IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2023] NZIPT 505908**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**OZ (India)**
Before:	M Benvie (Member)
Representative for the Appellant:	A McClymont
Date of Decision:	14 June 2023

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellant, a 31-year-old citizen of India, against his liability for deportation when he became unlawfully in New Zealand, following the expiry of his one-day visa.

THE ISSUE

[2] The primary issue on appeal is whether the appellant's physical paralysis and dependence upon personal and medical care, which is as a result of a workplace injury suffered in New Zealand, gives rise to exceptional circumstances of a humanitarian nature such that would make it unjust or unduly harsh for him to be deported from New Zealand.

[3] For the reasons that follow, the Tribunal finds that there are exceptional circumstances of a humanitarian nature and orders that the appellant be granted a resident visa.

BACKGROUND

[4] The appellant was born in India in 1991. He is the middle child of three children born to his parents. His father died when the appellant was young.

His mother and one brother live in Punjab state, India. His other brother lives in the Philippines.

[5] The appellant arrived in New Zealand in May 2012 on a student visa valid to 30 June 2013. He subsequently undertook studies at a New Zealand technical institute and obtained a further student visa valid to 13 January 2014. While undertaking his studies, and within the conditions of his visa, he also worked part-time for an employer at a car-dismantling yard.

[6] The appellant became unlawfully in New Zealand after 13 October 2014. He states that he was unable to apply for a further student visa due to a lack of funds. He had loaned money to one of his friends and this friend failed to repay the appellant. He unlawfully continued working at the car-dismantling yard due to his wanting to raise enough money to obtain a further student visa, to become lawfully in New Zealand and to complete his studies.

[7] In March 2017, the appellant was seriously injured when working at the car-dismantling yard. While removing a drive shaft from underneath a car that had been raised on a forklift, the car and forklift both toppled over on top of the appellant. After regaining consciousness, the appellant called his employer. The employer, knowing that the appellant was unlawfully working for him, decided that it should be claimed that the accident had happened at the appellant's home rather than at the workplace. To this end, and rather than immediately calling for an ambulance, the employer transported the appellant home where an ambulance was called. When later interviewed by the police, the employer denied that the accident occurred at his workplace and said that the appellant "used to work for him two years ago" and that he had been injured working on a car at home. Following further enquiries, the police concluded that the accident had in fact occurred at the employer's workplace. The partially redacted police record (1 April 2017) states:

> Conclusion
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> After reviewing the formal statements taken from [name redacted] and [name redacted] and the notebook statement from [name redacted], it appears that [the appellant] was injured at his work address and [name redacted] has attempted to cover the incident up by driving [the appellant] home afterwards.

[8] The appellant was transported by ambulance to hospital and was operated on that evening. His spinal cord was damaged and a steel rod was inserted to support his spine. His entire body below his ribcage was paralysed.

[9] After a week in hospital, he was transferred to a spinal rehabilitation unit. Here he was shown how to live as independently as possible despite his injuries and being unable to walk.

[10] In May 2017, while the appellant was receiving rehabilitation treatment at the spinal unit, he was served with a deportation order by Immigration New Zealand. In a distraught state of mind, he discharged himself from care and travelled to Rotorua. His former employer had another business in Rotorua and had promised to provide the appellant with a job and a place to live. The appellant lived in Rotorua in a relocated house that had been moved inside the employer's car-dismantling yard. The house was in a poor state of repair. It had no power, heating or running water. Unable to care for himself properly, and fearful of using health services because of his immigration status, by mid-2018, he had developed severe pressure wounds, sepsis and skin ulcers.

[11] In August 2018, having been encouraged to do so by members of a church he visited, he finally contacted his Accident Compensation Corporation (ACC) case manager and told her about his health conditions. He was subsequently transported to the hospital. At the hospital, the appellant again underwent surgery, received blood transfusions and remained in a ward for about six weeks while he recovered. He was then transferred to a private hospital where he continued to recuperate and undertook physical rehabilitation for approximately 18 months.

[12] In May 2022, following a request for Ministerial intervention, the Associate Minister of Immigration cancelled the appellant's deportation order and granted a one-day visa under section 61 of the Immigration Act 2009 so as to allow the appellant an opportunity to file an appeal to the Tribunal.

[13] In November 2022, the Tribunal received the appellant's humanitarian appeal.

[14] The appellant states in his written statement that he sold his share of a family farm before coming to New Zealand and that he also borrowed some money from his brother to fund his study here. He says that his mother raised him and his brothers as a solo parent and that "living in rural India, money was always tight".

[15] The appellant continues to receive assistance from ACC for rehabilitation, daily personal care and medical needs. He is wheelchair bound and requires an ongoing supply of consumables to assist with his personal cares. He does not

want to return to India and fears that his health will deteriorate if he is required to leave New Zealand. He is grateful for the assistance he has received from ACC which has allowed him to begin to live independently. He hopes to be able to find work in the future so as to support himself financially.

STATUTORY GROUNDS

[16] The grounds for determining a humanitarian appeal are set out in section 207 of the Immigration Act 2009 (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
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> (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

[17] The Supreme Court stated that three ingredients had to be established in the first limb of section 47(3) of the former Immigration Act 1987, the almost identical predecessor to section 207(1): (i) exceptional circumstances; (ii) of a humanitarian nature; (iii) that would make it unjust or unduly harsh for the person to be removed from New Zealand. The circumstances "must be well outside the normal run of circumstances" and while they do not need to be unique or very rare, they do have to be "truly an exception rather than the rule", *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34].

THE APPELLANT'S CASE

[18] The appellant's case is set out in his appeal form and counsel's written submissions (19 December 2022). It can be summarised as follows:

(a) The workplace accident saw the appellant suffer a traumatic spinal cord injury resulting in paralysis, a brain injury, a chest injury, bladder and bowel disfunction, and (over time) multiple pressure injuries secondary to the spinal cord injury. This confluence of injuries amount to circumstances outside the normal run of circumstances found in overstayer cases.

(b) The appellant's New Zealand employer was negligent, and also attempted to cover-up the workplace accident. Such actions may have worsened the injuries suffered by the appellant.

(c) The appellant has major physical and medical disabilities and is confined to a wheelchair. He requires regular medication, occupational therapy, physiotherapy, dietician assistance and ongoing medical assessments. In India, disabled persons face significant barriers in accessing healthcare and employment and are subjected to societal discrimination and stigma.

(d) Allowing the appellant to remain in New Zealand would not be contrary to the public interest. Although the appellant did not hold a valid visa at the time of his accident, a New Zealand employer hired him to work in an unsafe environment and then attempted to hide the workplace accident. Rather than shift the burden for the consequences of the workplace accident to India, New Zealand has a responsibility for what occurred. This is particularly so given the importance of preventing and remedying migrant worker exploitation.

(e) The reasons why the appellant is liable for deportation are outweighed by the consequences for him of returning to India.

[19] The following documents have been provided on appeal:

(a) A copy of the appellant's Indian passport.

(b) A copy of the counsel's written submissions (5 November 2021) to the Associate Minister of Immigration and the Associate Minister's letter (20 May 2022) in response advising of the cancellation of the appellant's deportation order and grant of a one-day visa under section 61 of the Act.

(c) A copy of a New Zealand Police report (16 March 2017) relating to the workplace accident, concluding that the accident had in fact occurred at the employer's workplace.

(d) A written statement by the appellant.

(e) A copy of an ACC support needs assessment (9 December 2022), and an ACC recovery plan for the appellant.

ASSESSMENT

[20] The Tribunal has considered the submissions and documents provided by the appellant. It has also considered the Immigration New Zealand files in relation to his temporary visa applications.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[21] 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 physical and medical issues

[22] In a workplace accident in March 2017, the appellant sustained a traumatic spinal cord injury. Medical records note his resulting complete paraplegia at level L2, ASIA impairment grade A (this grade means that there is no sensory or motor function preserved in the sacral segments S4-S5). The medical records also note cauda equina syndrome with neurogenic bladder (a neurologic disorder causing the appellant's bladder and bowel dysfunction).

[23] The appellant's ACC support needs assessment report (the ACC needs assessment report) included a 1-7 scale rating for both his functional independence measure and his functional assessment measure, where '1' equates to needing total assistance and '7' to having complete independence. His toileting self-care is assessed at 1, bathing self-care at 3 (moderate assistance) and bladder control at 1. Transfers to a bed, chair or wheelchair are assessed at 4 and transfers to the toilet or a shower or bathtub at 1. ACC's needs assessment recorded that the appellant required ACC-funded attendant care and nursing for a total of 35 hours per week and home help for 19.5 hours per week. Because of his infected wounds and sepsis in 2018, his support workers check his skin each day following his shower to ensure that there are no new wounds or skin breakdowns.

[24] The ACC needs assessment report also records that the appellant is not entitled to financial support from Work and Income New Zealand or from ACC (as he was a "non-earner" as at the date of his accident). It is noted that the appellant was living with three flatmates, one of whom was his cousin.

[25] It is apparent that ACC-funded attendant care and nursing treatment would not be available for the appellant outside of New Zealand (see Accident Compensation Corporation *Keep Getting Payments If You Move Overseas* (17 May 2023) at www.acc.co.nz).

[26] Counsel submits that the appellant's medical and physical needs mean that, if returned to India, he faces significant barriers to maintaining reasonable health given his circumstances and the health system there.

[27] The Tribunal notes that the Columbia University Mailman School of Public Health's report *Comparative Health Policy Library: India* records that the Indian healthcare system operates on a dual public and private model, with the public system being underfunded and the private only available to those who can pay:

> The health system, according to The Commonwealth Fund in India is characterized by two very different sectors: the public, and private systems. Indian citizens have access to free outpatient and inpatient care in public, government facilities. The Constitution of India states that the government is to ensure the right to health for all. In this sector, health coverage is universal but the system is under-funded and facilities experience shortages of staff and supplies. Due to the lack of resources and services, many Indian citizens turn to the private sector for care. This becomes difficult to access for lower-income individuals because most of the health system is funded by out-of-pocket payments. From 1995 to 2014, 65% of India's healthcare spending came from personal budgets.
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> The public health system is governed by India's 28 states and seven territories independently, which has created stark differences between each one. There are variations in delivery models, insurance coverage, availability, and access. Health disparities are prevalent between poorer and richer states with underfunded health systems that in many cases are inefficiently run and underregulated…

[28] It has been recently reported that, as at March 2022, the private sector played a major role in primary, secondary or tertiary care in the Punjab (the appellant's home state) and nearly 68 per cent of the money spent under the National Health Protection Scheme (also referred to as Ayushman Bharat Yojana) over the previous two years had gone to private sector hospitals; see K Talwar "Healthcare in Punjab Faces Fresh Challenges" *The Tribune* (22 March 2022).

[29] Having considered this evidence, the Tribunal finds that in India, the appellant is likely to need to fund all or some of his ongoing medical and care costs. Although some limited family assistance may be available, without any personal income or inherent family wealth, the appellant is unlikely to be able to access or pay for the level of care that he requires in India. This will directly and negatively impact on his physical health and personal dignity. Alternatively, in New Zealand, due to a to a workplace injury, the availability of ACC-funded

attendant care and nursing treatment means that the appellant's ongoing medical and care needs can be met in New Zealand. This ongoing support includes a nurse changing his urinary bladder catheter weekly and daily attendant care with toileting and bathing.

[30] One of the purposes of New Zealand's ACC scheme is to provide rehabilitative services so that persons covered by the scheme can obtain appropriate medical treatment and rehabilitation services to enable them to return to independence and where possible, employment. The appellant's ACC report notes that the appellant's current immigration status precludes him from undertaking either study or paid employment and records that, if the appellant is able to regularise his immigration status here, vocational support would be available to him. In his written statement, the appellant expresses his gratitude for the medical and rehabilitation assistance he has received and states:

> Now I want to show them I can live independently in the wheelchair. I need to get a job again and contribute and I want to give back.

Conclusion on exceptional circumstances of a humanitarian nature

[31] The Tribunal finds that the appellant's spinal cord injury in New Zealand that has left him a paraplegic, and that his need for ongoing care, rehabilitative and vocational support, and the potential risks to his health and safety on return to India, are exceptional humanitarian circumstances.

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

[32] Where, as in this case, exceptional humanitarian circumstances are found to exist, the Tribunal must go on to assess whether those circumstances would make it unjust or unduly harsh for the appellant to be deported. According to the Supreme Court in *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [9], this assessment is to be made "in light of the reasons why the appellant is liable for deportation and involves the balancing of those considerations against the consequences of deportation".

[33] The appellant is liable for deportation having become unlawful in New Zealand following the expiry of his student visa. He has explained that he was unable to apply for a further student visa due to loaning money to a friend and not being repaid. His long-term unlawful presence in New Zealand, and his unlawfully working here after the expiry of his visa, raise issues of the integrity of the New Zealand immigration system.

[34] Against these considerations must be weighed the exceptional humanitarian circumstances that have been found to exist in this case which are identified above. Weighing these against the appellant's previous long-term unlawfulness in New Zealand and his unlawfully working here, the Tribunal finds that, on balance, it would be unjust or unduly harsh for him to be deported from New Zealand.

Public Interest

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

[36] The appellant has no criminal convictions in India and the New Zealand Police vetting report obtained by the Tribunal on 13 June 2023 is clear.

[37] In the present appeal, the public interest is engaged in preserving the integrity of the immigration system in two important respects. These are, firstly, the appellant's unlawful presence in New Zealand since October 2014 and, secondly, his unlawful working in New Zealand after the expiry of his visa. He chose to remain here unlawfully and to work without a visa. This undermines the integrity of the immigration system, even though he states that it was in the hope of advancing by further study here. However, and balanced against these considerations, the Tribunal must also take into account that the appellant undertook work for a New Zealand employer who was not only aware of the appellant's ineligibility to work here but also provided him with an unsafe workplace in which to work. In the circumstances he found himself in, it would have been difficult for the appellant to leave an exploitative workplace situation. The consequences for the appellant from working in his employer's unsafe workplace were both catastrophic and life-changing as he is now a paraplegic.

[38] The appellant's ongoing care and medical needs will continue to place demands and costs on the public healthcare system, but they are a direct result of his spinal injury in a New Zealand workplace and ACC has accepted cover in respect of these care and medical needs. To this extent, the costs incurred will be

funded by the ACC system, which has the purpose of managing personal injury and ensuring that, where injuries occur, the primary focus is on rehabilitation. Such rehabilitation having the goal of achieving an appropriate quality of life through the provision of entitlements that restore to the maximum practicable extent a claimant's health, independence and participation: see section 3 of the Accident Compensation Act 2001.

[39] The Tribunal finds that, in all the circumstances, it would not be contrary to the public interest for the appellant to remain in New Zealand.

DETERMINATION

[40] For the reasons given, the Tribunal finds that the appellant has established that he has exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for him to be deported from New Zealand.

[41] The Tribunal also finds that it, in all of the circumstances, it would not be contrary to the public interest for him to remain in New Zealand on a permanent basis.

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

[43] The appeal is allowed on those terms.

Order as to Depersonalised Research Copy

[44] This decision contains sensitive information about the appellant's medical conditions. For this reason, 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.

"M Benvie"
M Benvie
Member

Certified to be the Research Copy released for publication.

M Benvie
Member