IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2020] NZIPT 505035**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**AC (Ireland)**
Before:	P Fuiava (Member)
Counsel for the Appellant:	C Morriss
Date of Decision:	15 September 2020

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellant, a 32-year-old citizen of Ireland, against his liability for deportation which arose when he was served with a deportation liability notice (DLN).

THE ISSUE

[2] The appellant was served with a DLN after he was charged with "Injures with Intent to Injure/Reckless Disregard (Manually)". His victim was his wife, a citizen of Z country and the holder of an Essential Skills work visa. The primary issue on appeal is whether the appellant's circumstances, including the interests of his two-year-old daughter, amount to exceptional humanitarian circumstances in terms of the statutory test.

[3] The Tribunal declines the appeal for the reasons that follow.

BACKGROUND

[4] The appellant and his wife are medical doctors. He is currently remanded in custody, having allegedly committed further offences against his wife while on bail.

[5] The appellant arrived in New Zealand on 26 July 2019 as the partner of a work visa holder. His wife and daughter had arrived in the country some four weeks earlier as the holders of work and visitor visas respectively. The wife was granted an Essential Skills work visa (valid to 27 June 2021) on the basis that she was offered employment by a district health board as a resident medical officer. The appellant was also offered employment by the same employer as a senior health officer of an emergency department. However, due to his ongoing criminal matters, he has since been suspended from employment.

[6] In January 2020, the appellant was charged with injuring with intent to injure, the victim of which was his wife. The offending is said to have occurred on 25 December 2019. In brief, it is alleged that the appellant struck his wife multiple times with his foot, knee and closed fist, leaving her with bruises to her thighs, lower leg and forearm. At court, the appellant pleaded not guilty and was released on bail with conditions, which included a condition that he not associate with, or contact, his wife and that he not go to her address.

[7] In February 2020, the appellant was charged with obstructing or perverting the course of justice. The police summary of facts states that he presented an affidavit, which he attested was true and correct, in support of a bail variation for a trip to Antwerp. In his affidavit, the appellant stated that he had no previous convictions in any country. However, when he was arrested in January 2020 in relation to the offending described above, information the police received via Interpol showed that he had previous criminal convictions in Slovakia.

[8] On 26 February 2020, the Family Court granted the appellant's wife a temporary protection order. The order included her daughter as a protected person.

[9] On 29 June 2020, the appellant was served with his DLN which stated he had been charged with injuring with intent to injure, the victim of which was his wife. The DLN also referred to information from Interpol which showed that the appellant had breached a barring order (an order which excludes a violent partner from the home) in Ireland on 24 February, 7 March, and 22 April 2019. The victim in these cases was his wife. It was understood by Immigration New Zealand that the barring order was dissolved sometime in 2019. It was also understood from Interpol that the Slovakian authorities held adverse information about the appellant. Based on the information before it, Immigration New Zealand was not satisfied that the appellant was of good character. Nor was it satisfied that his relationship with his wife was genuine and stable.

[10] On 10 July 2020, counsel made a 'good reasons' request to Immigration New Zealand as to why the appellant should not be deported under section 157(2). It was conceded that he had been charged with minor offences outside New Zealand, all of which were either withdrawn or expunged from his overseas criminal record by the relevant authorities. While he had been fined in Slovakia for having a small amount of cannabis in his possession, no conviction was entered against him.

[11] As for the charge in New Zealand of injuring with intent to injure, counsel advised that it had since been reduced to assault with intent to injure, which the appellant intended to defend. As for the attempting to pervert the course of justice charge, counsel provided Immigration New Zealand with a copy of an email from Interpol Bratislava, acknowledging that it had made a mistake regarding the appellant's overseas criminal history. In light of this new information, counsel expected that the charge would be withdrawn.

[12] Counsel reminded Immigration New Zealand of the presumption of innocence to which the appellant was entitled and that he had the right to be present at his trial and to present a defence. It was further submitted that he satisfied the good character requirements of instructions at A5.45 to be granted a visa. Even if he was convicted, the appellant had a strong case for a character waiver.

[13] Counsel referred to the interests of the appellant's daughter under Article 3 of the 1989 *Convention on the Rights of the Child* (CRC). It was submitted that it was in her best interests for her father to remain with her in New Zealand. As a qualified and experienced doctor, the appellant was able to make a significant contribution to the New Zealand economy, particularly in light of the COVID-19 pandemic. While he had previously struggled with episodes of low mood in the past, he had been proactive in getting professional help. Over the past six months, he had undertaken a Stopping Violence programme and relationship counselling.

[14] As for Immigration New Zealand's concern that the appellant's relationship with his wife was no longer genuine and stable, it was submitted that they were still married and that neither party had given any indication that they wished their marriage to end.

[15] On 25 July 2020, before Immigration New Zealand had responded to the 'good reasons' request, the appellant was charged with three offences of

breaching a protection order and one charge of “burglary – remained with intent”. In brief, the appellant is alleged to have arrived at his wife’s address unannounced and uninvited. When his wife asked him to leave, he refused to do so. When he eventually left the property, the police were contacted and the appellant was located and arrested shortly afterwards. At court, the police opposed bail and the appellant was remanded in custody, where he has remained since.

[16] On 5 August 2020, a delegated decision-maker declined the appellant’s ‘good reasons’ request.

[17] Immigration New Zealand’s electronic records record that, on 18 August 2020, the appellant pleaded guilty to three charges of breaching a protection order. He was further remanded in custody until 30 September 2020 for a case review hearing.

STATUTORY GROUNDS

[18] 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.

[19] 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].

THE APPELLANT’S CASE

[20] The appellant lodged this humanitarian appeal on 27 July 2020, nine days before Immigration New Zealand advised him that his ‘good reasons’ request had

been declined and his liability for deportation upheld. The appellant's case on appeal is set out in counsel's submissions (27 July 2020) which may be summarised in the following way:

(a) Immigration New Zealand's grounds for deporting the appellant are largely based on incorrect information that he has convictions outside of New Zealand, which is not the case.

(b) The appellant has been very open about his past mental health struggles. He has been proactive in getting professional help. He has received anger management and relationship counselling in New Zealand and is working towards bettering himself. While he has made some poor decisions in the past, he remains a person of good character.

(c) The appellant intends to defend the charges of assault with intent to injure and attempting to pervert the course of justice. Under section 25(c) of the New Zealand Bill of Rights Act 1990 (NZBORA), a defendant is presumed innocent until proven guilty. Under section 25(e), a defendant has the right to be present at trial and to present a defence.

(d) The appellant and his wife are still married and there is no indication that either party wishes their marriage to end. It would be unjust or unduly harsh to deport the appellant before he and his wife have had an opportunity to speak with each other and to confirm their continued relationship.

(e) The appellant has a two-year-old daughter who currently lives with her mother. Despite what has happened, the appellant continues to have a close relationship with his daughter. Until recently, he had supervised visits, facilitated by Barnardos. Under Article 3(1) of the CRC, the Tribunal must give the child's best interests primary consideration. It is in the daughter's best interests that her father be allowed to remain with her in New Zealand. If the appellant were deported, it may be a very long time before he is able to see his daughter again due to travel restrictions at this time. Separation will have an adverse effect on her self-esteem, cognitive development, behaviour, and future school achievement.

(f) The appellant has the potential to contribute to New Zealand as a medical professional. He has worked for a hospital in New Zealand and has highly sought-after qualifications and skills that would make a valuable contribution to New Zealand's workforce and response to the COVID-19 pandemic. It would not be contrary to the public interest to allow him to remain in New Zealand.

[21] In support of his appeal, the appellant provided:

(a) counsel's submissions (27 July 2020);

(b) a copy of the DLN; and

(c) a copy of counsel's 'good reasons' request to Immigration New Zealand (10 July 2020) with supporting documents.

ASSESSMENT

[22] The Tribunal has considered all the submissions and documents provided by the appellant. It has also considered his Immigration New Zealand file in relation to his temporary visa application and DLN.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[23] The appellant is a 32-year-old married man from Ireland who arrived in New Zealand on 26 July 2019. He has lived in New Zealand as the holder of a partnership-based work visa for approximately 13-and-a-half months. For the last seven weeks, he has been held in remand pending his next court appearance on 30 September 2020.

The DLN

[24] In June 2020, the appellant was served with a DLN following a determination by Immigration New Zealand that there was sufficient reason to deport him because he had been charged with assaulting his wife. There was also information from Interpol which called into question his good character and the nature of his relationship with his wife. On appeal, it was submitted that Immigration New Zealand's grounds for deporting the appellant were largely based on incorrect information that he had overseas convictions in Slovakia.

[25] However, whether the appellant has overseas convictions was not the only reason why he was issued with DLN. Immigration New Zealand's primary reason for deporting the appellant is his alleged recent criminal offending against his wife. In any case, the Tribunal does not have the jurisdiction to look behind the decision by Immigration New Zealand to issue a DLN – see *L v Removal Review Authority and the Chief Executive, Department of Labour* (HC, Wellington, CIV-2005-485-1601, 3 March 2006) at [11] and [13]. That decision has been repeatedly affirmed by the High Court, including recently in *Li v Chief Executive of the Ministry of Business, Innovation and Employment* [2017] NZHC 2977, [2018] NZAR 265 at [13] and [19]. The Tribunal's jurisdiction is limited to an assessment of an appellant's exceptional humanitarian circumstances, including the circumstances of those who stand to be affected by his deportation. Any challenge to the validity of a DLN would be a matter for the High Court by way of judicial review but no such application has been made, so far as the Tribunal is aware.

The appellant's marriage

[26] A written statement (17 June 2019) provided by the appellant to Immigration New Zealand in support of his work visa application states that he met his wife in July 2017 while they were working together in a hospital in Ireland. He and his future wife commenced living together in December 2017. In July 2018, they were married. Not long afterwards, the couple's now two-year-old daughter was born.

[27] The Tribunal observes that, in the relatively short period of time the appellant and his wife have been together, there have been multiple incidents of family violence between them where the appellant has been the aggressor. These include three breaches of a barring order in Ireland. The appellant currently faces a charge of assault with intent to injure in New Zealand. Again, the alleged victim of that offence is his wife. According to the DLN, the appellant is said to have struck her on multiple occasions with his foot, knee, and closed fist, leaving her with bruises to her thighs, lower leg and forearm.

[28] It was submitted on appeal that the appellant's relationship with his wife remains genuine and stable. The Tribunal disagrees. Notwithstanding that he had lodged his 'good reasons' request with Immigration New Zealand on 10 July 2019, he entered his wife's home on the evening of 25 July 2019. He had no permission to be there and he entered the home via the back door. When his wife and her male visitor told him to leave, he refused to do so. While the wife was not physically harmed in any way, all the circumstances point strongly to a material

breakdown of the relationship. The appellant's ongoing behaviour of family harm incidents towards his wife is such that the Tribunal does not find his relationship with her is stable. It is acknowledged that they currently remain married but there is nothing before the Tribunal to indicate that their relationship will endure.

[29] If deportation occurs, the appellant will be separated from his wife. The Tribunal observes that she currently holds an Essential Skills work visa valid to 27 June 2021, and that she is employed as a resident medical officer for a New Zealand hospital. Whether she extends her and her daughter's stay in New Zealand by applying for further visas for them both or departs the country for elsewhere is entirely a matter for her.

[30] It is accepted that the appellant appears to retain feelings of affection towards his wife. However, the history of violence and breaches of protection orders, and the couple's continuing separation, point to the relationship being unlikely to endure if, in fact, it has not already ended.

Presumption of innocence and the right to appear at trial

[31] The Tribunal understands that the appellant has pleaded not guilty to the charges of assault with intent to injure and attempting to pervert the course of justice. His current deportation liability will not interfere with his right to be present at his trial and to present a defence. Information on the Immigration New Zealand file relating to its review of the appellant's 'good reasons' request record that it will not take steps to deport him until all of his criminal matters have been resolved.

[32] While the presumption of innocence (section 25(c) of the NZBORA) continues to apply to the appellant, the Tribunal observes that Immigration New Zealand could still serve him with a DLN. Under section 157 of the Act, a temporary visa holder can be made liable for deportation if it is determined there is sufficient reason for the temporary visa holder to be deported. Under section 157(5) of the Act, the words 'sufficient reason' include, but are not limited to, criminal offending (see subsection 157(5)(b)).

The appellant's daughter

[33] The Tribunal acknowledges that, in all actions concerning children, the best interests of the child shall be a primary consideration: Article 3(1) of the CRC. The High Court has also stated that the best interests of the child are neither the paramount nor the primary consideration, but they are to be given important and

genuine assessment: *O'Brien v Immigration and Protection Tribunal* [2012] NZHC 2599 at [32].

[34] The appellant has a two-year-old daughter who is in the sole care of her mother. Little is known about the child's circumstances. However, the Immigration New Zealand file includes a copy of her mother's temporary protection order, which was granted by the Family Court on 26 February 2020. The protection order includes the daughter as a protected person. There are no other court orders on file.

[35] Until recently, the appellant was able to have supervised visits with his daughter, facilitated by Barnados. Photographs taken during these visits have been provided on appeal. An undated, written statement from the appellant records that he had two such sessions with Barnados to see his daughter. The Tribunal observes that, since 25 July 2020, the appellant has been in custody. Since then, it is not known whether he has been visited in prison by his wife and daughter.

[36] It is acknowledged that, generally, it is in a child's best interests to have and maintain meaningful relationships with both parents. However, in light of the appellant's alleged offending against his wife, including three recent charges of breaching a protection order, the Tribunal finds that the daughter's interests are best served by her remaining in the sole care of her mother, irrespective of where they live.

[37] Both mother and daughter live in New Zealand as temporary visa holders. They do not live here as residents. If the appellant is deported, it has not been demonstrated that his separation from his daughter will be permanent. There are ways and means by which he will be able to keep in contact with his daughter when he departs the country. He will also be able to instruct a lawyer in New Zealand to represent his interests as a parent, if required.

The appellant's mental health

[38] The appellant's Immigration New Zealand file shows that a concern was raised about his mental health. In a letter dated 15 July 2019, Immigration New Zealand advised that, having considered a letter (3 July 2019) from his family doctor in Ireland, it appeared that the appellant was not of an acceptable standard of health because he had, only recently, been treated for low mood with an antipsychotic drug. In response, the appellant explained that his doctor's letter

was misinterpreted in that the drug he had been prescribed caused him to develop a gambling problem. After learning of this unintended side effect, the appellant stopped taking the drug and his gambling issues were resolved.

[39] The Tribunal acknowledges that, at this point in time, the appellant may be feeling anxious and depressed at the prospect of being separated from his wife and daughter. As a husband and father, it would be natural for him to feel this way. However, in *Minister of Immigration v Jooste* [2014] NZHC 2882, [2015] 2 NZLR 765 at [45], the High Court stated that the stringent statutory test of exceptional humanitarian circumstances cannot be equated with "compassionate factors", circumstances that are more than simply "routine", or even "genuinely concerning circumstances". His wife is likely to remain their daughter's primary caregiver for the foreseeable future. Even if he remains in New Zealand, the appellant is likely to have only limited, supervised access to her for as long as she remains in this country. Separation is a real possibility whatever the future may hold.

Counselling

[40] Evidence was provided on appeal of the steps the appellant had undertaken to improve himself through anger management and relationship counselling. A letter (8 July 2020) from the group facilitator of a Stopping Violence service records that the appellant has completed 8 sessions of a 15-session individual programme. An undated letter from a family counsellor shows that the appellant has completed 12 counselling sessions. These steps are laudible but they are simply steps to restore the appellant to what the community and those around him are entitled to expect of him – that he is law-abiding and a supportive and protective husband and father. It is noted that the appellant was obliged to undertake anger management counselling as a condition of the temporary protection order made against him by the Family Court.

Circumstances in Ireland

[41] Not much is known about the appellant's life in Ireland as this information was not provided to the Tribunal on appeal. It is noted that he was educated in Ireland and studied medicine at a medical school in Slovakia. He has worked in various hospitals in Ireland, specialising in emergency medicine. Given his age, qualifications and work experience, the Tribunal is satisfied that he will be able to find suitable employment in Ireland. While he has skills and qualifications that

could benefit the New Zealand workforce, he has been suspended by his former employer and it is unclear at this time what the outcome will be for him.

Conclusion on exceptional humanitarian circumstances

[42] The appellant is a 32-year-old citizen of Ireland who has lived in New Zealand for approximately 13-and-a-half months as the partner of a work visa holder. He currently faces active charges involving alleged family violence against his wife. The totality of the alleged offending against his wife, coupled with the breaches of protection orders to which he has pleaded guilty, indicate that the relationship is not stable at this time.

[43] The appellant's liability for deportation will not affect his right to be present in New Zealand for his upcoming defended hearing, assuming he wishes to continue defending the matter. Immigration New Zealand will not deport him until all of his criminal matters are resolved. It is in his daughter's best interests that she remain in the care of her mother for the time being. Whether the mother and daughter remain in New Zealand or leave New Zealand for elsewhere is a matter for the wife to decide in light of her and her daughter's current circumstances.

[44] As a qualified and experienced medical practitioner in emergency medicine, the Tribunal is satisfied that the appellant will be to resettle in Ireland. Should his mental health deteriorate, it has not been demonstrated that he will not be able to access adequate mental health care assistance in his country of origin. Considered cumulatively, the Tribunal finds that the appellant's circumstances do not meet the high threshold required to establish exceptional circumstances of a humanitarian nature.

DETERMINATION

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

[46] 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.

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

Order as to Depersonalised Research Copy

[48] 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. The rationale for making such an order is to protect the identities of the appellant's wife and daughter.

"P Fuiava"

P Fuiava
Member

Certified to be the Research Copy released for publication.

P Fuiava
Member