

**RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA**

Appellant:	RATNAM, Suresh
Respondent:	THE MINISTER OF IMMIGRATION
Before:	S Benson (Member)
Counsel for the Appellant:	S Laurent
Counsel for the Respondent:	M Hall
Date of Hearing:	10 March 2022
Date of Decision:	28 April 2022

DEPORTATION (RESIDENT) DECISION

[1] This is an appeal by the appellant, a 45-year-old citizen of Sri Lanka who became a New Zealand resident in May 2009, against his liability for deportation.

THE ISSUE

[2] The appellant's deportation liability arises from his eight convictions for obtaining a pecuniary advantage by deception, which offending occurred in 2010 and in 2013 to 2014, and for which he was sentenced to six months' and four months' community detention respectively and ordered to pay reparation.

[3] The primary issue on appeal is whether the appellant has established that there are exceptional humanitarian circumstances, arising out of the dependence on him of his New Zealand-citizen wife and children, that would make it unjust or unduly harsh for him to be deported from New Zealand, and whether it would not in all the circumstances be contrary to the public interest to allow him to remain in New Zealand.

[4] For the reasons that follow, the Tribunal allows this appeal. However, the Tribunal orders that the deportation liability of the appellant be suspended for a period of three years, subject to the condition that he not be convicted of any further imprisonable offence of dishonesty, committed within that three-year period.

BACKGROUND

[5] The appellant was born in Sri Lanka in July 1976. In August 2006, he married his wife, a New Zealand citizen, in Sri Lanka. In September 2006, the wife returned to New Zealand, where she had been living since 2003. In April 2007, the appellant followed his wife to New Zealand. Based on his partnership with his wife, he was granted a visitor visa, a series of work visas and, in May 2009, a resident visa. The couple have two children, a son born in February 2008, and a daughter born in April 2011. The wife and children are citizens of New Zealand.

The Appellant's Offences

[6] In May 2013, the appellant was convicted of seven counts of obtaining a pecuniary advantage by deception (over \$1,000), an offence under section 240(1)(a) of the Crimes Act 1961. The District Court Judge's sentencing notes record that, in September and October 2010, the appellant took \$5,000 each from several members of his Sri Lankan community on the basis that he would obtain permanent residence for them in New Zealand. However, the appellant did not do so. The Judge, in a sentencing indication (14 January 2013), stated that:

No applications for permanent residence were lodged by the [appellant], who is not a licensed immigration adviser. The money was simply spent and lost, so that [the] total amount of loss for the seven victims of the offending is \$35,000.

[7] The Judge indicated a sentence of 26 months' imprisonment, based on a starting point of three years' imprisonment, less discounts of 10 months for no previous convictions and a guilty plea. The Judge indicated a possible further discount if reparation was made to the victims.

[8] The Provision of Advice to Courts (20 February 2013) from the Department of Corrections stated that the motivation for the offending was linked to the appellant's gambling.

[9] The appellant pleaded guilty to the offences. On 22 May 2013, the Judge noted that the appellant had paid \$10,000 to the victims and that he had offered to

pay the balance of the money by weekly instalments. The Judge gave a further discount of four months and, from that starting point, sentenced the appellant to six months' community detention and to pay the balance of \$25,000 at \$200 per week.

[10] On 24 February 2015, the appellant was convicted of a similar offence, which the court record states occurred between April 2013 to May 2014. He was sentenced to four months' community detention and ordered to repay \$5,365 to the victim.

[11] The appellant states that he has repaid all the victims of his offences. He has no other convictions.

Deportation Liability Notice

[12] On 2 June 2021, the respondent served a deportation liability notice on the appellant, which stated that he was liable for deportation from New Zealand because his first seven offences were committed within two years after he first held a New Zealand residence class visa, and the eighth offence was committed within five years after he first held a New Zealand residence class visa.

[13] On 14 June 2021, the appellant lodged the present appeal.

THE APPELLANT'S CASE

[14] The Tribunal heard evidence via audio-visual link from the appellant and his wife (AA).

Evidence of the Appellant

[15] The appellant states that he was born in the province of Jaffna, in northern Sri Lanka. In 1991 (when about 14 years old), he went to India with his parents and siblings as refugees. In India, he went to school and had employment as an unqualified physiotherapist at a church orphanage and as a driver in a family bakery business. His father is now deceased. His mother and four of his siblings continue to live in Tamil Nadu state in India as persons with refugee status. The appellant understands that the Indian government will not grant them permanent immigration status as residents or citizens. The appellant is in regular contact with his relatives in India. Several years ago, his youngest brother went to Germany.

The appellant's oldest sister is his only close relative still living in Sri Lanka. He is in contact with her from time-to-time.

[16] The appellant's wife, a Sri Lankan national by the name of AA, obtained residence in New Zealand through the Refugee Family Support category and entered New Zealand in 2003. She was sponsored by her sister, who lives here with her husband and three children. In 2007 or 2008, his wife became a citizen of New Zealand. AA's mother is deceased. Her father, two sisters and brother live in Sri Lanka.

[17] In August 2006, the appellant travelled from India to Sri Lanka, where he married his wife. In April 2007, he entered New Zealand with a visitor visa sponsored by his wife. He later held work visas, and, in May 2009, obtained a resident visa through his wife. In 2014 or 2015, he wanted to apply for New Zealand citizenship, but he was told that he would need to wait at least five years to apply because of his criminal convictions. In early 2020, he was told that he was not of good character to be approved for citizenship.

[18] The appellant and his wife have two children who were born in New Zealand. Their son was born in February 2008 and is now in year 10 at high school. Their daughter was born in April 2011 and is at intermediate school. She has mild asthma, but the children are otherwise in good health. The appellant takes medication to help him sleep but is in good general health. AA has diabetes, but this is well managed.

[19] The family has lived in the same rented property in Auckland for 11 years. The appellant and his wife are saving to buy a house and have about \$45,000 in Kiwisaver. He is employed as a night shift supervisor by a seafood company, an essential industry, where he has worked for 13 years. He has obtained many certificates through his employer, but he holds no other qualifications. His wife has had some part-time employment. He and his wife attend a Catholic church in Auckland.

[20] The appellant visited Sri Lanka in 2009, but he has otherwise stayed in New Zealand. In 2010, AA visited Sri Lanka with their son (then one year old) to visit AA's mother, who was sick at the time. His daughter has never been to Sri Lanka. The children understand some Tamil language.

[21] The appellant's family owns a house in Jaffna and a house in Colombo, which are rented out. He wants the properties to be sold so that he and his wife

can have some more money for a house in New Zealand. AA owns her own house in Puttalam in Sri Lanka, also rented out.

[22] The appellant admits that he committed the offences of deception, although he was in denial during the court process. He committed the offences because he had a gambling problem. He gambled at the Auckland casino with a friend, who suggested a scheme to obtain money from Sri Lankan immigrants. In May 2013, he was sentenced to six months' community detention and to repay the \$35,000 taken by him. By the time of sentencing, he had paid back \$10,000. He later paid back the remaining \$25,000 at \$200 per week and he completed his community detention. In February 2015, he was sentenced for the eighth offence. He again completed his sentence community detention and paid back the money taken by him.

[23] A few years ago, the appellant attended group therapy for problem gambling. The group have shared their telephone numbers so he can call them if he is in difficulty. He could not attend further therapy because he works night shift and must sleep during the day. He still has an urge to gamble if he has money in his hands and so, several years ago, he started paying his wages into his wife's bank account. He has stopped gambling and they are saving to buy a house.

[24] The appellant has had no other convictions or criminal charges in New Zealand or elsewhere.

[25] If he returned to Sri Lanka, the appellant could ask his family if he could live in the family home. However, he does not wish to return to Sri Lanka because he has been away for 12 years, only his oldest sister lives there, the government does not treat Tamil people well and (if his wife and children followed him there) he would be afraid for his family's security. He does not believe that his wife's family in Sri Lanka would help him. He could go to India, where his parents and siblings might offer some assistance, but he does not know if he could get a permanent visa to remain there. Despite the fact that he does not want to go to Sri Lanka alone, if he has to leave, his wife would stay with the children. For many years, he and his family have had a stable life in New Zealand. It would be harmful to his children's education, quality of life and their connection with him if he was separated from them while they were still at school.

Evidence of the Appellant's Wife, AA

[26] The appellant's wife states that she comes from Jaffna province in Sri Lanka. Her mother passed away in 2019. Her father and three sisters live in

Sri Lanka and her brother lives in Germany. In 2003, she obtained residence in New Zealand under the Refugee Family Support Category through another sister, who lives permanently here with her husband and three children. The wife believes that her sister and husband obtained refugee status in New Zealand because the husband had been in a Tamil freedom movement. The wife became a New Zealand citizen in 2007 or 2008.

[27] In August 2006, the wife married the appellant, as arranged by their families. She sponsored the appellant for a visitor visa to enter New Zealand and, in April 2007, he came to New Zealand. She supported his resident visa which he was granted in May 2009. They have a 14-year-old son, who attends high school, and a 10-year-old daughter, who is at intermediate school. The children are doing well at school. Since 2009, the wife has remained in New Zealand, except for one visit to Sri Lanka with her son in 2010. She was going to visit Sri Lanka with her daughter in the week after the Tribunal hearing. The children understand some Tamil language but do not speak it.

[28] In Sri Lanka, the wife was employed as a teacher. Her last full-time work in New Zealand was in 2006. Since then, she has had some part-time work on-call through an employment agency, mostly packing and scanning in a yoghurt factory. The family is supported financially by the appellant's employment. They have lived in a rented house for 11 years and are saving to buy their own house. She has diabetes, which she manages through her diet and avoiding sugar. The appellant had a gastric problem, but he is otherwise in good health.

[29] The wife owns a house in Puttalam, Sri Lanka, where her sister lives. The appellant could live there, if he needed accommodation. The appellant's family jointly own a house in Sri Lanka. He would like the house to be sold so they could have more money to buy a house in New Zealand. She and the appellant have no debts.

[30] The wife was not aware of the appellant's offences when they occurred or, until his charges, that he was gambling. He completed his sentences of community detention and repaid all the money taken from his victims. He has had no further convictions. The appellant has an automatic payment from his bank account to her bank account to pay the household expenses and she keeps an eye on his account to ensure that he is not gambling.

[31] The appellant applied for citizenship some years ago, but he was not approved because of his criminal record. He recently put in another application, but this was put on hold while he is liable for deportation. She would be happy if

the appellant could get citizenship. The family could then live together with more stability in New Zealand and the appellant could safely travel to India.

[32] The wife does not want to return to Sri Lanka. The economy is bad, and it is an expensive place to live. It is also a dangerous place, with a lot of crime. Tamils are arrested and jailed by the police. If the family returned to Sri Lanka, it would be difficult for them to adjust to life there and she would be afraid for the children's safety. If the appellant was deported, she would stay in New Zealand with the children and they could perhaps visit the appellant.

Documents and Submissions

[33] Counsel for the appellant has lodged written submissions (4 March 2022). Counsel also provides:

- (a) Letters of support from four work colleagues of the appellant.
- (b) A certificate stating that the appellant has provided 10 years' service to his employer.
- (c) A letter (17 August 2021) from the chief executive officer of the appellant's employer stating that the business is considered a provider of essential services during the COVID-19 Alert Level 4.
- (d) A letter (7 July 2021) from the Department of Internal Affairs to the appellant stating that he did not appear to be a person of good character for the purposes of his application for citizenship.
- (e) A handwritten statement (27 September 2021) by the appellant's son in which he states that the appellant is a hard-working night shift worker and that he does not want to see his father deported.
- (f) A handwritten statement (27 September 2021) by the appellant's daughter in which she refers to the appellant's work and support of the family.
- (g) School reports for the son (term 3, 2021) and daughter (mid-year 2021).

[34] Counsel submits, in summary, that cumulatively there are exceptional humanitarian circumstances:

- (a) There has been a long period of settlement by the appellant and his family in New Zealand.
- (b) Immigration New Zealand delayed exercising its power to deport the appellant, despite its early awareness of his convictions in 2013 and 2015.
- (c) The appellant has a responsible employment role in an essential industry, which is integral to the welfare of his family. The wife and children would not follow him to Sri Lanka but would remain in New Zealand where the wife has limited prospects of obtaining full-time employment. The quality of life for the wife and children would be significantly diminished.
- (d) Returning the appellant to Sri Lanka would be like sending him to a foreign country, given that he has not spent any significant part of his adult life there.
- (e) It is uncertain whether the appellant could avail himself of his refugee status in India after living in New Zealand and given the change in circumstances in Sri Lanka (Article 1C of the Refugee Convention 1951).

[35] Counsel submits that deportation would be unjust or unduly harsh:

- (a) Although the appellant's offences were serious, as they involved dishonesty, abuse of the immigration system and several victims, they occurred several years ago, with the final sentence reflecting multiple mitigating factors.
- (b) The best interests of the appellant's children are for the appellant to remain with them in New Zealand.
- (c) There would be a lack of support for the appellant in Sri Lanka, if he returned there, and conditions which pose risks to anyone of Tamil descent (such as the appellant) who returns there.

[36] Counsel submits that it would not be contrary to the public interest to allow the appellant to remain in New Zealand because the appellant has not reoffended for several years since his last conviction. The risk of reoffending has been limited

by steps taken by the appellant and his wife to cut off his source of funds for gambling.

[37] Counsel submits that the appeal should be allowed by cancellation of the appellant's liability for deportation or, at least, by suspension of his liability for deportation on the condition of good behaviour.

THE RESPONDENT'S CASE

[38] For the respondent, counsel has lodged:

- (a) Submissions (7 March 2022).
- (b) A copy of the file prepared for the Minister of Immigration before the deportation liability notice was issued.
- (c) A copy of the appellant's application for residence (23 June 2008).
- (d) Electronic case notes for the appellant and his wife.

[39] Counsel submits that the appellant's circumstances do not meet the high threshold of exceptional circumstances of a humanitarian nature for the following reasons:

- (a) In the context of deportation, separation from family in New Zealand is not itself an exceptional circumstance of a humanitarian nature.
- (b) The appellant could reintegrate into life in Sri Lanka, where he is familiar with the language, culture and customs, he owns property and has the prospect of support from family.

[40] Counsel submits that deportation would not be unjust or unduly harsh when the nature of the appellant's offences is weighed against any exceptional circumstances of a humanitarian nature. Further, it would be contrary to the public interest for the appellant to remain in New Zealand, taking into account the risk of reoffending, the interests of family unity and integrity of the immigration system.

STATUTORY GROUNDS

[41] The appellant's liability for deportation arose under:

- (a) Section 161(1)(a)(iii) of the Immigration Act 2009 (the Act) because he has been convicted of seven offences for which the court has the power to impose imprisonment for a term of three months or more if committed at any time not later than two years after he first held a residence class visa.
- (b) Section 161(1)(b) of the Act because he has been convicted of one 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 he first held a residence class visa.

[42] 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.

[43] 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 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.

[44] 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 *Madaffer v Australia* (Communication No 1011/2001, UN Doc CCPR/C/81/D/1011/2001, 26 August 2004) at [9.8].

ASSESSMENT

Whether there are Exceptional Circumstances of a Humanitarian Nature

[45] As to whether circumstances are exceptional, the Supreme Court noted, in *Ye v Minister of Immigration*, at [34] that they “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”.

[46] The High Court has held that the stringent statutory test of “exceptional circumstances of a humanitarian nature” cannot be equated with “compassionate factors”, circumstances that are more than simply “routine”, or “genuinely concerning circumstances”. The High Court has also noted “the high threshold for a finding of exceptional circumstances of a humanitarian nature” — see *Minister of Immigration v Jooste* [2014] NZHC 2882, [2015] 2 NZLR 765 at [45].

The appellant's wife

[47] On the evidence provided, the Tribunal accepts that the appellant and his wife have a longstanding, genuine and stable partnership. They married in 2006 and have remained together, despite various tests and stresses, such as separation immediately after marriage until the appellant could come to New Zealand in April 2007, the appellant's convictions in 2013 and 2015, his gambling problems and his liability for deportation.

[48] The Tribunal accepts that the appellant's deportation would be likely to result in separation of the appellant and his wife. The wife could follow the appellant to Sri Lanka. She could adjust to life in Sri Lanka, despite a lengthy time in New Zealand, given that she was born there, she is familiar with the way of life there, she has family to support her and she owns property there. However, the wife has stated that she will not follow the appellant to Sri Lanka because the children, now 14 and 10 years old, have lived all their lives in New Zealand and she does not consider Sri Lanka to be a safe place.

[49] If the appellant is deported and the wife remains in New Zealand, it is unlikely that the couple could fund travel by the wife and children to Sri Lanka. In contrast to the present situation, where the wife and one of her children at a time have been able to visit Sri Lanka (with a 12-year interval), the couple will have significantly less disposable income. The appellant will have to fund his living expenses in Sri Lanka and is likely to have much less well-paid employment there. The wife is unlikely to find well-paid full-time employment and her resources are

most likely to be committed to living expenses for herself and a solo parent of the children in New Zealand, with no financial support from the appellant and immediate family support only available from her sister and her husband.

The appellant's children

[50] The Tribunal notes that, under Article 3(1) of the 1989 *Convention on the Rights of the Child*, in all actions concerning children, the best interests of the child are 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].

[51] The best interests of a child are normally met by the ongoing care of both parents, but this is not an invariable rule. The quality of the parent's relationship with the child must be considered. A father's relationship with his child might be given more weight if, for example, there has been a long period of contact and he provides emotional support for the mother and child — see *Fitzsimmons v Minister of Immigration* [2018] NZIPT 600519 at [96]. On the other hand, the interests of the child might carry less weight if, for example, a father has had sporadic contact with his child — see *GR (Fiji) v Minister of Immigration* [2019] NZIPT 600496 at [112]. The characteristics of the child are also important. Each case must be assessed on its own facts.

[52] The appellant has a close relationship with his children, having lived with and provided financial support to them throughout their lives. The appellant's daily support for the children would be lost if he was deported.

[53] The wife and children would not follow the appellant to Sri Lanka because of the perception of the appellant and his wife that the children would not be safe there. If deported, the appellant is unlikely to have physical contact with his wife and children for the foreseeable future. As a deportee, he would not be permitted to return to New Zealand to visit them here. As a solo parent here, it is not likely that his wife would be able to afford travel to Sri Lanka. She must first provide care and accommodation for herself and the children in New Zealand. It is unlikely that she would find well-paid employment, given that her recent work experience is in part-time low-skilled employment and that she has no qualifications in New Zealand. The appellant may find it difficult to contribute financially as well as he has limited prospects of finding well-paid employment as he has no work

experience in Sri Lanka, few transferable qualifications and only one sister available there to assist him. If the appellant returns alone to Sri Lanka, he could maintain contact with his children by electronic means, such as video calls, but his relationship with the children would be significantly diminished.

[54] While the appellant's wife might reasonably be able to return to Sri Lanka if the appellant is deported, the same cannot be said of the couple's children, now 14 and 10 years old. They would face a difficult adjustment because they have lived all their lives in New Zealand. They would be separated from their friends and schools here. They have no experience of life in Sri Lanka and are not familiar with the culture, way of life, education system or language. The children would have an opportunity for closer contact with their extended families, that is, the wife's father and her siblings and the appellant's sister in Sri Lanka and the appellant's mother and his siblings in India. However, the appellant and his wife have no right to reside in India.

[55] The Tribunal finds that it would be in the children's best interests for the appellant to remain in New Zealand where he is able to provide for them physically, financially, and emotionally.

Appellant's prospects in Sri Lanka

[56] It would be difficult for the appellant to re-establish himself in Sri Lanka. Although he is a citizen of that country, he has limited experience of life there because he left for India as a child and as a refugee. He has some knowledge of the culture and way of life in Sri Lanka, and he may be assisted in settling there by accommodation provided by his sister (his only family member in Sri Lanka) or his wife's family. However, as stated above, he has not lived there since he was a child, he will have no neighbourhood or work contacts there, and he has no local work experience and few transferable qualifications to assist him in finding employment.

Appellant's prospects in India

[57] There would also be challenges for the appellant to establish himself in India, having lived in New Zealand for nearly 15 years. He has some familiarity with life in India, having lived there for at least 15 years until 2006. He had education in India and work experience as an unqualified physiotherapist and as a driver in a family bakery business. He could expect some practical day-to-day support from his mother and siblings there.

[58] However, the appellant has no automatic right of residence in India. On the evidence, his close relatives have refugee status in India, not citizenship or residence. Their ability to sponsor the appellant to remain in India is unclear. He may be unable to avail himself of his own previous refugee status. He would be unlikely to succeed in a claim for refugee status now given the present conditions in Sri Lanka and after his long time in New Zealand. The appellant might obtain a temporary visa to remain in India or he may be permitted to live in India without a formal immigration status.

Conclusion on exceptional circumstances of a humanitarian nature

[59] Some of the factors identified above, by themselves, would be the challenging, but ordinary, circumstances of deportation, rather than exceptional circumstances of a humanitarian nature. For example, it would be challenging for the appellant to re-establish himself in Sri Lanka, despite support from his sister there and accommodation available from his wife's family. However, he faces greater challenges because his experience of Sri Lanka is effectively more than 30 years ago as a child. In New Zealand, he has a longstanding genuine and stable partnership with his wife, and he has lived with and supported his children throughout their lives.

[60] Similarly, the wife could be expected to live in Sri Lanka with the appellant, despite her long time in New Zealand, given that she was born there, is familiar with culture and way of life and has family support there. However, her (and the appellant's) primary concern is for the children. They are concerned for the children's safety if they have to live in Sri Lanka because they have lived all their lives in New Zealand, have no useful experience of life in Sri Lanka and a limited ability to communicate in the local language.

[61] Accordingly, if the appellant is deported, the wife and children will not follow him to Sri Lanka. Deportation would effectively end physical contact between the appellant and his wife and children. It would be difficult for the appellant and his wife to fund travel by the children to Sri Lanka and therefore the appellant's relationship with them would be reduced to electronic contact. Deportation would reduce the quality of life of the wife and children in New Zealand as they would lose the financial support of the appellant from his employment, his other support in their daily lives and the wife would have to support the children on her own. There would be similar difficulties if the appellant lived in India, where, in any event, he would have an uncertain immigration status. It is clearly in the best interests of the children for their father to remain in New Zealand with them.

[62] Assessing these circumstances on a cumulative basis, the Tribunal is satisfied that there are exceptional circumstances of a humanitarian nature in the appellant's case.

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

[63] 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, 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 appellant's offending

[64] The appellant is liable for deportation because he was convicted of eight offences of obtaining a pecuniary advantage by deception, which, in total involved just over \$40,000 taken from the victims. The appellant pleaded guilty to the offences.

[65] In respect of the first seven offences, which occurred in 2010, the Judge stated, in a sentencing indication (14 January 2013), that:

[1] ... The facts are briefly that [the appellant] preyed on members of his own community and offered to obtain permanent residence for persons from Sri Lanka present in New Zealand on payment of \$5,000. Over a period of time, he persuaded some seven persons to pay him \$5,000. No applications for permanent residence were lodged by the [appellant] who is not a licensed immigration adviser. The money was simply spent and lost, so that [the] total amount of loss for the seven victims of the offending is \$35,000.

[2] No doubt, even although the sums of money are only in the amounts of \$5,000, these sums for many of the victims would have been significant.

[66] The maximum penalty for each of the appellant's offences was seven years' imprisonment. The Judge noted the aggravating factors of a breach of trust, which included work colleagues and friends, a significant degree of premeditation and the time over which the offending took place. The Judge adopted a starting point of three years' imprisonment, which he reduced to 26 months after discounts for the appellant's guilty plea and no previous convictions.

[67] The Judge, in sentencing notes (22 May 2013), accepted that the appellant had paid \$10,000 to the victims and that he had offered to pay the balance of the money by weekly instalments. The Judge gave a further discount of four months

and, from a starting point of 22 months' imprisonment, sentenced the appellant to serve six months' community detention and to pay the balance of \$25,000 to the victims at \$200 per week.

[68] The appellant's eighth offence is recorded in the court record as having occurred between 11 April 2013 and 11 May 2014, that is, either before or after his sentence for the previous seven offences. The appellant was sentenced to serve four months' community detention and to make reparation of \$5,375. The Tribunal does not have a copy of the Judge's sentencing notes.

[69] The appellant committed offences which involved premeditated deception of several victims for significant amounts of money for his own financial benefit. His last offence was committed after he had been charged for the first seven offences. He received custodial sentences which, although not close to the maximum sentence of seven years' imprisonment, reflected the seriousness of his offending.

The appellant's exceptional humanitarian circumstances

[70] The appellant's offending must be weighed against his exceptional humanitarian circumstances, here the cumulative adverse effects on his wife and children, who will not follow him to Sri Lanka or India.

[71] The Tribunal notes that the appellant became liable for deportation when he was first convicted in May 2013 and his children were five and two years old. If he had been deported at that time, he and his wife would have had a difficult, but realistic, option of relocating to Sri Lanka with the children, who were then young and could more easily have adapted to a new way of life. The delay in activating the appellant's liability for deportation has resulted in significantly more serious consequences for the children who have become established in New Zealand and now do not have a viable option to follow the appellant to Sri Lanka. The effects of separation from the appellant are now significantly greater for them as they have lived with the appellant for their entire lives, that is, 14 and 10 years respectively.

Conclusion on unjust or unduly harsh to deport

[72] The appellant has committed a series of eight offences, with aggravating features such as premeditation and deception of vulnerable persons for significant amounts of money for his own financial benefit. However, deportation would also have serious consequences for the appellant's children, who have lived all their

lives in the appellant's care and have no viable option to follow to Sri Lanka, if he is deported.

[73] Weighing the reasons why the appellant is liable for deportation against his exceptional humanitarian circumstances, the Tribunal is satisfied that it is unjust or unduly harsh for the appellant to be deported from New Zealand.

Public Interest

[74] 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.

[75] 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.

[76] 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 (Elias CJ at [81]), may be relevant to the analysis of whether it would not be contrary to the public interest to allow him to remain in New Zealand.

Exceptional humanitarian circumstances making it unjust or unduly harsh to deport, as identified

[77] The exceptional humanitarian circumstances which would make it unjust or unduly harsh to deport the appellant have been found to be the cumulative adverse effects on the appellant's wife and, in particular, his children, which will be caused by his departure from New Zealand.

Family unity

[78] There is a public interest in the preservation of family unity and in the observance of New Zealand's international obligations in that regard. The appellant has a longstanding genuine and stable partnership with his wife and has lived with his children throughout their lives. It is not feasible for his wife and children to follow him to Sri Lanka as the children have lived all their lives in New Zealand and would face a very difficult adjustment to life in Sri Lanka. Deportation would significantly diminish the appellant's relationship with his wife and children. It is unlikely that the appellant and his wife could fund significant physical contact in Sri Lanka. It is in the best interests of the children and family unity for the appellant to remain in New Zealand.

Risk of reoffending

[79] The risk of reoffending is an important adverse public interest consideration. The degree of risk of future offending which the public can be expected to tolerate varies according to the severity of the offending. The more serious the crime, the lower the chance of reoffending must be, if it is not to trigger an adverse public interest finding. See *Pulu* [2007] DRT 034/05 (17 July 2007) [101]–[114], approved by the High Court in *Pulu v Minister of Immigration* [2008] NZAR 429 (HC) at [12].

[80] 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”.

[81] The Tribunal notes that the Department of Corrections' Advice to Courts (20 February 2013) stated that the appellant had a medium risk of reoffending:

Given [the appellant] continues to maintain his innocence, shifted responsibility onto the victims and denial of problem gambling issues, his risk of re-offending and of causing harm to others is assessed as medium. However, without appropriate intervention, his risk is elevated.

[82] In 2015, the appellant was convicted of an offence which was committed between April 2013 and May 2014. However, there has been a long interval since then to the hearing of this appeal, with no further offences. The appellant still acknowledges an urge to gamble, but he and his wife have taken practical steps to limit his access to money and his opportunities to gamble.

[83] There appears to be a risk of reoffending, given that the appellant committed an eighth offence after he had been charged and was awaiting sentence for the first seven offences and that his offences were motivated by a gambling problem, which he admits is an addiction he must continue to keep under control. However, the risk of reoffending can be mitigated by the order the Tribunal intends to make at the end of this decision, that is, to suspend the appellant's liability for deportation for a period of three years, and to make the suspension subject to the condition that he is not convicted of any imprisonable offence of dishonesty, committed within the period of suspension. The fact that deportation liability may be reactivated if the appellant breaches the condition will be a motivation for him not to reoffend. The period of three years will serve as a protection to the public against the potentially serious adverse effects of further offending by the appellant.

Conclusion on public interest

[84] Weighing the considerations which would make it in the public interest that the appellant leave (the risk of reoffending) 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 wife and children 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.

DETERMINATION

[85] The Tribunal finds that:

- (a) there are exceptional circumstances of a humanitarian nature; and
- (b) those exceptional humanitarian circumstances make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
- (c) 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.

Suspension of Deportation Liability

[86] The appeal being allowed, 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 is not convicted of any further imprisonable offence of dishonesty, committed within that three-year period.

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

Caution in relation to future travel

[88] While this appeal is successful for the reasons given, it simply means that the current deportation liability of the appellant arising from his offending is extinguished. It does not mean that the offending 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 he 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.

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

Order as to Depersonalised Research Copy

[90] 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 name of the appellant's wife.

"S Benson"
S Benson
Member

Certified to be the Research
Copy released for publication.

S Benson
Member