IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2019] NZIPT 600593**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**XIE, Qi**
Respondent:	**THE MINISTER OF IMMIGRATION**
Before:	C M Treadwell (Member)
Counsel for the Appellant:	A James and M Hua
Counsel for the Respondent:	J Ongley
Date of Hearing:	14 June 2019
Date of Decision:	26 July 2019

DEPORTATION (RESIDENT) DECISION

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[1] This is an appeal on humanitarian grounds by the appellant, a 34-year-old citizen of China, against her liability for deportation.

[2] The appellant is liable for deportation on the ground that she has been convicted of one charge of wounding with intent to cause grievous bodily harm, for which the court had the power to impose imprisonment for a term of up to 14 years – see section 161(1)(a)(iii) of the Immigration Act 2009 ("the Act").

[3] The appellant stabbed her husband several times with a paring knife when she found out that he was having an affair. He suffered stab wounds to his thigh, elbow and back. He required some surgery to his elbow. The primary issues on appeal are:

(a) whether there are exceptional humanitarian circumstances arising from the fact that the appellant's marriage has survived the incident, that her husband does not want her to be deported and that, if she returns to China, he will be forced to return with her, destroying the life and business they have built together in this country; and

(b) whether, in terms of the public interest, there is a risk of the appellant re-offending, such that the overall balancing of the public interest considerations would favour the appellant's deportation.

[4] For the reasons which follow, the Tribunal declines the appeal.

BACKGROUND

[5] The appellant was born in China in 1984 and is an only child. Her parents continue to live there, though her mother spends extended time in New Zealand periodically.

[6] After graduating from university in China, majoring in French and advertising studies, the appellant undertook further studies in France, graduating with a double master's degree in management and French-Chinese business studies. She then completed an internship at a major agency in Paris.

[7] In 2010, the appellant returned to China where she worked for a marketing company, principally arranging major exhibitions in Europe and North America.

[8] In 2010, the appellant met her future husband, AA, who was working as a hospital pharmacist. At the time, he was planning to move to New Zealand to work as a photographer. After he had left China, they kept in touch and their relationship grew. AA returned to China in early 2012 and, shortly thereafter, proposed to the appellant.

[9] The appellant came to New Zealand in January 2013 and the couple were married in August that year. The decision to move to New Zealand was a significant one for the appellant. She had excellent employment in China, with good career prospects. Further, AA was, at that stage, merely an employee for a photographer. Her parents were concerned about her plans, but she felt confident in AA.

[10] On marrying, the couple bought a house in Auckland. They were both working and could afford the mortgage. Their parents helped with the deposit.

[11] In April 2015, the couple moved to Christchurch to set up a wedding photography business. They had an eye on the Asian wedding market, for which the South Island scenery was a significant drawcard. The appellant's role was in marketing and administration. In due course, the success of the business was

such that the appellant and AA expanded into all aspects of organising wedding packages. They bought a large house, with plans of using part of it to run their business.

[12] On 11 May 2016, the appellant was granted residence.

[13] On 20 January 2017, while they were at a café, the appellant discovered photographs on her husband's mobile telephone which indicated that he was still engaged in an affair with an employee. He had previously admitted to the affair to the appellant but had assured her that it was over. On seeing the photographs, the appellant became angry and upset.

[14] According to the sentencing notes of Judge Garland, the appellant threw AA's telephone out of the café and left. He tried to follow, remonstrating with her. Concerned bystanders called the police, who came and spoke to the couple.

[15] Later that night, at home, the appellant and AA sat on the couch to talk. Earlier, the appellant had placed a knife with a 10cm blade under a cushion. When she drew it out of its hiding place, a struggle ensued (the details are discussed later) and AA received stab wounds to his outer right thigh, his right elbow and his upper back. After he had wrestled the knife off the appellant, they sat on the sofa and talked for some time. When he began to feel faint, the appellant called an ambulance which arrived with the police in tow. The appellant was arrested that night.

[16] At trial on 8 March 2018, the appellant gave evidence that she had not set out to harm AA but had been intending to use the knife on herself. When he had tried to stop her, she said, the injuries had occurred by accident. The jury, however, rejected that explanation and convicted the appellant.

[17] At sentencing on 2 May 2018, Judge Garland noted the probation officer's assessment that the appellant presents only a low risk of re-offending but considered that this needed to be "treated with some caution" given her continuing denial of responsibility. From a starting point of five years' imprisonment, the judge could find no aggravating factors. In mitigation, he accepted the appellant's previously unblemished history and the difficulty for the appellant in facing a prison sentence without her family in the country and reduced the sentence to four years' imprisonment.

[18] On 9 November 2018 (though wrongly dated 2019), a delegated decision-maker determined that the appellant should be deported. She was served with a

Deportation Liability Notice to that effect and, on 9 April 2019, appealed to the Tribunal.

THE APPELLANT'S CASE

[19] The Tribunal heard evidence from the appellant, her husband and Ghazi Metoui, a senior forensic psychologist. The accounts which follow are summaries of their evidence. It is assessed later.

Evidence of the Appellant

[20] The appellant is a 34-year-old married woman from China. Her parents continue to live in Shanghai, as do her parents-in-law.

[21] According to the appellant, her husband gave up a promising career as a pharmacist in China, in order to pursue his dream of being a photographer. He came to New Zealand for that purpose in 2016 and the appellant later followed him here after he returned to China and they had begun a relationship.

[22] Initially, the couple settled in Auckland where, with the appellant's mother's help, they bought a house. The house was registered in the appellant's mother's name and is currently being rented out after the couple decided to move to Christchurch. They moved because Auckland was expensive and because the bulk of the husband's photography work was in the South Island, doing pre-wedding shoots for visitors from Asia.

[23] The business was successful, with the husband doing the photography work and the appellant doing the marketing and business side of the enterprise, as well as holding down another full-time job. They settled well into Christchurch and the appellant became a committed Christian after friends she had met there introduced her to a local church. The husband would go to church with her but is still determining where his faith lies.

[24] In retrospect, the appellant knows that she was leading an "unbalanced lifestyle" at this time. They were both putting extra effort into the business and had put the thought of children on hold while they built the business up. The husband was away frequently on long road trips, taking clients to scenic locations around Tekapo and Central Otago. She feels that they lost some of their communication. At the same time, they were somewhat isolated, without any family for support.

[25] In late 2016, the appellant discovered that her husband had been having an affair with a makeup artist who travelled with him. On about 20 December 2016, she confronted her husband, who admitted the affair and apologised to her, saying that he would end it. The appellant was shocked and devastated. She told her parents and her husband spoke to them as well, begging their forgiveness. The appellant resolved to stay with her husband and he talked of them spending more time together. As a result, she began accompanying him on some business trips.

[26] In January 2017, the appellant visited a café with her husband and some friends, where she noticed him checking the other woman's photograph on social media. An argument erupted, with the appellant very upset. She took her husband's telephone and threw it from the café. The argument continued in the street and the police were called.

[27] Later that night, as they sat on the sofa talking, the appellant pulled out from under a cushion a small paring knife which she had placed there earlier, intending to threaten to harm herself if her husband did not leave the house.

[28] There has been a significant shift in the appellant's acceptance of her offending since her trial. The jury rejected her claim that she had only been intending to threaten to harm herself, and that her husband had been injured by accident in the struggle. As she told the Tribunal (and is evident from her rehabilitation courses in prison), she now acknowledges a greater degree of intent than previously. She maintains that she *had* only been intending to threaten to harm herself (if her husband did not leave the house) but now acknowledges that, when he grappled with her to take the knife, she became angry and struck at him as they struggled.

[29] Waiting for trial, the appellant continued to live in the family home. Her husband moved to stay with friends so that she could do so. They could not talk much because the terms of her bail prohibited her from communicating with her husband, but they managed a brief talk whenever possible. The appellant continued to play a small role in the business and the husband would come to do the gardening while she was out, so there was occasional interaction.

[30] In prison, the appellant has done a number of rehabilitative courses which she has found very helpful, including the Kowhiritanga course. She has also seen counsellors. She has come to understand much about herself, including her own passive-aggressive behaviour. Her husband has been a significant support, speaking to her on the telephone twice a day. Their relationship has improved and

is, in her terms, “going in a good direction”. Her mother came from China and stayed with the husband in the family home for some time, so that they could both support the appellant. He would send her books in Chinese and they would exchange emails. He has looked after her parents in her absence.

[31] If the appellant is able to remain in New Zealand, she and her husband will resume their married life, though they may live apart initially while they undergo counselling. They are committed to each other and to making their marriage work. They hope to be able to resume working together in their business.

[32] If the appellant is deported, she has the support of her parents in China. Her husband has told her that, if she is forced to leave New Zealand, he will go with her, because he is committed to their marriage. This would mean the end of their business in this country and the end of their dream of settling here. This would be a particular hardship for them both.

Evidence of the Appellant’s Husband, AA

[33] Insofar as it records matters within his own knowledge, the evidence of AA mirrored that of his wife and need not be repeated.

[34] As to his own intentions if his wife is deported, AA confirmed that he will accompany her to China. He has forgiven his wife and feels at fault because her actions only arose as a result of his having wronged her by continuing a relationship with another woman. He confirms that it has been the only incident of violence between them.

[35] AA has been attending counselling through Pegasus Health and he and the appellant have discussed relationship counselling. He feels that there has already been an improvement in how they communicate and they both want to attend counselling to work on their relationship. They wish to be together and to have a family in due course.

[36] If they are to return to China, AA considers that it will be more difficult to start a successful photography business there because of the competition.

[37] Here in New Zealand, AA has continued to liaise with the appellant about the business, because he needs her marketing and business expertise. The business has suffered a set back because of the appellant’s inability to participate fully in it and he needs her skills with the online side of the business.

[38] If the appellant is able to stay in New Zealand, they plan to operate the business from their home, which has five bedrooms, enabling them to also operate a "B & B" option for clients. Their business will benefit New Zealand by bringing in tourists and enhancing the country's profile overseas.

[39] Until now, AA has not told his parents of his wife's offending or imprisonment because he has not wanted them to know what happened. It will not be possible to avoid this if they return to China.

[40] AA visits the appellant regularly in prison. He recently attended her graduation from the Kowhiritanga programme and they speak frequently by telephone. He takes her books in Chinese and puts money into her account at the prison.

Evidence of Ghazi Metoui, senior forensic psychologist

[41] Mr Metoui is a senior forensic psychologist. He has extensive experience in forensic psychology, including the provision of medico-legal reports to courts and tribunals. He was engaged by counsel to provide a report into the risk of re-offending posed by the appellant.

[42] Both Mr Metoui's written report of 17 May 2019 and his oral evidence were to the effect that the appellant poses only a low risk of re-offending. His evidence need not be traversed in detail (because the Tribunal accepts his conclusion), but it may be noted that his conclusions are premised upon the appellant's recent admission that, at the last moment, she did elect to turn the knife on her husband.

[43] After noting the appellant's "all-consuming shame and self-loathing at her behaviour", he records that she is a notably model prisoner and:

> "… is considered by staff as a positive influence on other prisoners because of the way that she conducts herself, but also the manner in which she interacts with other prisoners: encouraging, non-judgemental, helpful, and supportive of her fellow prisoners."

[44] Noting that the appellant credits the 46-session Kowhiritanga programme as the most significant intervention she has undertaken, Mr Metoui spoke with Jamie Stringer, clinical psychologist and group facilitator at the prison. She advised him that the appellant was "easily the most prosocial person in the group" and that, applying both the RoC*RoI and LS/CMI actuarial tools (the latter relevant to female offenders), she had reached the view that the appellant posed an "extremely low

risk of being incarcerated for a new offence within one year after release from prison".

[45] Mr Metoui undertook his own assessment of the appellant, applying a 'Structured Professional Judgement' approach as well as the HCR-20 v3 tool – the former because the latter will always return a 'low' rating for someone with the appellant's characteristics. Even, however, applying clinical judgement, he is confident that the appellant poses a low risk only of re-offending. He finds her to be a stable, prosocial and intelligent individual, with no mental health issues or personality disorders and with enough insight into her offending now that she is motivated not to re-offend.

DOCUMENTS AND SUBMISSIONS

[46] Counsel for the appellant has provided written submissions dated 7 June 2019, together with:

Statements and letters

(a) statements by the appellant (5 June 2019) and her husband (4 June 2019);

(b) a further short statement/letter (undated) from the appellant's husband;

(c) a report dated 17 May 2019 from Mr Metoui;

(d) letters in support from the appellant's mother, Fang Chen (undated), a friend Ting Fei (undated), Pastor Jack Stuart (20 May 2019), and a former employer and friend Joyce Chen (undated);

(e) a letter dated 21 May 2019 from Gayle Adams, trauma counsellor at Christchurch Women's Prison, recording that she has met with the appellant over 25 counselling sessions since 8 August 2018 and that the appellant has "always arrived at therapy ready to work and willing to challenge old patterns" and that she has "made courageous steps towards her own recovery";

Conviction and rehabilitation

(f) Crown summary of facts;

(g) Kowhiritanga intervention reports dated 2 April 2019 and 14 June 2019 by Jamie Stringer, registered clinical psychologist, and Holly Richardson, programme facilitator, the latter report concluding that, applying the LS/CMI assessment, the appellant is in the very low risk/needs category and that any risk of her re-offending is in the low category;

(h) a letter dated 21 May 2019 from the appellant to her lawyer in regard to her forthcoming parole hearing, with a letter of even date to the Parole Board attached;

(i) the appellant's proposed safety plan;

Miscellaneous

(j) a copy of the Certificate of Title for the properties in Auckland and Christchurch, registered in the appellant's mother's name;

(k) *Minister of Immigration v Q* [2018] NZHC 3173; and

(l) *YF (double jeopardy – JC confirmed) China CG* [2011] UKUT 32 (IAC).

[47] For the respondent, counsel has lodged submissions dated 7 June 2019.

[48] At the appeal hearing, the Tribunal invited counsel to reflect on the issue of the weight which should be given by it to the views of a victim who wishes the appellant to remain in New Zealand and who, if deportation is effected, will also be compelled to return to the home country. While the Tribunal is frequently required to consider the predicament of an unfortunate partner (and/or children) who, entirely innocent of the appellant's culpability, will be forced to choose between remaining here and ending the relationship or returning with the appellant and preserving it. Absent a return to conditions of unreasonable hardship, such a predicament is often seen as a choice which the partner needs to make and, if the relationship is sufficiently important to him or her, there is an option available to that end.

[49] The present case is not on all fours with that scenario. The husband is not merely the partner of the appellant but is the victim of the offending. To that end, the Tribunal extended time to the parties to file further submissions on the point.

[50] Counsel for the appellant has since lodged written closing submissions dated 20 June 2019, together with:

(a) Full Parole Assessment Report dated 7 June 2019;

(b) *Xie v R* [2019] NZCA 218 (dismissing the appellant's appeal against sentence); and

(c) Refugee Review Tribunal *Country Advice: China CHN38568* (2 May 2011).

[51] The Tribunal and the parties have also been provided with a copy of the file prepared for the Minister.

STATUTORY GROUND OF APPEAL

[52] The grounds for determining humanitarian appeals against deportation are set out in section 207 of the Act, which provides:

> (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.

[53] In relation to (the analogous) section 47(3) of the Immigration Act 1987, the majority of the Supreme Court stated, in *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104, that three ingredients had to be established in the first limb:

(a) exceptional circumstances;

(b) of a humanitarian nature;

(c) that would make it unjust or unduly harsh for the person to be removed from New Zealand.

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

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

Submissions by the Appellant

[56] As to exceptional humanitarian circumstances, counsel submits that the impact on the appellant's husband must be taken into account. The husband would not only be affected by the appellant's deportation in the general sense, but it must also be taken into account that he is the victim. As such, his commitment to the appellant means that he, too, will be forced to return to China – a wholly unreasonable outcome for the victim of the offending. His rights under Article 23 of the ICCPR and Article 10 of the 1966 *International Covenant on Economic, Cultural and Social Rights* ("the ICESCR") must be respected. It is also relevant "in the mix" that he is a New Zealand resident himself.

[57] The Tribunal's decision in *AH (Brazil)* [2015] NZIPT 600194 is relevant because of the focus on the impact on the appellant's husband, but his culpability in that case (a factor in the decline of the appeal) can be distinguished from the husband's predicament here, where there is an absence of fault on his part.

[58] Further, the appellant is at risk of double jeopardy, in that a return to China will expose her to the risk of being prosecuted again there for the same offence. Counsel refers to *YF (double jeopardy – JC confirmed) China CG* [2011] UKUT 32 (IAC) (26 January 2011) as authority for the proposition that the appellant is at "some risk" of being handed over to the local police to be questioned as to her

conviction and sentence in this country, which would involve some form of detention.

[59] It is also submitted that deportation would be unjust or unduly harsh, including to the husband, having regard to the particular circumstances of the offence and the appellant's positive response to rehabilitation.

[60] As to the public interest, it is submitted, on the positive side of the ledger, that the need for compliance with international obligations and the contribution of the appellant and her husband to New Zealand must be enhanced by the public interest in respecting the views of the victim and that, on the adverse side of the ledger, any risk of re-offending is no more than low. Further, the risk can be ameliorated by the imposition of suspension of deportation liability, on conditions.

[61] Finally, in his closing submissions of 20 June 2019, counsel submits that the views of the victim must be accorded significant weight. His wife's deportation will result in the victim himself being forced to leave New Zealand and return to China. His desire to remain in New Zealand with his wife, where he is a resident, and where they have plans to raise a family, must be accorded significant weight in the assessment of whether the humanitarian circumstances are exceptional.

Submissions by the Respondent

[62] Summarised, the respondent submits that, on the facts, the humanitarian circumstances are not exceptional.

[63] As to the appellant's husband, the respondent accepts that his wife's deportation will have some negative impact on him. He will need to restart or reshape his business or find alternative work. He will have to address the fact that his parents do not yet know of the events in New Zealand. He may suffer shame and there will be pressure on his marriage. Even so, it will be his choice to return to China in order to preserve his marriage. Even if he does so, he can return to New Zealand at some later point and resettlement in China will not be impossible for him, given his familiarity with the country and family support there. His skills as a photographer are transferrable.

[64] The fact that the victim is the appellant's husband is accepted to be a humanitarian circumstance but it is not an exceptional circumstance, either of itself or taken cumulatively. In many deportation cases, the partner (or child) is a victim, for whom deportation has adverse consequences. Counsel provides examples of

the views of victims being taken into account where the appeal is allowed (*Gacitua-Thomann v Minister of Immigration* [2014] NZIPT 600086 and *Duberly v Minister of Immigration* [2016] NZIPT 600178).

[65] As to the question of injustice or undue harshness, counsel points to the fact that the offending was serious. While the victim's views must be taken into account, they are not necessarily determinative of the outcome on this limb of the test either.

ASSESSMENT

Whether there are Exceptional Circumstances of a Humanitarian Nature

[66] The Tribunal accepts the representations of the appellant's friends and supporters, and the reports from the prison, that she is a warm, intelligent, prosocial person. She is highly educated and is a person of integrity. There is a comment in the Full Assessment Report prepared for the Parole Board, which refers to the appellant as having previously been someone of "power and control" in her relationships but, if that was ever true, the Tribunal accepts her evidence that prison has been an opportunity for reflection and personal insight for the appellant. Her personal journey through the Kowhiritanga programme has clearly been a rewarding one and she is spoken of in high terms.

[67] The appellant, if deported, will be compelled to give up her home and life in New Zealand, and return to China. Although she has supportive and caring parents there, with whom she could find accommodation, she would experience shame and a sense of failure and distress at losing what she has achieved in this country. The sense of shame which accompanies failure in Chinese culture is complex, deeply felt and pervades the family, rather than the individual. It will be felt by her parents as well as the appellant herself – see, for example, J Li, L Wang and K W Fischer "The Organisation of Chinese Shame Concepts" *Cognition and Emotion*, 2004 *18* (6) 767-797, at p770, who note that:

> "… shame is a group rather than an individual concern in China: People almost always belong to a closely integrated group on which their honour or shame is reflected.
>
> People's families and their wider community of friends, relatives, and superiors all have an interest in a member's advancements and setbacks. When people achieve well, the entire community shares the honour. Likewise, when people fail, they do not simply lose their own face, but they shame all those around them."

[68] In a similar vein, the appellant is likely to also feel that she has failed her husband.

[69] Balanced against the impact of these feelings of shame is the reality that the appellant has loving and caring parents who have supported her throughout her recent challenges. The Tribunal is satisfied that they will continue to support her and assist her to achieve in life, if she returns to China.

[70] Similarly, the appellant's husband loves her and is committed to their marriage. While they acknowledge, responsibly, that they have issues still to work through, it is evident that they both have the insight to do this and the evidence from both of them is that they are keen to engage in relationship counselling to help them rebuild and strengthen their partnership. The Tribunal has no doubt that that will occur whether they are in New Zealand or China.

[71] The appellant will face some challenges in re-establishing herself in China in terms of employment. That is accepted. While she has gained both marketing and international experience during her time in New Zealand, Shanghai (to which she would return) is a competitive market from which she has been absent for some years. It is accepted that it will be less easy for her to either find employment or establish her own business there than it would if she were to remain in New Zealand. Even so, she is skilled in her field, has international experience and is intelligent and personable. The Tribunal is satisfied that she would find or be able to create her own employment in China in due course.

[72] It is necessary to consider also the impact on the appellant's husband. It is accepted that he will return to China with the appellant if she is deported because he is committed to their marriage and there would be no other realistic way of maintaining it. His own return to China will, inevitably, bring an end his dreams of settling in this country and developing a successful business here long-term.

[73] The question of the impact of deportation on the husband is significant because he is the victim of the offending. Given this, the Tribunal sought submissions from counsel on the weight to be given to the impact on the husband.

[74] Counsel for the appellant points out that, as a victim, it is a mandatory consideration that the husband's views must be accorded some weight. That much is evident from section 208 of the Act, which is to be read in conjunction with section 48 of the Victims' Rights Act 2002. Mr James further submits, however, that it ought to be given "significant weight" because the appellant's deportation

would in effect penalise her husband further for her having offended against him. He would, in Mr James' terms, be re-victimised.

[75] Counsel for the respondent acknowledges that the fact that the husband is the victim is a humanitarian circumstance but submits it is not an exceptional circumstance, either of itself or taken cumulatively. Ms Ongley argues that, in many deportation cases, the partner (or child) is a victim, for whom deportation has adverse consequences, and points to the decisions in *Gacitua-Thomann (supra)* and *Duberly (supra)* as examples of the views of victims being taken into account.

[76] The Tribunal accepts that the views of a victim who would be further impacted by the deportation of an appellant should be given weight. The degree of weight will vary according to the circumstances but what can be said is that the views of a victim who would be further adversely impacted by an appellant's deportation are not a determinative factor but neither are they trivial, nor are they to be accorded merely the degree of weight given to a non-victim third party who is indirectly affected by the deportation – even as a family member. The Act expressly recognises the right of a victim to be heard and section 208 provides that the Tribunal "must have regard to" the submissions of a victim. Often, of course, the submissions of a victim will align with the respondent's intent to deport, but it is not always so and a victim's submission that the person be permitted to remain, and the reasons for that submission, require real and careful consideration by the Tribunal. The reasons may well, as the respondent properly acknowledges, form part of the matrix of humanitarian circumstances. Whether exceptionality is established will depend on the facts of the particular case.

[77] Neither *Gacitua-Thomann* nor *Duberly* assist the Tribunal in assessing the weight to be assigned to the views of the husband in this case. *Gacitua-Thomann* involved a Chilean man whose reckless driving caused the death of his partner. The victims – her parents and brother – made submissions asking for the appellant to be deported. The Tribunal had regard to those submissions (see particularly at [114]–[115]) in the course of finding that, notwithstanding them, the appeal should be allowed.

[78] As to *Duberly*, the appellant was a South African man in his 50s with mental health issues, who inflicted serious domestic violence on his former wife and son. Both the former wife and son made victims' submissions which urged the Tribunal to uphold the appellant's deportation. The Tribunal went on to allow the appeal but it did so for reasons entirely unconnected with the victims, even though it

expressly acknowledged, and gave weight to, the views expressed by them (at [117]–[119]).

[79] At most, *Gacitua-Thomann* and *Duberly* simply reinforce the point that, while weight must always be given to the views of victims, each case will turn very much on its own facts. That is uncontroversial.

[80] Here, the Tribunal accepts that the appellant's husband will be materially and emotionally impacted by the deportation of the appellant. His intention to return to China with her will mean that his business here will either need to be sold or closed down, or he will have to make substantial changes to the way it operates so that he can continue to work from China. The appellant questioned his ability to manage the last of these options, given that he would need to pay for many flights between China and New Zealand, and the Tribunal accepts (though accounts have not been put in evidence) that, in the long term, this would likely be a disbursement beyond the company's means and not recoverable from clients. It is most likely that the husband will need to either sell the business or close it down. Doubtless, he will be able to find work in Shanghai though he will regard it as a setback in his career and will face the same competition as the appellant in the larger marketplace there. He will, however, share the appellant's advantage of overseas experience. He, too, is young, energetic and skilled. The Tribunal is satisfied that he will find work in China.

[81] The Tribunal accepts Mr James' submission that a victim may be at risk of being 're-victimised' ('further harmed' may be a more appropriate expression) by the deportation of the offender. The Tribunal and its predecessor body have had regard to such considerations in the past. See for example, *Savali v Minister of Immigration* DRT 049/06 (17 October 2008), where deportation would have risked putting the young female victim (also from the same country) in the way of further harm, and *AB (Samoa)* [2012] NZIPT 500456, where the adverse impact on the victim of carrying the guilt for her father's deportation (and her family's adverse response to her for having been the instrument of it) was a significant factor. In both cases, the issue was considered in the context of the 'unjust or unduly harsh' limb of the enquiry, reflecting the law at that time, but the possibility of further harm being caused to a victim is obviously also potentially relevant to the first limb.

[82] The husband will be saddened and dismayed at having to leave New Zealand. He has worked hard to build a successful business here and the Tribunal accepts that the struggle of the last few years would likely be turned around if he and the appellant were able to remain here to rebuild the business.

He will feel a sense of failure and disappointment more keenly by already being the victim of the offending. It will feel like a double blow.

[83] The husband also faces the challenge of telling his parents of the offending, the reasons for it and his wife's conviction. He has avoided telling them for a long time and it is likely to be no easier now than it would have been at the time. It will be a difficult matter for him to address but it will likely be transitory.

[84] Regard must also be had to the impact of deportation on the appellant's parents, beyond the shame they are likely to experience (discussed above). The appellant's mother has assisted the couple financially during their time in New Zealand and the two houses here are registered in her name. They may need to be sold, though that is a financial decision for her and there is no evidence to suggest that she would suffer a loss. Above all, it can be expected that the appellant's parents would suffer the mixed emotions of happiness at having their daughter back, living in close proximity, and sadness for her that her dream to live in this country has been dashed. The natural emotional responses of parents to a child in difficulty can be expected. They will, however, be in a position to provide support and assistance to the appellant and her husband in getting re-established.

Conclusion on Exceptional Circumstances

[85] A return to China for the appellant will mean sadness and disappointment for her at the ending of her dream to settle permanently in this country. She will, however, have the support of her parents, both emotionally and practically, and she will continue to have the companionship, support and affection of her husband, who will also return to China She will experience shame at the circumstances which have brought about her return and, no doubt, will feel responsible for her husband's return. She will face the challenge of finding employment again.

[86] As to the husband, he will be saddened and disappointed to have to give up his business here and he too will face the challenge of getting re-established in China. He will also face the difficult task of explaining events to his parents and will also experience shame. As the victim of the offending, it will be particularly hard for him to suffer the further hardship of abandoning his life and business here. He is likely to feel it is unfair that he should have to endure that, on top of what he has suffered already.

[87] As to the appellant's parents, they will be sad that their daughter has had to return to China. They have invested a significant amount of time and money in assisting their daughter and her husband to settle here and will feel anguish and sadness for them, tempered somewhat by having their daughter back with them in China.

[88] Finally, counsel also submits that the appellant will be at risk of double jeopardy in China, but the country information is equivocal. The Refugee Review Tribunal notes, in its *Country Advice: China CHN38568 (supra)*, that "a Chinese citizen can be re-tried for a crime already prosecuted overseas; however, reported examples of this are scarce". It further records that "although the Chinese legal framework allows for re-prosecution for crimes already tried overseas, many argue that, in practice, the risk of retrial of ordinary criminals is negligible". However, it also notes:

> "Many experts consulted by the UK Asylum and Immigration Tribunal (UKAIT) contend that there is a genuine risk of re-prosecution of returnees. In refugee cases addressed by UKAIT, several academics and experts… advised that the double punishment provision exists not just formally but are applied in practice to returnees who have committed serious offences abroad. According to Professor Palmer, the lack of examples reflects 'not an absence of such cases but, rather, a problem of reporting – reflecting in part the problem of the secrecy that pervades important areas in the operation of the legal system in the PRC'."

[89] The Refugee Review Tribunal notes that the UKAIT's experts referred to five cases but, in reality, three were of unknown outcome, one was "given lenient treatment" and the last was convicted and further sentenced in China, but in relation to an offence for which he had escaped from jail in Kuwait before finishing his sentence. This latter case is likely to be reflected in the advice from the experts that "the prison term the citizen had served overseas might be taken into account by the Chinese authorities as a mitigating factor in determining his punishment". Here, the appellant has served a substantial sentence for causing injuries which were not life-threatening and in circumstances where she had been significantly wronged by her husband. As best as it can on the evidence, the Tribunal finds that, while she may be questioned on her return, the likelihood of the appellant suffering any further trial and sentence is no more than remote.

[90] The Tribunal is satisfied that the foregoing humanitarian circumstances, even taken cumulatively, are not exceptional. Even having careful regard to the added burden on the appellant's husband, of being both the victim and compelled to return to China with his wife in order to preserve his marriage, the humanitarian circumstances do not reach the high threshold of exceptionality discussed in *Minister of Immigration v Jooste* [2014] NZHC 2882. There will be sadness and

disappointment for all concerned, and a degree of challenge for the appellant and her husband in getting re-established, but there will be accommodation and support available and the couple are well able to build new careers for themselves in time.

[91] For the above reasons, the Tribunal is satisfied that there are no exceptional circumstances of a humanitarian nature.

[92] Given this finding, the appeal must fail and there is nothing to be gained by traversing the remaining limbs of the test.

DETERMINATION

[93] The Tribunal finds there are no exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand.

[94] The appeal is dismissed.

Order Delaying Deportation

[95] The Tribunal must also consider whether it is appropriate to order the delaying of deportation, in order to allow the appellant to get her affairs in order. Such an order can take into account the needs of other family members affected.

[96] Here, the Tribunal takes into account that the appellant's husband will need to resolve his business affairs and her mother will need to consider what to do with the two properties in her name here. Resolving those matters will inevitably take time.

[97] The appeal being declined and the Tribunal considering it necessary to enable the appellant to remain in New Zealand for the purposes of getting her affairs in order, it orders pursuant to section 216(1)(a) of the Act that the deportation of the appellant be delayed for three months, commencing on the date of this decision.

Order as to Depersonalised Research Copy

[98] 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 husband's name.

"C M Treadwell"
C M Treadwell
Member

Certified to be the Research Copy released for publication.

C M Treadwell
Member