IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2022] NZIPT 505640**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**MK (India)**
Before:	M A Roche (Member)
Counsel for the Appellant:	J Turner
Date of Decision:	29 July 2022

DEPORTATION (NON-RESIDENT) DECISION

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

THE ISSUE

[2] The appellant's wife and two children are New Zealand citizens. The primary issue on appeal is whether the effect of his deportation on them, including his possible separation from them, gives rise to exceptional circumstances of a humanitarian nature.

[3] The Tribunal finds that exceptional circumstances of a humanitarian nature exist and allows the appeal for the reasons that follow. It orders a temporary work visa for 12 months be granted to the appellant.

BACKGROUND

[4] The appellant is from Punjab state in India where his mother and brother remain.

[5] In 2009, the appellant and his wife married in India. In June 2010, their daughter was born there.

[6] In 2011, the wife entered New Zealand as the holder of a student visa. She commenced studying towards the degree of Bachelor of Nursing.

[7] In February 2012, the appellant lodged an application for a work visa as the partner of a student. This application was declined in May 2012. A letter (7 December 2020) on the Immigration New Zealand file records that in this work visa application the appellant declared that he had lived in Italy from 2002 until 2011.

[8] In March 2014, the appellant lodged a further application for a work visa as the partner of a student. This was granted and in April 2014, he entered New Zealand as the holder of this visa. He has remained here since then. The daughter remained in India until March 2015 when she joined her parents in New Zealand as the holder of a visitor visa.

[9] In December 2014, the appellant's wife was granted a resident visa under the Skilled Migrant category relying on her employment as a nurse.

[10] The appellant was granted further partnership-based visas from time to time.

[11] In April 2015 the appellant's daughter was granted a resident visa.

[12] In January 2017, the appellant's wife was granted a permanent resident visa.

[13] In February 2017, the appellant's son was born. He is a New Zealand citizen by birth.

[14] In August 2017, the appellant's daughter was granted a permanent resident visa.

[15] In April 2018, the appellant lodged an application for a resident visa based on his partnership with his wife. The application form required him to disclose the countries he had previously resided in; he did not disclose his period of residence in Italy.

[16] On 30 October 2018, Immigration New Zealand wrote to the appellant and requested that he provide an Italian police clearance certificate. Immigration

New Zealand subsequently clarified that a certificate was required for each of the four locations the appellant had lived or worked in in Italy, namely Vicenza, Cosenza, Verona and Cagliari.

[17] In August 2020, the appellant's wife was granted New Zealand citizenship.

[18] In September 2020, the appellant's daughter was granted New Zealand citizenship.

[19] There was ongoing correspondence between the appellant and Immigration New Zealand regarding his Italian police certificates. On 13 April 2021, the appellant's then representative advised Immigration New Zealand that the appellant was unable to obtain a certificate from Vicenza.

[20] In June 2021 the appellant applied for a further partnership-based work visa. This application remains unresolved. On 1 September 2021, he was granted an interim visa.

[21] On 16 February 2022, the appellant's present counsel provided Immigration New Zealand with the Vicenza police certificate dated 29 September 2021 with translation. The certificate showed there had been a ruling and a sentence of one year, six months and 10 days imprisonment imposed on the appellant in respect of the crime of robbery in respect of an offence committed in December 2005.

[22] On 1 March 2022, the appellant's interim visa expired, and he became unlawful on 3 March 2022. Because he was unlawful (and therefore liable for deportation) Immigration New Zealand suspended the processing of his residence application in accordance with section 169(3) of the Immigration Act 2009 ("the Act").

[23] On 10 March 2022, the appellant lodged a humanitarian appeal against deportation with the Tribunal.

[24] On 12 April 2022, Immigration New Zealand conducted a verification interview with the appellant via Microsoft Teams concerning the content of the Vicenza police certificate.

STATUTORY GROUNDS

[25] 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.

[26] 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].

[27] 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

[28] The appellant's case is set out in submissions lodged with the Tribunal on 19 April 2022 and can be summarised as follows:

(a) The appellant, his wife, daughter and son are well settled as a family unit in New Zealand. The wife, daughter and son are all New Zealand citizens. They have a close relationship with the appellant and need his support. The appellant has a high level of connection to New Zealand and very limited connection to his country of citizenship, India.

(b) Separating the appellant from his wife and children will mean breaking up a close family unit. The family is experiencing significant trauma at present because the appellant's future in New Zealand is uncertain. This will become worse, and difficult to bear, if the appellant is deported.

(c) The appellant and his wife are paying a mortgage on the property they own which requires the income of both of them. The wife is a nurse and a critical worker working in aged care, where it is very difficult to find staff. However, her income is barely sufficient to cover the family's expenses and, without the appellant's income, the family will struggle to make ends meet.

(d) The long delay in Immigration New Zealand processing the appellant's residence and work visa applications, due to suspicions he has a criminal record, is out of the ordinary. He appears to have a conviction in Vicenza City, Italy for a robbery for which he was sentenced to a term of imprisonment. However, because this was over 16 years ago, and in his youth, it is not contrary to the public interest for the appellant to remain in New Zealand. In addition, the appellant states he was not involved in any offence of robbery in Italy. This is corroborated in a letter from the robbery victim.

(e) It is in the public interest for New Zealand citizens to be supported by the husband and father. The children also have rights to be supported by and have access to their parents under Articles 3, 7 and 9 of the United Nations *Convention on the Rights of the Child* (UNCROC).

(f) The Tribunal should grant a 12-month work visa to the appellant so he can remain in New Zealand lawfully while his work visa application is under consideration and so processing of his residence application can resume.

[29] In support of his appeal, the appellant provides documents including the following:

(a) New Zealand passports and citizenship certificates for the appellant's wife and two children.

(b) Vicenza police certificate with translation (29 September 2021).

(c) An opinion from an Italian lawyer (21 December 2021). The opinion concerned the process of criminal rehabilitation in Italian law by which a crime is deleted from the criminal record. The opinion noted that an order for the execution of the sentence had not been made

and noted that the appellant could not ask for rehabilitation before the sentence became irrevocable.

(d) Letters from the appellant and the wife (undated) explaining why the appellant should not be deported. The appellant says that separation would damage his relationships as a husband and as a father to his children. Trauma is too small a word to describe what they are going through. The family would not be able to survive on a single income and the wife who is a registered nurse would be unable to work when the country needs nurses.

(e) The wife explains that when the daughter was 15 months old, she left her behind in India to pursue nursing studies in New Zealand with goal that the family would settle here. The daughter was four and a half before the wife saw her again as the daughter was not granted a visa to join her earlier. Having gone through separation and readjustment as a parent the wife does not want the daughter to face it again, or for her son to have to experience it. She says that her mental state has been badly affected over the years they have been dealing with the appellant's residency issues. The thought of separation gives her anxiety, mood swings and panic attacks as she cannot imagine being the mother of two young children without having a husband here. The children have been adversely affected by the distress this has been causing. She and the appellant have bought a house and have a significant mortgage. She is able to work with the appellant looking after the children day and night in her absence. She would not be able to work when the country needs nurses the most (if the appellant is deported). She asks that this not be allowed to happen to a sincere and hardworking family.

(f) A letter from the appellant's 12-year-old daughter (24 March 2022). The daughter writes of her love for her father and the stress on the family concerning his immigration issues.

(g) A collection of photographs of the appellant with his family.

(h) Documents relating to the appellant and his wife's mortgage.

(i) A letter from the appellant's employer (14 March 2022). The employer states that the appellant had worked as a bus driver since

June 2017, that his conduct had been exemplary, that he was a valued member of the team, and the employer supports his residence application.

(j) A letter from the wife's employer (25 March 2022) confirming that the wife is employed as a unit coordinator/senior registered nurse and leads a team of registered nurses and caregivers.

(k) A statutory declaration by the appellant setting out the family's expenses (28 March 2022).

(l) A declaration from the victim regarding the robbery (16 March 2022) together with a copy of his Italian identity card and passport identity page. The victim states that in 2005, a group of people damaged and snatched belongings in his home. These people were flatmates of the appellant and he reported their names, and that of the appellant. He states that it was dark, and he could not identify the people involved well and thought the appellant was participating and gave his name to the police. After that, he tried not to involve the appellant but that was not an option as the police went ahead with his initial statement. He says that the appellant was not actively involved and was only accompanying his other flatmates, but he was named because he was present. He and the appellant are on good terms and he has nothing against him. He believes the appellant should not have been charged and asks that the allegations against him be ignored.

(m) A letter by the appellant (28 March 2022) regarding the robbery. The appellant describes an altercation that took place in the victim's apartment between his friends and the victim and his flatmates, who owed them money. He was also a friend of the victim and had previously flatted with him. He states that there was a heated argument with fighting and pushing but that he did not hit the victim or anyone else or snatch or take anything out of the house and that no one was hurt or injured physically. He states that he believes his name was reported to the police because of a grudge and that his only mistake was being present when the fight occurred. He states that he was released by the police after being investigated and that he had no idea that the incident from 16 years ago was carried on his records. He was 24 years old when the incident occurred and is now

40 with a wife and children. All his other police certificates from the Italian cities he lived in and India are clear, and his only life is to work and look after his family. He asks for another chance.

(n) Photocopies of two photographs of groups of youths who appear to be friends. Handwritten notes identify the appellant and the victim within the groups and the year to be 2004–2005.

(o) A letter from the President of the Deg Tegh Fateh Sikh Society, Christchurch (25 March 2022). The letter states that the appellant regularly attends programs organised by the Society and also contributes to social support and community activities with other people to organise free food and social services in Christchurch. It states that the appellant is polite, sincere and helpful and seems to be of good and moral character.

(p) A letter from the president of the South Island Sikh Society (25 March 2022). He states that the appellant is a regular attendee at the weekly gathering organised by the Society in Christchurch and that he is of good and moral character and the Society supports his application for permanent residency in New Zealand.

ASSESSMENT

[30] The Tribunal has considered all the submissions and documents provided by the appellant. It has also considered the appellant's Immigration New Zealand file in relation to his temporary and resident visa applications and its relevant electronic records.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[31] No information is provided on appeal concerning the appellant's remaining family in India (his brother and mother) and what his circumstances would be on return there. His appeal is based entirely on his long settlement in New Zealand, the settlement and New Zealand citizenship of his wife and children, and the effects on the family were he to be deported and separated from them.

[32] Given the circumstances of the appellant's wife and two children, were the appellant to be deported, it seems unlikely the family would accompany him, at

least in the short term. Aside from the fact that they are well-settled in New Zealand, dual citizenship is prohibited under the Indian Constitution and Indian nationals who acquire the citizenship of another country lose their Indian citizenship pursuant to section 9(1) of the Indian Citizenship Act 1955. It follows that neither the wife nor the children retain the right of citizenship in India. They could apply to become "OCI" (Overseas Citizens of India) card holders. Their eligibility to access services there, though, would be uncertain. Their entitlement to residency, work and education in India is unclear. Further, country information indicates that the wife would not be able to work as a nurse in India. Although there are proposals for change, the Indian Nursing Council Act 1947 currently prevents the registration of nurses with overseas nursing qualifications: "Govt Moves to Address Shortage of Nurses, Likely to Permit Foreign Graduates to Work in India" *Trend News Agency* (8 February 2022).

[33] It is accepted that the separation of the appellant from his family would cause distress to all of them. It is also accepted that the removal of the appellant would create difficulty for the wife continuing to work as a residential care nurse, as the absence of a second adult in the home would cause childcare issues before and after school and at nights. It is accepted that should the appellant be deported, the lack of a second income, and the difficulty for the wife working will compromise the ability of the appellant and his wife to pay their mortgage and may result in further upheaval for the family.

[34] The wife's evidence is that she has been experiencing mental distress as a result of the appellant's immigration difficulties. The Tribunal accepts that his deportation would cause further distress to her. She has already experienced separation from the appellant and her daughter in order to achieve the family's goal of her qualifying and working as a nurse in New Zealand. She says that she would find a second separation hard and does not want to face it again. Having resided in New Zealand since 2011, she is otherwise well settled here as a citizen and fulfilling a valuable role as a senior residential care nurse and unit coordinator.

[35] The best interests of the appellant's 12-year-old daughter and five-year-old son are a primary consideration for the Tribunal in accordance with Article 3(1) of UNCROC. 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].

[36] The Tribunal notes that the High Court has held in *Minister of Immigration v Jooste* [2014] NZHC 2882, [2015] 2 NZLR 765 at [47]–[48] that separation from a child, by itself, is not unusual in the context of deportation, and that something more is required for a finding of exceptionality. However, as the Tribunal (differently constituted) discussed in *GR (Fiji) v Minister of Immigration* [2019] NZIPT 600496 at [76]–[86], this presumption about family separation is based on a broad observation made some 20 years previously. The discussion was limited to "being separated from family" without any distinction between the differences in such circumstances, such as where there is separation of adult siblings as opposed to the separation of a parent from a young dependent child. While the potential separation of parent and child is not necessarily sufficient, in itself, to give rise to exceptional humanitarian circumstances, it is not necessarily insufficient either. Each case must be assessed on its own facts. The quality of the appellant's relationship with the child must be considered.

[37] In *Hai v Minister of Immigration* [2019] NZCA 55, the Court of Appeal noted the evidence of a forensic psychiatrist who specialises in the needs of children and adolescents who had provided a report in that case. At [23], the Court noted the evidence of that forensic psychiatrist that "there are methodologically robust studies showing long-term negative effects of father absence on children, which persist into adolescence and adulthood". The Tribunal notes this general advice when considering the best interests of the daughter and son. In the present appeal, the Tribunal notes the active and ongoing presence of the appellant in the lives of his two children.

[38] The daughter is 12 and the son is five. The evidence before the Tribunal establishes that the appellant is a devoted parent to them and that they presently live with both their parents in a stable family environment. The deportation of the appellant will bring about their separation from him, at least temporarily. This will deprive them of his support in their daily lives and the financial support which he provides that contributes to their current stable household setting. His departure will cause upheaval and distress within the family, will affect their mother's ability to work and to provide for them, in and around her work commitments, and may (at worst) necessitate them leaving their home if she cannot pay the mortgage. While it may be possible for them to gain residency in India and entitlement to education there, relocation, particularly for the daughter will disrupt their educations. They have grown up in New Zealand and are New Zealand citizens. Relocation to India, should that be possible, will require considerable adjustment on their parts. It is clearly in the best interests of the children to remain in

New Zealand in the stable environment they currently enjoy, in the care of both their parents.

Conclusion on exceptional circumstances of a humanitarian nature

[39] Having regard to the circumstances of the appellant and his wife and children, in particular the long settlement in New Zealand; the citizenship of the wife and children; the distressing effects on each member of the family should the appellant be deported, including the separation of the family, at least in the short term; and the disruption to the lives of all of them and to the education of the children, the Tribunal finds that the deportation of the appellant, at this time, would give rise to exceptional circumstances of a humanitarian nature.

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

[40] Whether deportation would be unjust or unduly harsh must be assessed in light of the reasons why the appellant is liable for deportation and involves a balancing of those considerations against the consequences of deportation: *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [9].

[41] The appellant is liable for deportation having become unlawful following the expiry of his most recent interim visa. As a consequence of this, Immigration New Zealand suspended the processing of his residence application.

[42] The situation that has led to the appellant becoming unlawful appears to have resulted from a lack of candour on his part concerning his period of residence in Italy and from his delay in providing the Italian police certificate requested by immigration New Zealand in 2018. The Vicenza certificate, when finally provided, showed there had been a ruling and a sentence of one year, six months and 10 days imprisonment imposed on the appellant in respect of the crime of robbery.

[43] In a letter to the appellant on 7 December 2020, Immigration New Zealand expressed concerns that he was withholding information from them. In the verification interview conducted on 12 April 2022, the appellant was asked to explain the reason for the delay in providing the certificate. The appellant replied that it was late due to COVID-19, and also that it was lost by the public prosecutor and then found. When questioned, he stated that he was unaware of the sentence until the certificate was obtained, that he had been aware of the investigation but that he had not been to court and had heard nothing from the lawyer involved.

[44] The inference might be taken that the delay in producing the certificate may be related to an attempt to conceal its contents from Immigration New Zealand. This, and the sentence itself, will be a character issue Immigration New Zealand will need to consider when processing of the appellant's residence application resumes. In conducting any character waiver, Immigration New Zealand will have to consider not only the offence and/or any intentional withholding of information when applying for a visa, but also how long ago the offending occurred, the appellant's family members lawfully and permanently in New Zealand and whether he has some strong emotional or physical tie to New Zealand (A5.25.1.b of immigration instructions, effective 30 March 2015).

[45] With regard to the offending and sentence, explanations have been advanced from the appellant and the victim that paint the appellant in a favourable light. Whatever actually occurred, the incident that gave rise to the sentence took place in 2005, when the appellant was a young man. His remaining Italian police certificates, his Indian police certificate and a New Zealand police vetting report obtained by the Tribunal (13 July 2022) are all clear.

[46] Weighing the delay in providing the certificate, and the possibility that this was the result of an attempt to conceal its contents, and the contents themselves (the sentence) against the exceptional circumstances of a humanitarian nature that have been found to exist, the Tribunal finds that it would be unjust or unduly harsh to deport the appellant before his application for residence is determined. Immigration New Zealand have the opportunity to consider all of his circumstances and determine whether or not to grant a waiver in respect of the character issues that it may raise.

Public Interest

[47] Where the Tribunal has determined that there are exceptional humanitarian circumstances which would make it unjust or unduly harsh for the appellant to be deported, it must also be satisfied that it would not be contrary to the public interest to allow the appellant to remain in New Zealand. 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 he leaves: *Garate v Chief Executive of Department of Labour* (HC Auckland, CIV-2004-485-102, 30 November 2004) at [41].

[48] In the present appeal, the public interest is engaged in preserving the integrity of the immigration system. It is necessary that information provided by

people applying to Immigration New Zealand for visas can be relied upon and that all relevant information is disclosed. There is also a need for deterrence in respect of dishonesty in immigration applications. This need is at its highest in the case of offending for an ulterior motive, such as for pecuniary gain or people trafficking. As noted earlier, there will be character issues for Immigration New Zealand to assess arising from the Vicenza police certificate when the processing of the appellant's residence application resumes.

[49] There is also a public interest in maintaining the unity of families and in complying with the obligation in Article 3.1 of UNCROC to give the best interests of children primary consideration in decisions affecting them. The Tribunal has found that the children's best interests lie in the appellant remaining in New Zealand with both the appellant and their mother.

[50] The appellant's wife fulfils an essential role in New Zealand as a senior residential care nurse at a time when there is both a chronic shortage of nurses and a pandemic. There is a public interest in her maintaining her present employment at this time. The appellant's presence is necessary for this.

[51] Weighing the various public interest considerations, the Tribunal determines that it is not contrary to the public interest to allow the appellant to remain in New Zealand for the period of the temporary visa the Tribunal intends to order. This will allow him to remain with his family and support them while the processing of his residence application resumes. The outcome of that application, including any considerations of character, will be a matter entirely for Immigration New Zealand.

DETERMINATION

[52] For the reasons given, 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 the current time.

[53] The Tribunal also finds that it would not in all the circumstances be contrary to the public interest for him to remain in New Zealand at the present time.

[54] 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 from the date of this decision.

[55] The appeal is allowed on those terms.

Order as to Depersonalised Research Copy

[56] 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 his identification. This is to protect the privacy of the appellant's wife and children.

"M A Roche"
M A Roche
Member

Certified to be the Research Copy released for publication.

M A Roche
Member