IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2018] NZIPT 504322**

AT AUCKLAND

Appellant:	**AI (Thailand)**
Before:	V J Shaw (Member)
Representative for the Appellant:	I P Singh
Date of Decision:	29 November 2018

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal from the appellant, a 51-year-old citizen of Thailand, against her liability for deportation which arose when she became unlawfully in New Zealand. The appellant's nine-year-old daughter is included in her appeal.

THE ISSUES

[2] The appellant's partner and seven-year-old son are New Zealand citizens. The appellant and her partner have lived between Thailand and New Zealand, with the partner being based in New Zealand for employment reasons in recent years. The couple would now like to be based in New Zealand and the primary issues on appeal are whether the best interests of the two children in remaining in New Zealand give rise to exceptional humanitarian circumstances and whether it would be contrary to the public interest for the appellant to remain here because she is HIV positive.

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

BACKGROUND

[4] The appellant's parents are both deceased. Her two brothers remain living in Thailand and her sister lives in England.

[5] The appellant met her partner in Thailand in September 2003. He is 51 years old and is a New Zealand-born citizen.

[6] From June 2004 until August 2010, the partner lived with the appellant in Thailand. He would periodically visit New Zealand and the appellant accompanied him on four occasions, staying for two to three weeks.

[7] After the partner's return to New Zealand in August 2010, he travelled to Thailand on five occasions: 3 to 23 September 2011; 4 to 23 March 2014; 23 November 2014 to 18 January 2015; 27 November 2015 to 28 January 2016; and 30 November 2016 to 8 February 2017.

[8] During this same period, the appellant and the children made one visit to New Zealand from 16 September 2012 to 9 March 2013.

[9] The appellant legally adopted her daughter in Thailand in May 2011. Her daughter is the birth child of the appellant's niece.

[10] The appellant and her partner have a son together. He was born in Thailand in January 2011 and was registered as a New Zealand citizen by descent in December 2017.

[11] The appellant lodged a residence application based on her partnership in June 2013. At the time, she and the children were living in Thailand and her partner was living in New Zealand. In February 2014, Immigration New Zealand advised that although it accepted that the appellant's partnership was genuine and stable, it was not satisfied that she and her partner had been living together for at least 12 months, as required by the Partnership category. It would defer its decision for 12 months to allow the couple to meet the 12-month living together requirement. The couple had the option of staying outside New Zealand for the required 12 months or living together for 12 months in New Zealand. If the couple opted to live in New Zealand, the appellant was advised she would need to apply for a partnership-based work visa within one month and travel here within three months of the work visa being issued to her.

[12] The appellant and her partner did not take up this offer. After six months, Immigration New Zealand wrote to the appellant noting that the partner had not moved to Thailand nor had she made an application for a work visa and that this defeated the purpose of the deferral. Accordingly, the residence application was declined in September 2014.

[13] In May 2017, the appellant and the two children were granted one-year visitor visas based on the appellant's partnership and they arrived in New Zealand in June 2017. The appellant was granted a medical waiver in respect of her not having an acceptable standard of health due to her being HIV positive and taking antiviral medication. She and her partner advised that she would continue to obtain her medication in Thailand in accordance with her Thai doctor's prescription and that in Thailand the medication was a fraction of the cost in New Zealand.

[14] In August 2017, the appellant lodged an application for a partnership work visa as well as student visas for the children. Her partner had earlier advised Immigration New Zealand that he had not realised that in applying for visitor visas the children would not be able to attend school and had requested advice about how to change their visa status to enable them to do so. He also advised that after a year the appellant would apply for residence.

[15] In September 2017, Immigration New Zealand declined to grant a work visa to the appellant or student visas to the children as it was not satisfied that the appellant met the requirements of immigration instructions that they be living together in a genuine and stable partnership. Nor did she meet health requirements.

[16] On 28 February 2018, the appellant lodged a further application for a partnership-based work visa. On 14 August 2018, Immigration New Zealand wrote to her setting out its concerns that she did not have an acceptable standard of health for temporary entry because she is HIV positive and currently taking antiretroviral medication. The appellant responded that she purchased her own medical supplies from Thailand based on her doctor's prescribed course.

[17] On 13 September 2018, Immigration New Zealand declined the appellant's application. It was not satisfied that she had an acceptable standard of health. It had considered a medical waiver, but this had been declined. Immigration New Zealand accepted that her partnership met the relevant requirements for a partnership work visa, but, if granted a medical waiver, she would be eligible for

publicly-funded treatment, the cost of antiretroviral medication was in excess of $10,000 per annum and the treatment would be expected to be long-term.

[18] Following the decline of her application, the appellant's interim visa expired so that she became unlawfully in New Zealand from 15 September 2018. Her daughter's related application for a student visa was also declined in line with the appellant's application.

STATUTORY GROUNDS

[19] 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 –
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> (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.

[20] 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"; see *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34].

[21] 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

[22] The grounds of appeal, as set out in the representative's submissions, can be summarised as follows:

(a) The appellant met her partner in Thailand in September 2003. The partner went to live with the appellant in Thailand in June 2004 and remained there for nearly six years. During this time, he assisted the appellant in her retail business. He returned to New Zealand in August 2010 after the business slowed down so as to find employment in New Zealand. He has been at his present employment since February 2011.

(b) The partner is the only father figure the appellant's daughter has known, and the son and the daughter are closely bonded. It is in the best interests of both children that they stay in New Zealand with both their parents. They have now adapted to New Zealand life, are attending school, and are living in a loving family environment which includes their paternal grandparents.

(c) It is not practical for the partner to leave his employment and his elderly parents in New Zealand to live in Thailand. He has a very basic understanding of the Thai language but would not be able to earn sufficient income in Thailand to provide his family with the standard of living they have in New Zealand.

(d) The appellant's HIV status does not impede her ability to live a productive life. Currently she is not employed and cares for the children.

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

(a) Statement (undated) from the appellant who states that she loves her family and cannot live without them, the children are her life, and she has never spent any time away from them. She wants the children to grow up together. She needs her partner. She loves him and the children need their father. They also need her, they love the food she cooks for them, they need her hugs, bedtime stories and kisses. She has grown to love New Zealand. It is safe, clean and beautiful and she wants to stay here with her family. The children also want to stay here and they are doing well in school.

(b) Statement (undated) from the appellant's partner in which he confirms that he and the appellant have a very stable and loving relationship. Although they have had ups and downs like everyone,

they are committed to each other and their family. If the appellant's application to be in New Zealand was not successful, they would be devastated. He is a family man, loves being a dad and loves his children. He wants to see them develop and grow, be successful, be there when they cry and be involved in all aspects of their learning and activities. He cannot live in Thailand as he could not support his family. His job skills are in sales and sales support, he does not speak Thai fluently and would require a company sponsorship to obtain a job. He also has to look after his parents. They currently have an ideal life and could continue to do so if the appellant was able to stay here. Their children are settled in school, have made friends and are speaking English very well. The appellant and the children are loved by his extended family.

(c) Letter from the appellant's son who says that he does not want his mother to leave him and his father. He loves his mother, grandmother and big sister. He wants his mother to stay here with him and his dad. He goes to school with his sister and plays with her every day.

(d) Letter from the appellant's daughter who says she loves school, loves New Zealand and does not want to live in Thailand. She wants to live in New Zealand with her mum, dad and brother. She has good friends at school, she loves her family and her grandparents.

(e) Statement (undated) from the partner's parents who say that the appellant and the two children live with them and as they are both in their eighties, they find this arrangement very helpful. The appellant helps with household tasks, while their son helps with gardening, lawns and maintenance of the home. They both have health issues and having someone younger around during the day gives them peace of mind. The father has limited mobility and is recovering from a stroke and the mother has pain in both her shoulders and arms. They love having their grandchildren living with them. Their daughter has two children, but she lives in another city and they do not see them often. They are happy that they can be a family together with their son and the appellant and their children.

(f) A history of the relationship, including numerous photographs of the appellant, her partner, their children and other family members, and evidence of communication between the appellant and her partner from December 2013 until June 2017 via Facebook and Messenger.

(g) The partner's individual employment agreement (10 May 2017) for the position of sales adviser with an energy company and a selection of payslips and his Inland Revenue Department record of earnings for the period April 2011 to September 2018.

(h) Confirmation from Internal Affairs (8 December 2017) that the son had been registered as a New Zealand citizen by descent.

(i) Information about the appellant's HIV treatment.

(j) Medical information in relation to the partner's parents.

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 temporary and resident visa applications.

Whether there are Exceptional Circumstances of a Humanitarian Nature

Genuine and stable relationship

[25] The appellant and her partner say that they met in Thailand in September 2003, formed a friendship and, from mid-2004 until 2010, the partner lived with the appellant in Thailand. He only ever held a tourist visa. The appellant ran a retail stall in a night market and the partner assisted in the business. They also purchased a home in 2006 (in the sole name of the appellant to comply with Thai law). They say the partner's return to New Zealand was prompted by the decline of their business from 2008 and the consequent need for the partner to find employment. The appellant remained living in Thailand with the daughter whom she had adopted in 2011.

[26] It has not been properly explained why the appellant chose to remain living in Thailand throughout the next seven years rather than join her partner in New Zealand. It is not certain, therefore, whether this decision reflected issues in the

relationship or the appellant's preference for living in her own country. Whatever the reasons for the arrangement, it is apparent that the couple maintained a relationship, with the partner making occasional visits to Thailand and providing financial support. The appellant and the two children also spent between September 2012 and March 2013 with the partner in New Zealand. A residence application was lodged soon afterwards but was not pursued after the couple were advised they needed to live together for a year either in Thailand or New Zealand. The couple say that there were difficulties selling their Thai house at this time without major improvements being undertaken and this sale would be needed to finance the purchase a home in New Zealand.

[27] The partner spent over two months with the appellant and the children in Thailand during late 2016 and early 2017 and it seems that a decision was made then that they would join the partner on a permanent basis in New Zealand. The appellant applied for a partnership-based visitor visa within days of the partner's return to New Zealand in February 2017, and, after her application was granted, she and the children arrived here in June 2017.

[28] The appellant and her partner have now been living together in New Zealand for the last 17 months. They say that they are committed to living as a family in New Zealand, it is not practical for them to live together in Thailand for economic reasons, and because the partner has responsibilities towards his elderly parents, whose home the couple and their children share. Numerous photographs taken over the last two years, both in Thailand and New Zealand, show the couple together with their children at home and on a wide range of family outings, as well as socialising with family members. The photos suggest that a happy loving family life is well established.

[29] Having regard to the history of the relationship over the last 14 years and the time the couple have now spent living together in this country, the Tribunal accepts that the appellant and her partner are living together in a genuine and stable relationship.

[30] The couple has managed to live apart for extended periods while still maintaining their relationship. Although they might be able to sustain their relationship in this manner into the future, they now wish to live together as a united family with their children. New Zealand is the most practical option for them because this is where the partner is best placed to earn an income to support the family and because his elderly parents are here. Most importantly, the couple's commitment to living together in one place reflects their desire to benefit their

children who are getting older and ideally need the input of both parents in their upbringing.

Best interests of the children

[31] The appellant and her partner have two children: an adopted daughter aged nine and a son aged seven. Only the son is a New Zealand citizen. Their best interests are a primary consideration for the Tribunal; see Article 3(1) of the *Convention on the Rights of the Child*.

[32] The Tribunal accepts that there is a loving bond between the two children and their father. It is likely that this bond has deepened over the period they have been living with him in this country. Both children have written of their love for their family and their desire to stay here with their father, as well as their mother and grandparents. Their father has also written of his love for the children and the pleasure he is getting from being a father, able to teach and guide his children and share in their learning and day-to-day activities. The son is now seven years old and his father is able to provide him with a male role model as he matures. The Tribunal accepts that the appellant and her partner have succeeded in creating a stable family life for their children and that their stated commitment to being based in New Zealand for the benefit of their children is genuine.

[33] Both children appear to have settled well in their new home environment and at school. Their best interests lie in remaining in a united family receiving the care and support of both their parents. This is only likely to happen if the appellant and the daughter can stay permanently in New Zealand.

Conclusion on exceptional humanitarian circumstances

[34] The Tribunal finds that the appellant's likely separation from her New Zealand-citizen partner and, most particularly, that the best interests of the couple's two children is that their father is present in their daily lives providing them with love and support together with their mother, establish exceptional humanitarian circumstances.

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

[35] The appellant is liable for deportation because she is unlawfully in New Zealand. She and her daughter became unlawfully here after Immigration New Zealand declined to grant the appellant a partnership-based work visa because

she did not have an acceptable standard of health because she is HIV positive and requires antiretroviral medication.

[36] The Tribunal acknowledges the importance of immigration health instructions which aim to minimise the costs and burdens on public health services from migrants or those staying here temporarily.

[37] The appellant and her partner applied for visitor visas in February 2017 because they understood from the outcome of their 2014 residence application that they needed to demonstrate that they were actually living together in the same location for at least a year before they could successfully lodge a residence application. The appellant was granted a one-year visitor visa by an immigration officer who considered the full history of the relationship and granted the visa so as to enable the couple to live together in New Zealand.

[38] The partner handled the appellant's visa application and it is unfortunate that the issue of the children needing to attend school was not raised until after the visitor visas were issued. When an application was made in September 2017 to change from a visitor to a work visa so the children could have student visas, Immigration New Zealand then took the view that the couple could not demonstrate they were living together in a genuine and stable relationship. When a further application was made in March 2018, for a work visa and student visa for the daughter (the son having by then been registered as a citizen by descent) the couple's relationship was acknowledged to be genuine and stable, but a medical waiver was declined.

[39] The Tribunal must balance the reasons for the appellant being liable for deportation against the consequences for her family of deportation; see *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [9].

[40] The appellant currently does not meet the requirements of health instructions for a temporary or residence application but she is eligible to be considered for a medical waiver. Further, in terms of health instruction A4.60(d) relating to medical waivers for applicants for residence class visas, she is entitled to be granted a waiver as the partner of a New Zealand citizen as none of the exceptions in A4.60(a) and (b) apply to her.

[41] In addition, the Tribunal takes into account the history of her relationship with her New Zealand-citizen partner over 14 years, the fact that the couple have now been living together for 17 months in this country which is sufficient to meet

the living together requirement for a Family (Partnership) residence application and the inconsistent decisions made in respect of the appellant's recent visa applications. Deportation will result in the family being separated at a time when they have been endeavouring to demonstrate that they are living together in one country and were specifically granted visitor visas to allow for this. Separation from their father is also not in the best interests of the children who are now settled in their New Zealand schools.

[42] The Tribunal finds that it would be unjust and unduly harsh for the appellant and her daughter to be deported from New Zealand.

Public Interest

[43] The appellant has no criminal convictions in Thailand or in this country.

[44] The appellant is HIV positive for which she requires antiretroviral medication, a significant cost and burden on public health service. Since being here she has been taking the medication that is prescribed and supplied to her from Thailand.

[45] However, the appellant has a strong family nexus to New Zealand through her partner and young son, who are New Zealand citizens. The partner is 51 years old and was born in this country. New Zealand is the only practical option if the family are to remain united because of the constraints on the partner's ability to earn sufficient income to support the family in Thailand, and his need to care for his elderly parents in New Zealand. As the partner of a New Zealand citizen, the appellant is entitled to be granted a medical waiver for residence in terms of health instruction A4.60(d).

[46] The daughter has no health issues.

[47] There is a public interest in supporting family unity and wellbeing and complying with New Zealand's international obligations in this regard.

[48] The Tribunal finds that in all the circumstances it would not be contrary to the public interest for the appellant and her daughter to remain here on a permanent basis.

DETERMINATION

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

[50] 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.

[51] Pursuant to section 210(1)(a) of the Act the Tribunal orders that the appellant and her daughter be granted resident visas.

[52] The appeal is allowed on those terms.

Order as to Depersonalised Research Copy

[53] 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 and her partner's names and other identifying features.

"V J Shaw"
V J Shaw
Member

Certified to be the Research Copy released for publication.

V J Shaw
Member