathology, including depression, panic attacks, obsessive-compulsive disorder and PTSD.

[42] It is clear that the appellant could not cope with returning to an environment where she has no friends, family or support. Further, leaving her mother in New Zealand would impact severely on both of them. In her home in New Zealand, the appellant has finally found a place where she feels safe, happy, settled and accepted. She is unlikely to maintain the equilibrium she has developed in New Zealand if she is required to return to the United Kingdom.

[43] The Tribunal is satisfied that by reason of the factors identified in this case, the appellant has exceptional circumstances of a humanitarian nature in the sense contemplated by Glazebrook J in *Ye v Minister of Immigration* (cited above) and that it would be unjust or unduly harsh for her to be deported from New Zealand.

Public Interest

[44] The Tribunal must also be satisfied that it would not be contrary to the public interest if the appellant was allowed to remain in New Zealand.

[45] The information before the Tribunal, as part of the appellant’s applications for a temporary visa and for residence under the Business (Entrepreneur) category, is that the appellant has an acceptable standard of health and has both a clear United Kingdom (7 April 2010) and New Zealand police certificate (20 October 2016).

[46] The appellant has remained in New Zealand lawfully until the expiry of her last work visa renewed under the Work to Residence, Long Term Business Visa category in September 2016, then promptly lodged her humanitarian appeal. It is apparent from the appellant’s background and qualifications that she would make a positive contribution to this country as an experienced IT specialist.

[47] The Tribunal finds that it would not, in all the circumstances, be contrary to the public interest to allow the appellant to remain in New Zealand on a permanent basis.

DETERMINATION

[48] Pursuant to section 210(1)(a) of the Immigration Act 2009, the appellant is to be granted a resident visa.

[49] The appeal is allowed.

Order as to Depersonalised Research Copy

[50] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to the identification of the appellant or her family members.

"S Pearson"

S Pearson
Member

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