

**AT AUCKLAND**

**Appellant:** TAALA, Elik

**Respondent:** The Minister of Immigration

**Before:** Judge P Spiller

**Counsel for the Appellant:** C Curtis

**Counsel for the Respondent:** F Mohammed

**Date of Hearing:** 28 March 2018

**Date of Decision:** 5 April 2018

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**DEPORTATION (RESIDENT) DECISION**

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[1] This is an appeal against liability for deportation by the appellant, a 29-year-old citizen of Samoa and a New Zealand resident since 18 February 2009.

**THE ISSUE**

[2] This appeal is brought on humanitarian grounds. In broad terms, the appeal requires the Tribunal to consider whether the appellant has exceptional circumstances of a humanitarian nature, arising out of his family nexus to New Zealand, the interests of his partner and the best interests of their children, and the perceived difficulty of his return to Samoa, that would make it unjust or unduly harsh for him to be deported from New Zealand, and whether it would not in all the circumstances be contrary to the public interest to allow him to remain in New Zealand.

[3] For the reasons that follow, the Tribunal declines this appeal. However, the Tribunal orders the removal altogether of the period of prohibition on entry to New Zealand that would otherwise apply.

## **BACKGROUND**

[4] The appellant was born in Samoa in September 1988. He completed his secondary education and obtained a marine engineering certificate there. His adoptive parents are deceased, and he has one adoptive sibling still living in Samoa. He also has four natural brothers and one natural sister living in Samoa.

[5] In June 2008, the appellant applied for residence under the Family (Dependent Child) category. His application was based on his relationship with his new adoptive parents living in New Zealand. His application was approved on 26 November 2008.

[6] On 19 February 2009, the appellant arrived in New Zealand and was granted a resident visa. He has lived in New Zealand since then, except for return trips to Samoa in July–August 2009 and December 2010–January 2011, when he visited family members there. In 2009, the appellant worked for two months for an engine moulding company, and he subsequently worked as a machine operator for four years and then as a store person for a food company. He obtained certificates in health and safety, firefighting, security, employment skills and hospitality, and completed NCEA Levels 1 and 2.

[7] By the beginning of May 2011, the appellant formed a relationship with a New Zealand citizen, now aged 28 years, who has a child from a previous relationship born in April 2008. They began living together later in 2011.

[8] On 8 May 2011, a wheelchair-bound woman was wheeling herself to a friend's place. She had consumed a considerable amount of alcohol and was intoxicated. Upon realising that her friend's car was not in the driveway, she decided to wheel herself home. While wheeling through an alleyway, she was approached by the appellant. They spoke briefly, and he then grabbed hold of her wheelchair and prevented her from leaving. He pulled her singlet and bra down, exposing her left breast. He then sucked on her breast and kissed her face, despite her repeated requests for him to stop. He then pulled down her pants and raped her. She attempted to break away but was unable to do so. She told the appellant to stop but he did not. He eventually ejaculated on her legs and clothing and then left the alleyway. The victim wheeled herself to a nearby street and was picked up by a member of the public who took her home. The following day she went to the doctor and complained to the police. The cover of her wheelchair was forensically examined and the appellant's DNA was found on the cover.

[9] On 5 May 2012, the appellant drove a motor vehicle in a dangerous manner and with excess breath alcohol (limit 400: reading 553) and failed to stop. He was convicted and sentenced to a fine of \$550 and court costs, and was disqualified from driving for eight months.

[10] In July 2012, the first child of the appellant and his partner was born. The couple became engaged in 2013.

[11] On 27 July 2013, the appellant committed an assault on his partner. He was charged with common assault and bailed to his sister's address, and has not lived with his family since then. A non-association order was initially imposed, but he was in due course allowed to visit his partner and child. On 11 December 2013, he was convicted and sentenced to six months' supervision.

[12] In March 2014, the second child of the appellant and his partner was born.

[13] By mid-2014, following the discovery of the appellant's DNA connecting him with the rape of May 2011, the appellant was arrested and charged. He was again placed on bail, to live at his sister's address, although he continued to visit his partner and children.

[14] On 16 April 2015, the appellant, who had pleaded not guilty to charges arising out of the events of 8 May 2011, was found guilty by a jury. He was placed in custody.

[15] On 22 May 2015, the appellant was convicted and sentenced for the rape and indecent assault of a female over 16. The sentencing Judge commented as follows:

What makes this a band 2 case ... is the vulnerability of the victim. She has been confined to a wheelchair from an early age as a result of a car accident. She is tiny compared to you. She was [in] a dark alleyway asking for assistance to find her way in the early hours of the morning and ... she was not in control of her faculties due to consumption of alcohol. She was extremely vulnerable.

Having just seen her victim impact statement this morning, the impact of this offending on her has been enormous, which is hardly surprising and the impact of the offending continues and will do for a number of years to come, if not for the rest of her life, so there is real harm that has been occasioned by your offending.

You tried to tell the jury that you would not have participated in sex with her unless there was a condom available; that was just fabricated evidence by you. There was no condom that night. That is why your sperm went everywhere and that exposed her to the risk of pregnancy and/or infection. That also is an element of harm to the victim.

[16] The Judge adopted a starting point of 10 years' imprisonment. As an act of mercy to the appellant's young family, the Judge reduced the starting point by one year. The appellant was sentenced to nine years' imprisonment for rape and three years' imprisonment (concurrent) for indecent assault.

[17] On 20 August 2015, the respondent issued a Deportation Liability Notice against the appellant, arising out of his offending in May 2011.

[18] In October 2015, the appellant's third child was born. The appellant's partner and three children currently reside with her mother in New Zealand. The appellant has two adoptive brothers and two adoptive sisters and their families who reside permanently in New Zealand.

## **THE APPELLANT'S CASE**

[19] The Tribunal heard evidence from the appellant, his partner Ashlee Brandon, a psychologist Amanda McFadden, the appellant's brother Ben Taala, and the appellant's sister Taele Vala.

### **Evidence of the Appellant**

[20] The appellant has realised that the victim of his May 2011 offending was frightened and disgusted by what he did to her. However, he did not report the offending as he did not think that what he had done was wrong, being under the influence of alcohol and drugs. He entered a not guilty plea to the charges of indecent assault and rape when he was charged by the police in 2013, and he was found guilty by a jury in April 2015. Initially, he told his first lawyer he was guilty of both rape and indecent assault. A lot of it he found very difficult to remember because at the time he was drunk. However, he knew that he had assaulted and harmed the victim in 2011 and he wanted to take full responsibility for his actions. He was arrested two years after his offending and that is why some of what happened was hard to remember. He is deeply ashamed of what he did to the young woman and he deserves the prison sentence that he received. He harmed her and just left her and he does not know why he believed that what he did was okay. At the time, no one knew who had committed this crime and he did not go to the police and give himself in; he hoped that he would never be found.

[21] The appellant's family in New Zealand wanted him to be represented by a Samoan lawyer so that there would be no problems with communication. He told

the new lawyer that he was guilty. The lawyer told him to think about it and asked him if he was drunk and whether the victim was drunk. The lawyer said that it was the appellant's word against hers and the police must prove their case and that if he was found guilty of this violence towards a woman it would destroy his life and his partner's and children's lives. He then entered a not guilty plea and he states that he thereby forced the victim to have to give evidence. He finally told his lawyer that it was consensual sex. By now he was in a relationship with a woman who loved him and he struggled to admit to her and his extended family what he had done to a defenceless woman in a wheelchair. He tried to hide what he had done. Once he had said he was not guilty, everything escalated and he got caught up with the court process. He lied and kept on lying and his lies caused the victim even more misery when she had to give evidence. This is one of the most shameful things that he has ever done because he knew he had harmed her. He was found guilty but understood from his lawyer that there would be an appeal, so did not change his plea before sentencing. But what happened with the lawyers does not alter what he did to the victim. What he did was terrible. She could not run to get away from him. She was trapped. She would have been terrified of him and frightened and there was also for her the risk of possible disease or HIV or pregnancy. He hopes that she receives support and care and that she has been able to recover from what he did to her. He prays for her to be well and happy.

[22] The appellant accepts that his alcoholism caused problems because he started drink-driving. However, no one forced him to drink alcohol. He made that choice. He continued drinking and offending after the 2011 rape. He incurred a conviction for drink-driving along with dangerous driving in 2012. The driving incident arose from being with friends and being drunk and a car rushing past them and the driver of the other car was showing off and trying to show that it was faster. His friends were urging him on to chase it and show that they had the faster car. He was stupid to listen to them and he drove in a dangerous manner and hit the back of the car. They tried to get away from the scene. He admitted his guilt, completed the supervision and never drove drunk again, but he still drank. In 2013, he was drinking heavily and he also harmed his partner Ashlee whom he loves. They were arguing, and he pushed her. He completed a Stopping Violence programme. It was when the police took his DNA that they realised it was the same DNA on the victim in 2011 and he was arrested.

[23] The appellant has always worked in New Zealand and he expected to contribute to New Zealand for giving him the chance of a new life in this country.

He has three children and a stepdaughter and he is in a relationship. He loves his partner and the children very much. He speaks to all the children every day and writes them letters and Ashlee comes to the prison often so they can meet up. Being with Ashlee really helped him a lot and helped him learn about New Zealand culture, family living and lifestyle, speaking the language, and, most importantly, improving himself to be a better person. In 2012 his first son was born and this changed his life. He managed to stop drinking alcohol completely and the family noticed a change and they supported him and Ashlee and their children. His sister and her husband supported him and the children when they went to church. After he completed the programme at Pacific Project for Anger Management, he learnt a lot on how to control anger, how to make good choices and how alcohol and drugs could affect his life. He has applied all he has learned to his life, his everyday living and his relationship. His relationship with Ashlee and their children became stronger and they did things together as a family. He and his partner got engaged and planned to get married, but they put that on hold later in 2013 when he was arrested, charged and convicted and which is the reason he is now in prison.

[24] Every day in prison has been a stressful day, mostly when he rings home and the children always ask him: "Daddy why aren't you here daddy? Where are you? When are you coming back home?" Living away from Ashlee and their children is really tough. He has noticed the impact it has caused to his children's life growing up without him around. He tries to keep the bond between them strong by ringing home every day, sending birthday cards, letters and money that he can earn from his prison job for Christmas presents every year. None of this is their fault and he takes full responsibility for everything he did. Despite his offending, his relationship has been strong and he wants to be able to fully support his partner with their children. Ashlee and the children do have health problems and they would struggle trying to live in Samoa. All Ashlee's family are here in New Zealand and she would not move to Samoa permanently because of the health problems and also because she would be leaving her home and family. They have no support in Samoa and nowhere for the children to stay, and he would be on his own. They have a baby daughter and an older stepdaughter and he wants to protect them.

[25] The appellant's partner did not know of his May 2011 offending until he was charged. He continued to lie to her about his guilt until about June/July 2015, when he was in prison. His children do not know of his offending, and he does not know how he will explain this to them. In prison, his sister sees him once a week.

His partner and children used to come once a month, but now they come less often, and he last saw them before Christmas.

[26] The appellant likes working and is a hard worker. He wants to work on a farm and learn about how he can support his family. Ashlee lives in Whangarei with the children and he wants them to live together in the country where it is peaceful and the children have a different way of life. He has his family and extended family living in New Zealand. There is nothing for him back in Samoa, almost all his family live here. One brother is still in Samoa, and he cannot provide support. In New Zealand there are his two brothers and their partners and his sister and her partner.

[27] The appellant's offending is known within the Samoan community here and in Samoa. The shame is strong and he will be rejected because of his crime. His brother in Samoa is a part-time art teacher. He lives in a small village and is the chief there and he hates and despises the appellant for his behaviour in Samoa and in New Zealand. He is struggling financially and wants nothing to do with the appellant. The appellant studied for one year at Maritime Training School in Apia in 2007, and then went back to the village. There were no jobs then, and his qualification is now old and he is also older and will not get a job on a ship. He owes reparation for the drink-driving convictions: his car was written off and so was the other car. He had an \$8,000 loan to buy his car that has not been paid and he was also paying off reparation of about \$9,000 for the car that he hit. He also has a debt to Rapid Loans of about \$1,200. He knows that he can work in New Zealand and Ashlee can come off the benefit and they can be a family, they can resume paying off the reparation to the victim of the car crash and pay back the loans over time. He wants to work and he has had a very good work history. Depending on what his release conditions will be, he would live with extended family in Auckland to start, and work and see Ashlee and the children at weekends, and then they would decide to live either back in Auckland or in Whangarei. He will go where Ashlee and the children want to be. He will go wherever probation tells him to go on release from prison. He must work to support his family and pay back the victims of his crimes as best he can. In New Zealand, he can work and contribute in the future and pay back reparation. In Samoa, he cannot do this. He has no prospect of work, no special skills and nowhere to live.

[28] The appellant wants to go on the Te Piriti programme for sex offenders, and he wants to address his offending and attitudes that made him think it was

acceptable to harm other people and to harm a disabled woman. It is only available close to when he will be released from prison. He has also tried to get counselling but has been unable to obtain this.

### **Evidence of Ashlee Brandon**

[29] Ms Brandon is the partner of the appellant.

[30] Ms Brandon acknowledges the terrible crime that the appellant has committed. She acknowledges the victim whose life was affected by this terrible crime. She feels deeply for the victim. She did not deserve this to happen to her. There is no excuse. His actions were unjustified, unacceptable and thoughtless. She knew about the offending only when the appellant was charged, and he initially did not tell the truth about this. When she knew what had happened, she felt really angry, upset and disgusted.

[31] Ms Brandon and the appellant have been together almost seven years. He was 22 and she was 21 when they met. They have three young children together. She also has an older daughter from a previous relationship. The appellant is not only her partner/fiancé, he is her best friend, her soul mate, the love of her life and the father of their children. There is no doubt that they have had ups and downs in their relationship as most couples do, but they have overcome them and have grown stronger. Over the years they have both grown up and matured and their love for each other continues to grow.

[32] Ms Brandon says that the appellant worked hard during the week, and even on days where he would work he would always pick their son up from day care and help with the children's evening routines. He is a good father who loves, cares for and supports them. She knows over the past few years he has really struggled with being separated from them and has cried to her on the phone about this. He has always been a part of their lives since day one, and even while being in prison he has continued to do so and keep up the relationship and strong bond he has with their kids. He has also continued to ring the kids and herself every day since he went to prison. She has tried to keep up regular contact visits with him every few months during the school holidays, and last visited him in January. It has been hard, money is tight. She lives in Whangarei and the prison is in South Auckland and is a three-hour drive away. Although the kids count down the days until they see their dad, they also find it a bit distressing as they cannot understand why he has to stay. She has not explained the appellant's offending in detail to her children.

[33] The past three years have been the most stressful and hardest time of Ms Brandon's life. There has not been a day go by where she has not thought, worried and cried about what has happened and about this whole situation and also what will happen if he is deported back to Samoa. When the appellant went to prison their eldest son found this extremely hard as he is very close to his dad. He would walk around the house crying and looking for his dad and also wake up during the night and do the same thing. Even now he still asks all the time: "when will my daddy be home" or "I miss my dad and just want him back". The second son has also found this hard, and he is always asking for his dad. The children do not have any other male role models in their lives. She sees her dad once or twice a year and he has health problems. Her grandfather on her mum's side passed away, her grandfather on her dad's side has no contact with them, and her grandmother's husband is elderly and doesn't live close. They are too far away and are not close with their other family members. When the appellant went to prison she had only found out a few days before that she was pregnant with their third child. It was by far her hardest pregnancy and really took a toll on her. There was a lot of uncertainty around her health while she was pregnant but she is now okay. The child loves her dad very much, and loves talking to him on the phone and seeing him in visits. Her oldest daughter also loves and misses him a lot, as he has been in her life since the age of two. She calls him dad and speaks to him on the phone every time he rings and still continues to have a strong father/daughter kind of bond.

[34] As a mother bringing up four children on her own, Ms Brandon has found it extremely hard and tiring. It is made worse having very little help and support, and this has taken a huge toll on her mentally. She suffers badly from anxiety and at times depression, and struggles to function. This has become more obvious in last few years as she has no one to help at home. The last few years have been the worst for her, and at times it has become unbearable. The thought of the appellant being deported has never strayed far from her mind since this started, and she has suffered many sleepless nights, tears and feeling emotionally sick to her stomach when she thinks of how much hurt, pain and struggle this has brought and will bring to her and her children and the appellant.

[35] Ms Brandon understands that as the appellant needs to be held accountable for his actions, but him being deported then brings a permanent struggle and a lifetime of difficulty in all aspects. She and their children are still victims to his crimes in a sense as well. They had no part of this yet now live with the consequences of his actions.

[36] In May 2016, Ms Brandon and her children moved up to Whangarei from Auckland with her mother. Her mother is the only person she has here with her to support and help her physically. She does try very hard to help but at times finds four young children overwhelming. In November last year, the elder son ended up in Whangarei hospital for a period of time for a really bad kidney and UTI infection. Her mum then had to take nine days' unpaid time off work to help her as the son needed someone there with him and she also had three young children that had to be looked after at home. She has a huge amount of guilt in always relying on her mother. In the back of her mind she knows her mother will not be able to keep helping her and she knows in the future she is going to need the appellant here to help. Last year her mother was tested and found to have a genetic condition that runs in her dad's side of the family and also has an asthma hole in her heart. She has many other health issues that can affect her in the future and will limit what she can do and how she can help Ms Brandon and the children.

[37] Ms Brandon is also in contact with the appellant's family in New Zealand. She receives child support from the father of her eldest child, but there is only limited contact by the father. She receives social welfare payments as a sole parent. She has two friends and a half-sister in Auckland that she contacts from time to time, but they all have jobs, family and children of their own. She is also in contact with her two grandmothers who are elderly, so the only real support they can give is just an ear to listen over the phone. She is also in contact with her children's teachers.

[38] Ms Brandon says that the appellant is a very hard-working man and has always worked in New Zealand. He has always paid his taxes and has always contributed to his KiwiSaver and, while being in prison, has obtained a job in the prison kitchen. He will continue to work upon release, as working to provide for his children is very important to him, to be able to give their children what they want and what they need. Even while being in prison he saves up what he gets to send money for the children and also makes sure he makes enough money for his phone calls as he knows she struggles with living costs. Over the past years before going to prison he had been making positive changes to his life. He completed the Pacific Project Anger Management and Alcohol program in 2013. This made a huge change to his life and he applied what he learnt to everyday life. He also had a lot to do with his church. This also helped him and still continues to be a big positive part of his life. Even in prison he still continues to make positive changes and tries to do what parenting and educational courses he can do to help him learn skills he needs to be a better person and a better father. There are

other courses he would like to do but, as he falls into the low risk of re-offending category, the prison says he does not qualify.

[39] It has always been important to both Ms Brandon and the appellant that their children are brought up by two parents. In the long run, if he is sent away, she worries about the negative impact this will have on the children's lives, the relationship that they would not have with their father, the resentment that can be caused from him not being here for them, and the fact he was deported. He will be missing out on all aspects of their lives not only now but also in the future. It is also important for parents to set an example for their children and be in a strong, supportive, loving, relationship and a good family environment. As the appellant is Samoan and she is New Zealand European, it is important that their children know their Samoan culture and language. When their sons were born the appellant took great pride in teaching them Samoan. The elder son was bilingual but since then has lost it as she is unable to speak Samoan so was unable to continue to teach them. The appellant sends them letters with some Samoan words and the boys are very proud of this and take letters to day care, to show their class.

[40] Ms Brandon says that, if the appellant is sent back to Samoa, he has no support, nowhere to live and nowhere to go. He will be homeless with nothing and no friends or family. All his friends and adopted family are living, working and bringing up their families here in New Zealand. She would also be unable to take the children to see their dad as it costs too much. She will be the sole provider for her four children and she is struggling already now. She and all her children are New Zealand citizens. Her family and the appellant's family are here. There is nothing in Samoa for them or any help for them there. She and her children do not know the language or the culture. Her elder daughter's father lives here in New Zealand and she is unable to reside out of New Zealand. Both she and her sons have medical issues. The elder son has been under paediatrics at Whangarei hospital for ongoing bowel and bladder problems for about a year now and it is not looking like that is going to change any time soon. He has a predisposition to getting UTI's and kidney infections. He also has some behavioural issues. The younger son has bad asthma that needs constant monitoring and at times medical attention. She is anaphylactic to bee and wasp stings. If stung she needs medication for it right away as it makes her swell and unable to breathe, and at times needs to seek medical help. Without it, it becomes life threatening. She also suffers from anxiety and at times depression which has affected her most of her life, and something she struggles with in everyday life.

[41] Ms Brandon says that, if the appellant got to stay here in New Zealand, she, her mother and his family would help him all they could to get him working and support and guide him to integrate back into the community and into everyday family life. Their family home is a stable and child-focused household and they live a basic life on a lifestyle block. Her mother also lives here and neither of them has criminal records, and they do not smoke or drink. She and the appellant feel it would be of benefit if they did some relationship counselling and also for him one-on-one. There is a lot to be considered, and if deported what impact this will have on many people's lives not only short-term but long-term. She will continue to support, love and be there for him through this. She has never stopped loving him and never will, as he is her life-long partner.

[42] In regard to the appellant's previous convictions, Ms Brandon understands that these look bad. At times it has been hard for her to understand his background and the way Samoa and the Samoan way of life work. The appellant had a lot of instability during his childhood years and suffered from abandonment issues from being passed from adult to adult and then from one culture to another when he came to New Zealand. He was rejected by his birth family when he tried to meet them as a young teen. His family have done the best they could and, after his first adopted parents died, they still wanted him to have the support of having parents and that is why he was then adopted by his brother and his wife who lived here in Auckland where the adoption took place. In the recent few years he has understood more about his behaviour and what was wrong with it and is working on understanding himself and his behaviour and wanting to be a better father to his children and give them a better life than what he had. She believes that the reasons for him pleading not guilty in the end did come down to cultural issues and a lot of fear that came from that and also the fear of losing his children, himself and his family.

[43] Ms Brandon recalls that the rape happened around the time they had just got together. When they first started going out, he did have bad drinking and drug habits and was also influenced by the friends he was hanging out with at the time. She made very clear to him that she did not agree with that kind of lifestyle. She got pregnant with their first son at the time his drink-driving offence happened, and the birth was a changing point in his life. He broke contact with almost all his friends he had before and people he thought influenced him in a bad way. This was the first time in their relationship she had really seen him grow up and mature into a man and with that brought a lot of change to his life.

[44] Ms Brandon accepts that the assault charge was against her. However, it was not that he beat her up or bashed her or anything like that. She does not believe it was his intention to hurt her. She was in early stages of pregnancy with their second son. She had been getting really bad morning sickness and bleeding and hormonal. She had previously miscarried a baby a few months before, so at the time there were a lot of mixed emotions that were going on when this incident happened. That night he had wanted to go and spend time with one of his friends. She did not want him to go. It turned into an argument. She was standing over the top of him shouting at him. He put his leg up and pushed/kicked her back with his foot. By this stage she was really angry. She told him to go and he did not so, after about 30 or so minutes she rang the police. He was not trying to purposely hurt her. The whole thing was just stupid and immature on both their parts. She did not fear for her safety around him in any kind of way. He pleaded guilty to assault. He went on to do the Pacific Project Anger Management and Alcohol program and that did help him a lot. About two or so years ago he gave up drinking as he realised that this was affecting his behaviour. He stopped using drugs around the time their first son was born. The appellant has made many changes over the years they have been together and she is very proud of him for that. This is why she has continued to stay with him and loves and supports him.

#### **Evidence of Amanda McFadden**

[45] Ms McFadden reported that the appellant appeared physically fit and healthy, spoke and wrote fluently in English and Samoan, and showed no evidence of major mood disturbance or symptoms of mental disorder.

[46] Ms McFadden notes that the appellant described a strong bond with his partner that was independently verified by all other family members. The couple impressed as being emotionally reliant on each other. They have shared goals and interests. The loss of this relationship is likely to be highly significant for the appellant. Data gathered indicated that the relationship with Ashlee provided a foundation for positive changes in his lifestyle and behaviour. She accepts his offending and is realistic about the challenges they will face in reuniting as a couple and family after the appellant's release from prison. She struggles with feelings of resentment and negativity but remains committed to moving forwards. The relationship is a key protective factor in terms of his risk of sexual recidivism but also in respect of his emotional well-being. The relationship is considered to be long-term, stable and healthy, and appears to be robust.

[47] The appellant accepts that deportation is a potential consequence of his offending, but impressed as being poorly prepared for a return to Samoa. His core connections are in New Zealand and he has coped to date by focusing on what he can do to move forwards with his life and address his offending. His key life goals orient around providing for his family, being in partnership with Ashlee and providing his children with an active, engaged and committed father. The long-term loss of the roles of husband and father will be emotionally and psychologically damaging to the appellant. He expressed a strong sense of pride, responsibility and connection to his family and is motivated to make changes in his life for their benefit, and also the benefit of the New Zealand public.

[48] Ms McFadden comments that, should the appellant be deported, this would also put considerable pressure on the relationship. Ashlee is vulnerable to chronic mental health difficulties that, if poorly managed or untreated, may negatively impact her ability to cope with the demands of parenting her children and meeting their specific needs. There is a risk that, at times of heightened distress and mood disturbance, the children could be exposed to care and protection issues. This would be especially the case if Ashlee's mother were unable to maintain the level and nature of support she currently provides. The long-term and premature loss of a parental figure will be a significant event for all of the children. Their two younger children may be less overtly affected as a result of their young ages and them having less contact with the appellant during critical attachment periods, but they remain vulnerable to the longer term negative impacts of separation from their father. The stepdaughter is equally vulnerable due to the role the appellant has played in her upbringing and the absence of her biological father. The capacity of the children to continue building a relationship with the appellant would be significantly impacted by him returning to Samoa. At present they talk to him daily on the phone and see him monthly. It was evident that the appellant and Ashlee have worked hard to ensure that he is connected with the children's lives and is known to other key adults in their lives (teachers). However, should he return to Samoa, telephone calls would be limited and physical contact would be constrained by Ashlee's financial situation and other commitments (such as school and work). As the children age, their ability to understand the gravity of the situation will increase. It is at this point that they may be more affected by the loss of their father's role within the family.

[49] Ms McFadden comments that the appellant's family consistently reported that he has no tangible support in Samoa and believe that there will be significant cultural and social ramifications for him and themselves due to village counsel

laws. The family reported that they would not be able to assist the appellant in any practical ways should he be deported. They do not believe that he will be easily able to re-establish himself in Samoa due to the stigma attached to his offending and his lack of familial support. Conversely, they indicated that, if he remains in New Zealand, they can provide emotional, social and spiritual support. They also believe that that, by him remaining in New Zealand, the chances of them building and maintaining strong and meaningful connections with the children will be strengthened. The Taala family would like the appellant to have the chance to remain in New Zealand and reunite with his family. They are fully informed in respect of his offending and believe that, as a family, they need to take responsibility by providing him with unconditional love, counsel and support to address the impacts of his behaviour and strengthen his connections to his family.

[50] Ms McFadden believes that the estimated risk of the appellant engaging in sexual re-offending is considered to fall in the low range over the next five to 10-year period. He has several protective factors that mitigate the risk of further offending. The risk of general re-offending as measured was also assessed to fall in the low range. His previous traffic offences appear best understood within the context of his substance abuse and peer connections and poor impulse control. He accepted his offending and responded favourably to the imposition of sanctions by the court. The common assault charge, while concerning, appears to be more reflective of situational stressors and the presence of poor coping and emotional regulation within the intimate relationship. There is no evidence within the current assessment of the appellant presenting with an elevated risk of violent offending. The risk of further family violence was significantly reduced by his successful engagement in a culturally-focused community-based programme, his cessation of alcohol consumption, and his improved communication and conflict resolution in his relationship.

### **Evidence of Ben Taala**

[51] Mr Taala is the elder (adoptive) brother of the appellant.

[52] Mr Taala, on behalf of the appellant and his family, humbly apologises to the victim and her family. He believes that the damage has been done, and they cannot turn back the tide. He can only say that they are truly sorry for what happened. He prays that the victim and her family will find peace in their hearts to forgive his brother for the damage he has done. Mr Taala also apologises for the appellant entering a not guilty plea. There was a lot of misunderstanding going on

between lawyers. His prayer is for the appellant to own up to his mistakes and to apologise to the victim and her family.

[53] Mr Taala had high expectations for the appellant, for he was the baby of their family. Before their mother passed away, her last word for them was to look after him. That was why his second eldest brother adopted him and brought him here for his future.

[54] Mr Taala says that the appellant is an intelligent person, who has a good education. He was educated in one of the top colleges in Samoa, called the Samoa College in Apia. He topped the entrance exam from his primary school in Savaii to attend the college in Apia, which is very rare for a student from Savaii to achieve.

[55] Mr Taala's parents brought them up well with great morals to abide, with especially their faith in God. The appellant spent most of his time with their parents. But for some reason things went wrong when he came to New Zealand. It was all about wrong choices and the new friends that he had.

[56] Mr Taala asks that his brother be given another chance to stay in New Zealand for he is now a family man. His family is his priority. He is a good father to his children and a good partner to his wife Ashlee, and he has learnt his lesson while in prison. There is nothing for him in Samoa.

[57] Mr Taala says that there is always a time when a person can make a change in his/her life when they are in their down moments. The appellant has been in these moments. He is a good person but the choices he made have ruined his life and his family.

[58] Mr Taala can help his brother to restore his life again, physically and spiritually. If he goes back to Samoa, Mr Taala will support the appellant financially. Mr Taala has also given emotional and financial support to the appellant's partner in New Zealand, and sees them occasionally.

### **Evidence of Taele Vala**

[59] Ms Vala is the appellant's sister and she is a New Zealand permanent resident. She grew up with the appellant with their family in Samoa. When their parents passed away, their older brother brought him here in New Zealand for a better future. Later, she and her husband and three children moved here and the appellant helped them.

[60] Ms Vala says that the appellant is a very generous, kind and respectful brother in their family and also in the community. He also offers his help for her children's school work and activities. He stayed with her until he went to prison and he supported her and her family financially. When he had his partner Ashlee and his three kids, he worked hard to take care of his kids, to support Ashlee and support his lovely kids. He has a heart of love that is co-operative and supporting for his family, his partner and his three children. When he was taken to prison, she, her husband and her three children missed him a lot, that is why they visited him in the prison. She still visits him three times a month.

[61] Ms Vala is in contact with the appellant's partner and children via telephone and Facebook. When they come to Auckland to visit the appellant, they stay with Ms Vala and her family.

[62] Ms Vala can't possibly express how horrible it will be if the appellant is deported back to Samoa. She respectfully asks that he be allowed to stay in New Zealand, the country they call home.

### **Documents and Submissions**

[63] For the appellant, counsel has lodged:

- (a) a statement of the appellant (5 March 2018);
- (b) a statement from Ashlee Brandon (14 February 2018);
- (c) the psychological report of Amanda McFadden (15 March 2018);
- (d) a statement from Ben Taala (22 February 2018);
- (e) a statement from Taeleomanu Taala Mai Vala (28 March 2018);
- (f) a letter from Stuart Blake (22 February 2018); letters from ESR/IANZ (17 November 2015 and 18 October 2017) regarding drugs and alcohol; letters from the Department of Corrections (3 March 2016, 29 October 2015, 19 October 2015); a note from the appellant (22 October 2015); AODT support programme details; Certificate of Completion Kohuora Serco (16 December 2016); NZQA employment skills (12 May 2016); Pasifika Education Centre Certificate of Completion (14 December 2016); NZQA Taumata 2017; Precept Ministries New Zealand April 2016; Certificate of Achievement

Manga Masire (2 May 2016); Dynamics of Whanaungatanga (27 October 2015); NZQA National Certificate of Educational Achievement Level 1 (6 July 2017); NZQA Taumata 2016; NZQA National Certificate of Educational Achievement 2017; Tool Box Certificate of Achievement (12 April 2017); Service IQ (August 2016); a letter from Te Whareora O Tipunga (12 February 2018); a letter from Elizabeth Lisle (21 February 2018); a letter from Susan Croft (17 January 2018); a letter from Teresa Brandon (18 February 2018); a letter from Dianne Davis of Angels Child Care (22 July 2015); a letter from Tualima Taala (28 February 2018); and a letter from Sitalele Toleafoa (undated); and

(g) submissions (15 March 2018).

[64] In summary, the appellant submits:

- (a) The appellant has exceptional humanitarian circumstances. He is in a partnership, and his partner is very unwell and struggling to cope without the appellant. She has problems with her children and her dependence on her mother, the mother is very ill, and her son has serious emotional disturbances. She asks that the appellant stay in New Zealand to support her emotionally, psychologically and financially. Their children, mainly the eldest child, have significant health and mental health needs and need to be with the appellant.
- (b) It would be unjust or unduly harsh for the appellant to be deported from New Zealand. He is very remorseful for his offending. He has no family willing to assist him in Samoa and his brother there would suffer considerable shame if the appellant returned to Samoa. The appellant would be able to live with his family in New Zealand after his release from prison, and it would be unduly harsh for his partner and their children if the appellant is required to leave New Zealand.
- (c) It would not be contrary to the public interest to allow the appellant to remain in New Zealand. There is a public interest in the preservation of family unity. The appellant has a low-risk of recidivism.

## THE RESPONDENT'S CASE

[65] For the respondent, counsel has lodged:

- (a) a copy of the file prepared for the Minister of Immigration before the deportation liability notice was issued; and
- (b) submissions (23 March 2018).

[66] In summary, the respondent submits:

- (a) The appellant does not have exceptional humanitarian circumstances. If the appellant is deported and his partner remains in New Zealand with her children, they could continue living with the partner's mother, as has been the situation since the appellant has been in prison. The medical issues in relation to the partner and her children are being managed satisfactorily. The appellant could continue to maintain contact with his family and provide support to them.
- (b) It would not be unjust or unduly harsh for the appellant to be deported from New Zealand. He lived in Samoa until he was nearly 21 and is familiar with the life, language and culture there and could re-establish his life there. His offending was serious in nature, as reflected in the maximum sentences and final overall sentence, and he breached the privilege of his residence status.
- (c) It has not been established that it would not be contrary to the public interest to allow the appellant to remain in New Zealand. This is due to the serious nature of his offending and his attitudes towards his offending as indicated in his pre-sentence report.

## STATUTORY GROUNDS

[67] The appellant's liability for deportation arose under section 161(1)(b) of the Immigration Act 2009 (the Act) because he has been convicted of an offence for which the court had the power to impose imprisonment for a term of two years or more, the offence being committed not later than five years after the appellant first held a residence class visa.

[68] Section 206(1)(c) of the Act provides the appellant with a right to appeal his liability for deportation. The grounds for determining humanitarian appeals against deportation 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.

[69] In regard to section 47(3) of the Immigration Act 1987 (which is analogous to section 207(1)(a) above), the majority of the Supreme Court stated in *Ye v Minister of Immigration* [2010] 1 NZLR 104 that three ingredients had to be established: (a) exceptional circumstances; (b) of a humanitarian nature; (c) that would make it unjust or unduly harsh for the person to be removed from New Zealand.

[70] Because there are family interests at issue in this appeal, regard must be had to the entitlement of the family to protection as the fundamental group unit of society, exemplified by the right not to be subjected to arbitrary or unlawful interference with one's family – see Articles 17 and 23(1) of the 1966 International Covenant on Civil and Political Rights (the ICCPR). Whether such rights would be breached depends on whether deportation is reasonable (proportionate and necessary in the circumstances) – see the United Nations' Human Rights Committee's *General Comment 16* (8 April 1988) and the discussions in *Toonen v Australia* (Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1994) and *Madafferi v Australia* (Communication No. 1011/2001, UN Doc CCPR/C/81/D/1011/2001, 26 August 2004, para 9.8).

## **ASSESSMENT**

### **Whether there are Exceptional Circumstances of a Humanitarian Nature**

[71] As to whether circumstances are exceptional, the Supreme Court noted, in *Ye v Minister of Immigration* at [34], that they “must be well outside the normal run of circumstances” and, while they do not need to be unique or rare, they do have to be “truly an exception rather than the rule”.

*The appellant's nexus to New Zealand*

[72] The appellant has been a resident of New Zealand for the past nine years. During this time he has worked for an engine moulding company, as a machine operator, and as a store person for a food company. He has obtained certificates in health and safety, firefighting, security, employment skills and hospitality, and completed NCEA Levels 1 and 2. He has also incurred financial liabilities which require to be paid. For nearly seven years, he has been in a relationship with his New Zealand-citizen partner, and they have three children (aged five, four and two years), all of whom are New Zealand citizens. His partner has a child from a previous relationship, aged 10 years, also a New Zealand citizen. In addition, the appellant's two older brothers and two sisters, and their families, live permanently in New Zealand.

[73] However, the appellant also has a nexus to Samoa. He lived there for over 20 years before he came to New Zealand. He completed his secondary education and a marine engineering certificate there. An elder adoptive brother still lives there with his family, although the appellant says that they are estranged. He also has four natural brothers and one natural sister living in Samoa. The appellant is fluent in the Samoan language and is familiar with the lifestyle there. A recent psychological report noted that the appellant appeared physically fit and healthy, spoke and wrote fluently in English and Samoan, and showed no evidence of major mood disturbance or symptoms of mental disorder. He says that he likes working and is a hard worker, and would like to work on a farm. These factors should assist his return to Samoa.

[74] The appellant has not lived with his family in New Zealand for the past four years and eight months, and there is the real possibility that his absence from them will continue for some time into the future. He and his partner, children and other relatives have continued to communicate through the telephone, correspondence and visits, but over the last three years face-to-face contact has been limited and the family's last visit was some three months ago. The appellant has also not lived with his broader New Zealand family or in the New Zealand community for the last three years, and his absence may well continue for some time in the future. The long-distance communication that the appellant has with his immediate and broader family in New Zealand could be expected to continue if he returns to Samoa.

*The interests of the appellant's partner*

[75] The appellant's partner is now aged 28 years and, as noted above, is a New Zealand citizen. She lives with her four children and her mother in a provincial town. She says that the appellant is her partner/fiancé, her best friend, her soul mate, the love of her life and the father of their children. She says that she suffers badly from anxiety and at times depression, and struggles to function. She says that this has become more obvious in the last few years, in the absence of the appellant, and at times it has become unbearable for her. She is concerned that her mother has health issues that will affect her and her ability to provide support in the future. An expert psychological opinion notes that the partner is vulnerable to chronic mental health difficulties.

[76] However, the partner notes that her mother presently provides her with physical and emotional support. The partner also has two friends and a half-sister in Auckland, and other extended family including her two grandmothers, whom she contacts from time to time. She is in regular contact with members of the appellant's family in New Zealand, including his brother who provides financial and other support and his sister who provides accommodation when the partner and her children come to Auckland. She has tried to keep up regular contact visits with the appellant every few months, and there is regular telephone contact. This situation can be expected to continue into at least the immediate future.

[77] As a New Zealand citizen, the partner is entitled to have access to the state health and social welfare systems, which she has been using to support and assist herself and her children. She receives a state benefit as the sole parent provider of her children. She also receives child support from the father of her eldest child.

[78] The Tribunal noted that a psychological report assessed that the appellant's relationship with his partner is considered to be long-term, stable and healthy, and appears to be robust. However, the report noted that the partner is realistic about the challenges that she and the appellant will face in reuniting as a couple and family after the appellant's release from prison, and that she struggles with feelings of resentment and negativity. The Tribunal also notes that the appellant's rape of another woman occurred shortly after the start of the relationship between the appellant and his partner, and that he confessed his guilt to his partner only four years later. The appellant and his partner lived together for around two years. Then followed the assault committed by the appellant on his partner and the resultant non-association order and bail conditions that he live elsewhere, followed by the bail conditions and subsequent detention of the appellant arising out of his

offending in May 2011. The result has been that the appellant and his partner have not lived together for the past four years and eight months. Their separation is likely to continue into at least the immediate future, during the appellant's imprisonment. It is unknown at this stage what the appellant's release conditions will be, and so whether he will be allowed to live with his partner following his release.

[79] Overall, while the Tribunal accepts that the partner keenly feels the absence of the appellant as her partner and the father of her children, and acknowledges the expert opinion of the psychologist, it is unable to make a safe finding that the partnership between the couple is a stable and long-term one. The Tribunal reaches this conclusion in light of the instability in the appellant's relationship with his partner, their continuing time apart and the uncertainties of the future.

*The best interests of the appellant's children*

[80] As noted above, the appellant's three children are aged five, four and two years, and his partner's child is aged 10 years. The 1989 *Convention on the Rights of the Child* provides at Article 3.1 that, in all actions concerning children, the best interests of the child shall be a primary consideration — see also *Puli'uvea v Removal Review Authority* (1996) 14 FRNZ 322 (CA). The High Court has stated that the best interests of the child are neither paramount nor the primary consideration, but they are to be given important and genuine assessment — see *O'Brien v Immigration and Protection Tribunal* [2012] NZHC 2599 at [32].

[81] All the appellant's children, and his partner's child, are New Zealand citizens, and they have lived all their lives in New Zealand. The appellant lived with his partner and her child for around two years, from when this child was over three years old. The appellant also lived with his eldest child for a year, from the time of his birth until the appellant was made subject to a non-association order and then bailed to another address. The appellant has not lived at home with his second child or youngest child.

[82] The appellant and his partner state that he has been a devoted and caring father who has worked hard to sustain his relationships with his children and his partner's child. Until his detention three years ago, he visited his children regularly (except during the period of the non-association order) and provided support to them. While in detention, he has telephoned his home every day and sent gifts and correspondence to his children. They appear to maintain their affection for the appellant and state that they miss him and want him to be with them. According to

the partner, her own child still continues to have a strong father/daughter kind of bond. The partner speaks of the importance of her children having a male role model in their lives and maintaining their Samoan heritage. Particularly the eldest child has had health difficulties which have increased the need for support. In her expert opinion, Ms McFadden considers that the long-term and premature loss of a parental figure will be a significant event for all of the children. Ms McFadden opines that the mother's mental health difficulties, if poorly managed or untreated, may negatively impact her ability to cope with the demands of parenting her children and meeting their specific needs.

[83] However, the reality is that the appellant has not lived at home with his children during their lives, except for a short initial period in relation to his partner's child and his own eldest child. In her expert opinion, Ms McFadden notes that the two younger children may be less overtly affected by the appellant's departure as a result of their young ages and them having less contact with the appellant during critical attachment periods. For the past three years, all four children have not had his ongoing physical presence and support. There is the possibility that his absence will continue into at least the near future. Once he is released, it is not clear what the terms of his release will be and whether he will be able to live with his children. In the longer term, it is not clear what effect the appellant's offending of May 2011 will have on his relationship with his children, when they are of an age to understand the nature of this offending. Should the appellant be required to return to Samoa, he can continue the long-distance telephone and other communication that he has had with his children, at least until such time as he and his partner decide on their long-term future in New Zealand or in Samoa.

[84] The Tribunal accepts that, in principle, the best interests of children lie in them having the ongoing presence, love and support of both their parents, and the Tribunal acknowledges the expert opinion of Ms McFadden. However, overall, in view of the nature of the appellant's contact with his children and their mother over a considerable time, and the uncertainties of the future, the Tribunal is not satisfied that the long-term best interests of the appellant's children will be jeopardised by his return to Samoa.

*Conclusion on exceptional circumstances of a humanitarian nature*

[85] Looked at cumulatively, the appellant's circumstances are such that deportation will cause him, his partner, his children and his New Zealand-based family disappointment, distress and emotional upset. However, the High Court

has held that the stringent statutory test of "exceptional circumstances of a humanitarian nature" cannot be equated with "compassionate factors", circumstances that are more than simply "routine", or "genuinely concerning circumstances". The High Court has also noted "the high threshold for a finding of exceptional circumstances of a humanitarian nature" — see *Minister of Immigration v Jooste* [2014] NZHC 2882 at [45]. Taking into account the appellant's circumstances, the Tribunal is not satisfied that there are exceptional circumstances of a humanitarian nature in his case.

[86] The Supreme Court has indicated that, if it is not shown that there are exceptional circumstances of a humanitarian nature, the inquiry ends there (*Ye v Minister of Immigration* [2010] 1 NZLR 104 at [30]; confirmed in *Helu v Immigration and Protection Tribunal* [2015] NZSC 28 at [157]). The Tribunal's finding that there are none in this case makes it unnecessary to consider either the "unjust or unduly harsh" or "public interest" stages of the inquiry under the statutory test. However, for the sake of completeness, the Tribunal will consider the "unjust or unduly harsh" step.

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

[87] 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".

[88] The appellant is liable for deportation because he has been convicted of an offence for which the court had the power to impose imprisonment for a term of two years or more, the offence being committed not later than five years after the appellant first held a residence class visa. The appellant first held a residence class visa on 19 February 2009. On 8 May 2011, he committed the offences of rape (maximum sentence 20 years' imprisonment) and indecent assault of a female over 16 (maximum sentence seven years' imprisonment), and was later convicted of these offences.

[89] The seriousness of the appellant's offending is indicated by nature and length of his end sentence. The sentencing Judge noted in particular the vulnerability of the wheelchair-bound victim, the "enormous" and ongoing impact of the offending on her, and her exposure to the risk of pregnancy and/or infection.

[90] The Tribunal notes that the appellant has been convicted of offending after that of May 2011. He was convicted of driving a motor vehicle in a dangerous manner with excess breath alcohol and failure to stop, and the assault of his own partner. The Tribunal does acknowledge the appellant's expressions of remorse for all his offending and his efforts at and openness to rehabilitation, but the nature of his May 2011 offending and the evidence of further offending are cause for considerable concern.

[91] To be balanced against the appellant's offending are his humanitarian circumstances. As identified above, these are his settlement in New Zealand, his relationship with his New Zealand-citizen partner, and the interests of his New Zealand-citizen children and his partner's New Zealand-citizen child. His closest family members live in New Zealand and he would face at least initial difficulties in readjusting to living in Samoa again.

[92] However, the Tribunal has noted above the nexus of the appellant to Samoa and the factors which could support his return there. His good health and work ethic, his familiarity over the first 20 years of his life with the language and lifestyle in Samoa, and the qualifications and work experience that he has gained in New Zealand, should assist him to re-establish his life there. His New Zealand-based brother has offered to provide financial assistance to the appellant in Samoa.

[93] The appellant's partner and her four children, as New Zealand citizens, will continue to have ready access to the social welfare and health benefits that the state provides. They can continue to stay in the home of the partner's mother, and receive the emotional support of their wider family and friends in New Zealand. The partner and her eldest child will continue to receive child support from that child's father. The appellant's siblings in New Zealand have pledged to provide ongoing support, emotional and/or financial, to the partner and her children.

[94] The appellant's continuing separation from his family, and the uncertainties of when he will be released, what the terms of his release conditions will be and the future impact of his offending on his children when they are of an age to understand this, weigh against the appellant in the assessment of whether his deportation will be unjust or unduly harsh. If the appellant returns to Samoa after his release, he could continue the distance communication that he has had with his partner and children in New Zealand. He and his partner and family could at a later stage mutually assess how to continue their relationship in the future, and

whether a move by the partner and the children to Samoa on a short- or longer-term basis would be feasible.

*Conclusion on Unjust or Unduly Harsh to Deport*

[95] Weighing the appellant's serious offending against his humanitarian circumstances, the Tribunal is not satisfied that it would be unjust or unduly harsh for the appellant to be deported from New Zealand.

[96] The finding that the appellant does not have exceptional humanitarian circumstances which would make it unjust or unduly harsh for him to be deported makes it unnecessary to consider the 'public interest' limb of the test.

**DETERMINATION**

[97] For the reasons given, the Tribunal is not satisfied that there are exceptional circumstances of a humanitarian nature which would make it unjust or unduly harsh for the appellant to be deported from New Zealand.

[98] The appeal is declined.

**Order Removing the Period of Prohibition on Re-Entry**

[99] The appeal being declined, the Tribunal orders pursuant to section 215(1) of the Act the removal altogether of the period of prohibition on entry to New Zealand that would otherwise apply under section 179 following the appellant's deportation from New Zealand. The reason for this order is to allow the appellant the opportunity to visit his New Zealand-based family here. However, the decision on any such application will be for Immigration New Zealand to make, and the Tribunal cannot provide any guarantees in this regard.

[100] Pursuant to section 215(2) of the Act, the Tribunal orders that the removal of the period of prohibition is not subject to section 180(1).

[101] The appeal is declined in the above terms.

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Judge P Spiller  
Chair

"Judge P Spiller"  
Judge P Spiller  
Chair