IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2019] NZIPT 504557**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**BV (Philippines)**
Before:	D Smallholme (Member)
Counsel for the Appellant:	H Ratcliffe
Date of Decision:	30 October 2019

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellant, a 44-year-old citizen of the Philippines, against her liability for deportation which arose when she became unlawfully in New Zealand.

THE ISSUE

[2] The appellant had an operation for a brain tumour in 2018. Her most recent application for a work visa was declined on health grounds.

[3] The primary issue on appeal is whether the possibility that the appellant may be unable to obtain necessary medical treatment in the Philippines, and the dependence of her partner and two sons on the payments made from her New Zealand employment, give rise to exceptional humanitarian circumstances.

[4] The Tribunal finds the appellant's circumstances do not meet the high threshold of exceptional humanitarian circumstances. The appeal is therefore declined. However, for the purposes of getting her affairs in order, particularly having sufficient funds to return to the Philippines and to be in a better position to pay for annual MRI scans there, the Tribunal directs that the appellant be granted a work visa for six months.

BACKGROUND

[5] The appellant has a partner and two sons, aged 16 and 11 years, who are also citizens of the Philippines.

[6] In February 2014, the appellant travelled to New Zealand as a visitor. She was later granted a student visa and, in May 2015, was awarded a National Diploma in Business (Level 5).

[7] In June 2015, the appellant was granted an Essential Skills work visa to enable her to work as a housekeeping supervisor in a hotel in Auckland.

[8] In October 2016, the appellant was granted a further Essential Skills work visa, which was valid for one year, to continue her employment as an assistant housekeeping manager. She was granted a further Essential Skills work visa for this work in September 2017, and then a one-year work visa in November 2017.

[9] In late March 2018, the appellant was diagnosed with a brain tumour. She underwent surgery in April 2018 and then returned to work.

[10] On 8 October 2018, the appellant applied for an Essential Skills work visa to work as a housekeeping manager.

[11] Immigration New Zealand sought a report from the appellant's neurosurgeon who advised that the appellant had made an excellent recovery after surgery for her Grade II meningioma. There was no evidence of residual tumour growth according to the results of an MRI scan on 12 November 2018. According to data reported in medical literature, rates for recurrence of resected Grade II meningiomas were varied: one report gave a five-year progression-free survival rate of 86 per cent, whereas another gave a higher recurrence rate at 41 per cent, and progression-free survival of 59 per cent. In the neurosurgeon's experience, the recurrence rate was likely to be around 20 per cent at five years. It would be very unlikely for a patient to succumb to the disease within that time. The appellant required ongoing radiological surveillance: initially, six-monthly MRI, which could potentially become annual after a year or two. If there was evidence of progression, further surgery would be required followed by radiation.

[12] On 11 November 2018, Immigration New Zealand granted the appellant an interim visa.

[13] On 28 December 2018, Immigration New Zealand advised the appellant's former representative (the representative) that the appellant may not have an acceptable standard of health on the basis that she was unable to do the work on which her work visa application was based. The medical advisor considered that the appellant was likely to impose significant health costs and demands on New Zealand's health care system.

[14] On 20 January 2019, the representative responded to Immigration New Zealand's concerns. In a further report (15 January 2019), the appellant's neurosurgeon emphasised that there was no evidence of residual tumour on the post-operative MRI. While he was unaware of any literature that could give an accurate prediction for recurrence over the three-year term of the proposed work visa, the neurosurgeon guessed it would be three to five per cent. He recommended annual MRI scans during that time.

[15] On 12 February 2019, Immigration New Zealand informed the representative that the medical assessor had advised that the appellant did not have an acceptable standard of health. Further, the appellant did not meet the criteria for a medical waiver as set out in A4.65 of immigration instructions.

[16] On 19 February 2019, the representative raised concerns as to the reasons supporting the medical assessor's opinion and submitted that it was unlikely that the appellant was at high risk of imposing significant costs and demands on New Zealand's public health care system during the potential duration of the visa. According to the recent MRI, there was no tumour. It was very unlikely that any recurrence would be seen on MRI within the following year and any tumour that may be seen was extremely unlikely to require treatment.

[17] On 27 February 2019, Immigration New Zealand declined the appellant's application for an Essential Skills work visa.

[18] The appellant's interim visa expired on 21 March 2019 and she has remained unlawfully in New Zealand.

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

[21] In *Minister of Immigration v Jooste* [2014] NZHC 2882, [2015] 2 NZLR 765 at [53], the High Court held that the threshold for exceptionality in the first limb of the statutory test is high:

> Any appeal must fail at the first hurdle if there are no "exceptional circumstances" of a humanitarian nature. The significance of the initial threshold inquiry should not be minimised, however. Given the stringent nature of the "exceptionality" test, as articulated in *Ye*, the initial threshold is a high one. One would expect that only a minority of cases would progress to the "unjust or unduly harsh" stage of the inquiry.

THE APPELLANT'S CASE

[22] The appellant's appeal was lodged on 3 May 2019. Her case is set out in counsel's submissions (also 3 May 2019) and can be summarised as follows:

(a) The appellant's sons, who are aged 16 and 11 years, live with their father, the appellant's partner, in the Philippines. The partner is unable to work full-time due to physical limitations. His income from part-time work is sufficient to provide food but the remainder of the children's necessities, including rent, school, and clothing, are paid from the payments made by the appellant from her New Zealand income. The appellant has regularly sent money. She has worked hard and shared accommodation and foregone luxuries to keep her expenditure as low as possible.

(b) The appellant survived a Grade II tumour through luck and early medical intervention. After an appointment with an optometrist, the appellant was referred to hospital and diagnosed with the tumour, for which she had surgery in April 2018. No further treatment is required beyond regular MRI scans, unless there are signs that a tumour has returned, but the cost of regular MRI scans is beyond the appellant's means in the Philippines. The appellant has no savings to pay for potentially life-saving medical treatment upon her return to the Philippines. Basic surgery for a brain tumour there would likely cost at least NZD14,500. The appellant could probably find employment as a housekeeper but wages for such employment are very low and it is likely that she would never be able to pay for surgery costs. As she would be unable to afford brain surgery if her tumour returned, the appellant could die from a fast-growing tumour affecting her brain function. While this might not happen within the next few months, there is a likelihood that the tumour could recur in the next five years. The danger posed to the appellant is an exceptional circumstance of a humanitarian nature that is "well outside the normal run of circumstances".

(c) It would be unjust and unduly harsh to deport the appellant because her sons will be unable to utilise health care or educational opportunities in the Philippines, beyond the basic necessities of life, without her financial support from New Zealand. A further three-year work visa would allow the appellant to continue to support her family and to afford MRI scans to ensure any recurrence of the tumour is identified without delay. The appellant wants to explore the possibility of gaining residence here as a housekeeping manager. While there are costs involved in ensuring that the appellant remains in a good state of health, these are for scans; initially every six months, then annually. It would not be contrary to the public interest for the appellant to remain in New Zealand. The scan costs will be offset by the appellant's contribution to New Zealand through her employment.

[23] In support of the appeal, the following documents were provided:

(a) Copies of the sons' birth certificates and an affidavit (20 April 2009) from the partner consenting to use his surname on the older son's birth certificate.

(b) A signed offer of employment for the position of housekeeping manager and accompanying individual employment agreement (28 October 2018) and a letter (9 April 2019) from the appellant's general manager advising that the position remains open for the appellant.

(c) Numerous remittance forms showing payments totalling approximately NZD28,000 made by the appellant to her partner in the Philippines between January 2016 and September 2018.

(d) A copy of the appellant's National Diploma in Business (Level 5) and of her academic transcript.

(e) The appellant's medical records in relation to the diagnosis and treatment of her brain tumour and the results of her MRI scans.

(f) Letters from two of the appellant's friends (April 2019) describing their closeness to the appellant and her dedication to supporting her partner and sons.

ASSESSMENT

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

Whether there are Exceptional Circumstances of a Humanitarian Nature

[25] The appellant is a 44-year-old citizen of the Philippines who has been living in New Zealand for the past five-and-a-half years. During this time, she has provided substantial financial support to her partner and their two sons from her employment as a hotel housekeeper.

Financial concerns about the appellant's return to Philippines

[26] The appellant's sons, who are now aged 16 and 11 years, have remained in the Philippines with their father, the appellant's partner, while the appellant has been living and working in New Zealand. On appeal, it is submitted that the partner is unable to work full-time and that his income provides only for household food

expenses. He relies on the payments made by the appellant from her New Zealand income in order to meet their sons' reasonable expenses.

[27] The Tribunal observes that the remittance receipts produced on appeal show that the appellant paid NZD28,000 to her partner in the period between January 2016 and September 2018. There is no doubt that such a substantial financial contribution will have had an important and meaningful influence on the standard of living and the nature and quality of the education and other opportunities that could be made available to the sons. The appellant has made a considerable sacrifice in her own lifestyle, to make such payments, given that her income has been approximately NZD45,000 per annum (gross).

[28] The Tribunal accepts that wages are low in the Philippines, in comparison to New Zealand, and that while the appellant may be able to obtain some employment there as a housekeeper, there will inevitably be a drastic reduction in the amount of financial support that she can provide for her partner and their sons. It may be that such an adjustment has already been made given that the appellant has been unable to work here since her interim visa expired in late March 2019. Had the appellant's health situation been different, she may have been granted a further Essential Skills work visa and continued to make such financial contributions for a further three years. Nevertheless, a dramatic reduction in the appellant's income and, subsequently, of her ability to support her children, is not necessarily an exceptional humanitarian circumstance. As the High Court stated in *Ronberg v Chief Executive of Department of Labour* [1995] NZAR 509 (HC), at p 529-530:

> Mere economic betterment – the fact that a person can live more comfortably in New Zealand than elsewhere – perhaps with employment instead of unemployment – is not the type of humanitarian consideration in contemplation in the statute. It would usually have difficulty qualifying in itself as an "exceptional circumstance" rendering removal "unjust or unduly harsh". It was not intended New Zealand house the world.

[29] The Tribunal has an obligation to have regard to the best interests of the child, under Article 3(1) of the 1989 *Convention on the Rights of the Child*. The best interests of the appellant's children are a *primary* consideration in the Tribunal's assessment, rather than the *paramount* consideration. Nonetheless, they must be afforded substantial weight (see *Huang v Minister of Immigration* [2009] 2 NZLR 700 (CA) at [49]). While understanding the appellant's concern and disappointment that she will be unable to continue to provide for her sons at her former level, and that they may miss out on opportunities and a more hopeful future, there is no evidence to demonstrate that either of the appellant's two sons have any particular health issues or other vulnerabilities. It is likely that the appellant will be able to

obtain employment in the Philippines, as a housekeeper, and to continue to make some financial contribution to their living and education costs. She now has a business diploma and over five years' work experience in the New Zealand employment setting, and positive work references from her employer, which could be expected to enhance her ability to secure employment in the Philippines. The appellant states in her appeal form that her mother, step-father, and her seven step-brothers and step-sister continue to reside in the Philippines. They may provide her and her partner and their sons with some ongoing comfort and support upon her return there.

[30] It is submitted on appeal that the appellant wishes to apply for residence relying on the offer of employment as housekeeping manager (presumably in the occupation of Hotel Service Manager, which has a specialisation of Head Housekeeper). It is asserted that this will not be possible until she has been granted a work visa and is able to begin her job and increase her income. The Tribunal notes that the appellant is not able to apply for a residence class visa while liable for deportation (section 71(4) of the Act). Nevertheless, she could apply for a residence class visa from the Philippines (section 71(1)). Further, there are no guarantees that the appellant would be granted residence upon making any such application. Applicants for residence class visas must have an acceptable standard of health unless they have been granted a medical waiver. The requirements include that they be unlikely to impose significant costs or demands on New Zealand's health services (A4.10 of the administration instructions, effective 15 December 2017). The possibility of recurrence of the appellant's brain tumour would have to be weighed in any such application or medical waiver process.

The appellant's future health prospects

[31] The appellant underwent surgery for treatment of a Grade II meningioma in April 2018. She has now recovered and, according to her neurosurgeon, there was no evidence of residual tumour growth as at November 2018.

[32] On appeal, it is submitted that the designation of Grade II indicates that the growth of the tumour was relatively fast and that there is an associated (higher) risk of recurrence. The appellant requires regular MRI scans to ensure any further tumour is found quickly and dealt with immediately. If she is to return to the Philippines, the cost of regular MRI scans will be beyond the appellant's means. As she has no savings and would have low-paid work there, it is submitted that the appellant would be unable to pay for potentially life-saving medical treatment and

could die from a fast-growing tumour affecting her brain function. While this might not happen within the next few months, there is a likelihood that the tumour could recur in the next five years. The danger to the appellant, it is submitted, is an exceptional circumstance of a humanitarian nature that is "well outside the normal run of circumstances".

[33] The Tribunal acknowledges that there is a risk of the appellant developing a further brain tumour. However, that risk is not certain. An accurate prediction for the likelihood of recurrence for Grade II meningiomas at five years is difficult. There are two medical studies, which put the progression-free survival rate variously: at 86 per cent or at 59 per cent. In the experience of the appellant's neurosurgeon, the recurrence rate was likely to be around 20 per cent at five years. The neurosurgeon was unaware of any literature that could give an accurate prediction for recurrence over the three years of the proposed work visa but guessed that it was (as low as) three to five per cent.

[34] Nevertheless, the appellant requires regular MRI scans and there are real concerns as to whether she will be able to afford the costs for such scans in the Philippines. According to the Tribunal's general online inquires, the quality of the Philippines' state-subsidised public health care varies between rural and urban areas. Private healthcare provides more consistent care and facilities tend to be better equipped than public facilities. Costs for MRI scans could be in the vicinity of PHP20,000, or NZD615 per scan (R O Joson's Education for Health Development in the Philippines *Medical Prices Data in the Philippines: MRI Prices in the Philippines* (28 May 2016) at www.medicalpricesdatainph.wordpress.com; and, "MRI, CT Scan now available at Manila Government Hospitals" *Manila Bulletin* (16 April 2016)). As at 15 January 2019, the appellant's neurosurgeon recommends that the appellant undergo an annual MRI scan for the next three years.

[35] The appellant wants to remain in New Zealand for three years to have access to regular MRI scans and to test her eligibility for residence. If she remained here, she would be better placed to manage any future recurrence as she would have ready access to MRI services and could (presumably) build up her savings for any treatment that may be required. Nevertheless, MRI services are also available in the Philippines. The appellant is likely to have some income there and has not demonstrated that this would be insufficient to meet the costs of regular MRI scans. There is no certainty that the tumour will recur or that she will require surgery, or that there is no public health service available there to assist her should that situation arise.

[36] While not weighed in this part of the assessment, the Tribunal notes that it has the power, on the decline of an appeal, to direct that an appellant be granted a temporary visa so that they can get their affairs in order. The Tribunal directs the grant of a work visa in this case (see [43] below), which will allow the appellant to continue working in New Zealand for six months, during which time she can obtain a further MRI scan and save money for her return to the Philippines. The appellant may also check her entitlement for residence during this time.

Conclusion on exceptional humanitarian circumstances

[37] The appellant has had a brain tumour surgically removed and while this does not impact on her ongoing ability to work, there are risks that she will suffer a recurrence of the tumour. She seeks to stay in New Zealand as it offers her certainty in terms of access to quality health care which is of concern to her because of the possibility of a recurring brain tumour. However, while the appellant has concerns of such recurrence, it is not established that she could not access some medical care in the Philippines. Further, while the appellant would have better earnings in New Zealand than in the Philippines and a higher standard of living for her family, this is not the type of humanitarian circumstance contemplated by the statutory test.

[38] Having considered the appellant and her partner and their sons' circumstances cumulatively, the Tribunal finds that they do not meet the stringent statutory test of "exceptional circumstances of a humanitarian nature". Compassionate factors and genuinely concerning circumstances do not meet the high threshold for a finding of exceptional circumstances: *Minister of Immigration v Jooste* at [45].

[39] For the reasons set out above, the Tribunal finds that it is not established that the consequences of the appellant's departure from New Zealand are such that they meet the high threshold of exceptional humanitarian circumstances.

DETERMINATION

[40] The Tribunal finds that the appellant does not have exceptional circumstances of a humanitarian nature in terms of the statutory test.

[41] An appeal must fail if there are no exceptional circumstances of a humanitarian nature. The Tribunal's finding that there are none in this case makes

it unnecessary to consider either the "unjust or unduly harsh" or "public interest" stages of the inquiry under the statutory test.

[42] The appellant has failed to meet the requirements of section 207(1) of the Act and her appeal is declined.

[43] Although the appeal is declined, the Tribunal directs, pursuant to section 216(1)(b) of the Act, that the appellant be granted a work visa for a period of six months, commencing on the date of this decision. The Tribunal exercises its discretion so that the appellant can get her affairs in order, using the wording of that provision. The High Court has held that the phrase "getting affairs in order" means "organising those personal, legal or financial matters that, by reason of personal need or obligation (legal or moral) must be attended to so that deportation will not leave the individual concerned, or those associated with him or her, disadvantaged" (*Chief Executive of MBIE v Singh* [2018] NZHC 272 at [20]). Here, the appellant needs time to arrange for the transfer of her medical care to the Philippines and build savings for her return to the Philippines so that she can better meet the cost of annual MRI scans there so that any recurrence can be detected promptly and managed appropriately. The six-month timeframe will also give the appellant time to look for employment in the Philippines and make any changes that may be necessary to her sons' current arrangements.

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 appellant.

"D Smallholme"
D Smallholme
Member

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D Smallholme
Member