IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2018] NZIPT 503907**

AT AUCKLAND

Appellant:	**AM (United States of America)**
Before:	V J Shaw (Member)
Representative for the Appellant:	The appellant represents herself
Date of Decision:	15 August 2018

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellant, a 27-year-old national of the United States of America who was born in American Samoa, against her liability for deportation which arose when she became unlawfully in New Zealand.

THE ISSUE

[2] The appellant is married to a New Zealand citizen with whom she has four New Zealand-citizen children. The primary issue on appeal is whether this relationship and the best interests of the four children give rise to exceptional humanitarian circumstances, and whether it would be unjust and unduly harsh for the appellant to be deported having regard to her husband's recent domestic violence convictions.

[3] For the reasons that follow, the Tribunal grants the appeal and directs that the appellant be granted a resident visa.

BACKGROUND

[4] The appellant was born in American Samoa in 1990 and later moved with her family to live in the United States. She declares on her appeal form that her mother,

four sisters and two brothers all live in the United States, although other information in the appeal refers to a sister living in New Zealand.

[5] The appellant's husband was born in New Zealand in 1987 and is of Māori descent. In October 2000, when aged 13 years, he and his siblings were taken by his mother and step-father, who was a Tongan national, to the United States. When their initial visitor visas expired, the family remained in the United States unlawfully.

[6] The appellant and her husband met in California in mid-2007 and they married in January 2010. As the husband's unlawful status limited his employment opportunities, the couple decided to leave the United States.

[7] In April 2010, they came to New Zealand, staying here for three months before departing for Australia where they remained living.

[8] The appellant travelled back to the United States for the birth of her first child in January 2012.

[9] The couple's second and third children were born in Australia in October 2014 and January 2016.

[10] In July 2016, the couple and their three children re-entered New Zealand with the intention of settling here. The appellant was issued a three-month visitor visa.

[11] On 28 October 2016, the appellant lodged an application for a partnership-based work visa. Her application was returned to her as it was incomplete. When it was re-lodged on 2 November 2016, her visitor visa had expired so that Immigration New Zealand considered the application pursuant to section 61 of the Immigration Act 2009 (the Act). The application was approved and on 12 December 2016 the appellant was granted a one-year work visa.

[12] In November 2016, the appellant was admitted to hospital in Auckland with a pregnancy-related pulmonary emboli in her left lung. She discharged herself after four days because of the financial cost of the treatment. She was required to be monitored for a high risk pregnancy until her fourth child was born in May 2017. This child is also a New Zealand citizen.

[13] On 13 June 2017, the appellant and her three older children travelled to the United States so that the appellant could access medical treatment for a recurrence of her lung condition. They returned on 15 August 2017.

[14] On 7 November 2017 the appellant lodged an application for a further partnership-based work visa.

[15] On 27 November 2017, Immigration New Zealand wrote to the appellant outlining its concern that there was insufficient evidence provided with the application to establish shared residence, financial interdependence, public recognition, family support, time spent together, communication and maintenance of their relationship. A further concern was the appellant's *bona fides* in that it was noted she had an outstanding debt with Counties Manukau District Health Board of $9,435 and no evidence had been provided that the debt had been repaid or reasonable efforts were being made to repay the debt.

[16] On 4 December 2017, the appellant provided additional information to Immigration New Zealand. The information to establish the relationship now consisted of the couple's marriage certificate; the birth certificates for the couple's four children (the Australian certificates also record two common addresses for the appellant and her husband); four Australian rent receipts in the couple's joint names (June to September 2014); an envelope for a letter sent from the United States to the couple at an Australian address; a rent receipt (6 October 2016) in the couple's names for their earlier address in Auckland; a Housing New Zealand document recording the couple and their three older children as the household members since 24 February 2017; flight tickets and boarding passes for the couple's travel in 2010 between Honolulu, Auckland and Brisbane; marriage photographs and photographs of the couple and their children; and a letter (1 December 2017) from the appellant's midwife confirming that she had met the appellant and her husband in November 2016 as the appellant was under care of because of medical complications, she had continued to see the couple in their home and in the clinic until June 2017 and that, throughout this time, they were living together, co-parenting and a genuine couple.

[17] In respect of the hospital debt, the appellant advised that she was making payments but at the moment would only be making weekly $10 payments as she was working at a casual temporary job. She produced correspondence with BayCorp that she had an arrangement to pay $10 per week, commencing on 30 November 2017, and that her current debt was $8855.48.

[18] On 22 January 2018 Immigration New Zealand declined the application as it was not satisfied the appellant and her husband were living together in a genuine and stable partnership as there was "insufficient evidence of shared residence, financial interdependence, public recognition, family support, time spent together, communication and maintenance of their relationship".

[19] With the decline of her application, the appellant's interim visa expired and she became unlawfully in New Zealand from 24 January 2018.

[20] On 7 March 2018, the appellant's husband pleaded guilty to assaulting the appellant and four charges of threatening to kill in relation to each child. The charges followed from an incident on 1 December 2017 when he and the appellant had an argument. According to Judge Moses' sentencing notes, the husband was questioning the appellant's faithfulness, he pushed her in the back making her stumble forward and continued to push her several more times and swore at her to get out. She left, then returned and yelled that she had called the police and the husband yelled back that he would kill the children. He rushed at the appellant telling her she was going to regret it and pushed her again. He went inside and turned on the television to drown the cries of the children. He then came to the door and made the comment "One child down and one to go". The appellant was genuinely concerned that he had harmed one of the children.

[21] As a condition of his bail the husband was required to live separately from his family.

[22] On 5 July 2018 the husband was sentenced to nine months' supervision and he returned to live with his family.

STATUTORY GROUNDS

[23] The grounds for determining a humanitarian appeal 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.

[24] 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].

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

THE APPELLANT'S CASE

[26] The grounds of appeal as set out on the appeal form and in a letter from the appellant can be summarised as follows:

(a) The appellant's husband and their four children are New Zealand citizens.

(b) The appellant and her husband married in January 2010. They have since lived together in California, Hawaii, Australia and New Zealand.

(c) The couple struggled financially during 2016 and 2017. Following the birth of her fourth child in May 2017, the appellant was not well with blood clots on her lungs. She returned to the United States as she did not want to incur more hospital debts in New Zealand and she could access free medical treatment in the United States. Her husband had to cease work to care for their youngest child, and he began to suffer from depression. They did not have the funds to apply for residence so the appellant applied for another work visa in the hope of getting back on their feet.

(d) If the appellant is deported, her husband could not return to the United States with her due to his history of unlawfully living there. If she is deported, the four children would have to go with the appellant as their father is not able to care for them. In the United States, only the oldest child, who is also a US citizen, would have any medical coverage. The appellant would have to apply for the other children to obtain US citizenship, which would take time and be costly.

(e) After the husband was charged with domestic violence offences in December 2017 he had to live apart from the family in accordance with

bail conditions. During the 11 years of their relationship, this was the first time domestic violence had happened. The appellant believes it resulted from her husband's depression. It was the first time that she had been working and her husband had to be a stay-at-home parent.

[27] As well as the two letters from the appellant, the appeal was supported by the following information:

(a) A letter from the appellant's husband (21 February 2018), in which he explains that his intention in coming back to New Zealand was so that his children would be close to their whakapapa and for better employment opportunities. He confirms that he is currently working full-time and is paying $30 per week towards the appellant's hospital debt, which it will take him two years to repay. He also expresses what he feels to be the injustice to himself as a New Zealand citizen and tangata whenua that the appellant's visa application was denied because of unpaid medical expenses. Since July 2017 he has been receiving treatment for depression and had been improving quite dramatically. However, the decision to decline his wife's visa application caused his depression to resurface. If she is made to leave New Zealand it would cause major trauma for their children and he would not be fit enough to care for them alone. Deporting his wife would cause severe damage to their family's structure and stability. The husband also expresses his confusion as to why his wife's visa application was declined when they had four children together and the youngest was only 10 months old.

(b) Letter (8 December 2017) from the husband's general practitioner, who confirms that the husband has been treated for depression since August 2017 and that he has not been fit at times to attend different programmes which had been arranged for him.

(c) A Ministry of Education report (17 November 2017) in respect of the plan for a graduated transition to school for the oldest child because of concerns with aspects of his learning and behaviour, and confirmation from the Ministry of Education that, since March 2017 while at kindergarten, the son had received support from an early intervention teacher and a speech language therapist. He began school at the beginning of 2018 when he turned six years old. This was planned and graduated with his father staying in class to support

his son to adjust. The Ministry was no longer working alongside the son and his family.

(d) Information about Asperger's disorder relevant to the older son's learning issues.

(e) Transaction history covering January and February 2018 for the appellant's bank account, showing that her husband's wages were being paid into her account and that regular payments of between $10 or $20 were being made towards her hospital debt.

(f) Letter (26 January 2018) from the husband's employer, confirming an offer of employment as a wheel alignment technician and the husband's individual employment agreement.

(g) A power account (23 February 2018) in the husband's name in respect of the couple's home address; bond lodgement from Housing New Zealand showing the tenancy in the name of the husband, commenced on 24 February 2017; letters from the Ministry of Social Development and Housing New Zealand (22 February 2018) advising of a review of the income related rent; a Housing New Zealand inspection report (24 February 2017) recording the tenants as the husband, the appellant and their children, signed by both the appellant and her husband; and an invoice (27 February 2018) from the early learning centre attended by the second child addressed to the appellant and her husband.

(h) The husband's New Zealand driver's licence and community services card.

(i) The appellant and her husband's marriage certificate and the biodata pages from the appellant, her husband and the three older children's passports and the four children's birth certificates.

(j) A notice from the State of California Health and Welfare Agency (16 June 2017) advising the appellant that benefits (CalFresh payments) had been denied for the two middle children as they were either undocumented or ineligible non-citizens.

(k) US Department of Justice, Immigration and Naturalisation Service documentation in respect of an interview of the appellant's husband

on 13 July 2002 at Niagara Falls that established that he was unlawfully in the United States and an order that he report in person on 29 July 2002 for identification and deportation or removal.

(l) Appellant's clear United States police certificate (3 March 2018).

[28] In response to the Tribunal's queries the appellant provided a letter dated 4 April 2018 describing the domestic violence incident, the stress her husband was under, her reasons for going to the United States for medical treatment, her expectations of reuniting with her husband, and his loving relationship with the children. The appellant also periodically updated the Tribunal on the progress of her husband's criminal charges and changes in his bail conditions to allow him to have contact with her and the children.

[29] Following her husband's sentencing on 5 July 2018, the appellant advised on 11 July 2018 that her husband was again living at home, the family was reunited, and she and her husband intended that it remain so.

[30] On 16 July 2018, the Tribunal was provided with a copy of the psychological assessment in respect of the husband (2 July 2018) prepared at the request of the District Court by Dr Mahairi Duff, a consultant psychiatrist with the Auckland Regional Forensic Psychiatry Services. On 7 August 2018, the judge's sentencing notes were forwarded by the District Court.

ASSESSMENT

[31] The Tribunal has considered all the submissions and documents provided by the appellant. It has also considered her Immigration New Zealand file in relation to her temporary visa applications.

Whether there are Exceptional Circumstances of a Humanitarian Nature

Genuine and stable relationship with New Zealand citizen

[32] The appellant is a 28-year-old mother of four young children. She was born in American Samoa and is a citizen of the United States. She married her New Zealand-citizen husband in California in January 2010. Her husband, now aged 30 years, was taken by his mother and step-father from New Zealand to the United States in 2000, when he was aged 13 years, and his status was unlawful for most of the time that he lived there. Largely because of the difficulties his unlawful status

created for the couple, they left the United States soon after their marriage. After an initial short stay in New Zealand, they went to Australia where they lived until July 2016, then returned to New Zealand.

[33] Although Immigration New Zealand accepted that the couple was in a genuine and stable relationship and granted the appellant a partnership-based work visa in December 2016, when the appellant sought to renew her visa her application was declined. Immigration New Zealand held that it could not be satisfied, on the basis of the information provided, that she and her husband were living together in a genuine and stable relationship. This was a surprising finding given that there was evidence of a sustained relationship over eight years during which the couple had married and lived together in three different countries and had four children. However, unbeknown to Immigration New Zealand, by the time the application was declined on 22 January 2018, the couple was living apart because of a domestic violence incident on 1 December 2017 and it was a condition of the husband's bail that he live separately from his family.

[34] It has taken until early July 2018 for the husband's criminal charges to be resolved by the District Court and the family to be reunited.

[35] The Tribunal has reviewed all of the information on the Immigration New Zealand files, the additional information on appeal and has also had the advantage of being able to consider the detailed psychological assessment of the husband that was prepared at the request of the District Court. This includes background information about the husband, the couple's relationship and the stressors that the couple was experiencing in the period leading up to the domestic violence incident, as well as the (low) risk of reoffending.

[36] The Tribunal is in no doubt as to the genuineness of the couple's relationship. Clearly, they have experienced a period of recent instability in their relationship. However, this has to be assessed in the context of the stressful circumstances following the birth of their fourth child in May 2017 and their stated commitment to each other and to remaining a united family.

[37] The wife has explained that soon after she gave birth in late May 2017 she began to feel unwell and she started to cough blood. She had previously coughed large amounts of blood in November 2016, having developed a pulmonary embolism on her left lung. She spent time in hospital for which she was billed around $8000. It was recommended she stay in hospital for another two weeks but she had refused because they could not afford it. Her husband lost his job as he had to care for the

children. When, in early June 2017 she started to again cough blood, she and her husband did not want to incur another huge hospital debt. Instead, the wife says, that they spoke to their families in the United States and, as she had cover for medical care there, a flight was quickly organised for her and the three older children. The husband again left his work so as to look after the new baby. It was at this time that he started to experience depression. On her return, the appellant started working in September 2017 to support the family and her husband was to care for the children.

[38] The couple could not afford to lodge a residence application for the appellant and instead tried to renew her work visa. Immigration New Zealand wrote to them on 27 November 2018 to say it was not yet satisfied that she and her husband were living in a genuine and stable relationship and requesting further evidence, as well as evidence that they were repaying the appellant's $9,435 hospital bill, which was now in the hands of a debt collector.

[39] In her psychological assessment, Dr Duff notes that 2017 had been a difficult year for the couple with the appellant's illness, the husband losing his role as the primary breadwinner, the birth of the youngest child and the family separation. These factors all contributed to the husband's low mood and poor self confidence. He was prescribed an antidepressant in August 2017. He reported crying frequently, being exhausted and feeling insecure in his relationship with the appellant and losing perspective. Though not normally a jealous person, he became suspicious of his wife's relationship with people whom she met through her work, which led to arguments and contributed to the incident on 1 December 2017. Dr Duff considers that the situation was best conceptualised as a period of post-natal depression associated with psychological stressors.

[40] The husband is no longer on medication and his depression has resolved. He was anxious about the future but said that he had felt much better since being granted access to his children. He said the courses he had undertaken had been helpful. He had no history of offending or aggression and no prior history of mental illness. He was resolute that he would do whatever was necessary to ensure no further incident. Dr Duff describes the argument on 1 December 2017 as out of character. The husband strongly denied any intention to harm his children, and the summary of facts did not suggest that he made any attempt to harm them and he only minimally physically assaulted the appellant. However, it led to police involvement and "a cascade of consequences."

[41] The appellant reported to Dr Duff that the husband was “a good man”, and a good father and husband, sentiments she has also expressed to this Tribunal. She said there had never been verbal or physical aggression by him toward her or the children in the past. They faced multiple stressors and the husband became depressed and overwhelmed. She reported no fearfulness about reconciling with him, their discussions about their future had been open and productive, and they were intending to undertake marriage counselling through their church.

[42] The appellant and her husband resumed living together following the court hearing on 5 July 2017. The wife has stated to the Tribunal that her intention is to re-establish the family living together. Her relationship with her husband now spans some 11 years and, she says, “is worth saving”. They had never been in the situation they have just been through before and do not want to put their family in such a situation again.

[43] It is only very recently, with the resolution of the criminal charges, that the appellant and her husband have been able to resume living together. However, prior to the difficulties they experienced following the birth of their fourth child, theirs had been a strong relationship. The breakdown occurred in the context of multiple psychosocial stressors and the husband’s depression. The couple has insight into their predicament and the husband has made efforts to understand and address his offending through the anti-violence and parenting programmes he has completed. Both the appellant and her husband have a sincere commitment to strengthening their relationship and being a united family with their children. They have a realistic chance of succeeding.

[44] However, if the appellant was to be deported, the family would be shattered. The appellant would have to take the four children with her to the United States. The husband most likely could not accompany them because of his history of staying unlawfully in that country. His recent criminal convictions are another potential hurdle. The appellant and her husband would be separated with no certainty as to when and where they could be reunited. This would undermine their efforts to rebuild their family life, to the detriment of themselves and, most particularly, to the detriment of the four children.

Best interests of the four children

[45] The appellant’s children are aged six, four, two and one year. Their best interests are a primary consideration for the Tribunal (Article 3(1) of the *Convention on the Rights of the Child*).

[46] Following the incident on 1 December 2017, when the husband threatened to kill the children, he was prohibited from contact with them. He was later able to have telephone, then supervised physical, contact and the appellant reported to Dr Duff that the children were happy to see their father during these visits. Since his sentencing on 5 July 2016 he has been able to return to live with his family.

[47] Although the husband was convicted of threatening to kill the children, Dr Duff notes that he strongly denied any intention of harming the children and he made no attempt to do so. He acknowledges though that the events were frightening for his wife and children. As already discussed, Dr Duff is of the opinion that this incident was out-of-character behaviour in the context of a post-natal depression. She considers that the peculiar combination of stressors is unlikely to recur in the future. She found no general risk factors for future violence and assessed the husband's risk of re-offending as low. In sentencing the husband, Judge Moses accepted the background to the offending described by Dr Duff and imposed no penalty other than nine months' supervision. Having regard to all these factors, the Tribunal is satisfied that the husband's offending does not preclude his being able to play a positive paternal role in his children's upbringing.

[48] To the Tribunal the appellant has describes her husband as "an awesome dad" and "loving father". On his days off he would play all day with the children, though the appellant notes that, after his experience of having to look after the children full-time, he has a better appreciation of the demands of their care and the value of the short times he is able to spend playing with the children. He attended his oldest child's speech therapy sessions as he wanted to get a full understanding of their son's needs. She affirms that the husband has a positive role to play in their children's lives.

[49] The Tribunal finds that the development and well-being of the children will be best promoted by their being cared for by both their parents. This is so, irrespective of whether the parents are able to maintain their relationship, though for the present it is very much their intention to do so and to emotionally and financially support each other in parenting. Realistically, both parents maintaining their involvement in the children's ongoing care can only happen if the appellant is able to stay permanently in New Zealand. The Tribunal concurs with Dr Duff's observation that reducing immigration barriers so the appellant and her husband had the right to live and work in one of their two home countries would have the effect of removing stress and optimise access to family supports. If the appellant can become a New Zealand

resident this will hopefully support her and her husband in their efforts to strengthen their family life, which has to be in the best interests of the children.

Conclusion on exceptional humanitarian circumstances

[50] The appellant is married to a New Zealand citizen and together they have four young New Zealand-citizen children. Deportation of the appellant will result in her being separated from her husband and the children will be separated from their father as he cannot accompany them to live in the United States because of his immigration history. Separation of their parents or from their father is not in the best interests of the children. The Tribunal finds that the appellant has established exceptional humanitarian circumstances.

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

[51] The appellant is liable for deportation because she is unlawfully in New Zealand. The appellant became unlawfully here after she was declined a further partnership-based work visa because Immigration New Zealand considered that she had provided insufficient evidence of the genuineness and stability of the relationship.

[52] The Tribunal must balance the reasons for the appellant being liable for deportation against the consequences for her, her husband and their four children of deportation*: Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [9].

[53] The evidence on appeal satisfies the Tribunal that the appellant and her husband's relationship is genuine and, although there have been issues that led to a recent period of separation, the appellant and her husband are reunited and hopeful about their future together.

[54] The Tribunal does not overlook the husband's recent convictions for domestic violence. These mean that in terms of immigration instructions E7.45 and R5.95 he does not meet character requirements to be a supporting partner for the appellant to be granted either a partnership-based temporary or resident visa, unless he is granted a character waiver. While not restricted by immigration instructions, the Tribunal must nonetheless have regard for the integrity of the immigration system.

[55] Here there are a number of mitigating factors which reduce the seriousness of the offending.

[56] Minimal physical harm was done to the appellant and the children were not physically harmed at all. The offences occurred within a well-established marriage at a time when the appellant and her husband were experiencing multiple stressors and the husband was suffering from depression, as described in the very detailed psychological assessment of Dr Duff. The husband has made efforts to understand and address his offending through the anti-violence and parenting programmes. He received a sentence of nine months' supervision. Dr Duff, a consultant psychiatrist, has assessed him to have a low risk of re-offending. The appellant and her husband are reunited. Prior to the violent incident, and since he has been permitted to rejoin his family, the husband has played a supportive and positive role in the family. The best interests of the four children lie in their father continuing to play a role in their daily lives and their parents being supported in their efforts to strengthen their relationship and family life.

[57] Deportation of the appellant will shatter the family as it will separate the appellant from her husband and the four children from their father and can only harm the well-being and development of the children.

[58] Weighing all these factors, the Tribunal finds that it would be unjust and unduly harsh for the appellant to be deported from New Zealand.

Public Interest

[59] The appellant has no criminal convictions in the United States, Australia or this country.

[60] The appellant has a history of pregnancy-related pulmonary emboli in her left lung. She required hospitalisation for this (in November 2016) and subsequently had to be monitored for a high risk fourth pregnancy. She suffered a similar problem soon after giving birth.

[61] In light of this history, the appellant may make demands on public health services, especially should she again become pregnant.

[62] Against this, the appellant has a strong family nexus to New Zealand through her husband and children. There is also a public interest in promoting family unity and complying with New Zealand's international obligations in this regard. The appellant has four young New Zealand-citizen children under the age of six years and her deportation will separate them from their father.

[63] Weighing these matters, the Tribunal finds that it would not be contrary to the public interest for the appellant to be able to remain in New Zealand on a permanent basis.

DETERMINATION

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

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

[66] Pursuant to section 210(1)(a) of the Act, the Tribunal orders that the appellant be granted a resident visa.

[67] The appeal is allowed on those terms.

Order as to Depersonalised Research Copy

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

"V J Shaw"
V J Shaw
Member

Certified to be the Research Copy released for publication.

V J Shaw
Member