IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2020] NZIPT 504841**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**AK (Thailand)**
Before:	A M Clayton (Member)
Counsel for the Appellant:	A McClymont and V Tse
Date of Decision:	9 March 2020

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is an appeal against liability for deportation by the appellant, a 40-year-old citizen of Thailand, who became unlawfully in New Zealand after her last (interim) visa expired on 2 July 2019.

THE ISSUE

[2] The appellant is married to a 61-year-old New Zealand citizen who, because he was convicted of a domestic violence-related offence in 2016, is ineligible to support any application by the appellant for a temporary or resident visa.

[3] For the reasons that follow, the Tribunal finds that the appellant has exceptional humanitarian circumstances which would make it unjust or unduly harsh for her to be deported from New Zealand within the next nine months. It directs that Immigration New Zealand grant her a nine-month visitor visa.

BACKGROUND

[4] A few months before the appellant arrived in New Zealand in June 2018, she started an online relationship with her New Zealand partner. When she

arrived, she commenced living with him. She held visitor visas until 7 March 2019 at which point Immigration New Zealand granted her an interim visa while it processed her application for a further visitor visa based on partnership grounds.

[5] On 12 June 2019, Immigration New Zealand declined the appellant's application. It confirmed that decision after a reconsideration on 20 November 2019. It advised the appellant that, while it was ultimately satisfied with the genuineness and stability of her relationship with her supporting partner, he had a 2016 conviction for an offence involving domestic violence. As such, he was not eligible to support her partnership application. Immigration New Zealand did not consider that in all the circumstances a character waiver for him was warranted.

[6] Immigration New Zealand's waiver assessment (10 September 2019) recorded the partner's account of his offence which, he said, followed an argument between his ex-partner and her son (who was the victim of the partner's assault). The ex-partner had been standing in front of her son's vehicle to prevent him from driving and the partner stated that he became concerned about her as he thought her son might run her over. He said he pulled the car keys out of the ignition and pulled the son out of the car.

[7] Immigration New Zealand listed the factors supporting the grant of a waiver as the fact that the partner had only one conviction which appeared to relate to domestic violence. His sentence (80 hours' community work) indicated that the offence was at the lower end of the spectrum. The appellant and her partner had lived together since June 2018 and the appellant was pregnant. On the negative side, the partner's conviction for an offence involving domestic violence was relatively recent and he had also been involved in 21 family harm episodes from 1998 to 2005, and then 2012 and 2016 (apparently involving first, his former wife and second, another partner) in the majority of which he was recorded as the aggressor.

[8] In late December 2019, the appellant had a child.

STATUTORY GROUNDS

[9] 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.

[10] 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.

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

THE APPELLANT'S CASE

[12] The appellant's counsel has lodged submissions (20 December 2019, 8 and 31 January 2020) which may be summarised as follows:

(a) The appellant's partner and child are New Zealand citizens of Maori descent.

(b) The appellant's deportation would deprive one parent or the other of a relationship with their child.

(c) The partner's conviction for assault in a domestic setting was an assault against his ex-partner's son. When assessing whether to grant a waiver, Immigration New Zealand did not consider the context of the conviction or place any weight on the fact that he was trying to protect his ex-partner, not harm her. Further, Immigration New Zealand should not have placed any weight on the family harm incidents, especially given that the partner was the victim in many of the incidents with his ex-partner.

[13] In addition to copies of correspondence with Immigration New Zealand, counsel for the appellant provided the following documents:

(a) Medical letters in regard to the appellant's pregnancy.

(b) A letter from the partner (2 September 2019) attesting to the nature of his relationship with the appellant.

(c) The New Zealand birth certificate for the appellant's child recording the partner as the child's father.

(d) Copies of photographs of the appellant and her partner with their baby.

(e) A letter from a member of a marae trust board supporting the appellant's effort to stay in New Zealand.

(f) A copy of the partner's conviction history report and a copy of a New Zealand Police Vetting Report recording the 21 family harm episodes (physical and verbal) in the partner's family environment, involving him, his ex-partner and her son. The partner is recorded as the alleged aggressor in the majority of incidents.

(g) A letter from the partner's criminal counsel (11 December 2019) confirming that the partner had been acquitted in three jury trials on charges laid after his ex-partner had made allegations that he had been violent to her. Another charge was withdrawn. According to criminal counsel, the ex-partner was in fact the perpetrator of the violence in each case, usually associated with her abuse of alcohol.

(h) A letter from the partner's ex-partner (20 June 2017) explaining the circumstances of the partner's assault on her son and stating that she was grateful to the partner for stopping her son from driving the car because her son was in a "blind rage" such that she feared for her safety.

ASSESSMENT

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

Whether there are Exceptional Circumstances of a Humanitarian Nature

[15] Exceptional 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].

[16] The 40-year-old appellant arrived in New Zealand 21 months ago with the intention of living here with her 61-year-old New Zealand-citizen partner. Three months ago, she gave birth to their child.

How the appellant became liable for deportation

[17] Immigration New Zealand declined the appellant's application for a partnership-based visa because her partner was not eligible to support her application. This was because he had been convicted in 2016 of an offence involving domestic violence. Immigration New Zealand did not consider that the circumstances of the application merited a character waiver for the partner.

[18] Immigration New Zealand took into account the information that it had before it at the time and its decision not to grant a waiver was one that was open to it on that information. In any event, the Tribunal does not have jurisdiction in a humanitarian appeal, such as the present one, to re-examine the validity of the appellant's underlying liability for deportation; see *L v Removal Review Authority* (HC Wellington, CIV-2005-485-1601, 3 March 2006).

Recent developments

[19] Nevertheless, there have been a number of significant humanitarian developments since Immigration New Zealand made and reconfirmed its decision to decline the appellant's application.

[20] The first development is the birth of the couple's baby in late 2019. At the time of the waiver assessment, Immigration New Zealand recorded that it accepted that the appellant and her partner were in a genuine and stable

relationship (and acknowledged that the appellant was pregnant). However, it had earlier raised a number of concerns about their relationship and spent a significant proportion of its processing time on those concerns. With the passage of time and the birth of their baby, if the question of a waiver was to be reconsidered, the appellant and her partner would now be able to show that they have remained in a relationship (if they have), which will include their shared parenting of their almost three-month-old child.

[21] Second, on appeal, counsel has made available further information about the partner's apparent history of family violence which was not before Immigration New Zealand. The police record of 21 family harm incidents (from 1998 to 2005, 2012 and 2016, involving his first wife and another partner), in which the partner was described for the most part as the aggressor, formed an important part of Immigration New Zealand's assessment of whether he should be granted a character waiver. Counsel submits that the partner is recorded as the alleged aggressor on the Police Vetting Report only because he was the person complained about by the ex-partner. The partner's criminal counsel confirmed that four charges of assault, laid after complaints by the appellant's ex-partner, were not established (either by acquittal or withdrawal).

[22] Counsel also points out that the Police Vetting Report records that the partner obtained a final protection order in June 1999 (presumably against his former wife). It also records that in 2012, following a dispute between the partner and another of his former partners, his former partner was given a police warning after she admitted breaking a window. The Police Vetting Report must now be read in the context of this new information and commentary.

Best interests of the child

[23] The Tribunal is satisfied that both parents' presence during these very early stages of their child's life is of significant importance, to the child and to them. If the appellant is able to remain in New Zealand for at least some little time, both parents will be able to bond with the child and provide support for each other during the early months of the child's life.

[24] In terms of Article 3 of the 1989 *Convention on the Rights of the Child*, the Tribunal considers that the best interests of the child are met by the appellant remaining in New Zealand, at least in the short term.

Visa to allow further application and/or arrangements to leave

[25] If the couple are able to demonstrate a continued commitment to each other, and have the opportunity to put the developments discussed above before Immigration New Zealand, it is possible that the partner may be granted a character waiver.

[26] Alternatively, if Immigration New Zealand does not grant a character waiver and the appellant must leave, she and her partner will need to make arrangements for the partner and/or the child to accompany the appellant to Thailand or to stay in New Zealand. If their child is to accompany the appellant, she will be a little older and safer to travel by air.

Conclusion on exceptional circumstances of a humanitarian nature

[27] While there are valid concerns about the partner's eligibility to support the appellant's application for temporary visas (or, indeed, a resident visa), the Tribunal finds that the interests of the couple and the best interests of their child amount to exceptional humanitarian circumstances.

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

[28] In determining whether it is unjust or unduly harsh for the appellant to be deported, the Tribunal must balance the reasons for the appellant's liability for deportation against the exceptional humanitarian circumstances relating to the consequences of deportation for the appellant, her partner and child (see *Guo v Minister of Immigration* [2016] 1 NZLR 248 at [9]).

[29] The appellant is liable for deportation because she became unlawfully here after her application for a further partnership-based visa was declined. Immigration New Zealand declined her application because her partner was not eligible to support her application without a character waiver. Immigration New Zealand determined that the circumstances of the application did not merit the grant of a character waiver.

[30] Against this reason for deportation, the Tribunal weighs the circumstances discussed above if the appellant is deported. The appellant's need for support from her partner at this time and the child's best interests are significant considerations. A nine-month visitor visa will allow the appellant to remain in New Zealand to receive such support. It will also reinstate her lawful status in New

Zealand, giving her an opportunity to re-test her eligibility to stay here under partnership instructions. If she cannot remain here, nine months is sufficient time for the couple to make future plans for themselves and their baby.

[31] Weighing the reasons for deportation against the exceptional humanitarian circumstances, the Tribunal is satisfied that it is unjust or unduly harsh for the appellant to be deported from New Zealand at this time.

Public Interest

[32] Having found that the appellant has exceptional humanitarian circumstances which would make it unjust or unduly harsh to deport her within the next nine months, the Tribunal must also be satisfied that her stay here will not, in all the circumstances, be contrary to the public interest.

[33] A New Zealand police certificate for the appellant (3 March 2020) shows that she has no convictions and there are no recorded family violence episodes in her name.

[34] Weighing the public interest considerations favouring the appellant remaining in New Zealand, including ensuring family unity when the vulnerability of individuals in a family particularly require it, the Tribunal is satisfied that it would not be contrary to the public interest to allow the appellant to remain in New Zealand for a period of nine months.

DETERMINATION

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

[36] The Tribunal also finds that it would not in all the circumstances be contrary to the public interest for her to remain in New Zealand on a temporary basis.

[37] Having met the section 207(1) test, the Tribunal orders that the appellant be granted a visitor visa pursuant to section 210(1)(b) of the Act for a period of nine months commencing on the date of this decision.

[38] The appeal is allowed on those terms.

Order as to Depersonalised Research Copy

[39] 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 her identification.

"A M Clayton"
A M Clayton
Member

Certified to be the Research Copy released for publication.

A M Clayton
Member