IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2023] NZIPT 600734**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**CT (Philippines)**
Respondent:	**THE MINISTER OF IMMIGRATION**
Before:	Judge M Treadwell (Chair)
Representative for the Appellant:	The appellant represented himself
Counsel for the Respondent:	N Smith
Date of Hearing:	18 April 2023
Date of Decision:	16 August 2023

DEPORTATION (RESIDENT) DECISION

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[1] This is an appeal on humanitarian grounds by the appellant, a 33-year-old citizen of the Philippines who became a New Zealand resident in 2018, against his liability for deportation.

THE ISSUE

[2] The primary issue on appeal is whether there are exceptional humanitarian circumstances arising from the predicament faced by the appellant's wife, a nurse, and their child, both New Zealand citizens, if the appellant is deported.

[3] For the reasons which follow, the Tribunal finds that there are exceptional humanitarian circumstances in this case and that the other requirements of section 207 of the Immigration Act 2009 ("the Act") are met. The appeal is allowed. At the same time, the Tribunal suspends the appellant's liability for deportation for a period of three years, conditional on his not further offending in

that period in any way capable of attracting a term of imprisonment (whether such term is imposed or not).

BACKGROUND

[4] The appellant was born in the Philippines in 1990. His mother and his five siblings remain living in the Philippines.

[5] The appellant has been in a relationship with AA since 2014. AA had trained and worked as a nurse in the Philippines and came to New Zealand in 2015. She found work here as a nurse and became a New Zealand resident in 2016 and a New Zealand citizen in November 2022.

[6] On 3 October 2016, the appellant submitted an application for a work visa under the Family (Partnership) category but was refused as he did not meet the requirement in Immigration New Zealand instructions that the couple be living together. Instead, he was granted a visitor visa and, on 25 October 2016, he arrived in New Zealand. On 16 June 2017, he applied for residence under the Family (Partnership) category. That application was approved on 5 December 2017 and he was granted a resident visa on 5 January 2018. He found employment as an orderly at a hospital.

[7] The appellant and AA were married in early 2019. They have a daughter, BB, who was born in February 2021 in New Zealand. AA is currently pregnant with the couple's second child.

[8] The appellant is liable for deportation under section 161(1)(a)(iii) of the Act on the following grounds:

(a) He was convicted and, on 15 April 2021, sentenced in the Wellington District Court to six months' community detention for 19 offences of taking/obtaining/using a document to obtain a pecuniary advantage (arising from his taking details from patients' credit cards and purchasing items with them, in the course of his employment as a hospital orderly).

(b) The Court had the power to impose a sentence of imprisonment of seven years for each offence.

(c) He committed the offences between 5 May 2019 and 27 October 2019, which was not later than two years after he first held a residence class visa.

[9] On 28 October 2022, the appellant lodged the present appeal with the Tribunal against his deportation liability, on humanitarian grounds under section 206(1)(c) of the Act.

THE APPELLANT'S CASE

[10] The Tribunal heard evidence from the appellant and his wife, AA. What follows is a summary of the evidence given by them.

Evidence of the Appellant

[11] The appellant was born in Manila, the Philippines. His father, formerly a chef, died recently of an illness. His mother is aged 58 years and has diabetes. She is not working and lives in Manila in a two-bedroom house she owns, with the appellant's brother and two of his four sisters.

[12] One of the sisters living with the appellant's mother is disabled, in that she is substantially deaf and has impaired speech. She does not work and receives no government support. The other sister living with the appellant's mother works at a call centre. A third sister is employed in Manila and lives close to her place of work. She is separated and her daughter lives with the appellant's mother. A fourth sister is working in Dubai, United Arab Emirates, as a receptionist but will be returning to the Philippines in the new future.

[13] The appellant's brother was a store manager but lost his employment during the COVID-19 pandemic. He stays at home and looks after his mother.

[14] The family members in the Philippines are substantially supported by the appellant, who sends them approximately NZ$300–500 per week from New Zealand. They live in a two-bedroom house, though the appellant's brother eases the pressure by sleeping on the roof.

[15] The appellant completed college and attended a marine engineering course. In his last year, he had the option to become a naval cadet but the pay was poor and so he elected to work onboard an interisland tanker. He was employed there for two years as an able seaman.

[16] In 2013, the appellant met his future wife, a nurse, at a baptism for the child of a friend, at which they were both godparents. They developed a relationship.

[17] In 2015, the appellant's wife came to New Zealand and found employment here as a nurse. She became a resident in 2016 and the appellant was able to join her in October 2016. He found work in a hospital department.

[18] The appellant had no plan to start offending. On seeing patients' credit cards either lying around or in a sleeve on the backs of their telephones, he saw a way to get money to send to his family. He acknowledges that this was wrong and can only attribute it to his "not thinking" about either the harm or the consequences. He used the money to buy clothes and 'gadgets' which he did not really need. His thinking was so poor that he now acknowledges being pleased at his own cleverness, yet his plan was so poorly thought out that he gave his home address as the place to which goods he bought online should be couriered.

[19] The appellant's wife knew nothing of his offending. On the occasions when she noticed a new purchase, the appellant invented an explanation.

[20] The Court ordered the appellant to pay reparation of $2,500 to his victims, which, at the time of the appeal hearing, he had almost completed at the rate of $50 per week. During his nine months' probation, he attended counselling every month, organised by the Department of Corrections, to reflect on his offending and to learn how not to reoffend. It has taught him insight into 'triggers' which he should avoid.

[21] The appellant's daughter was born at 32 weeks, prematurely. She is still undergoing developmental tests and is expected to reach normal weight and markers by the age of two, though her cranial circumference is still undersize and requires monitoring. The appellant has structured his work, as a self-employed driver, around his wife's shift work as a nurse, so that he can care for their daughter while his wife is working. He thus spends many hours every day with her as her primary caregiver.

[22] If he is deported, the appellant thinks that his wife will not accompany him to the Philippines. She has worked hard to get the family to New Zealand, so that they can support their families back home. His wife has bought her family a house in the Philippines and is paying their mortgage for them. If she has to return, she will not be able to afford this and the house will have to be sold. It has been their

only chance at the security of a home and he fears that his wife will blame him so much that it will destroy their marriage.

[23] At present, the appellant is self-employed as a driver. He makes about NZ$500–600 per week, working when his wife is not at work, so that they can share caring for their daughter. At present, the appellant's wife is pregnant with their second child.

Evidence of the Appellant's Wife, AA

[24] AA confirmed that her parents, her two siblings and their families all live together in the Philippines, in a house she bought for them in 2017 for 2.3 million pesos (NZ$66,000). She paid a deposit of 600,000 pesos and is paying the balance by mortgage. The mortgage will be paid off in about five years. Prior to this, the family rented a house, the rental for which AA also paid.

[25] Her father was a 'trishaw' driver but does not work. Her mother is a dressmaker but does less now that she has had to have cataract surgery. She makes enough to cover daily living expenses.

[26] AA is the oldest sibling. Her sister, DD, is a primary teacher by profession but is now looking after her son. DD's husband is also a teacher. AA's brother, CC, works for a fast-food chain. His wife has just had a child and does not work.

[27] AA has a grandmother, an aunt and two cousins living in New Zealand.

[28] AA is worried about their daughter's development. She (the daughter) needs to see an ophthalmologist and is still under paediatric care. She is due for surgery when she is four, to correct a hernia scar on her abdomen that needs reconstruction and her vitamin B12 level is under close observation as a result. The hernia operation meant the loss of eight centimetre of her small intestine. Her head size is smaller than it should be at her age.

[29] As to her current pregnancy, AA is under 'high risk' observation because of her past pregnancy difficulties, which included both polycystic ovaries and preeclampsia, a serious blood pressure condition which is dangerous to both mother and child. She receives regular ultrasounds and is on calcium and aspirin. There is a risk of seizures, strokes and loss of the baby. Before her daughter was born, the daughter's heart rate dropped to 30 beats per second, which indicated that she was not breathing. Because of this, she was born by emergency caesarean section.

[30] In New Zealand, the appellant and AA rent a house. They are coping, but have no money to spare.

[31] If the appellant is forced to return to the Philippines, AA does not think she could go with him. They would be separated, which would cause her great distress and sadness. She would try to keep the relationship going from afar but it would be very difficult. She would also lose her husband's support in terms of childcare and the impact on the children of not having their father in their lives breaks her heart to think about.

[32] It would also mean that she could no longer afford the mortgage on her family's home. While she would find work as a nurse in the Philippines, the salary there is very low.

Documents and Submissions

[33] The appellant has lodged:

(a) an undated letter from the appellant;

(b) a copy of the New Zealand marriage certificate for the appellant and his wife;

(c) a copy of the Philippines 'report of marriage' certificate for the appellant and his wife;

(d) New Zealand citizenship certificate for the appellant's wife;

(e) a copy of the birth certificate for the appellant's daughter;

(f) a copy of the biodata page of the New Zealand passport for the appellant's daughter;

(g) a letter dated 20 March 2023, from a New Zealand medical centre, confirming that the appellant's wife is pregnant;

(h) a large bundle of medical reports on the appellant's daughter;

(a) a printout of the 'Google Finance' conversion rate from Philippines pesos to New Zealand dollars on 12 May 2023, being 35.1952;

(b) a payslip for the appellant's wife, indicating a base hourly rate of NZ$45.70 (NZ$95,340 full-time employment);

(c) correspondence between the appellant's wife and Te Whatu Ora as to access to records;

(d) a printout dated 12 May 2023 from 'Salary Explorer', indicating that the average monthly salary for a nurse in the Philippines is 32,600 pesos (391,000 pesos yearly, or NZ$11,109) and a nurse of between 10–15 years' experience earns 41,000 pesos per month (492,000 pesos yearly, or NZ$13,979);

(e) a letter dated 11 May 2023 from the Department of Corrections, confirming that the appellant completed his six months of community detention successfully, with no warnings or breaches and that he successfully completed all standard and special conditions of his supervision, including completing a prevention plan, and confirming that he is considered at low risk of reoffending; and

(f) records of multiple transfers of funds from the appellant and his wife to accounts in the Philippines, varying between NZ$350–1,400.

THE RESPONDENT'S CASE

[34] For the respondent, counsel has lodged written submissions dated 13 April 2023 and 25 May 2023, together with:

(a) the notes of Judge B Davidson on sentencing, dated 15 April 2021;

(b) the appellant's criminal and traffic history;

(c) a printout of Immigration New Zealand's electronic records in relation to the appellant and his wife; and

(d) the police summary of facts in relation to the appellant's offending.

[35] A copy of the file prepared for the Minister of Immigration at the time that the deportation liability notice was issued was also before the Tribunal and the parties.

[36] In summary, the respondent submits:

Exceptional humanitarian circumstances

(a) The appellant will be separated from his wife and two children who would remain in New Zealand if he is deported, but that is a matter between them, and no barriers to the family's return to the Philippines have been identified. The New Zealand citizenship status of his wife and daughter is not a reason for not deporting him.

(b) While deportation of the appellant will cause emotional upset for him, his wife and his daughter if they remain in New Zealand, emotional upset due to family separation is inevitable in all cases of deportation. Any inconvenience or hardship which may be caused by deportation is not exceptional and does not meet the threshold. As observed by Katz J in *Minister of Immigration v Jooste* [2014] NZHC 2882 at, at [47], with respect to separation of family members constituting an "exceptional circumstance":

> "Family separation through deportation will often cause 'difficulty, hardship and emotional upset' — but that in itself is not sufficient. Although such difficulties, hardship and emotional upset will clearly be 'compassionate circumstances' that may well be of 'genuine concern' something more is required for a finding of exceptionality."

(c) Separation needs to be considered against the fact that the appellant and his wife have spent significant time apart during their relationship. The appellant will be accustomed to what is required to maintain relationships from a distance. If deported, he could maintain contact with his New Zealand-based family by other means, such as via telephone, email and/or other video technology. The appellant's family would also be able to travel to the Philippines to visit.

(d) The appellant's parents and four of his siblings continue to reside in the Philippines, so deportation would unite him with his family there. Their presence means that there will be some level of support to assist him to reintegrate.

(e) The appellant is the primary carer of his daughter. His wife works full time and he has part-time self-employment. It is an inevitable result of deportation that there will be an impact on members of the family, including the inconvenience and upheaval of having to adjust caring roles. The appellant's wife has a number of relatives (an aunt and

two cousins) who are New Zealand citizens who may be able to offer support. New Zealand also offers numerous types of support to people bringing up children on their own. Further, the couple will be able to continue sharing the care responsibilities for their children if the family relocate together to the Philippines.

(f) The daughter was born prematurely and will require surgery in the future. However, there is no evidence of illness or long-term disability for her. If his wife and daughter remain in New Zealand and the daughter does require surgery, his wife has family members here who may be able to provide practical support. Should the family return together to the Philippines, then they would return to a country with a functioning healthcare system and may also benefit from the support of the appellant's wider family.

(g) The appellant will not be able to continue to support family members in the Philippines affected by COVID-19-related income loss if he is required to leave New Zealand. However, COVID-19 is not impacting on people's livelihoods as it was previously but, even if it was, the appellant would be able to work in the Philippines to support them.

(h) The appellant has raised no concerns about job prospects or other resettlement issues in the Philippines. He has NZQF (New Zealand Qualifications Framework) Catering Services qualifications. He is in good health and has been working since arriving in New Zealand. While wages in the Philippines are likely to be lower and the general standard of living not as high as in New Zealand, a difference in living standards is not exceptional. In *Ronberg v Chief Executive of the Department of Labour* [1995] NZAR 509, McGechan J stated, in relation to living standards:

> "Mere economic betterment – the fact a person can live more comfortably in New Zealand than elsewhere – perhaps with employment instead of unemployment – is not the type of humanitarian consideration in contemplation in the statute. It would usually have difficulty qualifying in itself as an 'exceptional circumstance' rendering removal 'unjust or unduly harsh'. It *was not intended* New Zealand house the world…. Poverty in itself will not suffice."

(i) The appellant could readjust to life in the Philippines. He lived there until he was 25 years of age, and will be familiar with the life, language and culture.

Injustice and undue harshness

(j) Overall, none of the above circumstances, either alone or in combination, constitute exceptional circumstances of a humanitarian nature.

(g) *Abdulhussein v Minister of Immigration* DRT 36/2007 (20 December 2007) stated that, where the offending is particularly serious, even strong humanitarian considerations may still not result in the deportation being unduly harsh or unjust.

(h) The appellant's offending in this case was serious, in particular, due to its dishonest nature, the fact that the victims were vulnerable, and that the appellant breached the trust that those who go to hospital are entitled to have. The seriousness is also reflected in the maximum possible sentence of seven years' imprisonment.

(i) As the appellant was convicted of 19 offences, each of which had a maximum term of imprisonment of seven years, this offending is at the more serious end of the scale that was anticipated by Parliament.

(j) Many of the charges were representative and the appellant took photographs of 57 different credit cards. He used the details to make numerous online purchases. Many were substantial, with at least 10 being between $2,300 and $3,000.

(k) The offending involved a gross breach of trust, a significantly aggravating feature. People who go to hospital are vulnerable, frail and sick. It was planned and sustained, and the level of spending was substantial. The purchases were not necessities and the appellant was motivated by "curiosity and enjoyment". There appears to have been no economic pressure on him.

(l) The appellant's offending was a repudiation of the values and standards which New Zealand residents are expected to uphold. If the Tribunal finds that the appellant has established exceptional humanitarian circumstances, his offending is at a serious level.

Balanced against any exceptional humanitarian considerations, it does not amount to deportation being unjust or unduly harsh.

Public interest

(m) As to family unity, New Zealand's international commitments include the right for persons to be free from unlawful or arbitrary interference in their family life and to support the family unit as the fundamental group unit of society. The right to family unity is however not unfettered or absolute, and is limited to protection against unlawful or arbitrary interference.

(n) The appellant has lived apart from his partner in the past. If she prefers to remain in New Zealand, then visits and modern communication methods could again maintain family relationships. The appellant's wife and their children are able to relocate to the Philippines with him and would easily adjust to life there where the appellant has almost all members of his family as a support network.

(o) As to the risk of reoffending, the Provision of Advice to Courts report assessed the appellant as being of "low risk". However, this should be weighed against the inherently serious nature of the offending and the fact that he has not completed any programmes to assist him.

(p) As to the integrity of the immigration system, residence in New Zealand is a privilege. The public can expect residents to uphold certain standards of behaviour. The appellant's conduct has fallen short of the public's expectation for New Zealand residents. To preserve public confidence in the immigration system, migrants who offend should be seen to be returned to their home countries because New Zealand will not tolerate such behaviour.

(q) The onus is on the appellant to establish it is not contrary to the public interest for him to remain in New Zealand. On the basis of the evidence before the Tribunal, it cannot be satisfied that it would not be contrary to the public interest to allow the appellant to remain.

[37] In his written closing submissions, counsel for the respondent made the following further points:

(a) The appellant told the Tribunal that, in offending, he was motivated to help family in the Philippines. This contradicts the Provision of Advice to Courts report.

(b) The appellant stated that he had completed counselling every month. A letter from the Department of Corrections states that he:

> "…completed all standard and special conditions of his Supervision sentence. He completed a prevention plan and complied [sic] engaged well."

This is ambiguous and refers specifically to a prevention plan (not provided) but not to a specific counselling programme.

(c) The appellant stated that his victims had left their credit cards in plain sight (not in wallets or bags). He was challenged as to the unlikelihood that so many people in a public building would leave their cards out in this way.

(d) The daughter's medical records contain test results and reports, including a letter dated 15 December 2022 from Dr Frederica Steiner which confirms that the daughter is developing normally, with no need for ongoing treatment but she should be monitored in terms of the ongoing growth of her head. There is no suggestion that there will be need for any future medical intervention.

(e) AA may face challenges in respect of her current pregnancy. That could be dealt with by delaying the appellant's deportation pursuant to section 216(1)(a) of the Act.

(f) As to why the appellant and his wife decided to have another child after the uncertainty of the appellant's future in New Zealand became apparent, they could offer no reasonable explanation but appear to have understood the possibility of deportation at the time.

(g) AA purchased a home for her family in the Philippines in 2017 for NZ$66,000 with a NZ$17,000 deposit and advised that she sends money back to the Philippines to pay the mortgage. She may struggle to pay this. She may be assisted for a period by family members or she may decide to tenant the property or sell it with her family reverting to renting. There are possible financial implications, none of which are certain.

(h) The amount of reparation ordered was minimal. Reparation of NZ$12,200 was sought but NZ$2,500 reparation was ordered by the Court, to be paid at NZ$50 per week. This should have been paid within 50 weeks but the appellant was yet to complete the payments (some 12 months after they should have been paid).

(i) The gravity of offending is such that it would not be unjust or unduly harsh for the appellant to be deported. The offending only stopped when he was caught. He was engaged in an addictive pattern of behaviour based on the gratification that he got from offending. He has presented no clear evidence that he has done anything to deal with the trigger factors that led to his criminal behaviour in the past. Other than being caught and punished, his circumstances have not changed.

STATUTORY GROUNDS

[38] The appellant's liability for deportation arose under section 161(1)(a)(iii) of the Immigration Act 2009 ("the Act") because he has been convicted of an offence for which the court had the power to impose imprisonment for a term of three months or more if committed at any time not later than two years after the appellant first held a residence class visa.

[39] Section 207 of the Act provides that the grounds for determining humanitarian appeals against deportation liability are as follows:

> "(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."

[40] 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.

[41] 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: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (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 *Madafferi v Australia* (Communication No 1011/2001, UN Doc CCPR/C/81/D/1011/2001, 26 August 2004), at para 9.8.

ASSESSMENT

Whether there are Exceptional Circumstances of a Humanitarian Nature

[42] 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".

[43] Were this appeal about the circumstances of the appellant alone, the Tribunal would have little difficulty in finding that there are no exceptional humanitarian circumstances. He has lived in this country only since 2016, a period of some seven years, and he has his parents and most of his siblings residing in the Philippines, to whom he could look for support.

[44] However, the Tribunal must also have regard to the interests of the other people who would be impacted by deportation.

The appellant's daughter

[45] First, it is necessary to turn to the most significant of the humanitarian concerns — the issue of the separation of the daughter from her father, if he is deported.

[46] The respondent makes the submission that it is a matter of AA's choice, to remain in New Zealand with her daughter. It is accepted that there are often cases in which the spouse of a person facing deportation does have a legitimate choice to make of this kind. The issue is likely to be, in determining whether such a choice exists, the degree to which it is reasonable to expect the spouse to accompany the person, in order to preserve the relationship and the family bonds which flow from it. Here, the issue is whether it is reasonable to expect AA, an experienced nurse who has worked for years to build a life for herself and her family in this country, with a predominant purpose of being able to support and care for her family in the Philippines. It is not a question of mere improvement of their lifestyle. Her intention was, and is, to provide the security of a home for her family, an achievement which will be undone if she returns to the salary of a nurse in the Philippines.

[47] Added to that, AA has reasonable concern about the health and welfare of her daughter. The daughter is a New Zealand citizen and is entitled to access the level of healthcare available to other New Zealand children.

[48] Given these considerations, the Tribunal is satisfied that the 'choice' for AA of returning to the Philippines with her husband is not, in fact, a reasonable one. It is accepted that, if he is deported, she and the couple's daughter will remain in New Zealand, not simply as a matter of preference.

[49] Deportation will separate the appellant from his daughter, causing distress and anguish to her (and to him). As already observed, the Tribunal is required to have regard to the best interests of children as a primary consideration. The impact of deportation on them must be given real, child-centric consideration.

[50] It is accepted that the best interests of a child are not always served by remaining in close, physical contact with their father. In cases of neglect, abuse or family harm, for example, it may even be in their best interests to be protected from further such contact. This is not a case of that kind. Notwithstanding his offending, the evidence indicates that the appellant is a loving and attentive father who is closely involved in his daughter's life. It is evident, for example, from the medical records that the appellant usually accompanies the daughter to medical appointments. The shared parenting while each of the parents works means that the appellant and his daughter spend a significant amount of time together and it is inevitable that they will share a close bond.

[51] The Tribunal is satisfied that separating the appellant from his daughter would result in her suffering serious adverse developmental consequences. Put simply, it would not be in her best interests to be separated from a loving, involved parent to whom she is bonded.

[52] The respondent refers the Tribunal to the decision of the High Court in *Minister of Immigration v Jooste* [2014] NZHC 2882 at, at [47], with respect to separation of family members. The Tribunal has previously considered the implications of the observation of Katz J in that case. See, for example, *GR (Fiji) v Minister of Immigration* [2019] NZIPT 600496, at [75]–[86], where the Tribunal concluded:

> "[85] Accordingly, while the High Court has made it clear that the potential separation of parent and child is not *necessarily* sufficient, in itself, to give rise to exceptional humanitarian circumstances (per *Jooste*), it has also made it clear that it is not *necessarily* insufficient either (per *Zanzoul*).
>
> [86] The assessment must take account of all relevant circumstances. The impact of family separation will depend upon the specific circumstances. Even the degree of difficulty, hardship and emotional upset caused by deportation is likely to vary widely across different manifestations of separation of a parent and child. Put simply, relationships are of varying quality and intensity and the impact of separation on both parent and child must always be assessed on the facts of the particular case.

[53] The present Tribunal respectfully concurs.

The appellant's wife

[54] Permanent separation by the appellant's deportation will cause distress and anguish to both the appellant and his wife and will, inevitably, bring their relationship to an end in the long term. The respondent points to their past separation, when AA came to New Zealand ahead of the appellant as evidence of an ability to tolerate living apart, but that separation was only intended to be short term and was for a particular purpose, at a time when they were not married. It does not stand comparison with the permanent separation of a couple with shared responsibilities for their child.

[55] The Tribunal accepts that AA is in a difficult situation. If she returns to the Philippines with her husband, she will no doubt find work as a nurse but it is clear that it will not be at a level of income that will enable her to maintain the family home on which her family depends. The respondent is correct that it could be rented out but there would be no value in that because any benefit would clearly be absorbed by the family having to rent elsewhere and payment of the mortgage

would remain an unresolved issue. It could be sold but, again, the purpose of owning the house is to provide security and stability to the family. It is necessary to view this in the context of an economy which is dependent on remittances. As the Asia Development Bank noted, in *Remittances and Household Behavior in the Philippines* (December 2009):

> "As one of the world's largest recipients of remittances, the Philippines received roughly 12% of its gross domestic product (GDP) through this channel in 2008. These flows have become the single most important source of foreign exchange to the economy… and a significant source of income for recipient families. Out of the households that received remittances in third quarter of 2009, 93% spent part of it for food and other household needs, 72% for education, and 63% for medical expenses (Bangko Sentral ng Pilipinas 2009)."

[56] The Tribunal accepts that a return to the Philippines would cause significant harm to the wife and her family. The house would need to be sold, undercutting the wife's years of work to build a stable base for her family.

[57] As to AA's medical issues, she is at risk of preeclampsia, a serious medical condition affecting some pregnant women. It is described by the New Zealand Heart Research Institute (HRI) on its website (HRI *Preeclampsia: Signs, Symptoms and Treatment* (2023) at www.hri.org) in the following terms:

> "Preeclampsia is a serious condition where high blood pressure develops during pregnancy, affecting both the mother and unborn baby. There may also be high levels of protein in the mother's urine (proteinuria), which indicates kidney damage, and other signs of organ damage.
>
> Preeclampsia puts stress on the heart and other organs and is associated with a number of serious effects, including kidney dysfunction, swelling of hands, feet and face, dizziness, headaches and difficulties with vision. It also increases the risk of the mother developing cardiovascular disease or other heart conditions in the future.
>
> If untreated, preeclampsia can lead to serious complications such as convulsions, kidney or liver failure, and blood clotting problems. In severe cases, preeclampsia can lead to maternal and infant death. In some cases, the baby needs to be delivered early."

[58] The Institute notes that a particular risk factor is having had preeclampsia in an earlier pregnancy, which was the case for AA. Further, she is at heightened risk of also developing post-partum preeclampsia if she requires another caesarean section — see the website of the United States National Library of Medicine.

[59] The respondent accepts that there is a need for the appellant to be present at this time, while his wife is pregnant, but argues that this could be arranged by the Tribunal ordering the grant of a temporary visa to the appellant, under its powers under section 216 of the Act. That, however, overlooks two matters. First,

the appellant's wife's primary risk factor is precisely one of high blood pressure. Granting the appellant a temporary visa is unlikely to diminish the stress on her of his imminent departure. Second, the issues arising from her condition are not easily definable or predictable. As their daughter's history indicates, preeclampsia and premature birth carries with it a real risk of wider complications.

[60] The daughter was born prematurely at 32 weeks, on the cusp between being very pre-term and moderately pre-term, by way of emergency caesarean section, because her heartbeat could no longer be detected. The medical records also indicate that, subsequent to her birth, she suffered from necrotising enterocolitis (the failing of the small intestine) and was, according to her Operation Record on 4 February 2021, "clinically deteriorating". A 15 centimetre length of her small intestine was removed, leaving only 4–5 centimetres before the junction of the small and large intestines. This has impacted her ability to absorb vitamin B12 and she will require close monitoring for this.

[61] The relevance of the daughter's medical history is not that it points to ongoing issues for the daughter herself (though these cannot be discounted). The relevance is that they provide an indicator of the risks that AA faces.

[62] The respondent makes the point that, while AA does not have immediate family in New Zealand, it appears that she does have some extended family members. They are her grandmother (aged 78 years), an aunt and two cousins. There is nothing to suggest that any of them is able to provide the degree of support that AA may need, particularly if she is hospitalised.

The appellant's family

[63] It is also the case that the appellant is making a significant contribution to the support of his own family in the Philippines, including a disabled adult sibling who has always lived with, and been cared for, by the family.

Conclusion on exceptional circumstances of a humanitarian nature

[64] Taking the foregoing factors into account cumulatively (the adverse consequences for the appellant's daughter, to whom he is closely bonded, and on his wife, her family members and the appellant's own family members, including a disabled sibling who he supports), 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

[65] 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

[66] The 15 April 2021 sentencing notes of Judge Davidson indicate that the appellant's offending occurred over a five-month period between May and October 2019. The Judge described the offending in the following terms:

> "The charges relate to your employment in the food services department at a local hospital. Through the course of your work you were able to access patients' property and photograph 57 sets of credit card details on your cellphone. This included the details, both from the front and the back of each individual card. One of the cards related to a co-employee. You then used those details to make a large number of online transactions. The transactions generally seemed to be in relation to luxury and non-vital items. The transactions totalled some $47,000; around $28,000 worth were unsuccessful. Some property was recovered. Reparation is sought of around $12,200."

[67] Mr Smith, for the respondent, submits that the appellant's offending was serious. He points to its dishonest nature, the fact that the victims were vulnerable, that the appellant breached the trust that those who go to hospital are entitled to have and the maximum sentence for such offending, which is seven years' imprisonment. He also points to the fact that there were 19 such offences and submits that the offending must therefore be viewed at the more serious end of the scale that was anticipated by Parliament.

[68] The Tribunal does not trivialise the offending. It was certainly serious enough in the eyes of the Court to warrant a custodial sentence. At the same time, however, a degree of reality needs to be brought to bear. The Court did not impose a sentence anywhere near the maximum for offending of this kind. Even taking into account the number of offences, the total sentence was six months' community detention — a sentence almost as low as could be imposed for such offending. The Tribunal is satisfied that the Court did not view the offending, including in its totality, as at the more serious end of the scale.

[69] It is accepted that the appellant has given different reasons, at different times, for his offending. That may simply be because he struggles to understand or articulate the reasons.

[70] While the respondent points to the lack of evidence of the appellant attending a rehabilitative 'course', the reality is that such courses are not routinely available to those not in prison. His probation officer, on the other hand, reports him as having completed a prevention plan and being at low risk of any further offending. The officer preparing the Provision of Advice to the Courts report was of the same view, stating that the appellant was at low risk of harm to the community.

[71] Finally on this point, the respondent points out the disparity between the amount of reparation sought and the amount ordered. It is not clear from the sentencing notes why there was a difference, but nor can it be attributed to the appellant — the amount of reparation being a matter for the sentencing judge.

Integrity of the immigration system

[72] It is accepted that the integrity of the immigration system is an important consideration. Residence in New Zealand is a privilege, not a right. Criminal offending is necessarily a serious breach of the reasonable expectation that residents will observe New Zealand law.

[73] The appellant has clearly failed in that obligation, albeit that the offending was not of the most serious kind.

The appellant's exceptional humanitarian circumstances

[74] The appellant's offending must be weighed against the existing exceptional humanitarian circumstances. As identified above, these are the best interests of his daughter, the impact that deportation would have on all parties in terms of separation from his wife and child, and his wife's pregnancy and health, which is of concern.

Conclusion on unjust or unduly harsh to deport

[75] Weighing the offending (serious, but not towards the upper end of the scale) against the exceptional humanitarian circumstances identified above, the

Tribunal is satisfied that it would be unjust or unduly harsh for the appellant to be deported from New Zealand.

Public Interest

[76] Where the Tribunal has determined that an appellant has exceptional humanitarian circumstances which would make it unjust or unduly harsh to deport the appellant, it must also be satisfied that it would not, in all the circumstances, be contrary to the public interest to allow the appellant to remain in New Zealand.

[77] As Hansen J held in *Garate v Chief Executive of Department of Labour* (High Court, 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."

[78] 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 [11]), are relevant to the analysis of whether it would not be contrary to the public interest to allow him to remain in New Zealand.

Family unity

[79] There is a public interest in the preservation of family unity and in the observance of New Zealand's international obligations in that regard. Deportation of the appellant would, for the reasons explained, result in the destruction of a functioning and healthy family unit. The rights of the appellant's daughter under Article 7 of the 1989 *Convention on the Rights of the Child* include, as far as possible, the right to know and be cared for by her parents.

Risk of reoffending

[80] 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 v Minister of Immigration* DRT 13/2007 (17 July 2007) at [101]–[114], approved by the High Court in *Pulu v Minister of Immigration* [2008] NZAR 429 at [12].

[81] Here, the risk has been identified by the Department of Corrections, who have had the best opportunity to assess it, as low. It is not possible for a person to demonstrate a risk lower than low. Further, to the extent that any residual risk remains, it is ameliorated by the order that the Tribunal intends to make at the conclusion of this decision, suspending the appellant's deportation liability for a period of three years. He will have a significant incentive not to reoffend.

Conclusion on public interest

[82] Weighing the considerations which would make it in the public interest that the appellant leave (the undermining of the integrity of the immigration system and a low risk of reoffending, both moderated by suspension) against the considerations which would make it in the public interest for the appellant to remain (family unity and the best interests of the appellant's daughter in growing up having close contact with her father), the Tribunal is satisfied that it would not be contrary to the public interest to allow the appellant to remain in New Zealand.

DETERMINATION

[83] The Tribunal finds:

(a) there are exceptional circumstances of a humanitarian nature; and

(b) that 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.

[84] The appeal is allowed.

Suspension of Deportation Liability

[85] The appeal being allowed, the Tribunal orders, pursuant to section 212(1), that the deportation liability of the appellant be suspended for a period of three years from the date of this decision, subject to condition that the appellant commits no offence in that period capable of attracting a term of imprisonment (whether such term is imposed or not).

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

Order as to Depersonalised Research Copy

[87] 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 names of the appellant, his partner and children and the names of the partner's siblings and any particulars likely to lead to their identification. This order is to protect the identity of the appellant's wife and children.

"Judge M Treadwell"
Judge M Treadwell
Chair

Certified to be the Research Copy released for publication.

Judge M Treadwell
Chair