

AT AUCKLAND

Appellants:	AW (Nepal)
Before:	A M Clayton (Member)
Counsel for the Appellants:	D Patchett
Counsel for the Respondent:	No Appearance
Date of Hearing:	21 August & 1 September 2017
Date of Decision:	22 September 2017

DEPORTATION (NON-RESIDENT) DECISION

[1] These are humanitarian appeals by the appellants, a husband aged [...] and a wife aged [...] from Nepal. The appeals were lodged at the same time as the couple's appeals for refugee and protected person status in New Zealand. Having declined those appeals, the Tribunal must now consider the couple's humanitarian appeals as if they were liable for deportation.

THE ISSUE

[2] The primary issue is whether the vulnerability of the appellants, given their experience in the April 2015 Nepal earthquake, their diagnoses of post-traumatic stress disorder (PTSD) which, in the wife's case, has induced a chronic physical condition, and the absence of family support for the couple in Nepal, gives rise to exceptional humanitarian circumstances that would make it unjust or unduly harsh for them to be deported from New Zealand. A secondary issue is whether, in view of the appellants' health conditions, it would not be contrary to the public interest to allow them to remain in New Zealand.

[3] For the following reasons, the Tribunal finds that the appellants meet all components of the statutory test. Their appeals are allowed and the appellants are to be granted resident visas.

BACKGROUND

[4] The appellants were in their home in Kathmandu when the April 2015 earthquake struck Nepal. They arrived in New Zealand a year later, in April 2016, and lodged refugee and protection claims in August 2016. Both presently hold work visas which are current until 10 May 2018.

[5] The appellants' claims for refugee and protection status were declined by the Refugee Status Branch in December 2016 and their appeals in regard to that decision have been dismissed by the Tribunal in *AV (Nepal)* [2017] NZIPT 801125-26.

[6] In view of the considerable crossover of evidence and grounds in the refugee and protection claims and the present appeals, the Tribunal determined in its absolute discretion to provide an oral hearing for the humanitarian appeals (see section 233(2) of the Immigration Act 2009 (the Act)). Both sets of appeals were heard in tandem on 21 August and 1 September 2017.

STATUTORY GROUNDS

[7] The appellants' appeals are brought under subsections 194(5) and (6) of the Act. The grounds for determining such appeals are set out in section 207 of 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.

[8] 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].

[9] 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 APPELLANTS’ CASE

[10] The accounts which follow are those given by the appellants and their witnesses at the appeal hearing.

The Husband’s Evidence

[11] The husband is [...] years old and was born in eastern Nepal. He has four living siblings, all of whom live with their own families in the east of the country. While they lived in Nepal, the husband and wife had contact with their respective families on special occasions only.

[12] The husband is a retired [...]. He and his wife have two adult children. Their [...] -year-old daughter studied in India and then went on, in 2006, to live in [...] with her husband and two children. Their [...] -year-old son has lived in [...] since he left Nepal in 1998.

[13] The wife and their daughter travelled to [...] in 2005 when Maoists in Nepal presented a danger in that they wished to enlist people, including the appellants’ daughter, to their cause. The Maoists also regularly extracted payments from ordinary citizens. The husband remained in Nepal where he “shared his salary” with the Maoists until the wife returned in 2008. The Maoist problem was effectively resolved when they gained some political power in approximately 2008.

[14] The husband and wife have visited their adult children overseas in the past although, in or around 2010, their applications to visit [...] were declined on the basis that they did not have sufficient reason to return to Nepal.

[15] Prior to the April 2015 earthquake, the husband and wife were retired and living in their home in Kathmandu, visiting temples regularly, and socialising with friends and former work colleagues. They were happy to continue living in Kathmandu with the expectation that they would have mutual visits to and from their adult children and their families. They used their savings, together with USD45,000 from their son, to build an extra one and a half storeys on their small home.

[16] On the day the earthquake struck, the couple struggled to get out of the debris of their home. The husband could not get out and the wife damaged her leg trying to do so. For three months they lived in a tent outside the house. Volunteers helped them erect the tent and also brought them food.

[17] After three months, the ground floor of their house had been repaired sufficiently to be habitable. Electricity and water were reconnected. However, whenever there were aftershocks, the couple slept on their verandah.

[18] Following the earthquake, the husband and wife were constantly fearful. Life was very difficult, especially with the ongoing tremors. They sometimes thought it might have been better to have died in the earthquake rather than suffer from the suspense of the aftershocks. There are few psychologists in Nepal and their services are only used for very disabled people, not people like the appellants.

[19] In addition, the husband had problems with ongoing pain in his foot and was bedridden for months following surgery on it. The operation cost two *lakh rupees*, which his son helped pay, but it did not relieve the pain.

[20] The wife was constantly stressed. She had no children to support her and was worried about the husband's leg. She would cry and was unable to sleep. Both the husband and wife felt that they had nothing to lose and used to talk about it not being worthwhile to go on.

[21] While the ground floor of their home has been repaired sufficiently to be habitable, there will be problems if there is another earthquake. Currently the couple allows students to live on the ground floor of their home on the basis that they pay only electricity and water rates. No-one can live on the additional floors. To repair them would cost an amount beyond the reasonable means of the appellants and their son.

[22] The danger of further earthquakes has not passed. Aftershocks have continued since the couple left and there was a 4.6 earthquake in August 2017 near Dolakha, close to Kathmandu. Those of their friends who are still in Nepal have their adult children to help them. Many others have gone overseas.

[23] In New Zealand, the husband and wife feel much more secure. If there was an earthquake here, they would feel safe in their son's house. They have spent four weeks with their son and more time with his wife and two children (aged four and two and a half) in New Zealand. Their daughter has visited from [...] twice with her children and is returning in October to visit them. Her elder daughter (their granddaughter) will come over for six weeks in the summer. Their son will also return for four weeks in January or February 2018.

[24] In New Zealand the wife feels more hopeful and is sleeping better. She can speak to the children and grandchildren over the internet whenever she wishes whereas, in Nepal, their computer could not be used for 18 of every 24 hours.

[25] The husband and wife have no more savings. Their son had to pay for their tickets to New Zealand. Their only property, other than their house in Kathmandu, is a parcel of land in the east of Nepal which, because it is prone to flooding, cannot be used or sold.

[26] The husband keeps up with the news from Nepali and is learning English at a community centre. The couple's priority over anything else is to have ongoing contact with their two adult children and their families. If they stay in New Zealand, they can see their daughter and family a few times a year and their son is still seeking permanent employment in New Zealand in order to settle here permanently.

The Wife's Evidence

[27] The wife is [...] years old. Her 99-year-old father lives with her older brother in east Nepal. She has three sisters who spend their time between Kathmandu and their children's homes overseas. She used to see them in Nepal on special occasions.

[28] The wife studied to a Master's degree level and had a variety of jobs in Nepal, including [...] and [...].

[29] In 2004, the wife became very concerned for her daughter's safety because Maoists had threatened to enlist her as a supporter. The wife and daughter

travelled to where her son lived in [...], and applied for refugee status. The claim was refused because, with her husband remaining in Nepal, the wife was expected to be able to tolerate the Maoists' activities.

[30] When the couple lived in Nepal, their daughter was able to visit from [...] approximately only once every three years. The couple was able to visit their daughter and her family in [...] only once.

[31] Immediately after the earthquake, the appellants lived outside and then in a tent. The earthquake had caused the ground floor of their home to subside and the wife could put her hands through the cracks in the wall. From October 2015, when the winter had started and after her husband's surgery, the couple started to live inside the house.

[32] The husband was in pain both before and after his surgery. His foot would not heal after the operation and they had to go to the hospital three times a week. Taxi fares to the hospital rose from 500 *rupees* to 3,500 *rupees*. Given her husband's state, the wife felt that she had to shoulder all the responsibility for the household.

[33] Four months after the earthquake, the wife went to the doctor herself as she was in pain all down her left side. She attended physiotherapy for a while but had to stop to look after her husband.

[34] After the earthquake, the appellants lost hope in Nepal. This was particularly because they had no children there to support them. In the year before they were able to come to New Zealand, the wife constantly felt like crying, she would forget everything, she felt frightened all the time, and also tired and weak. She was startled by small noises. Her heart used to pound. They would leave the door of the house open so that they felt they could escape. On about 10 or 15 occasions the wife would run out of the house at night. She caught up on her sleep during the day on the verandah. There are no psychological services available in Nepal for her to access.

[35] Even though, if they returned to Nepal, they could live in their house (and perhaps even rent out one of the two rooms) she and her husband simply could not live without their children. The couple's friends in Kathmandu are unable to help them. The wife acknowledges that her son could send them money but the point is that they need emotional care and protection. If they were better, they could live without their children, but presently they cannot.

[36] If they have to return to Nepal, the wife cannot expect her daughter to travel there to care for them because she is married, her parents-in-law live with her and she has small children. Nor can she expect her son to live with them in Nepal because there are no jobs for him there. Her son's wife has told her that she cannot visit Nepal for more than two or three weeks a year because of their small children.

[37] If the appellants can continue to live in New Zealand, their daughter can visit much more easily and often. She has already visited for a few days in October 2016 and two weeks in July 2017 and is coming back at the end of this year. They will also have their eight-and-a-half-year-old granddaughter with them for six weeks over the summer.

[38] In New Zealand, the wife sleeps better and does not run out of the house at night anymore. She feels secure that the house will not fall and kill them. Their son will come and live with them and look after them. He has no intention of staying in [...] indefinitely and cannot do so because he only has a work visa.

[39] The wife still has flashbacks, although fewer, where she thinks of people who died in front of her, including her friend. Her mouth still feels dry and she often feels like making everything dark and lying on the bed. She does not think that the antidepressant medication she has taken over the past six months has made any difference.

Evidence of the Appellants' Son

[40] The appellants' son gave evidence to the Tribunal via telephone from his home in [...]. The son has not lived in Nepal since 1998 when, at the age of 19, he left to study in [...]. He did not visit the country again until 2008, when he was married there. In the meantime he obtained a Bachelor's Degree in Computer Science and Business Administration and a Master's Degree in [...].

[41] Ever since his graduation, the son has held a series of roles in [...] technology companies. He holds an H1 visa which entitles him to work. He is presently working as a security engineer and his current salary of USD96,000 gross per annum will soon be increased to USD120,000 per annum. The son lives with his wife and two children, who are now aged six and three.

[42] The appellants visited their son in [...] for his graduation in May 2004. His mother and sister returned in December 2004, his sister staying until 2005 and his mother until 2008. They applied unsuccessfully for refugee status in [...].

[43] The son has made a number of trips back to Nepal since his graduation. He has assessed the possibility of getting employment there but there is no scope for his area of expertise in Nepal. The information technology infrastructure is very poor and there is no (government) budget for such initiatives as information security. The only type of job he thinks he might be able to get in Nepal is as a general science or physics teacher, with a salary of a little over USD80 per month.

[44] Given that he was unable to return to Nepal, in 2011 the son applied for New Zealand residence status. Even though he did not have an offer of employment, he and his family were granted residence status under the Skilled Migrant category in 2013. He sought jobs online but without success. He thinks the problem is that he is applying from a distance.

[45] The son visited New Zealand for nine days in 2014, three months in 2015, and a month each in 2016 and 2017. He made a particular effort when he visited in 2015 to find employment, permanent accommodation and a new life in New Zealand. He purchased a home, intending to stay, but his attempts to find a suitable employment position were unsuccessful.

[46] The son is making active attempts to move to New Zealand which he regards as his home and which he sees as a potential shelter for himself, his wife, their children and his parents. He wishes to contribute to New Zealand but he is not an entrepreneur and needs an employment position in order to use his skills.

[47] The son says that the only time he has sent money to his parents is when they added two storeys to their home in Kathmandu. He sent USD45,000 altogether. The addition of the two storeys took one and a half to two years to complete. It was intended that his parents would be able to stay in their improved home, which allowed them to access significantly more natural daylight, formerly blocked by the tall buildings around it. However, only a couple of months after they had completed the addition, the April 2015 earthquake struck.

[48] The appellants' home in Kathmandu was not designated for demolition but it had visible cracks. The floor was completely uneven and was only able to be temporarily fixed by the addition of more bricks and clay. It is not safe to live in,

but the appellants have someone in it paying a nominal rent. If they have to return to Nepal, returning to that house is out of the question.

[49] When the son visited his parents in Nepal after the earthquake, he did not find them to be in a normal state of mind. His mother would run away in her sleep and his father would stay and cry, with his leg in pain, feeling abandoned. The son tried very hard to get his parents over to New Zealand at that stage so that they could recover in this country. However, this was delayed by his father having to spend 18 or 19 days in hospital for foot surgery and by Immigration New Zealand raising a medical issue (which was eventually resolved).

[50] In April 2016, the appellants were granted visitor visas and they arrived in New Zealand. The son's wife and children were already here and the son joined them for four weeks. Again, the son considered that the appellants were "not the same parents" as he had before. After he returned to [...], his mother called him and said she was continuing to have nightmares and his father told him that his mother had said she would commit suicide. The son does not believe his mother could emotionally bear a return to Nepal.

[51] At the same time, his parents miss Kathmandu. His father in particular misses his retired colleagues and friends. The son's 99-year-old maternal grandfather lives in the southern (eastern) part of Nepal. His parents had a parcel of land in the southern (eastern) part, but the son is not sure what has happened to it.

Evidence of the Appellants' General Practitioner, Dr AA

[52] The appellants registered at Dr AA's practice in December 2016 after transferring from another New Zealand medical centre. Their previous general practitioner in New Zealand had made a diagnosis of PTSD for each of them.

[53] In regard to the husband, Dr AA was able to discover the cause of the ongoing pain in his foot. The husband had had a ruptured tendon in 2015 and this was repaired in Nepal. An ultrasound scan revealed unresolved suture material in his heel and the husband has just had surgery for the removal of this material. Dr AA believes the husband will now make a complete recovery and that the pain he has been suffering for a long time will disappear.

[54] When the husband was registered at Dr AA's practice he came with a diagnosis of type 2 diabetes with which Dr AA did not agree. He considers the

husband to be pre-diabetic, not diabetic. The husband is taking low dose Felodipine, a common hypertension medication and Omeprazole, another common drug, for acid reflux.

[55] As to the husband's diagnosis of PTSD, Dr AA noted that the previous practitioner had referred both appellants to mental health services but had been told that these were oversubscribed and that, without refugee status, they could not access funded assistance. Dr AA has not assessed the husband in this regard, principally because his English is very limited.

[56] As for the wife, Dr AA has seen her approximately five times since February 2017. He readily agrees with the diagnosis of PTSD in her case, given her levels of anxiety and the fact that she experiences frequent flashbacks and nightmares and is woken from her sleep as a result. For an individual to be found to suffer from PTSD, they need to have been in fear for their life at some earlier stage. Dr AA believes that the wife did fear for her life and was also very disturbed by the aftermath of the earthquakes when she saw dead bodies and maimed people.

[57] Dr AA has also diagnosed the wife's chronic pain on her left side as fibromyalgia. Painkillers, anti-inflammatories and simple analgesics do not affect the pain felt by someone suffering from this chronic condition. It is better to address the underlying anxiety or PTSD as this is a condition where the state of the patient's mental health affects their experience of physical symptoms. Dr AA has trialled different antidepressant medication but has observed no therapeutic benefit over the six months the wife has been his patient.

[58] The wife also suffers from hypothyroidism and will have to take a common medication for her thyroid on a lifelong basis.

[59] Dr AA considers that the couple is quite socially isolated, especially the husband, who has no English. They have no family here. The couple's status needs a speedy resolution.

Material and Submissions Received

[60] Counsel for the appellants has lodged:

- (a) opening submissions (17 August 2017);

- (b) letters from the appellants' general practitioner Dr AA (both dated 10 August 2017) and from their former general practitioner (both dated 12 September 2016) in regard to the appellants' health;
- (c) a statement by the appellants' son (received 2 August 2017);
- (d) information on fibromyalgia;
- (e) previous decisions of the Tribunal relevant to the appellants' humanitarian circumstances and to the connection between natural disasters, human rights, and international refugee law; and
- (f) since the hearing, correspondence from the appellants' daughter regarding her past and anticipated trips to New Zealand.

[61] The Tribunal obtained records of the movements and visas for the appellants and their two children from Immigration New Zealand. These show that the appellants arrived together on 26 April 2016. They also confirm that the appellants' son and his family were granted resident visas under the Skilled Migrant category in May 2013 and permanent resident visas in May 2016. The son has spent the following periods in New Zealand:

- (a) 11 to 20 May 2014;
- (b) 10 April to 24 July 2015;
- (c) 25 April to 26 May 2016; and
- (d) 19 February to 15 March 2017.

[62] While the Tribunal has been unable to find any Immigration New Zealand record of the appellants' daughter entering New Zealand or holding a visa here, it is accepted on the evidence presented that she has visited New Zealand twice and intends to return with her children for six weeks over the summer.

ASSESSMENT

[63] The Tribunal has considered all the submissions and documents provided by the appellants. It has also considered their Immigration New Zealand files in relation to their visa applications and their refugee and protection claims.

Whether there are Exceptional Circumstances of a Humanitarian Nature

Credibility

[64] While the husband was a quiet and reserved witness, the wife presented in a more agitated way. The Tribunal found both their testimonies to be credible and unembellished. It also accepted the evidence of their son and their general practitioner, Dr AA.

The appellants' mental health

[65] Both appellants suffer from PTSD, a chronic condition from which they obtain some respite in New Zealand. The wife's symptoms of PTSD have not been mild. While still in Kathmandu, she ran from her home in the middle of the night on between 10 and 15 occasions. She experienced sleeplessness to the level that she had to catch up on sleep during the day, which she would do outside on the verandah. She (and her husband) felt in constant fear for their lives and the wife continues to be disturbed by flashbacks of dead and maimed bodies.

[66] Not only does the wife suffer from PTSD but also fibromyalgia, the causes and symptoms of which were traversed by the couple's general practitioner at the hearing. Fibromyalgia, a mental/muscular condition, cannot be treated with normal painkillers. It means that the wife is in chronic pain which, it can be readily imagined, exacerbates her mental condition.

[67] The appellants' current mental states can be assisted in three ways if they are permitted to remain in New Zealand. The first is by way of the geographical distance from the country in which their PTSD arose and their subjective feelings of safety in this country.

[68] The second way in which their mental health may be improved in New Zealand is the potential they have here to access psychiatric assistance or counselling which, on both appellants' evidence, are not available in Nepal to anything like the level of sophistication or access as they are in this country.

[69] The third advantage New Zealand presents for their overall health is the most significant, and that is the physical proximity of their children and grandchildren. This is achieved currently by way of visits by their family and, in the future, by way of their son's permanent move to New Zealand.

The appellants' contact with their adult children

[70] The appellants' counsel submits that allowing the appellants to remain in New Zealand means that family unity is achieved. While this in fact would not immediately be the case, given that the son and his family do not yet live here permanently, the Tribunal accepts that this will be the ultimate outcome. And, if his parents are permitted to live here permanently, this can only increase the son's resolve that family unity be achieved sooner rather than later.

[71] The goal of family unity in New Zealand, to which the appellants and both children are committed, can be contrasted with the degree of contact and support that the appellants could expect to have with their children in the future, if they had to return to Nepal. It has to be said at this point that the appellants do not particularly wish to live away from Kathmandu, where they have family and friends. Their son remarked that his father, in particular, misses the regular contact he used to have with his former work colleagues. However, despite having extended family and friends in and around Kathmandu, both appellants state that they cannot return. They are concerned about their own and each other's mental health. In particular, the husband believes that his wife will simply be unable to cope on a daily basis in the original location of her trauma and without the comfort of either of her children's presence.

[72] As to any alternative to that scenario, on the evidence presented, it is unrealistic to expect that either their daughter or son can, or will, return on a permanent basis to Nepal. The son was unable to find suitably skilled employment there. He is highly unlikely to give up the handsome salary he currently earns in [...], which enables him to provide for his family and his parents, to be a secondary school teacher in Nepal earning USD80 per month. While he is culturally and personally motivated to be near, and to assist, his parents, he now has children of his own whose interests he must protect.

[73] Nor is the appellants' daughter able to return to Nepal. She has lived in [...] since 2006 with her Nepalese husband and two young children. Her husband's parents live with them and she is expected, culturally, to prioritise their needs over those of her own parents.

[74] The Tribunal accepts that the son's overwhelming desire is to come to New Zealand with his wife and children and settle here with his parents. Given that he has only temporary work visa status in [...], it is inevitable that he will settle here and it is accepted that he is not using his base in New Zealand simply as a matter

of convenience. His inability, to date, to obtain suitably skilled employment, and the unforeseen impacts of the earthquake in Nepal on his parents, have conspired to create the unusual state of affairs where he and his family continue to live in [...] while his parents are already in New Zealand.

[75] Nonetheless, the appellants' presence in New Zealand has already given rise to a significant improvement in their level of contact with their adult children. When the appellants lived in Nepal, their daughter was able to visit them only once every three years. In contrast, in the last year, she has visited them twice already and will be visiting again with her children for six weeks at the end of the year. If they have the status to remain in New Zealand, the appellants will be able to make visits to their daughter, son-in-law and grandchildren in [...]. While the couple travelled from Nepal to visit them in [...] on one occasion, clearly the geographic proximity of New Zealand creates the potential for much more regular, reciprocal visits. Even the internet contact the appellants have, while in New Zealand, with their children and grandchildren in [...] and [...] is more regular and reliable than the internet access they had in Nepal.

[76] The appellants' son has made annual visits to them in Nepal from [...]. However, the appellants' ability to visit their son and his family is severely curtailed. In 2010, the appellants' applications to visit [...] were declined on the basis that they did not have sufficient reason to return to Nepal, a decision highly likely to have been triggered by the wife's immigration history in [...] (where she and her daughter had previously applied unsuccessfully for refugee status).

[77] If the appellants return to Nepal and in the future they wish to apply for visas to enter [...], [...] or New Zealand, the fact that they have made claims for refugee status in two of those countries and become liable for deportation in New Zealand may well restrict their ability to obtain visas to visit their children in any of those countries. Accordingly, it cannot be confidently determined that the distress of their separation from their children can be assuaged by the appellants' ability to visit either of their children in their respective countries.

Conclusion on exceptional humanitarian circumstances

[78] In view of the appellants' ages and health problems, in particular the wife's PTSD and co-morbid fibromyalgia, their emotional dependence on their two adult children who live in [...] and [...], and the absence of any meaningful family support in Nepal, the Tribunal determines that they have exceptional circumstances of a humanitarian nature.

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

[79] 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”.

[80] In considering whether it would be unjust or unduly harsh for the appellants to be deported from New Zealand, the Tribunal bears in mind their exceptional humanitarian circumstances, as described above.

[81] The Tribunal recognises that Immigration New Zealand’s initial grant of temporary visas to the appellants was made so that they could join their son and his family in New Zealand to recover from the trauma of the April 2015 earthquake and from the living conditions they had to endure in the year following it. The Tribunal also recognises that subsequent temporary visas were granted to them on the basis that they applied for refugee status. While their refugee and protection claims were determined to be unfounded in terms of international refugee and protection law, the Tribunal found the appellants to be sincere. They gave credible, unembellished evidence of their experiences in Nepal. It is accepted that they suffer from PTSD and that this, especially in the wife’s case, has had a severely adverse impact on her health.

[82] The stage has now been reached where the appellants must either return to Nepal, with all that represents to them both physically and mentally, or be permitted to remain here. In Nepal, annual visits by their son may well continue but visits by their daughter and her family are likely to occur only once every three years, as in the past. The Tribunal accepts that the appellants have lodged their appeals as a last opportunity to secure any meaningful future life with their children and grandchildren.

[83] If the present appeals are not granted, their ability to re-enter New Zealand may be compromised and there is no certainty that a Family (Parent) category of residence instructions will be reinstated in the near future. Certainly if that category existed now, while the appellants’ son would not meet the residence criterion, he would certainly be able to show that he could financially support his parents.

Conclusion on whether it is unjust or unduly harsh to deport the appellants

[84] The Tribunal finds that the appellants' exceptional humanitarian circumstances would make it unjust or unduly harsh for them to be deported from New Zealand. If they are required to return to Nepal there are serious concerns about their vulnerability there, especially given the wife's co-morbid conditions of PTSD and fibromyalgia. They would have no ongoing immediate family support and while this was once something they were able to live with, this is no longer the case. The couple 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

[85] The Tribunal turns finally to the question of the public interest. Given that neither appellant has a criminal record in Nepal or New Zealand, the only issue impinging on the public interest is their potential burden to the New Zealand health system.

[86] Dr AA notes that the husband is pre-diabetic but is confident that this is under control. The husband also takes medication for hypertension and reflux but these are not conditions or medications which are likely to present an unacceptable burden to the New Zealand health system.

[87] As to the wife, she has been diagnosed with PTSD and fibromyalgia and does potentially present a burden to the system. The extent of any such burden cannot be quantified and, at the moment, the wife is able to go about her daily activities in spite of her condition. If the impact of her PTSD can be lessened, as is likely if she remains in New Zealand, it is likely that her fibromyalgia will also be improved, or at least made easier to manage.

[88] The Tribunal finds that the wife's potential burden on the New Zealand health system is outweighed by the exceptional humanitarian factors present in the appellants' case. These factors include their age and vulnerability, their strong and dependent relationships with their adult children and the deprivation of those relationships if the appellants must return to Nepal.

[89] The Tribunal therefore finds that it would not, in all those circumstances, be contrary to the public interest to allow the appellants to remain in New Zealand.

DETERMINATION

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

[91] 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 permanent basis.

[92] The appellants have met both limbs of the test in section 207(1) of the Act. Therefore, pursuant to section 210(1)(a) of the Act, the Tribunal orders that each appellant be granted a resident visa.

[93] The appeals are allowed.

Order as to Depersonalised Research Copy

[94] 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 appellants' names and any particulars likely to lead to their identification.

"A.M. Clayton"
A M Clayton
Member

Certified to be the Research
Copy released for publication.

A M Clayton
Member