IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2022] NZIPT 505532**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**AV (Tuvalu)**
Before:	B L Burson (Member)
Representative for the Appellant:	A Talava
Date of Decision:	10 August 2022

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellant, a 55-year-old citizen of Tuvalu, against his liability for deportation which arose when he became unlawfully in New Zealand.

THE ISSUE

[2] The primary issue on appeal is whether it would be unjust or unduly harsh for the appellant to be deported from New Zealand.

[3] The Tribunal allows the appeal and orders that the appellant be granted a resident visa.

BACKGROUND

[4] The appellant was born on Ocean Island (also known as Banaba, now a part of Kiribati) in the mid-1960s. He has one sister. When aged approximately two, the appellant contracted meningitis and lost his ability to hear and talk. He was educated in Fiji at a school (variously described in the file as being either a school of deaf children or for intellectually handicapped children) for almost five years before being sent back to live with his family in Tuvalu.

[5] In December 1995, the appellant arrived in New Zealand with his mother as the holder of a visitor visa, along with other family members. By this time, his mother had separated from his birth father (who worked as a seafarer and had been living in New Zealand since the 1970s) and he was brought to New Zealand by his mother and stepfather, his mother by that time having remarried. The appellant was granted further extensions to his visitor visa as was his mother.

[6] In September 1996, his mother applied for residence in New Zealand under the then Family Reunion (Parent) category and included the appellant as a dependent in her application. The appellant's mother's application was sponsored by his sister who was a New Zealand resident by that time. In support of this application, a clear police certificate from the Tuvaluan police (14 June 1996) was provided.

[7] However, the New Zealand Immigration Service (NZIS; predecessor of Immigration New Zealand) advised that, as the appellant was aged 19, he could not be included as a dependent child. He was invited to make an application for residence in his own capacity under the Family Reunion (Adult Sibling) category. The appellant lodged this application on 23 September 1996.

[8] An assessment by NZIS' consulting physician recommended that the appellant's application for residence be declined on the basis that his being deaf and mute meant he would be a burden on the New Zealand health system.

[9] In response, the appellant's then immigration advisor filed a report on the appellant by Dr Anthony Asteriadis, a consultant psychiatrist (4 January 1997). In his report, Dr Asteriadis notes that the appellant's communication with him was facilitated by the appellant's sister who attended the appointment. Dr Asteriadis notes the appellant did not respond to spoken speech but read his sister's lips and responded by signing. Dr Asteriadis noted that, the appellant presented as being "a lot younger than his years". After gaining an indication as to the appellant's life history, Dr Asteriadis concludes that the appellant had "a fairly concrete and simple approach to life" and was "very reliant on his parents". He was only able to do independent tasks around the house and could not function independently. Dr Asteriadis stated that, while the appellant's deaf and muteness were physical problems they also "undoubtedly have psychological and organic neurological aspects to them" which "may represent an underlying brain defect as well, causing some intellectual handicap". Dr Asteriadis concluded that:

> [H]aving these problems in itself constitutes serious emotional harm, that this has been going on for a long time and because of this longstanding problem he has not

> been able to function in normal society. He has only been able to function by living with his parents. They have moved to New Zealand and consequently he needs to be with them. I don't think he could function on his own. Providing that they are staying in New Zealand, I don't see any reasonable solution other than to grant him New Zealand residency to stay with his parents. I don't see how he could manage on his own in Tuvalu, given that there are no close relatives who will be prepared to look after him.

[10] This report was forwarded to NZIS' consulting physician. On 20 March 1997, NZIS wrote (by fax) to the appellant's immigration advisor, stating that its consulting physician had recommended that the appellant's application be assessed "on humanitarian grounds given that [the appellant] is completely dependent on his family". NZIS requested a full statement from the appellant setting out the humanitarian aspects of this implication including what would happen to him if he was required to return to Tuvalu.

[11] Further letters were written to the appellant's immigration advisor on 30 June 1997 and 30 September 1997 requesting further information in relation to his applications under the Family Reunion (Adult Sibling) category and the Humanitarian category. In relation to the former, it was requested that the appellant provide evidence that his entire family are all in New Zealand and had New Zealand residence. In relation to the latter, the request for the full statement and supporting documents was reiterated.

[12] No further Information was provided and, on 4 November 1997, NZIS declined his application. The appellant became unlawful in New Zealand but remained living in New Zealand with his family and found casual work in New Zealand alongside his stepfather.

[13] The appellant's birth father promised to resolve the appellant's immigration situation in New Zealand, but he died unexpectedly at sea in October 1999. A copy of the death certificate of the appellant's birth father (22 December 2011) confirming his death at sea near the Poor Knights Islands in October 1999 is on the file.

[14] In 1997, the appellant's mother was diagnosed with cancer and he cared for her along with his sister and stepfather. She made a full recovery, but passed away two years ago.

[15] On 26 May 2020, through the local Member of Parliament, the appellant requested that he be given a one-day visa under section 61 of the Immigration Act 2009 (the Act) to allow him to lodge his present appeal. The application was supported by the Member of Parliament and with the following documents:

(a) A letter (undated) from the appellant's niece (the first niece) who he travelled with to New Zealand in 1995. She describes the appellant as being a "gentle, caring, kind-hearted, God-fearing, hardworking and compassionate person". She confirms the appellant provided care for his mother/her grandmother while she recovered from cancer, and as she aged, became her "first choice" for help and support over herself and mother. He provided great care to her, but she passed away in 2018. She describes the particularly close bond between the appellant and his mother.

(b) A letter from a work colleague of approximately 15 years who describes the appellant as reliable and trustworthy.

(c) A letter (undated) from another niece (the second niece) who is a New Zealand citizen who confirms that the appellant was of great help to her mother (the appellant's sister) when her grandmother (the appellant's mother) was ill. She states the appellant has no immediate family in Tuvalu as they all reside in New Zealand.

(d) A letter of support (25 August 2019) from another co-worker stating the appellant's reputation as an honest and reliable employee.

(e) A letter of support from Reverend Iopu of the Tuvalu Christian Church who states that having been in New Zealand for quite some time, the appellant had "established a solid foundation for himself in our community". He describes the appellant as being of good character and brought up in a family which practises and embraces Christian principles and values. He expresses concern for the appellant were he to be deported to Tuvalu given the adverse impacts of climate change there.

(f) A letter (29 August 2019) from the appellant's stepfather confirming he has known the appellant since the appellant was six years old and he is a very reliable, humble and honest person.

[16] On 9 November 2021, the appellant was granted a one-day visitor visa. His appeal was received by the Tribunal on 9 December 2021. On 23 February 2022, the appellant's representative (Reverend Talava) stated that, due to his disability, the appellant is "not able to write a letter 'expressing his emotional struggle to get

residency for a long time'". However, Reverend Talava filed the following documents:

(a) A letter (23 February 2022) from the appellant's sister. She confirms that she migrated to New Zealand in 1989 and decided to try and bring her mother and brother to New Zealand. She described the close bond between the appellant and their mother, for whom he cared for when she was unwell. She states that the passing of their mother has had a "strong impact" on the appellant, who cries a lot at the loss. She also describes the close relationship between themselves as siblings. Both parents are deceased, and with the passing of an uncle last year, there is no one in Tuvalu who could look after the appellant; she is "the only one surviving that will truly love him and keep him safe."

(b) A copy of the letter from the first niece submitted with the section 61 application.

(c) A letter (23 February 2022) from the second niece, repeating the matters raised in her letter in support of the section 61 request.

(d) A letter (23 February 2022) from Reverend Iopu repeating the matters he raised in his letter in support of the section 61 request.

(e) A letter (11 November 2021) from the appellant's employer confirming the appellant was a hard worker, who communicated with others though usage of notes and hand gestures.

(f) A letter (20 November 2020) from a family friend who has known the appellant since he was a child. Now living in New Zealand, the friend confirms the appellant participates in church and community life, and that he has no close relatives in Tuvalu. Rather "the people he loves and knows every day of his life" reside in New Zealand.

[17] On 5 August 2022, the Tribunal received further submissions from Reverend Talava in support of the appeal along with a copy of the biodata page of the appellant's sister's New Zealand passport and a copy of a page from the first niece's passport with whom Reverend Talava states the appellant is now living with. In his submissions, Reverend Talava draws attention to the following:

(a) The appellant has been living in New Zealand for a long period of time now. He was brought to New Zealand by his mother, with whom he was very close, and whom he helped look after until her death. His only sibling lives in New Zealand as a citizen, and he has many uncles, aunts and cousin who are New Zealand citizens or residents.

(b) The appellant has no support available to him in Tuvalu, where he would face harsh living conditions. Citing *Tuvalu Economic and Development Strategy Handbook: Volume 1 Strategic Information and Development* (International Business Publications, United States of America, 2014), Reverend Talava notes that families often are compelled to live in overcrowded conditions and have limited employment options, and Tuvalu has "a serious problem of lack of clean water, proper sanitation and health concerns. Citing population data from the South Pacific Commission *Pacific Island Populations – Estimates and Projections of Demographic Indication for Selected Years* (2013)*: Tuvalu*, Reverend Talava notes that Tuvalu's existing problems will be exacerbated by population increases; from an estimated 11,000 at present to an estimated 14,400 by 2030, and 19,600 by 2050. Further, population density is projected to increase from 420 persons per 2 square kilometres to 556 persons per 2 square kilometres.

(c) The appellant's life is threatened in Tuvalu by rising sea levels which cause frequent flooding that swamps parts of the islands and constantly contaminates its water supply. Tuvalu's geomorphology is porous so even when the land is not flooded, the sea water penetrates the rocks under the land increasing salinity of fresh ground water supplies. This means most water needs must be met using rainwater catchment systems. Just a short period of a few weeks without rain can lead to drought. Although, as a result of a particularly severe drought in 1999, a desalination plant has been purchased, it is only used in Funafuti during droughts because of its high operating costs.

STATUTORY GROUNDS

[18] 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—
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> (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.

[19] 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].

THE APPELLANT'S CASE

[20] The appellant's case is set out in the appeal form and the letters lodged with the appellant's section 61 request and with the Tribunal on 23 February 2022 and 5 August 2022. It can be summarised as follows:

(a) The appellant has been living in New Zealand for most of his life. Now aged in his mid-50s, he was brought to New Zealand by his now deceased mother when aged 19. The appellant is deaf and mute and relies on his family for his everyday needs. In contrast, in Tuvalu, there is nobody to care for him.

(b) The appellant is settled into the Tuvaluan community in New Zealand.

(c) In Tuvalu, he will face economic hardship and be vulnerable to the impacts of climate change.

ASSESSMENT

[21] The Tribunal has considered all the documents provided by the appellant. It has also considered the appellant's Immigration New Zealand file in relation to his residence application and its relevant electronic records.

Whether there are Exceptional Circumstances of a Humanitarian Nature

Circumstances in New Zealand

[22] The appellant is deaf and mute. Although Dr Asteriadis' psychiatric report hints there may be some underlying intellectual disability, there has been no formal diagnosis in this regard. Nevertheless, the appellant relies heavily on his family for his needs.

[23] He has been living in New Zealand for most of his life. His mother, prior to her death, was a New Zealand permanent resident. His only sibling, a sister, lives here and is a New Zealand citizen. The appellant has been living as a much-loved member of a Tuvaluan family, the members of which include uncles, aunts, cousins and nieces, who have been living in New Zealand as citizens or residents. The appellant is also well-settled in the Tuvaluan community in New Zealand participating in church and community life.

Circumstances in Tuvalu

[24] There are no close family members in Tuvalu who can be reasonably expected to support the appellant. The one who might have, an uncle, died last year. The appellant would struggle to find any meaningful work.

[25] The Tribunal notes the concerns raised by Reverends Iopu and Talava in their submissions that that Tuvalu faces a number of challenges in the context of climate change. This is accepted. A useful summary of the climate risks, as well as some of the surrounding uncertainty, can be found in The World Bank Group and Asian Development Bank *Climate Risk Country Profile: Tuvalu (2021*). This report notes, as 'Key Messages', at p1, that "Tuvalu faces a diverse set of risks from climate change but data and reliable model projections are lacking." Risks include "potential threats to human [wellbeing] and natural ecosystems" from increased prevalence of heatwave, intensified cyclones, saline intrusion, wave-driven flooding, and permanent inundation." The report further notes that Tuvalu faces "a potential long-term threat from permanent inundation and wave-driven

flooding, and some studies have suggested that many of its low-lying islands will become uninhabitable within the 21st century." While Tuvalu's population have adapted to living in a dynamic ecosystem, climate change is likely "to increase its variability, pose new threats, and place stress on livelihoods" such that "communities are likely to need support to adapt and manage disaster risks facing their wellbeing, livelihoods, and infrastructure."

[26] In addition to the generalised risks faced by Tuvalu's population, as a deaf and mute person, the appellant is inherently going to be more vulnerable to natural hazards. For example, being hearing impaired, he would not be in a position to hear early warnings of impending events that may be broadcast over the radio and would need to rely on communication and sign language. There is no evidence that such extended family members in Tuvalu are proficient in sign language and the appellant would struggle to be able to have meaningful communication and interaction with his extended family members if he were in Tuvalu, let alone communication to keep him safe in the event of cyclonic wind and storm surge such as those associated with Tropical Cyclone Pam which devastated Tuvalu (and other Pacific countries) in 2015; see United Nations Office for Coordination of Humanitarian Affairs *Tuvalu: Tropical Cyclone Pam Situation Report No. 1 (as of 22 March 2015)* (22 March 2015).

Conclusion on exceptional humanitarian circumstances

[27] The Tribunal is satisfied that there are exceptional circumstances of a humanitarian nature. The appellant has been living in New Zealand for most of his adult life. His family are all here. He is deaf and mute. He is a much-loved part of a close-knit family long settled in New Zealand. His deportation from New Zealand can be expected to cause significant emotional distress to himself and sister, and to a lesser extent his nieces and other family members here. While it may be possible for the appellant to maintain some contact with family members in New Zealand over the telephone and internet, the reality is, to the extent this is available at all, the distress to himself and his family will remain.

[28] Further, the evidence establishes that the appellant has been particularly affected by the death of his mother to whom he was very close. She died here in New Zealand and his deportation will result in a loss of spiritual connection to her through his not being able to be physically present in places where they shared life together, and from where he can draw on memories of her to sustain him emotionally.

[29] It is clear from the NZIS file in relation to the appellant's residence application that it was contemplated that the appellant would likely secure residence either under the Family Reunion (Adult Sibling) category or under the Humanitarian categories as they then existed. There was over 20 years ago a recognition that, even if the appellant could not bring himself within the requirements of existing policy, there were strong and compelling humanitarian reasons why he could not realistically be sent back to Tuvalu given his then complete dependence on his mother (then alive) and family for his basic needs.

[30] It is not clear why the requests for further information were not actioned. It seems reasonably likely that the appellant knew nothing of this and was at all times relying on other family members and his then immigration adviser to progress the matter further. The possibility that the appellant may not have been at fault for his lengthy period of unlawfulness is noted but it is not relevant to the question whether there are exceptional humanitarian circumstances. As stated by the Court of Appeal recently, in *Minister of Immigration v Q* [2020] NZCA 288, at [33]:

> We agree […] that absence of fault is similarly incapable of amounting to an exceptional circumstance of a humanitarian nature, because it is not a consequence or effect of the deportation. Rather, it is a relevant consideration at the next two stages of the inquiry….

[31] What is clear, however, is that the humanitarian circumstances now are even more compelling than those as of 1996, given the length of time the appellant has been living in New Zealand, the settlement here of his extended family (and to the contrary, lack of familial support in Tuvalu), and the risks to his wellbeing (both in general with the population and differentially as a person living with disability) in Tuvalu associated with the impacts of worsening climatic conditions.

[32] Viewed cumulatively, the appellant's circumstances are well outside the normal run of things. He has exceptional circumstances of a humanitarian nature.

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

[33] 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]).

[34] 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].

[35] The appellant is liable for deportation because he has become unlawful in New Zealand. He has been living unlawfully in New Zealand for a considerable period of time and appears to have been working unlawfully for a number of years. The Tribunal notes and weighs that allowing the appellant to stay will have an impact on the integrity of New Zealand's immigration system. As against this, it is not entirely clear whether he should bear full responsibility for his being here unlawfully for so long, being reliant on family members to regularise the status. It seems that the plan may have been for the appellant's birth father to help regularise his status, but this was unable to be progressed following his birth father's death at sea in 1999.

Conclusion on injustice or undue harshness

[36] Bearing in mind the above factors, the Tribunal considers that it is unjust or unduly harsh for the appellant to be deported to Tuvalu.

Public Interest

[37] 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].

[38] The appellant filed a clear Tuvaluan police certificate with his original residence application in 1996. He has a clear New Zealand police report (24 May 2022).

[39] Although the appellant is deaf and mute, there is no evidence that he, in the almost 25 years he has been living here, has imposed any burden on the New Zealand public health service.

[40] There is a public interest in keeping families together such as this extended Pacifica family which have, for all intents and purposes, made New Zealand their home; see here Article 23(1) of the 1966 *International Covenant on Civil and Political Rights*.

Conclusion on public interest

[41] For the above reasons, the Tribunal is satisfied that it would not be contrary to the public interest to allow the appellant to remain living in New Zealand permanently.

DETERMINATION

[42] 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.

[43] 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 on a permanent basis.

Order for grant of a visa

[44] Pursuant to section 210(1)(a) of the Act, the Tribunal orders that the appellant be granted a resident visa.

Order as to Depersonalised Research Copy

[45] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to the identification of the appellant. This is because of the appellant's particular vulnerabilities.

Certified to be the Research Copy released for publication.

B L Burson
Member

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