IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2018] NZIPT 503759-760**

AT AUCKLAND

Appellants:	**BUNKHAMPHA, Sunisa** **HUANG, Qixing**
Before:	V J Shaw (Member)
Representative for the Appellants:	T Delamere
Date of Decision:	7 June 2018

DEPORTATION (NON-RESIDENT) DECISION

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[1] These are humanitarian appeals by the appellants, against their liability for deportation which arose when they became unlawfully in New Zealand.

THE ISSUE

[2] Ms Bunkhampha is a 52-year-old Thai citizen and her partner Mr Huang is a 48-year-old Chinese citizen. They have a 12-year-old son who was born in New Zealand and who is a New Zealand citizen. The primary issues on appeal are whether the appellants' lengthy stay in New Zealand and their son's best interests in remaining in New Zealand cumulatively establish exceptional humanitarian circumstances.

[3] For the reasons that follow, the Tribunal allows the appeals and directs the grant of residence visas.

BACKGROUND

[4] Mr Huang has been living in New Zealand since April 1999. When his work visa expired in April 2000 he remained here unlawfully.

[5] Ms Bunkhampha has been living in New Zealand since July 2000. When her visitor visa expired in March 2001, she too remained here unlawfully.

[6] When he came to New Zealand, Mr Huang was still married to his wife in China, with whom he had two daughters. The older daughter is 28 years old. She came to New Zealand in 2012 as a student and became a resident in September 2015. She is married with one child. The younger daughter is 23 years old and lives in Tonga.

[7] Other immediate family are Mr Huang's father and two sisters living in China and his two brothers living in Tonga. Ms Bunkhampha has a sister and four brothers living in Thailand.

[8] The appellants met in New Zealand in around 2002. They started living together and their son was born in 2005. He is a New Zealand citizen.

[9] In July 2008, Mr Huang was served with a removal order and taken into custody. Following successful judicial review proceedings, the High Court, in November 2008, directed Immigration New Zealand to reconsider whether the family had humanitarian circumstances. Mr Huang was released from custody, but he had to continue to regularly report to the police.

[10] For the next three-and-a-half-years there followed protracted correspondence between the representative and Immigration New Zealand with no reconsideration ever completed. Instead, in August 2012, the removal order was cancelled and in October 2012 the appellants were granted two-year work visas in accordance with a Ministerial direction.

[11] Mr Huang was self-employed in his plastering and painting business.

[12] In October 2014, the appellants were granted further work visas, valid to 2 July 2015, to await the outcome of their request for a further Ministerial direction.

[13] In October 2015, following a second Ministerial direction, the appellants were again granted two-year work visas.

[14] Following the expiry of their final work visas on 20 October 2017, the appellants lodged these humanitarian appeals.

[15] Mr Huang twice visited China for several weeks, in early 2014 and early 2016. Ms Bunkhampha twice visited Thailand, in early 2013 and early 2016,

staying for one month on each visit. The couple's son accompanied each of his parents on these visits.

STATUTORY GROUNDS

[16] The grounds for determining a humanitarian appeal are set out in section 207 of the Immigration Act 2009 (the Act):

> (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that –
>
> (a) there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
>
> (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

[17] The Supreme Court stated that three ingredients had to be established in the first limb of section 47(3) of the former Immigration Act 1987, the almost identical predecessor to section 207(1): (i) exceptional circumstances; (ii) of a humanitarian nature; (iii) that would make it unjust or unduly harsh for the person to be removed from New Zealand. The circumstances "must be well outside the normal run of circumstances" and while they do not need to be unique or very rare, they do have to be "truly an exception rather than the rule", *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34].

[18] To determine whether it would be unjust or unduly harsh for an appellant to be deported from New Zealand, the Supreme Court in *Ye* stated that an appellant must show a level of harshness more than a "generic concern" and "beyond the level of harshness that must be regarded as acceptable in order to preserve the integrity of New Zealand's immigration system" (at [35]).

THE APPELLANTS' CASE

[19] The grounds of appeal are set out in submissions and can be summarised as follows:

(a) The appellants are in a *de facto* relationship. Mr Huang is not entitled to residence in Thailand and Ms Bunkhampha is not entitled to residence in China.

(b) Mr Huang is an experienced painter and plasterer and runs his own business employing one other person. He has always been able to support his family in New Zealand.

(c) The appellants' 12-year-old son is a New Zealand citizen and has been living in New Zealand his whole life. He is entitled to the benefits that flow from his citizenship.

(d) In China or Thailand, the son would struggle to progress his education as he has been educated in New Zealand solely in the English language. Leaving New Zealand to live in either China or Thailand would create problems for his education and it would also be a huge upheaval in his life.

(e) New Zealand offers the family the best prospect for remaining together as a family unit.

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

(a) A letter (12 April 2018) from the appellant's son who states that he wants his parents to live in New Zealand. He dislikes China and Thailand and New Zealand is his favourite country. His parents love him and care for him. Most days after school he goes swimming. On Saturdays he helps his father with his work and on Sundays he attends a Chinese school for two hours. He will be starting high school next year and his hope is for his parents to be able to stay with him in New Zealand.

(b) A letter (13 April 2018) from Mr Huang's older daughter who states that she has been in New Zealand for eight years. She married in 2016 and her child was born in 2017. Her husband holds a Licensed Building Practitioner (LBP) licence for foundation construction and she helps manage their business. When she came to New Zealand, she lived with the appellants for five years while studying business management. Her 12-year-old brother needs to be with his parents. He speaks only English and cannot read and write Mandarin. She loves her father who visits her and his grandson weekly, and she needs him to stay here.

(c) A letter (11 April 208) from the principal and two teachers at the son's intermediate school. The son is settled and has a stable peer group

at the school. His academic performance is highly promising. He is committed to achieving at school and puts considerable effort into his work. He is a friendly, helpful and reliable member of his class, accepts all challenges and participates in all activities. He will thrive in the New Zealand school environment.

(d) The financial statements for Mr Huang's business for the year ended 31 March 2015 and employer monthly schedules for two months in 2015.

(e) The certificate of title for a residential property owned by the appellants.

(f) The bio-data pages from the appellants and their son's passports and the appellants' most recent work visas.

(g) Correspondence between the representative and Immigration New Zealand in relation to the appellants' immigration matters and the appellants' counsel's submissions in respect of the High Court judicial review.

(h) Medical certificates (2 May 2018) for both appellants and two specialist reports (28 and 30 May 2018) in respect of Ms Bunkhampha.

ASSESSMENT

[21] 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.

Whether there are Exceptional Circumstances of a Humanitarian Nature

Nexus to New Zealand

[22] Mr Huang has been living in New Zealand for the last 19 years and Ms Bunkhampha for just under 18 years. They met here and have now been together in a *de facto* relationship for around 14 years. Their 12-year-old son is a New Zealand citizen. Mr Huang's older married daughter is a permanent resident and her young child a New Zealand citizen. Mr Huang has operated a plastering and painting business since 2007, which has enabled him to support his family.

[23] It is accepted that after such a lengthy stay, the appellants can now be considered well-settled in New Zealand.

Best interests of son

[24] The appellants' son is aged 12 years and he is a New Zealand citizen. His best interests are a primary consideration for the Tribunal (Article 3(1) of the *Convention on the Rights of the Child.*

[25] The son has written that he has a settled and happy life in New Zealand. In recent years he has visited both China and Thailand to meet his family members there and he has expressed a clear preference to be able to live in New Zealand.

[26] It is submitted that, if the son has to accompany his parents to live in either China or Thailand, his education will suffer because he has been educated in English and he will struggle to adapt to education in a new language and script. It is noted that the son says that he goes to a Chinese school for two hours a week so presumably he has some familiarity with Chinese, although his older sister states that he speaks only in English and cannot read and write Mandarin. He presumably is also not fluent in Thai or able to read and write Thai script. This means that should he have to attend school in either China or Thailand, his educational progress will be severely disrupted, with consequences for his future opportunities.

[27] A key feature of the judicial review and subsequent submissions to Immigration New Zealand was the family's inability to remain united in either China or Thailand because of the Ms Bunkhampha's inability to become a resident in China and the barriers to Mr Huang establishing a stable income from plastering work in Thailand, a requirement for becoming a resident there. In China, the son, may also not have been able to freely access schooling or health services because he is a New Zealand citizen.

[28] China will be the likely destination should the appellants have to leave New Zealand. Mr Huang has in the past stated that he would not go to Thailand as he does not speak the language so he has a better chance of supporting his family in China.

[29] In New Zealand the appellants are well able to support themselves and their son through their small plastering and painting business in which they are joint shareholders. They purchased a home in 2013. If they did have to go to China, where Mr Huang has not lived or worked for almost two decades, their ability to

provide their son with a comparable standard of living through plastering work will be much reduced. The son, who is a New Zealand citizen and knows only a New Zealand lifestyle, would experience the loss of his familiar life, school and friends most keenly, and adapting to the different Chinese lifestyle and, most particularly, the Chinese education system would be very challenging.

[30] The son's best interests lies in his remaining in the care of his parents in New Zealand as here he has a settled life, is doing well in his education and his parents are best able to provide for his current and future needs.

Conclusion on exceptional humanitarian circumstances

[31] The Tribunal finds that the appellants' well-settled life in New Zealand and the best interests of their New Zealand-citizen son in remaining in New Zealand, as this offers him the best chance of educational success and a secure future, cumulatively establish exceptional humanitarian circumstances.

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

[32] The Tribunal must balance the reasons for the appellants being liable for deportation against the consequences for the appellants and their son of deportation: *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [9].

[33] The appellants are liable for deportation because they are unlawfully in New Zealand. They became unlawfully here after their most recent work visas expired.

[34] The appellants have a history of being unlawfully in New Zealand over a significant period. Immigration New Zealand attempted to deport Mr Huang in 2008, but, after a successful judicial review, it was directed by the High Court to reconsider its decision. No reconsideration was ever completed and, after almost four years, the Associate Minster directed that the removal order be cancelled and the appellants be granted two-year work visas as an exception to instructions. A second Ministerial direction resulted in further two-year-work visas being granted in 2015.

[35] While the Tribunal must have regard for the integrity of New Zealand's immigration system, this is a case where the appellants' unlawful stay is tempered by the need to bring an end to the uncertainty about their immigration status and future that has been ongoing since the resolution of the initial litigation in 2008.

[36] Deportation will result in significant hardship for the appellants and their son. They will lose their settled, economically secure life in this country, which is not in the best interests of their New Zealand-citizen son, while living in either of his parents' home countries will not only jeopardise the couple's ability to support themselves but also the son's educational progress and therefore his future life opportunities.

[37] The Tribunal finds that it would be unjust and unduly harsh for the appellants to be deported from New Zealand.

Public Interest

[38] Both appellants have clear police records in their home countries and in New Zealand.

[39] Mr Huang's medical certificate indicates no significant medical issues.

[40] Ms Bunkhampha medical certificate indicated that she has chronic hepatitis B and possible thalassaemia/haemoglobinopathy; specialist reports were obtained.

[41] Gastroenterologist Dr Judy Huang reports, in her letter of 28 May 2018, that Ms Bunkhampha has chronic hepatitis B, E-antigen negative disease. She has normal liver function tests and normal AFP and her HBVDNA viral load is 5.01lg. The fibroscan was in keeping with no or minimal fibrosis. She does not require anti-viral treatment and is unlikely to be a burden on health services.

[42] Consultant haematologist Dr James Liang, in his letter of 30 May 2018, states that although he has not done a thalassamia/haemoglobinopathy screen, he is very confident that Ms Bunkhampha does have an underlying thalassamia/haemoglobinopathy. She is from Thailand which means that she might have heterozygous HbE, and the normal haemoglobin and increased red blood cells is highly suggestive. However, with a normal Hb, this condition will have no implications for her. Her long-term survival will be similar to anyone without the condition, there will be no limits on her ability to work, and she will not require any increase in healthcare because of the condition.

[43] In light of these specialist opinions, it does not appear likely that Ms Bunkhampha will impose significant costs or burdens on health services.

[44] The Tribunal therefore finds that it would not in all the circumstances be contrary to the public interest for the appellants to remain here on a permanent basis

DETERMINATION

[45] 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.

[46] 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.

[47] Pursuant to section 210(1)(a) of the Act, the Tribunal orders that the appellants be granted resident visas.

[48] The appeals are allowed on those terms.

"V J Shaw"
V J Shaw
Member

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V J Shaw
Member