IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2020] NZIPT 504822-823**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**AZ (Colombia)**
Before:	M Avia (Member)
Counsel for the Appellant:	I Uca
Date of Decision:	12 June 2020

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellants, citizens of Colombia, aged 8 and 14, against their liability for deportation. Although the appellants are lawfully in New Zealand, they were required to lodge humanitarian appeals against deportation liability at the same time as their refugee and protection appeals – see section 194(6) of the Immigration Act 2009 (the Act).

[2] The Refugee Status Unit found both the appellants' parents to be refugees. However, it found that the appellants' claims of harm did not reach the threshold of a real chance and their claims were declined. Their subsequent appeals to the Tribunal were also declined – see *BA (Colombia)* [2020] NZIPT 801697-698. Because the appellants were not recognised as refugees or protected persons, their humanitarian appeals must now be considered (see section 194(6)(b) of the Act)

[3] The Act provides that it is the appellants' responsibility to establish their claims (see section 226). It also provides that the Tribunal may rely on findings of credibility or fact made by the Tribunal in any previous appeal involving the appellants (see section 231).

THE ISSUE

[4] The Tribunal must determine in this appeal whether the appellants' combined circumstances, which include prospective separation of the family unit, where the

parents have refugee status in New Zealand and are therefore unable to return to Colombia without facing a real chance of being persecuted, constitute exceptional humanitarian circumstances which would make it unjust or unduly harsh for them to be required to leave New Zealand.

[5] The Tribunal finds that the appellants' circumstances meet the statutory test. The appeals are allowed, and the Tribunal directs the grant of student visas to the appellants for 12 months from the date of this decision.

BACKGROUND

[6] The son was born in 2011 to both parents.

[7] The daughter was born in 2006 to her mother and her biological father, a Colombian national who lives in Colombia. Her stepfather met her mother in 2010 and it was they who sought and were granted refugee status in New Zealand. The daughter regards her stepfather as her father and he will be referred to as such throughout the remainder of the decision.

[8] The appellants and their parents arrived in New Zealand on 11 March 2019, as the holders of visitor visas. Shortly afterwards, the appellants (through their parents) claimed refugee and protected person status and were granted student visas while their claims were assessed.

[9] The family's claims were made on the basis that the parents had received death threats from the National Liberation Army (ELN). The parents had opened a music school for disadvantaged children to encourage them away from crime. The ELN considered that the parents were teaching the students in a way that went against the ELN's interests and threatened to kill them. The family left the area in which they were living, and the parents closed the school. After unsuccessfully seeking help from government and non-governmental agencies, they decided to leave the country and then travelled to New Zealand.

[10] On 15 November 2019, the parents were recognised as refugees by the Refugee Status Unit, as they were found to be at risk of serious harm. However, the appellants' claims of harm were found not to reach the threshold of a real chance and their claims were declined, as were their subsequent appeals to the Tribunal.

[11] However, the finding of the Refugee Status Unit in relation to the appellants' parents means that the parents cannot be deported from this country to Colombia,

by virtue of section 164 of the Act (there are exceptions therein to the general *non-refoulement* principle but, on the evidence, they do not apply). It follows that, unless their parents voluntarily chose to return to Colombia with them, deportation of the appellants would separate them (likely permanently) from their parents.

[12] The Tribunal must determine whether the predicament of the appellants gives rise to exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for them to be required to leave New Zealand.

STATUTORY GROUNDS

[13] The appellants' appeals are brought under subsections 194(5) and (6) of the Act and were lodged contemporaneously with their refugee and protection appeals. The grounds for determining a humanitarian appeal are set out in section 207 of 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
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> (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

[14] 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].

[15] 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

[16] The appellants' case encompasses the evidence their parents have in regard to both their and the appellants' claims for refugee and protected person status; the submissions filed in support of their previous appeals, and the documents produced following the hearing of the appellants' refugee appeals, consisting of articles setting out the current situation in Colombia as it pertains to COVID-19; and further information about the targeting of social leaders by guerrilla and paramilitary groups.

[17] The status of the appellants' mother and father in New Zealand means that they can remain here and, indeed, Immigration New Zealand's records indicate that they have applied for residence because of their refugee status, and the appellants have been included as secondary applicants. Although such applications are entirely a matter for Immigration New Zealand, they are likely to be successful. There are no known health or character issues relating to the appellants which might impede this.

[18] However, that the appellants may be entitled to be granted residence as dependents of recognised refugees is a matter for the future. The Tribunal is required to determine their humanitarian appeals against their deportation liability as matters stand at the date of determination of this appeal. If the appellants are deported to Colombia, they will be separated from their parents permanently, at a time when they are unable to live independently of adult care and support. According to the parents, neither the family members nor the daughter's biological father are well placed to look after the appellants. Even if the appellants have relatives with whom they can live, it remains that deportation would separate children from their parents.

ASSESSMENT

[19] The Tribunal has considered all the submissions and documents provided on behalf of the appellants. It has also considered their Immigration New Zealand file in relation to their refugee and protection appeals.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[20] In accordance with section 231 of the Act, the Tribunal relies on the findings of credibility and fact arrived at in *BA (Colombia)*.

The circumstances of the appellants' parents

[21] The appellants' parents have been recognised as refugees in New Zealand, they cannot be required to return to Colombia where it has been accepted they each face a real chance of being persecuted by the ELN. Therefore, the deportation of the appellants presents their parents with an invidious choice: remain safe in New Zealand but separated from their children, or to preserve family unity by voluntarily returning to Colombia where they are in danger.

[22] Therefore, the appellants, who have lived in close relationships with their parents for all or (in the case of the father and daughter) most of their lives, face the prospect of having to return to Colombia without their parents.

The best interests of the appellants

[23] The appellants are children and, accordingly, the Tribunal must have regard to New Zealand's obligations under various international conventions, including Article 3(1) of the 1989 *Convention on the Rights of the Child* (CRC) which requires the Tribunal to have regard to the best interests of any child affected by its decisions, as a primary consideration.

The daughter

[24] The relationship between the daughter's mother and biological father (who lives in Colombia) ended in the year following the daughter's birth and since then, she has always lived with her mother. The step-father has raised the daughter as his own since meeting her mother in 2010. As a result, they regard their relationship as one of father and daughter; for example, neither of them would ever think to introduce the other as step-father or step-daughter.

[25] While the daughter has a cordial relationship with her biological father, he has not played a major part in her life. When in Colombia, the daughter would visit her biological father from time to time. The daughter has had some contact with her biological father since her arrival in New Zealand.

[26] Currently, the daughter is a year 10 student who loves social sciences, art and music. She mixes well with other students and has made a number of good friends.

The son

[27] The son is wholly dependent on his parents for his physical, emotional and

practical support. He is a year 4 student, who loves sport, art, music and maths. He is particularly sociable.

Conclusion – best interests

[28] Bearing in mind ages of the appellants, the fact that their parents cannot return to Colombia means that deportation would separate them from their parents, likely permanently. The loss of contact with their parents is likely to be severely detrimental to their wellbeing. The Tribunal finds that it is in the best interests of the appellants to remain in the care of the mother and the father. Further, it is in the best interests of the appellants that they remain in the care of the parents in New Zealand, rather than Colombia, where the parents are at risk of serious harm.

[29] Even if the parents' relatives were able to provide some support to the appellants if they returned alone, this cannot be expected to replace the close and nurturing relationships that the appellants enjoy with the mother and father. The same considerations apply to the daughter's biological father, particularly in light of his lesser involvement with the daughter. The possibility of the daughter being cared for by her biological father raises the prospect of additional emotional dislocation as, according to the mother, this would likely result in the siblings being cared for separately.

Conclusion on Exceptional Circumstances

[30] For the above reasons, the Tribunal finds that the appellants' predicament is "well outside the normal run of circumstances" in the sense intended by the Supreme Court in *Ye*, and that there are exceptional circumstances of a humanitarian nature in respect of each of them.

[31] Given this finding, the Tribunal turns to consider whether it would be unjust or unduly harsh for the appellants to be deported.

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

[32] According to the Supreme Court in *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [9], this assessment is to be made "in light of the reasons why the appellant is liable for deportation and involves a balancing of those considerations against the consequences for the appellant of deportation". The Supreme Court, in *Ye* at [35], found that there must be a level of harshness more than just 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".

[33] The appellants are liable for deportation because the Tribunal has found that they are not at risk of serious harm such that they are entitled to be recognised as refugees or protected persons. In due course, they will become liable for deportation.

[34] As against this, the Tribunal has found that the appellants have exceptional circumstances of a humanitarian nature. The separation of the appellants from their parents, who alone, to date, have been providing for their emotional, psychological and financial wellbeing, will have significant adverse consequences for the wellbeing and development of the appellants.

[35] The Tribunal is also satisfied that these circumstances render it unjust or unduly harsh to deport the appellants.

[36] If the appellants were to be deported, their parents would be put in the position of having to contemplate a return to Colombia in order to keep the family together. The stress and other psychological harm that this would cause to the parents, not to mention the risk of being persecuted if they were to return to Colombia, is significant.

[37] In these circumstances, the Tribunal finds that deportation would be unjust or unduly harsh.

Public Interest

[38] No issue arises as to the character of the appellants, who are minors. No evidence of them having any adverse medical conditions that would engage the public interest is before the Tribunal. Should any such conditions exist, it will be necessary for Immigration New Zealand to assess the implications of this in the context of the parents' residence application.

[39] There is a positive public interest in ensuring that New Zealand meets its obligation to provide protection to the appellants' parents. That obligation would potentially be undermined if these humanitarian appeals were to be declined and the parents were to contemplate accompanying the appellants to Colombia, thereby exposing themselves to a risk of serious harm.

[40] Furthermore, there is the positive public interest in maintaining family unity. Separation from family is one of the most keenly felt impacts of having to flee abroad to avoid being persecuted. There is a public interest in allowing refugee families to remain together to assist with resettlement and help cope with trauma. On family reunification generally, see Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons A/CONF.2/108/Rev.1 (25 July 1951) at Recommendation B; K Jastram and K Newland "Family Unity and Refugee Protection" in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) 555 at p564.

[41] For these reasons, the Tribunal is satisfied that it would not, in all the circumstances, be contrary to the public interest for the appellants to remain in New Zealand.

DETERMINATION

[42] The Tribunal finds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellants to be deported from New Zealand.

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

[44] The appellants' parents have applied for residence on the basis of their refugee status, but that is not an application for the Tribunal to determine. It is, however, appropriate that the appellants be granted student visas that will enable the family to arrange their affairs over the next 12 months, including awaiting the determination of the parents' residence application, in which the appellants are included as secondary applicants.

[45] To that end, the Tribunal orders, pursuant to section 210(1)(b) of the Act, that an immigration officer grant each of the appellants a student visa for 12 months from the date of this decision.

[46] The appeals are allowed on those terms.

Order as to Depersonalised Research Copy

[47] 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 appellants' names and any particulars likely to lead to the identification of the appellants.

"M Avia"
M Avia
Member

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