IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2020] NZIPT 505057-058**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellants:	**HN (Fiji)**
Before:	M B Martin (Member)
Counsel for the Appellants:	S Graham
Date of Decision:	14 December 2020

DEPORTATION (NON-RESIDENT) DECISION

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[1] The appellants are husband and wife, aged 41 and 33 respectively, and they are citizens of Fiji. These are the couple's humanitarian appeals against their liability for deportation which arose when they were served with deportation liability notices.

[2] The Tribunal has heard these appeals together and issues a single decision, pursuant to section 235 of the Immigration Act 2009 (the Act).

THE ISSUE

[3] The husband has had stereotactic radiosurgery while in New Zealand and he and his wife are undergoing fertility treatment. The primary issue on appeal is whether the husband's need to be present in New Zealand for an outpatient neurosurgical follow-up in February 2021, and the fact that he and his wife are currently receiving fertility treatment, give rise to exceptional humanitarian circumstances that would make it unjust or unduly harsh for them to be deported at this time. If so, the Tribunal must then determine whether it would be contrary to the public interest to allow the appellants to remain in New Zealand until their current work visas are due to expire (6 June 2021).

[4] For the reasons which follow, the Tribunal allows the appeals. The appellants' work visas remain valid within their existing terms.

BACKGROUND

[5] In 2008, the appellants married in Fiji. While most of the husband's immediate family members have moved to other countries, his wife's parents and only sibling reside in Fiji.

[6] The husband spent time in New Zealand between January 2013 and April 2013. He returned to New Zealand in November 2014 and has lived here since, with the exception of three trips overseas (13 July 2015 to 4 August 2015, 30 March 2017 to 10 April 2017, and 3 November 2018 to 24 November 2018). Immigration New Zealand records reflect that two of those trips were direct to Fiji.

[7] The wife spent time in New Zealand between October 2014 and April 2015. She returned to New Zealand in September 2015 and has lived here since, with the exception of two trips to Fiji (24 November 2017 to 5 December 2017, and 3 November 2018 to 24 November 2018).

[8] The appellants have held multiple temporary visas while in New Zealand. The husband currently holds an Essential Skills work visa, which was granted on the basis of his employment as a painter and plasterer. His wife holds an open work visa, granted on the basis of their partnership. The visas expire on 6 June 2021.

[9] On 30 June 2018, while in New Zealand, the husband committed the offence of driving with excess breath alcohol (his reading being 600 micrograms of alcohol per litre of breath). On 1 August 2018, he was convicted and ordered to pay a fine of $370 and court costs. He was also disqualified from driving for six months.

[10] Shortly following the above offending, the husband was arrested for assaulting a female (not his wife) on 23 September 2018. Following a District Court trial, the husband was convicted on two counts of male assaults female. On 10 June 2020, he was sentenced to three months' community detention, 100 hours' community work, and he was ordered to pay reparation of $250.

[11] The appellants were served with deportation liability notices (13 August 2020) on the basis of the husband's convictions. On 1 September 2020, they lodged these appeals.

STATUTORY GROUNDS

[12] The grounds for determining humanitarian appeals 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—
>
> (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.

[13] 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].

[14] 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

[15] The appellants' case is set out in counsel's written submissions (28 August 2020). In summary, counsel submits that the appellants have exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for them to be deported. Counsel makes various points in support, including:

(a) The wife's liability for deportation arose out of her husband's offending. Her husband's drink-driving offending could be categorised as falling within the "low to medium level", having regard to the alcohol reading. His male assaults female offending was, arguably, at the "lower end of the spectrum", having regard to the sentence imposed and the comments made by the Department of Corrections/Ara Poutama Aotearoa in its "Provision of Advice to Courts" report (4 June 2020).

(b) The appellants have settled successfully in New Zealand over the past six or so years. The husband has established enduring connections

within the community and his wife has obtained various New Zealand qualifications. They both have a history of working here and engaging in volunteer work.

(c) The appellants have a potential pathway to residence under the Skilled Migrant category.

(d) While in New Zealand, the husband was diagnosed with arteriovenous malformation. Fewer than four per cent of arteriovenous malformations haemorrhage. He was referred for and had stereotactic radiosurgery. The "current medical treatment which is available to [the husband] in New Zealand (which could be lifesaving), does not appear to be available in Fiji".

(e) The wife has type 2 diabetes and polycystic ovary syndrome. She has been unable to conceive a child due to the latter condition and is currently undergoing in vitro fertilisation (IVF), a treatment which is not available in Fiji. This treatment could be "cut short" on the appellants' deportation, which would cause them disappointment. They have long dreamt of having a child together.

(f) The only family member that the husband has in Fiji is an estranged brother. While the wife's parents, brother, and the brother's small family live in Fiji, they all share a small property and so the appellants would not have any accommodation immediately available to them on a return. They would face financial challenges due to the current economic conditions in Fiji, which make finding employment problematic, and they may have to seek support from the wife's family. This need to seek support could create tensions between the appellants and the wife's family. The wife also believes that her relationship with her parents would come under further strain because she and her husband entered into a "love marriage", which counsel adds was "presumably against her parents' wishes". Counsel says that the fact that the wife may not be able to have children "will likely add further fuel to this matter".

(g) There is a real risk that details about the husband's offending will be made public in Fiji, which "will likely add further difficulties to the couple's marriage" and cause the husband difficulties in his Fijian community.

(h) Regard must be had to international law, including the 1966 *International Covenant on Civil and Political Rights* and the 1966 *International Covenant on Economic, Social and Cultural Rights.*

[16] Counsel submits that it would not, in all the circumstances, be contrary to the public interest to allow the appellants to remain in New Zealand. Various submissions are made in support, including that the husband presents a low risk of reoffending.

[17] Finally, counsel submits that the best outcome for the appellants would be that they are granted resident visas, as opposed to temporary visas.

[18] Evidence produced in support of these submissions included:

(a) Statements (26 August 2020) from the appellants.

(b) A copy of the husband's employment agreement (September 2017) confirming his employment as a painter and plasterer, along with a letter (23 August 2020) from his employer noting his "excellent" skills.

(c) A certificate of service (20 January 2019) from a New Zealand aged care facility advising that the wife had been employed as a healthcare assistant in the hospital unit from February 2016 to January 2019. The wife states that this facility was sold, and she was employed by the new owners. A letter (17 August 2020) from the new owners, also produced on appeal, records that the wife had been employed as a healthcare assistant with the company from January 2019 until she resigned in August 2020. These documents were supported by a copy of the wife's previous employment agreement.

(d) Certificates awarded to the wife, including: a certificate recording that she had achieved unit standards in dementia; a New Zealand Certificate in Health and Wellbeing Health Assistance (Level 3); and a Certificate of Successful Participation in Exploring Personhood Workshop.

(e) With respect to the husband's male assaults female offending, copies of: the Crown Charge List; a Crown Charge Amendment Notice; the Provision of Advice to Courts report (4 June 2020); and his Order for Sentence of Community Detention (10 June 2020).

(f) Evidence in respect of the husband's arteriovenous malformation diagnosis and treatment, including hospital notes, test results, and various medical letters/reports. These letters/reports included: a report (3 March 2020) from a radiation oncologist confirming that the husband had undergone successful stereotactic radiosurgery on 27 February 2020; a letter (24 August 2020) from the husband's general practitioner in New Zealand noting that the husband needed to have a neurosurgical outpatient follow-up and a Magnetic Resonance Imaging (MRI) scan in February 2021, to check for recurrence, and that an MRI scan and follow-up would not be possible in Fiji; and a letter (27 August 2020) from a general practitioner based in Fiji advising that he (the doctor) does not believe that stereotactic radiosurgery is available in Fiji.

(g) A letter (17 February 2020) from a New Zealand fertility clinic to the appellants noting that they were nearing the top of the waiting list for publicly-funded fertility treatment. There was also, it appears, a fertility test result.

(h) A letter (August 2020) from the president of a New Zealand-based Fijian association, along with various other letters of support.

[19] On 12 November 2020, the Tribunal wrote to counsel seeking clarification from the husband's general practitioner in New Zealand as to how she had come to determine that the husband could not receive his required neurosurgical follow-up and MRI scan in Fiji. It was noted that the Tribunal had discovered, from an online search, that an MRI scanner was available in Fiji. The Tribunal also requested other evidence and information, which included: confirmation from the appellants' fertility provider that the couple's IVF treatment had commenced, and to what extent they needed to remain in New Zealand for further treatment; evidence (possibly from the general practitioner in Fiji) confirming whether or not IVF treatment is available in Fiji; a response from the husband as to why a medical document provided on appeal recorded that he and his wife had two children living in Fiji, who had not been declared; a response from the wife as to why she had said in her written statement that she remained employed by the company which had said, in the letter referred to at [18(c)] above, that she had resigned; and a copy of any sentencing notes that counsel could produce relating to the husband's male assaults female sentencing.

[20] On 26 November 2020, counsel provided further submissions (25 November 2020) where it was noted, among other things, that sentencing notes relating to the

husband's sentencing for assaulting a female could not be obtained. The following evidence was also produced:

(a) A copy of documents that had been held by the criminal lawyer who represented the husband following his arrest for the male assaults female offending, including notes of evidence.

(b) Two letters from the Department of Corrections/Ara Poutama Aotearoa (both generated during November 2020) confirming that the husband has completed the community-based components of the sentence imposed on him for his male assaults female offending.

(c) A letter (19 November 2020) from the husband's general practitioner in New Zealand advising that the comments that she had made previously about there not being an MRI scanner in Fiji were "not substantiated". She went on to say that there is a "possibility" of the husband's arteriovenous malformation recurring, which would be monitored by MRI scanning. If it did reoccur, treatment would be with repeat stereotactic radiosurgery. She was not aware of this procedure being available in Fiji.

(d) A joint letter (15 October 2020) from a neurosurgical registrar and a neurosurgeon, both based in New Zealand, stating that the husband requires follow-up in February 2021 for his stereotactic radiosurgery which was performed in February 2020. They say that the husband will need an MRI/Magnetic Resonance Angiography (MRA) as part of this follow-up. He would "likely require further scans for follow-up".

(e) A letter (24 November 2020) from the general practitioner in Fiji advising that, while an MRI scan can take place in Fiji, this is not the case as regards an MRA scan. The doctor also says that stereotactic radiosurgery and IVF treatment are not available in Fiji.

(f) A letter (19 November 2020) from the manager of the appellants' fertility treatment provider in New Zealand confirming that the couple is receiving publicly-funded fertility treatment. The IVF cycle was conducted in July 2020 and 10 embryos were frozen. The couple is still undergoing thawed embryo replacement treatment.

(g) An email (25 November 2020) from the husband explaining that his "children" in Fiji are a niece and nephew (children of his wife's brother

in Fiji). He treats them as his own children, and before he and his wife moved to New Zealand, he used to spend time with them every day.

(h) A statement (23 November 2020) from the wife where she notes that, when she received her deportation liability notice, she "mistakenly resigned" from her employment because she believed that she was not allowed to keep working. When she received legal advice that she could remain in her employment in the meantime, it was too late because all of her shifts had been given away. She is currently searching for new employment.

ASSESSMENT

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

Whether there are Exceptional Circumstances of a Humanitarian Nature

The appellants' family

[22] The appellants have not declared any immediate family members resident in New Zealand. The wife's parents and one sibling, an adult brother, reside lawfully and permanently in Fiji. It appears that the husband's father is deceased. The husband advises that his mother and one adult sister are residing in the United States of America. He has three other adult siblings: a New Zealand-citizen sister who is residing in Canada, a sister who is residing in Australia, and an estranged brother who is residing in Fiji.

[23] The husband refers to two children of his wife's brother as being his own children. He says that he and the children have been "very attached" to each other since they were born, and, before coming to New Zealand, he would see them every day. He calls them every day from New Zealand. In 2018, he and his wife brought the children to New Zealand for a visit and they (the appellants) have wanted to do this again.

[24] Letters produced on appeal indicate that the appellants have a number of extended family members living in other parts of New Zealand, including the wife's aunt and two individuals who refer to the husband as their uncle.

[25] Counsel, in his submissions, refers to Article 23(1) of the 1966 *International Covenant on Civil and Political Rights* (ICCPR), which states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Article 17(1) states that "[n]o one shall be subjected to arbitrary or unlawful interference" with his or her family.

[26] The appellants have no immediate family members in New Zealand and they have a strong familial nexus to Fiji. Even if it could be said that they have a strong familial nexus to New Zealand, through those extended family members living here, the Tribunal would find that requiring them to depart New Zealand and leave these family members behind would not breach the ICCPR. Article 17(1) of this Covenant prohibits only unlawful or arbitrary acts by the State. It is neither arbitrary nor unlawful to require this couple to return to their country of citizenship in circumstances where they are lawfully and reasonably found to be liable for deportation.

Settlement in New Zealand

[27] Counsel notes that the appellants have lived in New Zealand for approximately six years. While in New Zealand, the wife has gained a number of healthcare certificates and has a history of working in an aged care facility as a healthcare assistant. She is currently applying for new employment.

[28] The wife says that she helps her husband with some of the community activities that he engages in, and this includes preparing food for events.

[29] The husband, while in New Zealand, has worked as a painter and plasterer. There is also evidence of his involvement in a local multi-cultural organisation, a recent Indian festival, certain Fijian-Indian community sports events, and football coaching and associated activities (such as fundraising).

[30] In support of the husband having exceptional humanitarian circumstances, counsel refers to the husband's settlement in New Zealand and submits that he has established "enduring connections with his community as contemplated" by Elias CJ in *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [66]–[74]. The Tribunal finds that it could not reasonably be said that New Zealand is, for all intents and purposes, the husband's "own country", in the sense described by Elias CJ in the referenced paragraphs. The appellant in *Helu* arrived in New Zealand as a child and grew to adulthood here. The husband has been here for approximately six years but has spent the major part of his adult life

in Fiji. While the husband, and indeed his wife, are settled in New Zealand and have plans for the future here, the length of time that they have spent in New Zealand and their circumstances as set out above are not, in themselves, "well outside the normal run of circumstances" (*Ye*, above).

The husband's health

[31] In October 2019, the husband was admitted to a New Zealand hospital suffering from an acute headache. Hospital records before the Tribunal show that, following certain tests, including an MRA, he was diagnosed with arteriovenous malformation "deep in the anterior sylvian fissure". An arteriovenous malformation is an "abnormal tangle of blood vessels connecting arteries and veins, which disrupts normal blood flow and oxygen circulation" (Mayo Clinic *Arteriovenous Malformation* (17 May 2019) at www.mayoclinic.org). The biggest concern related to arteriovenous malformations is that they will cause uncontrolled bleeding, or haemorrhage, although fewer than four per cent of malformations haemorrhage (Johns Hopkins Medicine *Arteriovenous Malformations* at www.hopkinsmedicine.org). The medical records before the Tribunal show that, at the time the husband underwent testing in hospital, no haemorrhage was discovered.

[32] Following diagnosis, the husband was referred to a radiosurgery department at another New Zealand hospital where, on 27 February 2020, he had stereotactic radiosurgery. This type of intervention is a "very precise form of therapeutic radiation" (Johns Hopkins Medicine *Stereotactic Radiosurgery* at www.hopkinsmedicine.org). In a report (3 March 2020) before the Tribunal from a radiation oncologist, it is noted that the husband's stereotactic radiosurgery "went well, with no difficulties".

[33] On appeal, a joint letter (15 October 2020) is produced from a neurosurgical registrar and a neurosurgeon advising that the husband requires post-radiosurgery follow-up in February 2021. It is indicated that similar testing to what he has undergone before, such as an MRA, will be required, and that he "will likely require further scans for follow-up".

[34] In a letter (24 November 2020) from a general practitioner in Fiji, which is before the Tribunal, it is noted that, while an MRI scan can be undertaken in Fiji, that is not the case with respect to an MRA scan.

[35] The appellant's general practitioner in New Zealand advises, in a letter dated 19 November 2020, that there is a "possibility" of the husband's arteriovenous malformation recurring, but this risk can be monitored by MRI surveillance. If the malformation did recur, the treatment would be with repeat stereotactic radiosurgery. The Tribunal notes here that the general practitioner in Fiji advised that this type of treatment is not currently available in Fiji.

[36] Counsel suggests that the husband would receive a better level of healthcare in New Zealand than in Fiji. Counsel also refers to Article 12(1) of the 1966 *International Covenant on Economic, Social and Cultural Rights*, which says that:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

[37] As the Tribunal has previously acknowledged, on the spectrum of healthcare services around the world, New Zealand's health system is of a higher standard than that of Fiji. However, that an appellant may be able to receive a better standard of care in New Zealand than in their country of citizenship does not, by itself, make their circumstances exceptional. Further, Article 12(1) does not impose a mandatory requirement on New Zealand to grant residence to any person who has only a temporary right to stay in New Zealand, and who is lawfully required to depart the country.

[38] The husband had stereotactic radiosurgery in February 2020. The Tribunal accepts that it is standard for neurosurgical follow-up to occur a year following this type of intervention, and so the husband is booked for review, at a New Zealand hospital, in February 2021. As part of his scheduled follow-up, he may require an MRA scan, and this is not a test that he would be able to have in Fiji. At this stage, the risk of recurrence, or the risk that the husband will need treatment available only in New Zealand, are entirely matters of speculation. Some greater clarity may be provided at the husband's review early next year, where decisions may also be made as to if/when the husband ought to receive further follow-up, and what sort of tests that may necessitate.

The wife's health

[39] The wife has type 2 diabetes. She says that, being diabetic, she "fear[s] the health system in Fiji as treatment is very late or not available". However, the Tribunal finds that there is no objective or reliable evidence to demonstrate that she would be unable to manage her condition in Fiji, or that she would be unable to access the treatment and medical monitoring that she requires.

[40] The wife also has polycystic ovary syndrome and says that she has been unable to conceive a child.

Fertility treatment

[41] The husband and his wife are currently receiving publicly-funded fertility treatment in New Zealand. The manager of their fertility clinic states, in a letter dated 19 November 2020, that the couple initiated an IVF cycle which was conducted in July 2020, where 10 embryos were frozen. The couple is still undergoing thawed embryo replacement treatment in an attempt to conceive. The manager notes that IVF treatment is not available in Fiji.

[42] The wife says that the last embryo transfer did not work and suggests that she was quite stressed at that time. She adds that the treatment is "emotionally stressful".

[43] The husband says that he and his wife have been waiting 12 years to be able to conceive. They want to be able to "fulfil [their] dreams of having a baby". Counsel accepts that there are no guarantees that IVF treatment will work, but the fact that this treatment could be "cut short" on the appellants' deportation, would be very disappointing to them.

[44] The Tribunal notes that no evidence has been produced indicating when the current treatment cycle is due to conclude, and accepts that, even with continued treatment, there can be no certainty that the fertility treatment offered will work for this couple. However, it is clear that they are emotionally invested in the treatment process, and so it would be distressing to them for this process to abruptly stop. If permitted to remain in New Zealand for a further period of time, such as for the time remaining on their current visas, they would be afforded time to discuss their circumstances with their fertility specialists, to look at whether any treatment steps that may be imminent could be completed in the time that is available, and to withdraw from their fertility programme in a considered and managed way.

The appellants' other concerns about returning to Fiji

[45] Counsel, in his submissions on appeal, indicates that the appellants would not be able to live with the wife's immediate family members in Fiji (her parents and brother) because these family members, together with the brother's wife and children, live in a modest-sized home. Therefore, the appellants would not have any accommodation immediately available to them on a return to Fiji. In addition,

due to current economic conditions, in a world still dealing with COVID-19, the appellants would find it difficult to secure employment in Fiji (especially employment with good pay, the husband adds in his statement). Counsel suggests that the appellants may need to seek some kind of support from the wife's family, which could create tensions between these family members and the appellants. The wife also believes that her relationship with her parents would come under further strain because she and her husband entered into a "love marriage", which counsel adds was "presumably against her parents' wishes". The wife says, in her statement, that she will be pressured into ending the marriage and would face humiliation. Counsel says that the fact that the wife has been unable to have children "will likely add further fuel" to family tensions.

[46] In addition to the above, the husband says that, if deported, he and his wife will be "questioned every step of the way as to why [they] are back". It is likely that people in Fiji will find out about his offending history and that this was the reason for their having to return. He will face "problems from [his] family and community".

[47] The Tribunal acknowledges that the husband has stable employment in New Zealand, and if permitted to remain here, that would not likely change. The appellants will likely find it more challenging to find immediate employment in Fiji than is the case in New Zealand, and they will likely face lower wages and therefore a lower standard of living when compared to what they may have in New Zealand. However, as the High Court stated in *Ronberg v Chief Executive of Department of Labour* [1995] NZAR 509 (HC) at 529–530:

> Mere economic betterment – the fact 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.

[48] The Tribunal observes that the appellants may be assisted in securing employment in Fiji by the work experience that they have gained in New Zealand (and the qualifications, on the wife's part). In terms of housing, the Tribunal finds that, while they may not be able to stay with the wife's immediate family in Fiji, it has not been demonstrated that they would be unable to obtain alternative accommodation for themselves.

[49] With respect to the concerns expressed about tensions developing between the wife and her parents, on her return to Fiji, due to factors including the nature of her marriage to her husband, and the fact that she has been unable to have children, these are rejected. There is no evidence that such tensions have existed for the time that the appellants lived together as a married couple in Fiji, or while they have been in New Zealand. The evidence does not credibly establish that the appellants

have, or would, come under any particular pressure to end their marriage, certainly from their family members.

[50] Finally, the Tribunal notes that there is no reliable evidence to demonstrate that, even if certain people in Fiji who know the husband somehow came to learn of his offending history, this would prevent him from being able to resettle successfully in his country of citizenship.

Potential pathway to residence

[51] Counsel submits on appeal that "[the wife] and possibly [her husband] have realistic prospects of obtaining residence under the [S]killed [M]igrant category". It is indicated that the wife would likely be the principal applicant in any application made under this category. However, the Tribunal notes that this potential pathway to residence does not make the appellants' circumstances exceptional.

Conclusion on exceptional humanitarian circumstances

[52] While in New Zealand, the husband was diagnosed with arteriovenous malformation and, in February 2020, he underwent stereotactic radiosurgery. Recurrence and future treatment needs are, at this point in time, matters of speculation. However, what is clear is that the husband requires a neurosurgical follow-up in February 2021, and if he were deported to Fiji, he would not likely receive a full and complete review there. A particular concern is the lack of MRA scanning services in Fiji. It is in the husband's interests to remain in New Zealand to undergo his required tests, to meet with his specialists, and, following his assessment, to have some time to make plans for the future management of his health. In addition, the Tribunal finds that the husband's interests would be served by having his wife remain with him in New Zealand to provide any support that he may need around the time of his follow-up.

[53] With respect to the appellants' fertility treatment, the Tribunal recognises that this is a sensitive and personal process, and it follows a long history of trying to naturally conceive a child. Fertility treatment is not available in Fiji. At this point in time, the appellants are still undergoing thawed embryo replacement treatment. No evidence has been produced indicating when the current treatment cycle is due to conclude. However, given the couple's emotional investment in the treatment process, it would not be in their interests for this process to abruptly stop. If permitted to remain in New Zealand for a further period of time, such as for the time remaining on their current visas, they would be afforded time to carefully discuss

their circumstances with their fertility specialists, to look at whether any treatment steps that may be imminent could be completed in the time that is available, and to withdraw from the fertility programme in a managed and considered way.

[54] Having regard to the above factors, in combination, the Tribunal finds that there are currently exceptional circumstances of a humanitarian nature. By being permitted to remain in New Zealand for the currency of their existing work visas, the husband will be able to undergo his scheduled neurosurgical review, with his wife's support, and they will be able to determine an appropriate point to complete their current fertility treatment. In the meantime, the appellants will be afforded more time to make plans for their future, which could include testing their eligibility for residence under the Skilled Migrant category.

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

[55] Where, as in this case, exceptional humanitarian circumstances are found to exist, the Tribunal must go on to assess whether those circumstances would make it unjust or unduly harsh for the appellants to be deported. 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".

[56] The husband is liable for deportation because of offending that he has committed while in New Zealand. He has three New Zealand convictions. His first conviction, entered in August 2018, is for driving with excess breath alcohol in June 2018 (his alcohol reading being 600 micrograms of alcohol per litre of breath, the maximum being 400). He was sentenced to pay a fine of $370, pay court costs of $130, and he was disqualified from driving for six months. His two other convictions are for male assaults female offending which was committed in September 2018. Following a trial, the husband was convicted of this offending, and, in June 2020, he was sentenced to three months' community detention, 100 hours' community work, and he was ordered to pay reparation in the amount of $250.

[57] Counsel was unable to provide the Tribunal with the sentencing notes for the husband's assault offending, but the evidence before the Tribunal shows that there was one victim and she went to an address with the husband. There, she was physically assaulted by the husband. On appeal, the husband, who says that he regrets his actions and thinks about what he did every day, provides letters from the

Department of Corrections/Ara Poutama Aotearoa showing that he has completed his community-based sentence.

[58] The Tribunal finds that the husband's drink-driving offending presented a risk to public safety. However, it also recognises that the sentence imposed indicates that the offending was not at a high level: this offending was punishable by imprisonment for a term not exceeding three months or a fine not exceeding $4,500, and at least six months' disqualification from driving (section 56(3) of the Land Transport Act 1998).

[59] With respect to the male assaults female offending, this could be considered more serious offending because it is punishable by imprisonment for a term not exceeding two years (section 194(b) of the Crimes Act 1961). The sentence handed down in this case, which was community-based and included three months' community detention, reflects that the husband's offending was considered to be at the moderate level of the scale.

[60] The wife is liable for deportation because she held her work visa as the partner of her husband. She has not committed any offending that has independently triggered her deportation liability.

[61] Against the reasons for the appellants' liability for deportation (the husband's offending and the fact that the wife was granted a visa as his partner) must be weighed the exceptional humanitarian circumstances that have been found to exist. Having regard to, in particular, the husband's need to be present in New Zealand for a scheduled neurosurgical follow-up in February 2021, and the importance of allowing this couple a period of time to manage their withdrawal from their current fertility treatment, the Tribunal finds that it would be unjust or unduly harsh for them to be deported at this time.

Public Interest

[62] Having found that the appellants have exceptional humanitarian circumstances which would make it unjust or unduly harsh to deport them at this time, the Tribunal must also be satisfied that their stay here will not, in all the circumstances, be contrary to the public interest. This involves the weighing of those factors which would make it in the public interest for the appellants to remain against those which make it in the public interest that they leave: *Garate v Chief Executive of Department of Labour* (HC Auckland, CIV-2004-485-102, 30 November 2004) at [41].

[63] The presentation of a significant burden to New Zealand's health system is contrary to the public interest. When Immigration New Zealand determined the wife's most recent work visa application, in July 2018, it accepted that she had an acceptable standard of health for the purposes of that temporary visa only. It found that, if she applied for another visa in the future, she would need to provide a range of medical tests so that her diabetes condition could receive further assessment. The Tribunal finds that there is no evidence to suggest that, if permitted to remain in New Zealand for the remainder of her current work visa, the wife would present any particular burden to the health system as a result of her diabetes. The Tribunal is not required to assess here any burden that she presents to the health system on a long-term basis.

[64] The husband has already had stereotactic radiosurgery for arteriovenous malformation while in New Zealand, and the costs associated with that intervention have not been the subject of objective evidence on appeal. He will require neurological outpatient follow-up and testing in February 2021. Costs associated with this follow-up are not likely to be significant. Whether, following this assessment, recurrence of arteriovenous malformation is diagnosed, is a matter of speculation at this time. Importantly, the Tribunal is considering permitting the husband to remain in New Zealand for the duration of his current work visa only. The question of any potential long-term burden that he presents to New Zealand's health system, and indeed that his wife presents, would likely be addressed during the assessment of any residence application that the appellants make under the Skilled Migrant category.

[65] The appellants have already been approved publicly-funded fertility treatment in New Zealand and so the completion of the current cycle of treatment is unlikely to present new costs.

[66] Immigration New Zealand records reflect that it holds clear Fijian police certificates for the couple dated 15 February 2018.

[67] The Tribunal has received updated New Zealand police certificates for the appellants (dated 7 December 2020). The wife's police certificate is clear, and the husband's certificate reflects the offending already set out above (a conviction for drink-driving and two convictions for male assaults female).

[68] The public interest is engaged in respect of the husband's offending and a key concern is the risk of reoffending. When assessing the risk of further violent offending, the Tribunal is assisted by the Department of Corrections/Ara Poutama

Aotearoa “Provision of Advice to Courts” report, prepared to assist the District Court in its sentencing of the husband for his male assaults female offending. In this report, it was noted that the husband acknowledged that he was under the influence of alcohol at the time of his offending, but he did not consider his use to be problematic and claimed that he was no longer able to consume alcohol due to his stereotactic radiosurgery. He also said that he did not believe that he had any violence-related issues. The report writer found:

> Despite the fact that both alcohol and violence appear to have been factors in his offending, [the husband’s] claims regarding these issues are strengthened somewhat by his very limited conviction history.

[69] The report writer did not consider that the husband had any rehabilitative needs. Having regard to this factor, along with, it appears, the nature of the husband’s offending and his limited conviction history, it was concluded that he presented “a low risk of harm to others” and “a low risk of recidivism”. The Tribunal has no reason to challenge the opinion reached in this report.

[70] The Tribunal notes that the husband’s drink-driving and assault offending, all of which occurred in the context of alcohol use, occurred between June 2018 and September 2018, and there has not been any further offending since that time, alcohol-related or otherwise.

[71] Weighing all the aforementioned factors, the Tribunal finds that it would not be contrary to the public interest to allow the appellants to remain in New Zealand for the period of their existing temporary visas. The husband will be able to attend his scheduled neurosurgical follow-up, with the support of his wife, and it will also ensure that the appellants have time to prepare for a managed exit from their current fertility treatment while, at the same time, affording them an opportunity to lodge an application for residence from within New Zealand. If they do make this application, the husband may need to apply for a character waiver. He will not assist his case for any character waiver applied for if he reoffends following the release of this decision, and this may be an added incentive not to engage in any further offending.

DETERMINATION

[72] 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 at this present time. The Tribunal also finds that it would not in all the circumstances be contrary to the public interest to

allow them to remain in New Zealand within the validity and terms of their current work visas.

[73] Accordingly, the appeals are allowed. The appellants' liability for deportation is cancelled and they are able to remain in New Zealand on their current work visas until 6 June 2021. Depending on the outcome of the husband's neurosurgical follow-up, and the stage at which any residence application that has been made by the appellants is at, the couple may decide to make further applications for temporary visas to extend their stay here (beyond June 2021). Any such applications will be for Immigration New Zealand or the Minister of Immigration to determine, and the Tribunal is unable to comment on their prospects of success.

Order as to Depersonalised Research Copy

[74] 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. The Tribunal makes this order having regard to the fact that this decision makes repeated references to personal medical information in respect of both appellants.

"M B Martin"

M B Martin
Member

Certified to be the Research Copy released for publication.

M B Martin
Member