

**RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA**

Appellants: **AX (United Kingdom)**

Before: V J Shaw (Member)

Counsel for the Appellants: S Laurent

Date of Decision: 13 August 2019

DEPORTATION (NON-RESIDENT) DECISION

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

[2] The appellants are a mother, aged 38 years, and her 18-year-old son.

THE ISSUE

[3] For the last 12 years, the appellants have been living in New Zealand with the mother's mother and stepfather ("the grandparents") who are New Zealand citizens. The primary issue on appeal is whether both appellants' dependency on their family in New Zealand gives rise to exceptional circumstances of a humanitarian nature.

[4] For the reasons that follow, the Tribunal allows the appeals and directs that the appellants be granted resident visas.

BACKGROUND

[5] The mother was born in the United Kingdom. Her parents separated when she was young. Her mother, stepfather and her only sibling, a younger sister, became New Zealand residents in 2003 and are now New Zealand citizens. Her father remains living in the United Kingdom.

[6] The son was born in the United Kingdom in 2001. His parents were estranged around the time of his birth. His father remains living in the United Kingdom and is currently serving a lengthy term of imprisonment for serious sexual offences.

[7] The appellants first visited New Zealand for three weeks in August 2003. They visited again for five weeks in March/April 2004 and for another month in December 2004. They re-entered in July 2005 and remained here for seven months. Their last entry was in January 2007 when they were granted six-month visitor visas.

[8] In January 2008, the son was granted the first of a series of student visas as an international fee-paying student and the mother a series of visitor visas as his guardian.

[9] The son completed secondary school at the end of 2018.

[10] The appellants' final student and visitor visas expired on 31 March 2019. They lodged these appeals on 16 April 2019.

STATUTORY GROUNDS

[11] 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.

[12] 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].

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

THE APPELLANTS’ CASE

[14] The grounds of appeal as set out in counsel’s submissions can be summarised as follows:

- (a) The appellants have lived with the mother’s mother and stepfather, Mr and Mrs AA, in New Zealand for some 12 years and have established a settled life here. They maintained a lawful status throughout this time. In the case of the son, 12 years represents all his school years and the majority of his life.
- (b) The son has formed a strong bond with his grandparents. At school he developmental and learning difficulties and the support of his grandparents has contributed to his level of achievement. This family’s support enhances his prospects for success as he enters adulthood. The son’s father has had no input into his upbringing. In February 2019, the father was imprisoned [...]. The family consider that it is beneficial for the son that he remains away from his father and is not drawn into a relationship with him.
- (c) The mother has a history of poor mental health and in 2006 she was hospitalised in the United Kingdom. With Mr and Mrs AA’s support, her mental health has improved so that she can lead a normal life and care for her son. Mrs AA fears that if the mother has to return to

the United Kingdom she would suffer a relapse. Her father there is not in good health and cannot provide her with the level of family support that has been so beneficial for her in New Zealand.

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

- (a) A statement (undated) from the mother explaining her reasons for wishing to stay in New Zealand. She has a very close and supportive relationship with her mother, stepfather and sister, and her sister's husband and two young children. Being with her family has enabled her to provide her son with a family environment and support. Living in New Zealand has been a very positive experience for both her and her son and she has found even the climate beneficial for her mental health. The mother outlines her various voluntary activities including with the SPCA, Salvation Army and at her son's primary school and her more recent work as a paid teacher aide assisting special needs students. Although she has lived with the burden of mental health issues, she has found that with the support of her family she has been able to lead a normal life knowing that her family is there in the background. Her son enjoys a close bond with his grandparents and this has helped him to become a considerate, mature and kind young man. Having to return to England is a harrowing thought for them both as it would mean living away from their close family and it would put pressure on her mother and stepfather to return to the United Kingdom with them. She also does not want her son to have to grow up with any prejudice from his father's actions.
- (b) A psychologist report (29 April 2019) in respect of the mother prepared by registered psychologist Louis Van Niekerk.
- (c) A record of the mother's volunteer positions and employment since 2017, two references from organisations she has volunteered for, her birth certificate, and a medical prescription (18 June 2019) for her current medication.

- (d) A statement (undated) from the son who states that the people in New Zealand have been very nice to him, he has made a lot of friends through his school and most of his family are here. Although he was born in England, he now feels very much a “Kiwi” and he would love to stay here and make a success of his life. He has been very happy with his grandparents and aunt. They do a lot of outdoor activities such as fishing, camping and walking, and he has learnt a lot about the natural environment. He hopes to be able to do building work.
- (e) A report (11 April 2011) from a general and developmental paediatrician in respect of the son when he was aged 10 years which addresses his learning difficulties and a further assessment of the son’s cognitive and educational abilities prepared by a learning and behaviour specialist (3 May 2012).
- (f) The son’s Year 13 school report (June 2018), and a reference from his teacher who is also the head of department for learner support. The son always displayed respect for his teachers and peers and was a conscientious, hard-working student. He was always well-presented, maintained excellent attendance and was always well-rested and ready for school each day. There is no doubt that this was due to the support and care provided by his mother and grandparents. His grandparents put in a significant financial contribution to ensure that the son could access education at the school and it is evidence of the support the family has provided.
- (g) Photographs of the son over the years with his mother and grandparents and other family members.
- (h) Media reports concerning the conviction and sentencing of the son’s father in the United Kingdom.
- (i) Statements from both Mr and Mrs AA in which they explain the degree of support they provide to both appellants. They immigrated to New Zealand in 2003 and although their younger daughter was able to obtain residence as a dependent, the mother was not as she had given birth to her son. The appellants joined them here for six months but on their return to Britain the mother’s mental health deteriorated to the point that she was unable to care for her son and

Mrs AA travelled back to Britain to care for them both. They all later returned to New Zealand and since then they have supported both appellants, including paying for the son's education in New Zealand. The family is anxious that if the appellants are unable to stay in New Zealand their future as a family will be uncertain. Mr and Mrs AA would not be able to stay in New Zealand as the practicalities of supporting the appellants would inevitably mean that they would all have to return to the United Kingdom.

- (j) Mr and Mrs AA's marriage certificate, their respective qualifications in veterinarian science and in agricultural production and management and confirmation of their current employment in the field of animal health.
- (k) A letter (22 March 2019) from the mother's father living in the United Kingdom. He states that his daughter's mother and stepfather have been very supportive of the appellants, giving them a stable and loving home. The son looks to his grandfather as a father figure and he has been the main role model in his life. It would be very difficult for the appellants to adjust to life in the United Kingdom as they would lose the stability and support that they currently have. The few family members in the United Kingdom are elderly. He is their closest relative and at 66 he is due to retire and is presently having tests for coronary heart disease. He misses his daughter and grandson but wants the best for them. They stay in regular contact via phone and internet and he has visited them in New Zealand several times.
- (l) Thirteen letters of support from family members and friends both in New Zealand and the United Kingdom.

ASSESSMENT

[16] The Tribunal has considered all the submissions and documents provided by the appellants. It has also considered the appellants' Immigration New Zealand file in relation to their temporary visa applications.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[17] For the last 12 years the appellants have been living in New Zealand with the mother's mother and step-father. They were able to maintain a lawful status as the son attended school as an international fee-paying student and the mother held a guardian visitor visa. The son is now 18 years and has completed his schooling so that arrangement is no longer available. The appellants request that they be able to stay permanently in New Zealand with their family members with whom they share a close bond and rely on for emotional and practical support.

The mother

[18] The mother is aged 38 years and is single. She was aged 19 years when her son was born in January 2001. She and her son's father separated soon after the son's birth. When her mother, step-father and younger sister migrated to New Zealand in 2003 she could not be included in the residence application as she had a child. She visited her family here during 2003 and 2004, then returned in July 2005 and stayed for eight months. When back in the United Kingdom during 2006 she suffered a major mental health episode and had to be hospitalised suffering from paranoia and anxiety. Her mother returned to the United Kingdom to look after her and the son before all three returned to New Zealand in January 2007. In the care of her family in New Zealand, the mother's health stabilised.

[19] According to registered psychologist Mr Van Niekerk in his report of 29 April 2019, he saw the mother regularly from March 2008 to April 2010 as she was still feeling anxious and a bit paranoid. She was diagnosed with epilepsy (periods of absence) when aged 15. He did not see her again until April 2018 to prepare an updated report. At that time, she had no issues. She has continued over the years on the same dose of the mood stabiliser medication Olanzapine, and Carbamazepine for her epilepsy. Her epilepsy is well-controlled and she has not had a period of absence in more than a decade. Similarly, she has not had anxiety, paranoid thoughts or mood issues over the same period and has required no psychiatric input. She takes her medication regularly and has no issues about doing so. She has been working as a teacher aide in recent years and is 100 percent fit to work. Her energy, motivation and self esteem are good.

[20] In New Zealand the appellants have always lived with the mother's mother and step-father. They have their own area of the home so that they have some independence although the family usually eats together and enjoys outings and other activities together. Mrs AA states that although her daughter maintains a

healthy life and has been able to work, she enjoys that balance with the support and encouragement of her family. If she had to return to live in the United Kingdom, Mrs AA fears that, without her current support network, her daughter's mental health could well deteriorate. Mr and Mrs AA consider that that they would have to return to the United Kingdom to provide the support necessary for both appellants.

[21] The mother has emphasised in her statement that she and her son have stayed in New Zealand over the last 12 years because of the close and supportive relationship they have with her family here. She is a single parent and family support is necessary during difficult times and has given both her and her son the confidence to lead a complete life and cope with challenges. She is very saddened at the prospect of their having to leave New Zealand which she has found hugely positive for her mental health. She has devoted time over the years to voluntary work with community organisations and at her son's primary school, which ultimately led to her being able to work as a paid teacher aid for special needs children. She hopes that if she can become a resident she will be able to undertake training in this field. She feels that in New Zealand her and her son's future is secure. She has lived with the burden of poor mental health but with her family's support, she has managed to lead a normal life always knowing that her family is there in the background. They have always helped her work through any anxiety she feels. She is finding the thought of having to return to England and live away from her family "harrowing". She keeps in touch with her father in England but he could not help her when she first experienced a decline in her mental health. She is also concerned that her mother and stepfather will feel pressured to return with her and her son and to give up their very settled life here.

The son

[22] The son is aged 18 years. His father has not had any input into his upbringing. He was about to turn 6 years old when, following his mother illness, he returned with her to New Zealand to stay permanently with his grandparents. A decision was made that his grandparents would pay for him to be educated in New Zealand which would enable him and his mother to stay here and the grandparents to support his mother in raising him. His step-grandfather has, throughout the last 12 years, been his primary male role model. The close bond he shares with his grandparents is confirmed by his mother and the friends and family members who have written in support.

[23] The son, because of certain vulnerabilities, continues to need strong family support even though he is now a young adult. At school he struggled with learning and was diagnosed with mild dyslexia and attention deficit disorder. When tested for cognitive and educational ability when he was aged 11 years 3 months he had global developmental delay. His overall performance was in the low average range of intellectual functioning. In literacy and numeracy skills he was at the level of 6 to 7.4 years and his scores were consistent with dyslexia characteristics. He had special learning needs so as to require an adapted curriculum and individualised learning programme. He finished secondary school in 2018 and has no formal qualifications. His teacher has commended him for the respect he displayed towards his peers, and for being a conscientious and hard-working student. At school he was always well-presented, maintained excellent attendance, and was well-rested and ready for the school day. She notes the support the son has received from his mother and grandparents.

[24] The son's grandmother notes the effort the family put into outdoor activities with the son such as camping and fishing and playing sports. She describes him as "a very kind, calm young man" with whom she, and especially his grandfather, have a special relationship. Since finishing school, he has busied himself with household and garden chores, learning the road code and a fitness programme. He has become a great support to a friend's autistic child.

[25] His mother writes that the son has flourished in his current environment. He has developed a great respect for the environment and she hopes he will be able to embark on a training or workplace programme. She attributes his having become a "considerate, mature and kind young man" to the close bond and positive role model of his grandfather with whom he enjoys discussions on many topics.

[26] Extended family and friends who have written in support of the appeal have commented on the close-knit nature of the family, the stable loving home the grandparents have provided and the fact that the son looks to his grandfather as a father figure. His uncle describes him as a "bright upstanding young man" and notes his endless patience with his five and two years-old cousins, who adore him. A couple, who have been family friends over the last 10 years, describe the son as "a very polite young man and role model for both their boys" who, along with his mother, has thrived because of the support provided by his grandparents.

[27] The son has written of the many friends he has made through school and that most of his family are here. He says that he would love to stay here as it is his home and he feels a “Kiwi”. He hopes to be able to do building work and make a success of his life. He has been happy ever since he came with his mother to join his grandparents and aunt. They do many activities together such as fishing, camping, walking and visiting many different places and he has learned a lot about New Zealand nature.

[28] An issue that has also been raised concerning the son is that earlier this year his father in the United Kingdom was sentenced to [...] imprisonment [...]. Although his father has not featured in the son’s life to date, his mother and grandparents worry that if the son was to return to live in the United Kingdom he may somehow be drawn into having a relationship with his father, which would be very detrimental. Remaining in New Zealand ensures that the son will not be affected by his father’s situation.

[29] The son has spent all his formative years in New Zealand. The Tribunal considers that his history of learning difficulties means that he faces significant challenges in terms of work and income and establishing an independent life. He has greatly benefited in his development from the loving, secure and supportive home life that his mother and his grandparents have provided for him. He is much loved by all his family here, including his aunt and uncle and two young cousins. As he matures, he will still need and benefit from the support and oversight of his family. Separating him from his key family members, his friends and the only life he effectively knows would be very harmful to him.

[30] Noted is the acknowledgment by the mother’s mother and step-father that they would consider returning to the United Kingdom to support the appellants as the pressures might otherwise affect the mother’s mental health. This might resolve the issue of support for the appellants, but it would mean a major upheaval for all the family. The mother’s mother and step-father would have to give up their settled life in New Zealand, established over the last 16 years, and they would be separated from their younger daughter, who is their only other child, and her husband and two children.

Conclusion on exceptional humanitarian circumstances

[31] The mother has a history of poor mental health and the son has a history of learning difficulties so that ongoing support from their New Zealand family members is important for the well-being of both appellants. They have lived with

and been supported by the mother's mother and stepfather over the last 12 years so that the son effectively regards New Zealand as his home. Remaining in his current environment, including his secure loving home, offers him the best chance of a successful adult life. Deportation would separate the appellants from their key support thereby jeopardising the mother's mental health and diminishing their quality of life. It would put pressure on the mother's mother and stepfather to give up their settled life in New Zealand which would also separate them from their younger daughter and grandchildren in New Zealand.

[32] The Tribunal finds that the appellants have exceptional humanitarian circumstances.

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

[33] The appellants are liable for deportation because they are unlawfully in New Zealand. They became unlawfully here after the son's student visa and the mother's guardian visitor visa expired on 31 March 2019. Prior to that, they had maintained a lawful status over a period of 12 years.

[34] The Tribunal must balance the reasons for the appellants being liable for deportation against the consequences of deportation for them: see *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [9]. In this case, deportation will separate the appellants from critical family support.

[35] In light of the consequences of deportation for the appellants and their family, the Tribunal finds that it would be unjust and unduly harsh for the appellants to be deported from New Zealand.

Public Interest

[36] The mother has a clear police record in the United Kingdom and New Zealand and the 18-year-old son also has a clear record in New Zealand, where he has been raised.

[37] The mother has epilepsy and has been prescribed anti-psychotic medication since a major mental health episode in 2006. She saw a psychologist for therapy regularly throughout 2008 and 2009 but has needed no other psychiatric input since then. Her epilepsy is well-controlled, and she maintains stable mental health on her current medication which is prescribed by her medical

practitioner. She is able to lead a productive life and until her last visa expired she had been able to work as a teacher aide during the previous three years. There is little or no risk that her conditions would be a major cost or burden on public health services.

[38] The son has previously been assessed as having an acceptable standard of health.

[39] The Tribunal finds that in all the circumstances it would not be contrary to the public interest for the appellants to remain permanently in New Zealand.

DETERMINATION

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

[41] 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.

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

[43] The appeals are allowed on those terms.

Order as to Depersonalised Research Copy

[44] 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 appellants and their family members.

"V J Shaw"
V J Shaw
Member

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Copy released for publication.

V J Shaw
Member