IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2021] NZIPT 505142**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**CW (Tonga)**
Before:	L Moor (Member)
Counsel for the Appellant:	A McClymont
Date of Decision:	16 April 2021

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellant, a 40-year-old citizen of Tonga, against her liability for deportation which arose when she became unlawfully in New Zealand.

THE ISSUE

[2] The primary issue on appeal is whether the appellant has exceptional humanitarian circumstances which would make it unjust or unduly harsh for her to be deported at the present time. These arise from the best interests of her New Zealand-citizen children, the right to family unity and the impact of separation on her children, her husband and herself if she were required to leave New Zealand now, before the reassessment of her residence application.

[3] For the reasons which follow, the Tribunal allows the appeal and directs that a 12-month work visa be granted to the appellant.

BACKGROUND

[4] The appellant was born in Tonga in 1981. In February 2007, she arrived in New Zealand, as the holder of a visitor visa. This expired in November 2007, and

she remained unlawfully in New Zealand until 28 November 2018, when she was granted a one-year work visa under section 61 of the Immigration Act 2009 (the Act).

[5] In January 2014, the appellant gave birth to her first son.

[6] In May 2015, the appellant met her husband at work. In August 2016, they became engaged, and the appellant and her son moved into the husband's parents' home to live with the husband and his family.

[7] On 25 March 2017, the appellant and her husband married.

[8] In November 2017, the couple's son was born. In March 2019, the couple's daughter was born.

Partnership-Based Work Visa

[9] On 18 November 2019, the appellant made an application for a partnership-based work visa. This was declined by Immigration New Zealand on 14 August 2020.

[10] On 27 August 2020, the appellant requested a reconsideration of this decision.

[11] On 16 September 2020, Immigration New Zealand advised that it had reconsidered its decision, but maintained its position to decline the work visa application.

Resident Visa

[12] On 18 November 2019, the appellant also made an application for residence under the Family (Partnership) category.

[13] On 16 September 2020, Immigration New Zealand declined the residence application. The appellant appealed this decision to the Tribunal.

[14] By decision *IJ (Partnership)* [2021] NZIPT 205898 (29 March 2021), the Tribunal determined the appeal pursuant to section 188(1)(e) of the Act. It found that Immigration New Zealand had incorrectly declined the residence application. Immigration New Zealand had not properly considered all relevant factors and had considered irrelevant factors. Its assessment of the credibility of the appellant's and her husband's statements was flawed, and this prejudicially affected the outcome of the appellant's application. The decision to refuse the visa was made on the basis

of an incorrect assessment in terms of the applicable residence instructions. The Tribunal cancelled the decision of Immigration New Zealand and referred the application back for a correct assessment.

[15] On 9 March 2020, the appellant was granted an interim visa. This expired on 25 September 2020. The appellant became unlawfully in New Zealand.

STATUTORY GROUNDS

[16] The grounds for determining a humanitarian appeal are set out in section 207 of the Act:

> (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that –
>
> (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.

[17] 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].

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

THE APPELLANT'S CASE

[19] The appellant's case is set out in submissions (25 November 2020) and can be summarised as follows:

(a) The appellant and her New Zealand-citizen husband are in a genuine and stable partnership. Immigration New Zealand failed to properly consider relevant evidence and considered irrelevant information in its assessment of the genuineness and stability of the couple's partnership. The appellant was unable to competently provide answers in the Immigration New Zealand interview and as a result, inconsistencies in her evidence arose. These arose due to the appellant's persistent depressive disorder, stress and difficulties with the English language.

(b) Pursuant to Articles 3(1) and 18(1) of the 1989 United Nations *Convention on the Rights of the Child* (UNCROC), the best interests of the appellant's three children require her to remain living in New Zealand with them, and their New Zealand-citizen father.

(c) The children, aged seven, three and two years, will suffer negative developmental impacts if separated from either parent, but especially their mother who is their primary attachment figure. They are innocent of any wrong-doing and need the support and love of both parents. Their rights to family unity will be impacted.

(d) Article 25(2) of the 1948 *Universal Declaration of Human Rights* (UDHR) requires that motherhood and childhood are entitled to special care and assistance, including breastfeeding and medical care. The two-year-old daughter requires her mother's continued presence in New Zealand as she is still breastfed. If her mother is deported, she would need to accompany her to have her needs met, but this would restrict her from accessing her rights, including to health and medical care, that she is entitled to as a New Zealand-citizen.

(e) The appellant is a person of good character and actively participating in her community. Friends and family write in support of her, describing her as a mature and heart-warming person.

(f) The appellant has no criminal record in any country and poses no threat to national security of New Zealand society. It would not be contrary to the public interest for her to remain in New Zealand.

(g) Preservation of family unity and the observance of New Zealand's international obligations in that regard is also in the public interest:

Garate v Chief Executive of Department of Labour (HC Auckland, CIV-2004-485-102, 30 November 2004).

[20] In support of her appeal, the appellant provided the following documents:

(a) A copy of Immigration New Zealand records regarding the appellant's work visa application.

(b) A copy of the psychiatrist report of Dr Patrick Daniels (19 November 2020), stating that the appellant suffers from persistent depressive disorder and this would have had an impact on her Immigration New Zealand interview.

(c) A personal statement from the appellant's husband (undated).

(d) Letters of support from friends, family and the appellant's pastor in New Zealand (variously dated).

(e) Copies of the children's New Zealand birth certificates.

[21] On 29 March 2021, the Tribunal wrote to counsel requesting further information, including with regard to the parentage of the eldest child and inviting any further submissions in light of its decision on the appellant's residence appeal.

[22] By letter dated 9 April 2021, counsel responded, advising that the appellant's husband was not the biological father of the eldest son. He is treated as the stepfather. He has not formally adopted the eldest son but has raised him since a toddler. He was added to an updated version of the eldest son's birth certificate (3 September 2020) so that the eldest son "would have the same family name as his siblings", and to show that the husband was father to all three children "regardless of blood relation". Furthermore, due to cultural sensitivity within the Tongan community and the stigma attached to being a single mother, the appellant felt it was shameful not to have the eldest son share the same surname as his two other siblings. She did not want her eldest son to feel like an "outsider" within his family or within their community.

[23] Counsel also admits that the appellant provided contradictory evidence to Immigration New Zealand regarding whether her husband was the biological father of the eldest son. However, this was due to her:

> [S]truggling to understand English as well as her persistent depressive disorder. Therefore, she did not inten[d] to provide false and misleading declaration to Immigration New Zealand.

[24] Counsel produced copies of the eldest son's two birth certificates. The first certificate (May 2015) does not record his father. It states that the son was not a New Zealand citizen by birth. The second certificate (September 2020) records the husband as the eldest son's father, and states that the son is a New Zealand citizen by birth.

ASSESSMENT

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

Whether there are Exceptional Circumstances of a Humanitarian Nature

[26] The appellant has lived in New Zealand for the last 14 years.

[27] In New Zealand, the appellant has married a New Zealand-citizen and has given birth to three children, now aged seven, three and two years. The appellant's husband is father to the two younger children. While the eldest son is not biologically his own child, he has served as the child's father since he was young and considers him as such.

[28] On appeal, the appellant has confirmed that her husband is not her eldest son's biological father. However, the son has been raised by him and is considered to be his son. The husband was added to the eldest son's birth certificate, so that they would have the same surname and be considered a unified family unit. This would protect the son from potential stigma.

Appellant and husband's partnership

[29] The Tribunal is satisfied that the appellant and her New Zealand-citizen husband are in a genuine and stable partnership. They have also been living together in this partnership since late 2016. A wide range of evidence has been produced supporting the genuineness and stability of their partnership.

[30] The Tribunal found, in its decision on the appellant's residence appeal, *IJ (Partnership)*, that Immigration New Zealand failed to properly consider this relevant evidence and considered irrelevant factors. As such, its decision was incorrect, unfair and has been sent for a reassessment. In making this finding, the

Tribunal did acknowledge that inconsistent information had been provided about the parentage of the eldest son, but this did not undermine the overall credibility of the evidence regarding their partnership, stating at [35]:

> The Tribunal acknowledges that the appellant provided significantly different information about the biological parentage of the eldest son in the interview, from that provided at other times. While this remains an issue, it is not fatal to an assessment of the genuineness and stability of the partnership. The parentage of the two other children was never in doubt. Further, viewing this in context, the appellant's concern about her child's immigration status would also have factored into her poor decision-making about sharing information on this issue. However, this does not undermine the overall credibility of the available evidence of the couple's genuine and stable partnership.

[31] According to the report of Dr Daniels, Psychiatrist, the appellant is suffering from persistent depressive disorder, with high testing scores for anxiety and stress, and a moderate score for depression. These mental health difficulties, as well as language difficulties, and childcare distractions affected her ability to give consistent answers to Immigration New Zealand.

[32] On appeal, the husband explains (undated statement) that the appellant's deportation will not only impact the children's wellbeing and their relationship, but he cannot relocate to Tonga, a country where he has no family, has never visited himself and where he would not be able to obtain employment to support his family.

Best interests of the children

[33] The best interests of the children are a primary consideration in the Tribunal's assessment, pursuant to Article 3(1) of UNCROC: see also *Puli'uvea v Removal Review Authority* (1996) 14 FRNZ 322 (CA).

[34] The three and two-year-old children are New Zealand-citizens. The seven-year-old eldest son is not the biological child of the appellant's husband. His own biological father has not been disclosed to the Tribunal. While the husband's name was added to his birth certificate, he was not formally adopted and, as such, his citizenship remains unknown. Notwithstanding this, as a minor, his best interests remain the primary consideration.

[35] The appellant's three young children are well-settled in New Zealand, where they were each born and have lived their entire lives. Here, they enjoy a stable childhood, with the love and support of both parents, as well as the husband's parents. The eldest son attends school, where he is well-settled and does not wish to move away from, according to the appellant's husband's statement. The two younger children are too young for school but are happy and settled here. The

youngest child, the two-year-old daughter is being breast-fed by the appellant and refuses infant formula. She remains highly dependent on her mother.

[36] It is clearly in the best interests of all three children that they remain living here, with the love and support of both parents. Due to their young ages, they remain dependent on their mother, as their primary caregiver, and being separated from her would cause the children significant hardship and distress. Similarly, the appellant's separation from her young children would cause her significant emotional distress.

Conclusion on exceptional humanitarian circumstances

[37] The appellant has settled in New Zealand over the 14 years she has lived here. She has a strong nexus to the country, including through her children and husband. Due to the children's young ages, they remain highly dependent on her as their primary caregiver. The appellant's family who are all, or mostly, New Zealand-citizens cannot reasonably be expected to relocate to Tonga in the event of her deportation.

[38] Having regard to the prospect of emotional harm to each member of the family unit, arising from the deportation of the appellant before the reassessment of her residence application, the Tribunal finds that there currently are exceptional circumstances of a humanitarian nature. The grant of a 12-month temporary visa would afford her a reasonable amount of time for Immigration New Zealand to compete this reassessment, which the Tribunal has directed be undertaken as a matter of priority.

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

[39] 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. 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".

[40] The appellant is liable for deportation because she is unlawfully in New Zealand. This occurred after the expiry of her interim visa. Prior to this, the appellant was unlawfully in the country for approximately 11 years. After the expiry

of her initial visitor visa in 2007, she remained here unlawfully until the Minister granted her a visa under section 61 of the Act in 2018.

[41] The appellant's long history of living unlawfully in New Zealand reflects a disregard for New Zealand's immigration laws. However, on multiple intervals during this time, the appellant has attempted to regularise her status, through visa applications. These were not successful until she was granted a section 61 visa by the Minister in 2018. This was done with the stated purpose of her making an application for residence, while remaining in the country with her children.

[42] The appellant's residence application process has not been finalised. The Tribunal has found that Immigration New Zealand incorrectly declined her application for residence and it has returned the application for a correct assessment.

[43] The appellant is currently awaiting the outcome of her residence reassessment, which as noted above, was initially unfair and flawed. She has a pathway to residence through this application. As such, separation from her family, who have rights to remain here as New Zealand-citizens, would negatively impact the psychological and emotional wellbeing of her children, husband, as well as herself. In addition, her young daughter's physical wellbeing would be impacted through the removal of her breastfeeding mother.

[44] Furthermore, in light of the psychiatrist's report, the Tribunal finds that the appellant's mental health may be negatively impacted if deported, even if she was later able to return.

[45] While the outcome of this reassessment is not known, and Immigration New Zealand will need to address any character issues that may arise regarding information given as to the parentage of her eldest son, there is a high likelihood she may be granted residence under the Family (Partnership) category.

[46] Even if character issues arise on the reassessment, the Tribunal notes the appellant's explanations regarding intent provided on appeal, as well as the compelling and exceptional humanitarian circumstances arising from the best interests of the children. These would need to be weighed in any character waiver assessment.

Conclusion on unjust or unduly harsh

[47] Weighing the reasons why the appellant is liable for deportation against the exceptional humanitarian circumstances, the Tribunal is satisfied that it is unjust or

unduly harsh for the appellant to be deported from New Zealand until her residence application has been reassessed.

Public Interest

[48] Having found that the appellant has exceptional humanitarian circumstances which would make it unjust or unduly harsh to deport her at this time, the Tribunal must also be satisfied that her 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 appellant to remain against those which make it in the public interest that she leaves: *Garate v Chief Executive of Department of Labour* (HC Auckland, CIV-2004-485-102, 30 November 2004) at [41].

[49] The Tribunal has obtained a clear New Zealand police certificate (1 April 2021) for the appellant.

[50] The appellant has not disclosed any particular health conditions and there is no evidence contained on Immigration New Zealand's files to suggest that she has imposed a burden on New Zealand's health system over the years that she has lived here or will do so in the next 12 months.

[51] The appellant has been living unlawfully in New Zealand for approximately 11 years. There is a public interest in preserving the integrity of the immigration system. There is a need for deterrence in respect of dishonesty in immigration applications and unlawful presence in the country. This need is at its highest in the case of offending for an ulterior motive, such as for pecuniary gain or people trafficking. This is not such a case, however. In this case, the appellant has made regular attempts at legalising her status here. In 2018, this was granted, with a view to her seeking a permanent resolution through a residence application. At present, her pathway to residence remains open due to the incorrect decision-making of Immigration New Zealand in relation to her residence application.

[52] The Tribunal recognises that there is a public interest in the upholding of New Zealand's international obligations with regard to family unity and the best interests of children pursuant to Article 23(1) of the 1966 *International Covenant on Civil and Political Rights* and Article 3(1) of UNCROC. It is accepted that there is a public interest in the protection of the appellant's family unit and in the promotion of the best interests of the appellant's children who are aged under 18 (which, as noted above, are served by remaining in New Zealand with both their parents).

[53] While the Tribunal is satisfied that the appellant and her husband are in a genuine and stable partnership, it also observes that she has provided inconsistent information regarding the parentage of her eldest son. She has provided an explanation and psychiatric report in response. However, this remains an issue which Immigration New Zealand needs to further investigate. This may raise character issues. Notwithstanding this, the Tribunal remains satisfied that it would not be contrary to the public interest to grant a temporary visa while this is further investigated, when weighed against all other factors.

Conclusion on public interest

[54] Weighing the considerations which would make it in the public interest that the appellant leave against the considerations which would make it in the public interest for the appellant to remain (that is, the cumulative adverse effects on the appellant's children, husband and the interests of family unity), the Tribunal is satisfied that it would not be contrary to the public interest to allow the appellant to remain in New Zealand for the period of the visa directed below.

DETERMINATION

[55] For the reasons set out above, the Tribunal finds that there are exceptional circumstances of a humanitarian nature which would make it unjust or unduly harsh for the appellant to be deported from New Zealand at this time. The Tribunal also finds that it would not in all the circumstances be contrary to the public interest for her to remain in New Zealand on a temporary basis. It therefore allows the appeal.

[56] Pursuant to section 210(1)(b) of the Act, the Tribunal orders that the appellant be granted a work visa for a period of 12 months. This will enable her to remain in New Zealand with her husband and children while they await the outcome of Immigration New Zealand's reassessment of its decision to decline her partnership-based resident visa.

[57] The appeal is allowed on these terms.

Caution in Relation to Future Travel

[58] While this appeal is successful for the reasons given, it simply means that the current deportation liability of the appellant arising from her unlawful status is extinguished. It does not mean that the unlawful status may not be considered by

Immigration New Zealand in the course of any future visa application (or the seeking of entry permission) which the appellant might make if she leaves New Zealand and then wishes to return. That will be a matter for Immigration New Zealand to determine at the time and this decision should not be taken as an indicator of the outcome of any such application.

[59] If the appellant is at any time contemplating future travel, she may wish to seek legal advice before doing so.

Order as to Depersonalised Research Copy

[60] 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, her children or husband.

"L Moor"
L Moor
Member

Certified to be the Research Copy released for publication.

L Moor
Member