**IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND** **[2020] NZIPT 600571**

**RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA**

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| **Appellant:** | **KB (India)** |
| **Respondent:** | **THE MINISTER OF IMMIGRATION** |
| **Before:** | D Smallholme (Member) |
| **Counsel for the Appellant:** | S Dalley |
| **Counsel for the Respondent:** | J Perrott |
| **Date of Hearing:** | 19 November 2020 |
| **Date of Decision:** | 18 December 2020 |

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**DEPORTATION (RESIDENT) DECISION**

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[1] This is an appeal on humanitarian grounds by the appellant, a 31-year-old citizen of India, who became a New Zealand resident in July 2013.

[2] The appellant appeals against his liability for deportation which arises from his conviction for one offence of theft (over $1,000) and one offence of obtaining by deception (over $1,000), committed between September and November 2015, for which he was sentenced to six months' community detention and ordered to pay reparation.

## THE ISSUE

[3] In broad terms, the issues in this appeal are:

(a) whether the appellant has exceptional circumstances of a humanitarian nature, arising from his likely circumstances in India, particularly the impact of those circumstances on his two young

daughters, who are New Zealand citizens, and their best interests, and, if so;

(b) whether it would be unjust and unduly harsh for the appellant to be deported from New Zealand and would not in all the circumstances be contrary to the public interest to allow him to remain in New Zealand.

[4] For the reasons set out below, the Tribunal finds that the appellant has exceptional humanitarian circumstances that would make it unjust and unduly harsh for him to be deported. It also finds that it would not be contrary to the public interest for the appellant to remain in New Zealand subject to the condition that his deportation is suspended for three years commencing from the date of this decision, during which time he must not commit any further offence for which he could be sentenced to a term of imprisonment within that three-year period.

## BACKGROUND

[5] The appellant was born in India in 1989. He was raised by his parents in their home town. His parents and younger brother, aged 29 years, continue to live there. His father owns a shop and several other properties.

[6] In August 2010, the appellant arrived in New Zealand as the holder of a student visa. He obtained a Diploma in Information Technology (Level 6) and was then granted a work visa and obtained employment as a computer technician. He applied for residence under the Skilled Migrant category, as an ICT Hardware Technician, and was granted a resident class visa on 17 July 2013.

[7] In late 2013, the appellant visited India for five weeks, during which time his introduction to his wife was arranged through a family member. He again visited India, in late 2014, for five weeks, and married his wife there, in December 2014. His wife visited New Zealand from April to August 2015. In November 2015, the appellant travelled to India and stayed there for five months. His wife then arrived in New Zealand, in April 2016, as a visitor. She has been living here since then. She currently holds a visitor visa valid to 25 February 2021.

[8] The appellant and his wife have two daughters, AA, born in May 2017, and BB, born in June 2019, who are New Zealand citizens by birth.

[9] The appellant was convicted of one offence of theft (over $1,000) and one offence of obtaining by deception (over $1,000) in May 2018. According to the

New Zealand Police summary of facts, the appellant and his two associates set up a company, in July 2015, and placed online advertisements for the position of service technician, in September 2015. Over the following weeks, they interviewed a number of individuals for the advertised position. Applicants were then advised that they had succeeded in gaining the position but would get the job only if they paid some several thousand dollars. The requested sums were paid but when the successful applicants sought to take up their employment, they found that the company's premises had been vacated. Further, in early November 2015, the appellant arranged to hire camera equipment, valued at $95,000. He collected the equipment but did not return it. Initially, the appellant advised that his luggage had been lost when he was travelling overseas. He later stated that he had given the camera equipment to an associate who had lost it.

[10] Upon his convictions, the appellant was sentenced to six months' community detention and ordered to pay reparation of $21,375. He has completed his sentence of community detention. He has reduced the amount of reparation owing to about $15,000 and continues to make reparation payments at the rate of $50 per week.

[11] On 22 November 2018, relying on the two convictions, the respondent issued a deportation liability notice to the appellant pursuant to section 161(1)(b) of the Immigration Act 2009 ("the Act").

## THE APPELLANT'S CASE

[12] The Tribunal heard evidence from the appellant, his wife, and a registered psychologist, Mr Wotherspoon.

### Evidence of the Appellant

[13] The appellant was raised by his parents in a provincial town in India. His father owns a small shop from which he sells electrical supplies. Two of the appellant's paternal uncles are married to two of his maternal aunts, who live together with their families, some 250 kilometres away. The appellant's paternal grandfather lives with those aunts and uncles. His maternal grandmother lives with his father's other brother. The appellant's family have not had much to do with these other family members.

[14] At primary and secondary school, the appellant was a high achiever. He was disappointed that his parents could not afford to help him to study medicine. Instead, he obtained a Bachelor of Arts degree in art, English literature and computer science

from a local college which is associated with a university. He then spent eight months in New Delhi, obtaining Microsoft vendor certificates, and eight months in Jaipur, preparing for his International English Language Testing System examination.

[15] In 2010, the appellant came to New Zealand to study. He was supported financially by his father and paternal grandfather but also has work at a car wash and as a night-filler for a supermarket. He completed his Diploma in Information Technology and got work as a computer technician and was granted residence. His marriage was arranged. His wife's parents had died and she was living with her uncle and his family, on land which he had owned jointly with her father. The uncle gave gifts upon their marriage, of gold jewellery, a car and household contents which are now in the possession of the appellant's parents. The wife's uncle has taken ownership of the house he had owned jointly with her father. The wife has two brothers: her older brother still works on the land but lives in a rented home in a nearby town with his wife and children; her younger brother is studying.

[16] In April 2016, the appellant obtained employment in a provincial centre. He had to give up this employment in May 2016 after he was arrested. He started his own business in September 2016. His income is enough to support his family. He owes about $55,000 in bank loans and $15,000 in reparation.

[17] The appellant explained that he used to be close to his parents. He would telephone them every second or third week and stayed with them whenever he returned to India. His parents were very proud of him as they thought he was doing well in New Zealand. While here, he had sent his parents about NZ$100,000 – some from loans which he still had to pay and some from the offending. His parents have used the money to finish building their home and to buy three empty sections, and for his brother's education.

[18] The appellant's parents' affection decreased after the birth of the appellant's and his wife's first daughter. His parents were disappointed that the first-born child was not a boy. They were even more unhappy after the second daughter was born. When his wife was in labour with their younger daughter, the appellant was unable to be with her, as he had to care for their older daughter. He asked his mother to talk with his wife, but his mother refused, stating that his wife was having another daughter. His parents' views reflect the values of Indian society. There is much more value placed on the existence of sons – daughters are of no value and are "trouble".

[19] In July 2019, the appellant told his parents of his criminal offending and possible deportation. His father immediately stated that the appellant had destroyed their family's "good name" and that the appellant was not to visit their home ever again. About a week later, his brother emailed an affidavit which had been sworn by his parents. They have evicted and dispossessed the appellant. Since then, the appellant has tried to call his father many times but his father does not answer his calls. He has tried to call the home line but it goes unanswered. His mother will not talk to him. She has told him, through his brother, that he must talk to their father. The appellant has appealed to his brother but the brother says that he "can't do anything" as his parents have made their decision.

[20] The appellant is quite certain that he cannot return to his family home in India because his parents would close the door on him and his wife and their daughters. He worries about the health of his daughters, particularly AA, who suffers from asthma. She often has a thick, chesty cough and wheezes. There have been many visits to the medical centre and she has been in the hospital three or four times. His home town is near the Thar Desert and the dust storms would cause her further problems. Otherwise, AA is prone to sickness. She developed a lump under her armpit, after routine vaccinations, which did not heal properly and required surgery. In India, there are long waits for public health services. The appellant would be unable to pay for private healthcare which comes at a high cost. Nor could he afford to pay for a decent education. The girls could attend public schools up to the age of 14, although the quality of teaching is poor and they would need extra tuition. The appellant has fears about his daughters living in India. Girls are of no value in society. There are expectations of early marriage: his younger cousin was married at the age of 14 or 15 years. Many young women are raped and there is no law to protect them. There are few opportunities for good employment. Women are discriminated against and are "second-class citizens".

[21] The appellant has NZ$15,000 in savings which he would need to use to buy air tickets to India (he thinks that, currently, there are only chartered flights), and to pay for his lawyer and the psychologist. There will be no money left to support them in India. He has considered living in a different state, to minimise the impact on AA's health, but this is not feasible as most of the 30 states have their own language and many states and cities, such as New Delhi, also have high air pollution and crime rates. The appellant expects that he could get work as a labourer on a farm or construction site and earn about Rs9,000–10,000 per month – about NZ$200. However, this would only pay for their monthly accommodation. There would be no money for other costs which would be about NZ$300 for food and NZ$50–100 for water and electricity. His wife would be unable to work as she has to care for the

children. He also fears that she would face sexual harassment and exploitation in the workplace.

[22] The appellant and his wife are so concerned about their daughters' prospects in India that they have contacted Oranga Tamariki to set about making arrangements for adoption in New Zealand. They have met with a social worker. The couple know that it would be difficult on all of them, to be separated, but their daughters would be better off with an Indian family in New Zealand than with them in India. They know that their daughters could return to New Zealand once they are older but the "main base" for their lives would have been destroyed. Even if he could afford to send them here, they would not speak English well enough to enter the New Zealand education system and there would be no one to support them.

[23] When he looks back on his offending, the appellant feels that he was naïve, and exploited by his two co-offenders. He had entered into a legitimate business venture and borrowed money to support the business. When the business was struggling, his co-offenders placed the advertisement for staff. Initially, he did not know what they intended. The appellant was present when the bogus interviews were held but he did not ask any of the people for the money. He put it into an account on the instructions of the co-offenders. The money was then divided between them. His co-offenders told him to use it to pay off the loans he had taken to start the business. He also gave some of the money to his parents who used it to finish building their house. The appellant feels very bad about his offending and wants to pay the reparation, and more, to his victims. He stated: "If I could, I would go back to July 2015 and I would change everything".

**Evidence of the Appellant's Wife, CC**

[24] CC stated that she was born in a small rural village in India in 1990. She is one of four sisters and they have two brothers. Their mother died when she was 10 years old. Her family continued to live with her father on a farm property that he owned jointly with her uncle (his brother). She attended primary school in a nearby village and obtained a Bachelor of Arts degree from the local college.

[25] In 2012, CC's father died. She continued to live with her uncle and his family. He arranged the marriage of each of the four daughters and paid the dowry for their weddings. It was understood that, once the four daughters were married off, her uncle would take ownership of the house on the farm property. CC was the last daughter to be married. Her uncle gave some gold jewellery and household furniture and a car, which are now in the possession of the appellant's parents. Her uncle lives in the family home with his four children. Her older brother has moved

off the property and lives in a rented home with his wife and their two children. She has occasional contact with her older brother. When she told him of the appellant's liability for deportation, he told her that she had to deal with whatever was going on, on her own.

[26] CC stated that it is extremely difficult for girls in India. Women are seen as sexual objects and subject to frequent sexual harassment. She went through a lot of hardship. Because of her own personal experiences, she does not want her daughters to have to grow up in India: a girl's life is not easy. In the four years that she has been in New Zealand, CC has seen the culture here and knows that their girls will be free to do whatever they want to do. There is no way they will be able to give their daughters this kind of life in India. They will struggle financially when they go back and be unable to afford for them to have a good education or to send them back to attend university in New Zealand. Their older daughter has asthma. Medical care is not publicly funded. CC is worried that she will not be able to get her older daughter's medication. When she weighs up losing her children against their safety, and her own childhood experiences, she would rather leave them in New Zealand. She does not know how she would survive without her children but she knows for a fact that she will not be able to give them the life that they can have in New Zealand.

[27] The appellant's parents were not happy with CC for giving birth to two daughters. When they found out about the appellant's offending, they completely disowned him. He is not welcome at their home – they have said that their doors are closed to him. The father is more worried about his reputation than the well-being of the appellant and his family: she is sure that if they arrived at the family home, the appellant's father would turn them away. Her older brother is not in a financial position to help them. He has a wife and two children and is supporting their younger brother in his studies.

**Evidence of registered psychologist, Mr Wotherspoon**

[28] Mr Wotherspoon produced a written report (29 October 2020), addressing the psychological impacts for all family members arising out of the potential deportation of the appellant. He interviewed the appellant and his wife on several occasions and had regard to the Deportation Liability Assessment file prepared for the respondent (dated 19 November 2018) and the New Zealand Police summary of facts and the District Court judge's sentencing notes. An interpreter assisted when the appellant's wife, CC, was interviewed.

[29] In his report, Mr Wotherspoon stated that the appellant and his wife presented as a devoted couple. As individuals, they were seriously struggling to come to terms with the possibility of the appellant being deported and the future of their two young daughters being undecided.

[30] The appellant suffers from depressive episodes and anxiety and is psychologically vulnerable. Since the decision was made to deport him, the appellant has experienced an increase in the frequency and intensity of depressive behaviours and high levels of anxiety and negative stressors. The appellant struggles to experience positive emotions of happiness or satisfaction which impacts on relationships within the family. He often expressed dismay and guilt about his offending and several times spontaneously mentioned that he is so angry with himself for placing his family in such an "awful situation". He stated: "I cry a lot about what I did and wish I could start again" and "I'm a bad person for what I did". While many individuals would suffer increased anxiety when facing the prospect of deportation, the appellant's personal circumstances meant his anxiety was heightened: there was additional stress arising because of the impact on his two daughters, the fact that the wife cannot remain here with them, the loss to the appellant of his business and associated financial issues, and the fact that he has been cut off by his family. This latter fact was of considerable seriousness to the appellant. The appellant had stated "with strength" that, if deported, he and his family would face total rejection from his family and his wife's family. The appellant is, in his own terms, "devastated" by the rejection from his parents.

[31] The appellant's wife suffers from depressive episodes, labile mood, intrusive dreams and nightmares, and headaches. Her physical health has deteriorated since hearing of the potential deportation of her husband: her allergy and vertigo have increased in intensity and her sleep behaviour has become erratic, often containing nightmares, night sweats and nausea. Mr Wotherspoon considered the wife's persistent negative beliefs and expectations about herself and her negative emotional state to be worrisome. She currently restricts herself to remaining indoors due to the fear of being recognised as the wife of the appellant, which seriously limits any social contact with people. Her fear of being recognised has been reinforced by the appellant's family in India rejecting them and refusing any contact. This is a crippling blow to both the appellant and his wife. In Mr Wotherspoon's opinion, the appellant's wife is psychologically fragile and psychologically vulnerable.

[32] Over the past three or four years, when in a depressed mood, which is not uncommon, both the appellant and his wife have had thoughts of suicide. The idea

of suicide is discussed together or considered by each separately. The thought of their daughters' future has prevented them from attempting suicide but the frequency and intensity of the thoughts have become seriously intrusive in their lives and are sufficient for mental health intervention. Mr Wotherspoon considered that the frequency of the appellant's and his wife's suicidal thoughts was "high" and the intensity was "above average". Given these circumstances, the appellant and his wife should have had psychological support "some time ago". It was unlikely that they would get such support in India: what mental health assistance was offered there was "at the very low end" of services.

[33] Deportation of the appellant poses serious and unimaginable decision making for the appellant and his wife regarding their two daughters. Both stated that taking the children to India is not an option because each daughter would have a prescribed future, subjected to arranged marriage and have no opportunity to pursue their education or careers of their choice. The couple were investigating the viability of arranging an adoption of the girls by a family in New Zealand as they believed this would secure them a "much better future and life". Mr Wotherspoon stated that he found this proposal, in consultation with his colleagues, to be "quite extraordinary". An adoption would have negative impacts on the girls, who may have difficulties in identifying who they are, and would want to know why their parents had left them, but could also result in positive outcomes such as in them undertaking their education in New Zealand.

[34] While there were many uncertainties, it was noted that the appellant and his wife were actively working towards an adoption, not simply contemplating it. Their decision to pursue adoption was informed largely by the absence of family support in India. There was no physical, emotional or spiritual nurturing available there for the appellant or his family members. It was an "empty environment", which Mr Wotherspoon considered was quite unusual for Indian families. While there is no family support in New Zealand, it would be easier to arrange for the social support of the children, and for their health needs, and mental health support for the appellant and his wife. The appellant displays some features of Post-Traumatic Stress Disorders and requires some monitoring and assistance to help him manage some of the adverse effects of his memories (which manifest in nightmares) and his feelings of guilt which affect his daily life and sleep habits. Such support would assist with resolving his psychological and emotional vulnerability.

**Documents and Submissions for the Appellant**

[35] For the appellant, counsel has lodged:

(a) A written statement (2 November 2020) from the appellant to which is attached a copy of the affidavit sworn by his parents on 11 July 2019 and information concerning the appellant's criminal proceedings.

(b) A written statement (2 November 2020) from the appellant's wife.

(c) A medical report (5 October 2020) from the older daughter's general practitioner and a copy of her full medical history.

(d) An exchange of emails between the appellant and an Oranga Tamariki social worker, on 3 November 2020.

(e) Letters of support from representatives of businesses with whom the appellant's business is connected and from the appellant's and his wife's friends.

(f) A copy of the United Nations International Covenant on Civil and Political Rights (ICCPR).

(g) The following country information: United Nations Human Rights Committee *List of Issues Prior to Submission of the Fourth Periodic Report of India* CCPR/C/IND/QPR/4 (22 August 2019); Human Rights Watch *World Report 2020 – India*; United States Department of State *Country Reports on Human Rights Practices 2019: India* (11 March 2020); United Nations Committee on the Elimination of Discrimination against Women *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India* CEDAW/C/IND/CO/4-5 (24 July 2014); Amnesty International *Human Rights in Asia-Pacific: Review of 2019 – India* (30 January 2020); United Nations Committee on the Rights of the Child *Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* CRC/C/IND/CO/3-4 (13 June 2014); United Nations Human Rights Committee *General Comment No. 16: Article 17 (Right to Privacy)* (adopted 8 April 1988); and United Nations Committee on the Rights of the Child *General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)* CRC/C/GC/15 (17 April 2013).

(h) Information from the New Zealand Ministry of Foreign Affairs and Trade's *Safe Travel* website, at www.safetravel.govt.nz: Safe Travel *India* (18 April 2020); Safe Travel *India: Severe Air Pollution* (as

reviewed 17 December 2019); and Safe Travel *COVID-19 (Coronavirus)*: *do not travel overseas at this time* (9 November 2020).

(i) International Air Transport Association *COVID-19 Travel Regulations Map* (published 30 October 2020) with details on flights to India at that time.

(j) An article by S Biswas "Coronavirus: Has the Pandemic Really Peaked in India?" *BBC News* (19 October 2020).

[36] In his written submissions, the appellant's counsel submits:

(a) There are exceptional humanitarian circumstances arising from the prospect of the appellant's and his wife's permanent separation from their two New Zealand-citizen daughters (through adoption) or the massive decline in the daughters' living standards and associated negative health, education and welfare outcomes for them should they have to live with their parents in India. The appellant will have difficulty obtaining well-paid employment due to his convictions and the economic impacts of the Coronavirus pandemic. He cannot look to his own family or his wife's family for financial or social support. His older daughter would suffer an exacerbation of her asthma due to the climate and geography in India. Gender-based discrimination against women and children is prevalent. The appellant's deportation would result in the *de facto* deportation of two New Zealand citizen children. It is speculative to assert that they would be able to return to live here as adults. It is unlikely that the appellant or his wife would obtain the right to re-enter New Zealand to assist their children should they return to live here.

(b) The appellant was convicted of one offence of theft and one offence of obtaining by deception and, given the nature of his exceptional humanitarian circumstances, it would be unjust or unduly harsh for him to be deported. The appellant's sentence, of six months' community detention and reparation of NZ$21,375 indicates that the court considered his offending at the low-level of seriousness for such offences, given the maximum sentence of seven years' imprisonment for each offence.

(c) It is not against the public interest for the appellant to remain in New Zealand. Family unity is a cornerstone of New Zealand society

as evidenced by the incorporation of the ICCPR into New Zealand domestic law via the Bill of Rights Act 1990 and must be taken into account when determining this appeal. However, it cannot be premised on the basis of effectively forcing New Zealand-citizen children to follow their father to his home country where they would suffer a decline in their human rights. The appellant's case involves non-violent offending that appears to have been out of character, given the information contained in his references. The appellant's New Zealand citizen children are innocent of the appellant's crimes. Should the Tribunal allow the appeal, but wish to ensure that the appellant does not reoffend, it could suspend his liability for deportation for a period of up to of five years.

(d) If the appeal is not allowed, the Tribunal should delay the appellant's deportation, given current travel restrictions, and cancel the permanent prohibition against him re-entering New Zealand. Finally, the decision should be depersonalised due to the trauma the publication of the appellant's criminal matters has already caused his wife.

**Documents and Submissions for the Respondent**

[37] Counsel for the respondent has lodged a bundle of documents, including the deportation liability notice, New Zealand Police summary of facts, sentencing indication notes of Judge S Patel and the appellant's conviction history report.

[38] In his written submissions, counsel for the respondent submits:

(a) The appellant is unable to establish exceptional circumstances. It is not necessary for the family unit to be separated because the appellant and his wife could choose to take their children back to India with them. As New Zealand citizens, the children would have the right to return to New Zealand in adulthood if they wished to do so. Gender-based discrimination against female children and negative health, education and welfare outcomes do not qualify as exceptional circumstances as these issues do not relate to specific characteristics of the appellant or his family. They are general socioeconomic issues within India and therefore cannot in their nature be exceptional circumstances pertaining to the appellant. The appellant and his wife's symptoms of depression and anxiety and suicidal ideation is not unusual given their

current predicament of facing deportation and (in any event) anxiety and depression have a reasonably high prevalence in the general population. The appellant has not provided any compelling evidence to support the assertion that he would be less able to find work in India. In terms of the impact of COVID-19, all parts of the world are suffering negative economic impacts. There is no evidence to suggest that AA's asthma cannot be managed by the medical system within India. It is a common condition. Atmospheric conditions vary across India depending on urbanisation and other factors. The appellant and his wife could choose to live somewhere with more favourable conditions. The appellant and his wife grew up in India and will be familiar with the life, language and culture there and could quickly adjust to returning there. The appellant is physically healthy and has experience running a business. The children are young and could adjust to living in India.

(b) If exceptional humanitarian circumstances exist, it would not be unjust or unduly harsh to deport the appellant due to the seriousness of the offending. There was premeditated offending that involved the creation of a company and taking money from multiple victims. The appellant and his co-defendants obtained $59,200 by deception. The camera equipment was valued at $99,000. The serious nature of the appellant's offending is indicated by the maximum sentence of seven years' imprisonment.

(c) In considering the public interest, it is the appellant and his wife's choice as to whether family separation occurs. There is some risk to the community in the possibility that the appellant may reoffend, which is suggested by the level of planning and repetition involved in his offending.

## STATUTORY GROUNDS

[39] The appellant's liability for deportation arose under section 161(1)(b) of the Immigration Act 2009 (the Act) because he has been convicted of an offence for which the court had the power to impose imprisonment for a term of two years or more, the offence being committed not later than five years after the appellant first held a residence class visa.

[40] Section 206(1)(c) of the Act provides the appellant with a right to appeal his liability for deportation. The grounds for determining humanitarian appeals against deportation 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."

[41] In regard to section 47(3) of the Immigration Act 1987 (which is analogous to section 207(1)(a) above), the majority of the Supreme Court stated in *Ye v Minister of Immigration* [2010] 1 NZLR 104, at [34], that three ingredients had to be established: (a) exceptional circumstances; (b) of a humanitarian nature; (c) that would make it unjust or unduly harsh for the person to be removed from New Zealand.

[42] Because there are family interests at issue in this appeal, regard must be had to the entitlement of the family to protection as the fundamental group unit of society, exemplified by the right not to be subjected to arbitrary or unlawful interference with one's family – see Articles 17 and 23(1) of the 1966 International Covenant on Civil and Political Rights (the ICCPR). Whether such rights would be breached depends on whether deportation is reasonable (proportionate and necessary in the circumstances) – see the United Nations' Human Rights Committee's General Comment 16 (8 April 1988) and the discussions in *Toonen v Australia* (Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1994) and *Madafferi v Australia* (Communication No 1011/2001, UN Doc CCPR/C/81/D/1011/2001, 26 August 2004), at [9.8].

[43] The 1989 Convention on the Rights of the Child provides at Article 3.1 that, in all actions concerning children, the best interests of the child shall be a primary consideration – see also *Puli'uvea v Removal Review Authority* (1996) 14 FRNZ 322 (CA). The High Court has stated that the best interests of the child are neither paramount nor the primary consideration, but they are to be given important and genuine assessment – see *O'Brien v Immigration and Protection Tribunal* [2012] NZHC 2599 at [32]. However, the best interests of children are a primary consideration in the Tribunal's determination and must be afforded due weight and genuine assessment: *Huang v Minister of Immigration* [2009] 2 NZLR 700 (CA) at [49]) and *O'Brien* at [32].

## ASSESSMENT

### Whether there are Exceptional Circumstances of a Humanitarian Nature

*The appellant's and his wife's circumstances*

[44] The appellant has been living in New Zealand for 10 years, which is a considerable period of time. He completed study here, obtaining a Level 6 Diploma in Information Technology, and has had various employment positions. He was granted residence in July 2013. After an unsuccessful attempt to establish a computer-servicing business, the appellant started his own business in a provincial centre. He supports his wife, and their two young children, AA, aged three years, and BB, aged 18 months, who are New Zealand citizens by birth.

[45] Mr Wotherspoon has concluded that both the appellant and his wife are psychologically vulnerable. His evidence in this regard is consistent with the observations of the Tribunal and his report and evidence are persuasive. It is accepted that the couple are psychologically fragile. While most individuals suffer anxiety and depression when facing deportation, there were additional stressors for the appellant due to the likely impact of deportation on his two daughters, the loss of his business and associated financial stress, and his rejection by his parents.

[46] The appellant's wife has been living in New Zealand for about four years, on a temporary basis. She suffers from depressive episodes, labile mood, intrusive dreams, nightmares, and headaches. Her physical health has recently deteriorated. In giving her evidence, the wife described how her experiences as a child were in India were difficult. Essentially, it appears to the Tribunal that she has no family there. Both of her parents have died; her mother when she was only 10 years old. As she is now married, there is nowhere for her to go, other than with her husband.

[47] Mr Wotherspoon noted that both the appellant and his wife have frequent suicidal thoughts, which are held at bay only by their sense of responsibility to their two daughters. In Mr Wotherspoon's opinion, these suicidal thoughts could manifest into action if the couple felt they were unable to properly care for the children.

[48] The Tribunal acknowledges that the veracity of the appellant's rejection by his parents was not able to be tested outside his and his wife's oral evidence, such as by way of cross-examination of his parents, or brother. It is also acknowledged that it is to the appellant's advantage to assert that his parents have rejected him because his circumstances, and those of his wife and two daughters, will be significantly worse without the financial, emotional and social support of the

appellant's parents in India. However, if the parents have disowned the appellant, it would be unlikely that they would then appear in his support at a hearing where he is seeking to avoid his deportation. The parents have benefitted immensely from the remittances that he has sent to them while in New Zealand. By the appellant's recollection, his parents have received NZ$100,000, including some of the money received as a result of the offending. They have used this money to finish building their own home and to purchase three empty sections. They would not want their position to be undermined as might occur if they offered support to the appellant.

[49] Further, Mr Wotherspoon noted that, when discussing the contents and purpose of the parents' affidavit, the appellant required lengthy pauses so that he could recover and continue with the session. In his own words, the appellant said that he was "devastated" by his parents' rejection. Relying on his assessment of the appellant and his wife, Mr Wotherspoon concluded that the parents' rejection was a real and "crippling blow" to each of them.

[50] It is accepted that, given the current psychological vulnerability of the appellant and his wife, it is likely that they would find it very difficult to make sound decisions concerning the futures of their two daughters and also to re-establish themselves in India, without any family support. The couple has no family support in India: the appellant's parents have rejected him and his wife's wider family (her two brothers and uncle) do not feel any obligation to support her. With this absence of financial, emotional and social support, and few financial resources to draw on, the appellant and his wife will find it very difficult to settle with their children in India. There will be no physical, emotional or spiritual nurturing available there for the appellant or his family members: as Mr Wotherspoon noted, it is an "empty environment" for them.

*Best interests of the appellant's children*

[51] The appellant's older daughter, AA, who is aged three-and-a-half years, suffers from poor health. According to the information in her medical history, she suffered from recurrent infection due to an abscess under her arm (which had arisen after a routine vaccination) throughout late 2018 and the first three months of 2019. There were many visits to the doctor and hospital and two surgical procedures were required (which occurred in December 2018 and March 2019).

[52] AA has also seen her doctor on many occasions for treatment of upper respiratory tract infections and was diagnosed with asthma in 2020. She has received treatment in hospital for these conditions on four occasions (June 2019,

December 2019, August 2020 and October 2020). She now uses a regular preventative inhaler and also a reliever inhaler. Her asthma control has improved. In his medical report, her general practitioner advises that high levels of atmospheric pollution such as may be encountered in India would be expected to worsen the control of respiratory illnesses such as asthma. There is also the possibility that an infection with COVID-19 might worsen her asthma control.

[53] The appellant's younger daughter, BB, who is aged 18 months, keeps good health. She does not have any particular vulnerabilities.

[54] The appellant and his wife have fears for the wellbeing of their daughters in India because of the likely diminished level of health, education and welfare support that would be available to their daughters there. Their fears are so strong that they have initiated negotiations with Oranga Tamariki for the adoption of the children within New Zealand. The Tribunal cannot predict whether any such adoption would occur if the couple leave New Zealand – certainly, it is difficult to understand how their permanent separation from their parents could be seen to be in the girls' best interests. It is considered therefore that it is more likely that, if the appellant is deported, his wife and their two daughters would return to India with them.

[55] There is no doubt that general socioeconomic issues within India are significantly worse than in New Zealand. While counsel for the appellant notes the reports of significant human rights breaches in India, there is no indication that the family members would be prone to, or subject to, such acts. However, the Tribunal accepts that, as girls, the appellant's two daughters would be raised in a culture where there is pervasive discrimination against girls and women and persistent and longstanding traditions and cultural influences that perpetuate the preference for boys and the unequal status of girls (United Nations Committee on the Rights of the Child *Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* CRC/C/IND/CO/3-4 (13 June 2014) (the CRC report) at [33]). In their own personal experience, the appellant and his wife have experienced the express dissatisfaction of the appellant's parents at the birth of each of their daughters.

[56] There is also a prevalence of communicable diseases among children in India, such as acute respiratory infections, diarrhoea and fever, and of poverty among children, with children in disadvantaged and marginalised situations being particularly vulnerable (the CRC report at [63(f)] and [69], respectively).

[57] In India, it is likely that the appellant and his family would be living on or below the poverty line. The Tribunal has accepted that there is no family support for the appellant and his wife and their daughters in India. It notes the appellant's evidence that, with his history of offending, he is unlikely to obtain a well-paid job and that he would have to obtain employment as a labourer, earning perhaps Rs9,000–10,000 per month (about NZ$200). This would pay for the family's accommodation but there would be no money for food, water and electricity, which he expected to cost a further NZ$350–400 per month. The appellant's savings, of some NZ$15,000, are likely to be used largely in arranging the move to India and tidying away his financial commitments in New Zealand. Any funds that remain will not be sufficient to support the family members for any meaningful length of time.

[58] There are understandable concerns about the impacts of poor living conditions and atmospheric conditions on the appellant's older daughter due to her history of respiratory illness, and asthma, and it is the appellant's evidence that it is not feasible to simply live in another state in India. The appellant gave accounts of difficulties in obtaining medical treatment in India arising from huge demands on the public health system and his fears that he would not be able to pay for private treatment.

[59] While education is free to the age of 14 years in India, there are a large number of children who are not in school, high drop-out rates at Grade 5, poor numeracy and literacy skills, and a low quality of education as well as the shortage of qualified teachers and classrooms (see the CRC report at [71]). It was argued by counsel for the respondent that the appellant's daughters could return to New Zealand as young adults. That remains the case; however, in the meantime, it is likely that they will have lived a life of hardship, have experienced discrimination because they are girls, and will not have achieved the level of English-language ability sufficient to enter the New Zealand tertiary education system. Further, any return to New Zealand is predicated entirely on the appellant and his wife obtaining sufficient financial resources for their return, which appears to be unlikely. The appellant's two daughters are New Zealand citizens: they are entitled to live in New Zealand and to enjoy the benefits of the healthcare, education and social systems here.

[60] Having considered the likely circumstances of the appellant's two daughters, the Tribunal finds that it is in their best interests to remain living in New Zealand. Clearly, it would also be in their best interests to remain in the care of their parents.

*Conclusion on exceptional circumstances of a humanitarian nature*

[61] The High Court has made it clear that the exceptional circumstances test is a threshold inquiry and that the threshold is "high". As Justice Katz held, in *Minister of Immigration v Jooste* [2014] NZHC 2882 at [53]:

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

[62] The Tribunal acknowledges that deportation will often cause difficulty, hardship and emotional upset, and that something more is required for a finding of exceptionality (*Jooste* at [46] and [47]). Nevertheless, each case must be assessed on its own facts and circumstances. As the Tribunal (differently constituted) set out in *GR (Fiji) v Minister of Immigration* [2019] NZIPT 600496, from [76] to [86], and touched on in *Fitzsimmons v Minister of Immigration* [2018] NZIPT 600519, at [93], the presumption that family separation is not unusual in deportation cases is a generic observation. The discussion in *Jooste* was limited to "being separated from family" without any distinction between the differences in such circumstances, such as (say) where there is separation of adult siblings as opposed to the separation of a parent from a young dependent child.

[63] However, the prospect of the separation of the appellant and his wife from their two daughters in the present case is by no means certain. It could be that they cannot arrange a suitable adoption within New Zealand. It is also, in the Tribunal's view, unlikely that the couple would be able to convince the relevant authorities that this would be in the children's best interests or that they, in fact, leave their children behind in this country. From the Tribunal's assessment, the appellant and his wife are otherwise responsible, caring and loving parents, and they present as unlikely to simply abandon their two young daughters.

[64] In this appeal, the Tribunal is most usefully guided by the Supreme Court, which has noted that the circumstances "must be well outside the normal run of circumstances" and, while they do not need to be unique or rare, they do have to be "truly an exception rather than the rule": *Ye v Minister of Immigration* at [34].

[65] Having cumulatively considered the factors at play in the appellant's case, the Tribunal is satisfied that there are exceptional circumstances of a humanitarian nature. The relevant factors include: the absence of family support for the appellant

and his wife in India; their likely financial position and living circumstances there; their symptoms of depression and anxiety and need for treatment; and the best interests of their two young daughters (particularly the elder), who as New Zealand citizens are entitled to be able to access New Zealand's healthcare services.

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

[66] 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 appellant to be deported.

[67] According to the Supreme Court in *Guo v Minister of Immigration* [2015] NZSC 132, 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 balancing exercise*

[68] Counsel for the appellant submits that, when balancing the triggering event for deportation (the appellant's offending) against the exception humanitarian circumstances (as found above), more weight must be given to the welfare and best interests of the appellant's children than to the appellant's offending. The triggering event does not have "legislative primacy" as it is not explicitly referenced in section 207 of the Act; nor have the higher courts given it such primacy. However, the welfare and best interests of the child carry such primacy (as a primary consideration). Therefore, the children's rights must be given greater weight by the Tribunal than the triggering event of the offending, when considering the overall proportionality ("unjust or unduly harsh") limb of the statutory test. The Tribunal does not agree with counsel's submission. The statutory test in section 207 of the Act is not proscriptive: neither the triggering event nor the best interests of the child are referenced there. While the best interests of the children are a primary consideration, they are not paramount.

*The appellant's offending*

[69] The appellant is liable for deportation because he was convicted of one offence of theft (over $1,000) and one offence of obtaining by deception (over $1,000). The Tribunal accepts that his offending occurred in the context of a number of alleged thefts as set out in the New Zealand Police Summary of Facts.

[70] Counsel for the respondent suggests that the appellant's offending is serious in nature as indicated by the context of the offending and maximum sentence of seven years' imprisonment. The offending was premeditated and there were a number of victims. However, for his part, the appellant states that he was naïve, and lured into this offending by his more sophisticated and calculating co- offenders. The appellant was sentenced at the lower end of the available sentence, to six months' community detention and reparation of $21,375. He has completed his sentence of community detention and is taking seriously his duty to pay reparation, by paying $50 each week. He has reduced the amount owing to about $15,000. It is apparent that he now understands the serious consequences of his deportation on his two daughters. This is likely to be a motivating factor against any such further offending.

*Exceptional humanitarian circumstances, as identified*

[71] To be balanced against the appellant's offending are the exceptional humanitarian circumstances which arise from his and his wife's psychological vulnerability and the best interests of the couple's two New Zealand citizen daughters. As a consequence of his deportation, the appellant's daughters face the adverse and negative short and longer-term consequences of a life in India, where there is no family support to moderate their likely poor living conditions. The appellant's two daughters are New Zealand citizens who are entitled to a childhood in New Zealand. They are innocent parties in the appellant's offending.

*Conclusion on unjust or unduly harsh to deport*

[72] Weighing the appellants' liability for deportation arising from his offending against the exceptional humanitarian circumstances, the Tribunal is satisfied that it would be unjust or unduly harsh for the appellant to be deported from New Zealand.

**Public Interest**

[73] In cases where the Tribunal has determined that the appellant has exceptional humanitarian circumstances which would make it unjust or unduly harsh to deport the appellant, the Tribunal must also be satisfied that it would not, in all those circumstances, be contrary to the public interest to allow the appellant to remain in New Zealand.

[74] As Hansen J held in *Garate v Chief Executive of Department of Labour* (HC Auckland, CIV-2004-485-102, 30 November 2004), at [41] (discussing section 63B of the 1987 Act, the predecessor to the later section 47(3)):

> "Section 63B(2)(b) requires all circumstances to be looked at afresh through the prism of the public interest. For this purpose, it seems to me, the Authority is required to weigh those factors which would make it in the public interest for the appellant to remain against those which make it in the public interest that he leave. The former are likely to include (although will not be confined to) the exceptional circumstances of a humanitarian nature relied on under subpara (a), for it must be in the public interest that a family with established roots in this country should be permitted to stay, and to stay together, and that international conventions directed to those ends are respected."

[75] This approach was endorsed by the majority of the Supreme Court in *Helu v Immigration and Protection Tribunal and Minister of Immigration* [2015] NZSC 28 which agreed that the factors personal to an appellant and his family which were taken into account when deciding it was unjust or unduly harsh to deport him, and that finding in itself (per Elias CJ at [9]), are relevant to the analysis of whether it would not be contrary to the public interest to allow him to remain in New Zealand.

[76] In *Helu* (supra) the Supreme Court accepted (at [192]) that "… a sliding scale assessment of the gravity and probability of future offending may helpfully indicate the weight to be given to the risk of reoffending when assessing the public interest".

[77] The Tribunal does not overlook the harm caused to the victims of the appellant's offending. However, it notes that the sentence passed down to the appellant, of six months' community detention, was at the lower end of the available sentence, of seven years' imprisonment. Some of the harm is mitigated by the order for reparation, with which the appellant is complying. While there is no evidence of the likelihood of the appellant reoffending, the Tribunal notes that his offending occurred in 2015, which is now some five years ago, and that there has been no further offending. In his evidence, he stated that he no longer associates with his co-offenders. To an extent, any risk to the public interest of the appellant reoffending can be moderated by the Tribunal suspending the appellant's deportation liability, as it proposes to do.

[78] There is a positive public interest in New Zealand complying with its obligations under international conventions such as the 1989 Convention on the Rights of the Child which include observing the rights and best interests of the appellant's two young New Zealand-citizen daughters to remain living in New Zealand with their parents.

*Conclusion on public interest*

[79] Weighing the considerations which would make it in the public interest that the appellant leave (his offending and the possibility that he might reoffend) against the considerations which would make it in the public interest for the appellant to

remain (the absence of family support in India and likely living circumstances there and the best interests of his New Zealand-citizen daughters), the Tribunal is satisfied that it would not be contrary to the public interest to allow the appellant to remain in New Zealand.

## DETERMINATION

[80] The Tribunal finds that there are exceptional humanitarian circumstances that make it unjust or unduly harsh for the appellant to be deported from New Zealand and it is satisfied that it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

[81] The appeal is allowed.

### Suspension of Deportation Liability

[82] Pursuant to section 212(1) of the Act, on allowing any humanitarian appeal, the Tribunal may, in the case of a resident or permanent resident, make an order suspending the appellant's liability for deportation for a period not exceeding five years, subject to such conditions (if any) as the Tribunal determines.

[83] The Tribunal considers that the appellant's case is one of the such cases where suspension of deportation liability is likely to be of some effect. The appellant's offending occurred over five years ago. He has no history of any offending of that nature, or of any other offending, and he has not offended in any way since 2015.

[84] Accordingly, the Tribunal orders, pursuant to section 212(1) of the Act, that the appellant's liability for deportation be suspended for a period of three years commencing from the date of this decision subject to the condition that he does not commit any further offence for which he could be sentenced to a term of imprisonment within that three-year period.

[85] The appeal is allowed in the above terms.

### Order as to Depersonalised Research Copy

[86] 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. This is to protect the identity and privacy of the appellant's two daughters and wife.

"D Smallholme"

D Smallholme
Member

Certified to be the Research Copy released for publication.

D Smallholme
Member