IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2018] NZIPT 504140**

AT AUCKLAND

Appellant:	**GF (Fiji)**
Before:	A M Clayton (Member)
Counsel for the Appellant:	A McClymont
Date of Decision:	15 August 2018

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellant, a 29-year-old female citizen of Fiji, against her liability for deportation which arose when she became unlawfully in New Zealand.

THE ISSUE

[2] The primary issue on appeal is whether the fact that Immigration New Zealand has not finalised the appellant's applications for residence and work visas, both made under the Victims of Domestic Violence category, creates exceptional humanitarian circumstances which would make it unjust or unduly harsh for her to be deported from New Zealand.

[3] The Tribunal allows the appeal for the reasons that follow. In particular, applications under the Victims of Domestic Violence category are of a special nature in that return to a home country before such applications are determined may put an applicant at risk of discrimination, ostracism or even physical harm in their community. The Tribunal grants the appellant a three-month work visa commencing on the date of this decision, to enable Immigration New Zealand to complete its processing of the appellant's applications.

BACKGROUND

[4] The appellant was previously married in Fiji; she and her former husband separated in January 2016. Her former husband and young son continue to live in Fiji.

[5] The appellant was subsequently introduced to a Fijian-born New Zealand citizen ("her partner") through a family contact. On 20 July 2016, she and her partner were formally engaged in Fiji. The appellant remained in Fiji after her partner returned to New Zealand and applied for a visa to join him.

[6] Subsequently, Immigration New Zealand received anonymous allegations that the couple's relationship was not genuine. On 27 February 2017, it conducted telephone interviews with the appellant in Fiji and her partner in New Zealand. They both confirmed that their relationship was genuine and the partner suggested that the claim that it was not may have come from the appellant's former husband, with whom she continued to have issues.

[7] In its interviews, Immigration New Zealand also asked the appellant and her partner about the partner's withdrawal of support for her application for a visa to enter New Zealand, from 22 January to 6 February 2017. The appellant advised that she knew nothing about this. Her partner stated that he had withdrawn his support for a two-week period after hearing that the appellant was dating other men. He had reinstated his support for her as soon as he realised that, once again, the source of these false allegations was her former husband.

[8] The appellant was granted a visa and, on 14 April 2017, she arrived in New Zealand and began living with her partner.

[9] On 15 August 2017, Immigration New Zealand notified the appellant that her partner had withdrawn his support for her application.

[10] On 23 August 2017, the appellant made a complaint to the police against her partner, alleging domestic violence and sexual assault by him from 15 April to 22 August 2017.

[11] On 13 November 2017, the appellant was granted a temporary protection order.

[12] On 16 November 2017, the appellant applied for a work visa under the Victims of Domestic Violence category. A work visa was granted under this category on 27 November 2017, valid to 27 May 2018.

[13] On 14 December 2017, by agreement between the parties, the appellant's protection order against her partner was discharged on the basis that certain undertakings were made.

[14] On 10 January 2018, the police advised that it would not be prosecuting the appellant's complaint against her partner because it had concerns about the veracity of some of the information she had given.

[15] On 28 February 2018, the appellant lodged an application for residence under the Victims of Domestic Violence category. This application is yet to be determined by Immigration New Zealand.

[16] On 22 May 2018, the appellant applied for a further work visa under the Victims of Domestic Violence category. Immigration New Zealand decided not to grant her an interim visa on 6 June 2018. On 11 June 2018, in regard to her application for a work visa, Immigration New Zealand wrote the appellant a letter setting out potentially prejudicial information in regard to that application. That application remains outstanding.

[17] With the expiry of her last work visa on 27 May 2018, the appellant became unlawfully in New Zealand. On 3 July 2018, she lodged this appeal against her liability for deportation.

STATUTORY GROUNDS

[18] 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.

[19] 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].

[20] 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

[21] The appellant's case is set out in her counsel's submissions lodged with the Tribunal and can be summarised as follows.

[22] It is submitted that the appellant has exceptional humanitarian circumstances that would make it unjust and unduly harsh for her to leave New Zealand before her work and residence visa applications are properly determined. The appellant's counsel has requested her files from Immigration New Zealand and the New Zealand Police. It is submitted that the police have recently advised that they would be rewriting the letter in which they stated that they would not be prosecuting the appellant's complaints against her partner. A short-term work visa would allow the appellant, who currently has no money, to undertake employment and support herself while she is waiting for all the necessary files to be produced in order to respond to Immigration New Zealand's letter setting out potentially prejudicial information.

[23] Lodged in support of the appeal are the following documents:

(a) counsel's submission dated 18 July 2018;

(b) identity documents in regard to the appellant;

(c) copy of a letter from Immigration New Zealand to the appellant (15 August 2017) advising her that it had received information from

her partner that their relationship had not worked out and that he wished to withdraw his support;

(d) copy of a letter from Immigration New Zealand to the appellant (6 June 2018) advising that it had decided not to grant her an interim visa;

(e) copy of a letter from Immigration New Zealand to the appellant (11 June 2018) setting out potentially prejudicial information in regard to her application for a work visa under the Victims of Domestic Violence category. Reference is made to an attached letter from the New Zealand Police (presumably the letter dated 10 January 2018 which has also been supplied on appeal) which refers to a number of inconsistencies in the appellant's complaint made against her partner;

(f) copy of a letter from the New Zealand Police setting out its decision not to prosecute the appellant's complaint (10 January 2018);

(g) a handwritten statement by the appellant in regard to the domestic violence she says she has suffered (undated);

(h) evidence in support of the appellant's *ex parte* application for a protection order, including a statutory declaration from her general practitioner (26 October 2017), two letters from a refuge (9 November 2017, 20 February 2018), a statutory declaration from a social worker (16 November 2017), reports from a senior medical officer in sexual assault (5 October 2017, 18 October 2017, updated 30 January 2018), and an affidavit by the appellant (9 November 2017);

(i) a statutory declaration from the appellant's mother in Fiji (14 November 2017) advising that she has no income with which to support the appellant now that her husband has died; that her late husband had been "very distressed by witnessing domestic violence by [the appellant's partner] and died of a severe heart attack while visiting Auckland"; that her husband's family blame the appellant for his sudden death; and that the appellant refuses to dress in a correct Muslim fashion. The appellant's mother explains that the appellant's first marriage was a love marriage and against the wishes of her

parents; their community was aware of this and her latest separation would further tarnish their respect. The mother said that, while "we" (presumably the mother and her late husband) accepted the appellant after her first marriage break-up, the mother could not accept her back in her home because, in their community and religion, the break-up of a child's marriage disgraces the child's parents. The mother stated that she lived in a "difficult situation" and did not wish to face any more problems;

(j) a letter from the appellant's local Member of Parliament (14 June 2018);

(k) a statement in support of the appellant from her paternal cousin in Fiji (10 November 2017), advising that the appellant's mother had withdrawn her support and that the cousin had been reliably informed by her own parents that they did not wish her to come back to Fiji; and

(l) a medical report (1 July 2017) and other medical documents in regard to the appellant.

ASSESSMENT

[24] 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 visa applications.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[25] The appellant arrived in New Zealand in April 2017 in order to join her partner, to whom she had been engaged since mid-2016 as arranged through a family contact. She subsequently advised the New Zealand Police and the Family Court that her partner sexually and physically abused her on numerous occasions from the day after she arrived in New Zealand until she left their home on 23 August 2017. Nonetheless, the appellant agreed in December 2017 that the temporary protection order against her partner could lapse, and the police have advised that they will not be prosecuting her complaint against her partner, citing "a number of inconsistencies … and credibility issues".

[26] As far as her immigration status is concerned, the appellant has outstanding applications for work and residence class visas, both made under the Victims of Domestic Violence category. Her application for a work visa has progressed to the point where Immigration New Zealand has issued a letter setting out potentially prejudicial information, in particular that she provided false and misleading information in the affidavit she provided to the Family Court. Immigration New Zealand poses that this allowed her to obtain a protection order, upon which basis she was granted a work visa under the Victims of Domestic Violence category.

[27] Immigration New Zealand requested a response to its letter from the appellant by 19 June 2018. However, her counsel advised the Tribunal as recently as 18 July 2018 that he had not received the Immigration New Zealand or police files which he had requested in order, he said, to respond properly to Immigration New Zealand's allegation that the appellant had provided false information. Counsel also submitted that the police had advised that it would be "rewriting its letter", although there is no evidence of this presented on appeal.

[28] Counsel's main concern about the letter from the police is that it highlights that the appellant made the complaint about her partner's abuse on 23 August 2017, which is described as the "same day" as she received notification from Immigration New Zealand that her partner had withdrawn his sponsorship. Counsel points out that in fact Immigration New Zealand wrote to the appellant on 15 August 2017, which appears to be correct. Nevertheless, while it behoves both the police and Immigration New Zealand to accurately cite any facts upon which they contend that the appellant's account is untrue, the fact that the police recorded that the appellant made her complaint on the same day as, rather than eight days after, the withdrawal of her partner's support does not appear to be the most crucial factor in the police decision not to prosecute.

[29] What is of more immediate significance is that the appellant has made two applications for immigration status as a putative victim of domestic violence and that she has become liable for deportation on the basis that an interim visa has not been granted. Immigration New Zealand's letter containing its decision not to grant an interim visa advised that the decline "will not itself affect the outcome of your application for a temporary visa", but it is difficult to see how the appellant is not severely negatively impacted by becoming liable for deportation.

[30] Applications for residence under the Victims of Domestic Violence category are of a special nature. The objective of the Special Residence Category for

Victims of Domestic Violence (S4.5.1, effective 30 March 2015) is to enable partners of New Zealand citizens or residents to remain in New Zealand if they had intended to seek residence on the basis of their relationship but the relationship has ended because of domestic violence, in circumstances where the applicant "cannot return home because of the impacts of stigma, or because they would have no means of independent financial support from employment or other means". Stigma is defined in instruction S4.5.2.d.ii as "… risk of abuse or exclusion from their community …". Clearly the overriding objective of the instructions is to prevent physical and psychological harm to women, upon return to their home countries, as the result of their failed relationships.

[31] Normally, the fact that an application for a visa has been made by a person onshore does not give that person a right to remain in New Zealand while the application is considered (see section 14(2)(b) of the Act). However, where an application is made under the Victims of Domestic Violence category, Immigration New Zealand must be circumspect about any decision not to grant a visa to the applicant to remain in New Zealand. This is particularly so where it is not required to give reasons (as it is not obliged to do when deciding whether or not to grant an interim visa).

[32] The consequences of returning to her home country for an individual who has made an application under the Victims of Domestic Violence category are potentially harmful. In the present case, the appellant's application for a work visa is partly processed and the assessment of her application for a resident visa is suspended for as long as she is liable for deportation (pursuant to section 169(3) of the Act). Both applications should be determined before the appellant is capable of being deported to her home country. Her present predicament constitutes exceptional humanitarian circumstances.

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

[33] According to the Supreme Court in *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 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".

[34] Because Immigration New Zealand has not determined either of the appellant's applications under the Victims of Domestic Violence category, the Tribunal is unable to be satisfied that any hardship the appellant may encounter upon returning to Fiji is necessary and proportionate in the circumstances. It

therefore finds that, until the applications are determined, it would be unjust or unduly harsh for the appellant to be deported from New Zealand.

Public Interest

[35] There are no public interest issues arising from the appellant having another three months in New Zealand in order to await the outcome of her applications under the Victims of Domestic Violence category.

DETERMINATION

[36] 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.

[37] 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 temporary basis.

[38] Pursuant to section 210(1)(b) of the Act, the Tribunal orders that the appellant be granted a work visa for a period of three months. She and her counsel must co-operate with Immigration New Zealand which should ensure that it determines both her applications within that time period. If neither application is granted, there would appear to be no reason why the appellant cannot return to Fiji before the end of that three-month period.

[39] The appeal is allowed on those terms.

Order as to Depersonalised Research Copy

[40] 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.

"A M Clayton"
A M Clayton
Member

Certified to be the Research Copy released for publication.

A M Clayton
Member