

RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA

Appellant: GALODAMU, Josefa

Before: S A Aitchison (Member)

Representative for the Appellant: C Summers

Date of Decision: 23 March 2023

DEPORTATION (NON-RESIDENT) DECISION

[1] This is a humanitarian appeal by the appellant, a 69-year-old citizen of Fiji, against his liability for deportation which arose when he became unlawfully in New Zealand.

THE ISSUE

[2] The primary issue on appeal is whether the appellant's strong family nexus to New Zealand through his New Zealand-citizen daughter and her family, the care and support he receives from them, and the lack of support available to him in Fiji if he were to return there, gives rise to exceptional humanitarian circumstances which would make it unjust or unduly harsh for him to be deported from New Zealand.

[3] For the reasons that follow, the Tribunal allows the appeal and directs that the appellant be granted a resident visa.

BACKGROUND

[4] The appellant was born in Fiji. His wife died in April 2019. He has a New Zealand-citizen daughter, aged 41 years. He also had a son, who died a number of years ago.

[5] The daughter was born in Fiji. She has been living in New Zealand with her husband and three children (who were also born in Fiji), since February 2014. She was granted residence as a dependent of her husband when he was granted residence under the Skilled Migrant category of the instructions in 2015. She became a New Zealand permanent resident in 2017 and is now a New Zealand citizen. Her husband, aged 46 years, and three children, including twin sons, aged 15 years, and a daughter aged 13 years, are also New Zealand citizens. The daughter is employed as a caregiver for the elderly and her husband is an aircraft maintenance engineer. Immigration New Zealand records convey that the husband has three half-siblings living in Fiji.

[6] The appellant arrived in New Zealand in July 2019 as the holder of a visitor visa. He subsequently held successive visitor visas. His most recent visitor visa expired on 9 June 2022.

[7] The appellant lodged an application for a resident visa (no category) on 14 February 2022.

[8] On the expiry of his visitor visa on 9 June 2022, the appellant became unlawfully in New Zealand. He appealed to the Tribunal on 18 July 2022.

STATUTORY GROUNDS

[9] 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—
 - (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.

[10] 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].

[11] To determine whether it would be unjust or unduly harsh for an appellant to be deported from New Zealand, the Supreme Court in *Ye* stated that an appellant must show a level of harshness more than a “generic concern” and “beyond the level of harshness that must be regarded as acceptable in order to preserve the integrity of New Zealand’s immigration system” (at [35]).

THE APPELLANT’S CASE

[12] The appellant’s case is set out in the representative’s submissions (1 August 2022) lodged with the Tribunal on 26 August 2022 and can be summarised as follows:

- (a) The appellant did not cope well following the death of his wife in Fiji in 2019, and his only daughter (child) arranged for him to come to New Zealand to live with her and her family. In Fiji, the appellant had been living in a home owned by his son-in-law. However, in October 2021, the son-in-law sold that home to finance the purchase of a property for his family in New Zealand.
- (b) In New Zealand, the appellant lives with his daughter and her family and is supported financially and emotionally by them. He is dependent on them for companionship, emotional and social support and care, in his advanced years. He has lived with them for more than three years, which has strengthened his bonds with them.
- (c) The appellant no longer has any family in Fiji or support system there. At his age, the appellant will no longer be able to work and maintain a home in Fiji. His earnings have been modest, and he does not have financial resources to support himself independently in Fiji. His daughter and her family would not be able to afford to support the appellant in Fiji. They have a mortgage and three children to support.
- (d) There are no rest homes (aged-care facilities) in Fiji. There is a cultural expectation that children care for their parents in their advancing years. The daughter would feel like she had abandoned her father if she were not able to care for him.

- (e) The daughter would not be able to accompany the appellant to live in Fiji. She is a skilled caregiver in New Zealand, who has been employed in an area of skill shortage during a challenging pandemic. She and her family have been settled in New Zealand for a decade now.
- (f) The COVID-19 outbreak in Fiji makes return untenable for the appellant. The medical facilities in Fiji are inferior to New Zealand and there is a much lower vaccination rate in the population there. Such circumstances present a threat to the appellant's health and wellbeing.
- (g) At this time, there is no pathway to residence for the appellant. The Family (Parent) category has been closed until further notice. The appellant lodged a resident visa application (under no particular category) on 14 February 2022 with the view to having an opportunity to appeal to the Tribunal on special circumstances. It will be a long wait to have this application processed.
- (h) The Tribunal has found in cases similar to the appellant's that there are exceptional humanitarian circumstances that would make it unjust or unduly harsh for those appellants to be deported from New Zealand.
- (i) Deportation would have negative consequences for the appellant's daughter who is extremely close to her father and has, along with her husband and children, lived with him as a family unit for the past three years. It would be extremely distressing for the appellant's grandchildren to suddenly no longer have their grandfather in their lives every day.
- (j) There are no adverse public interest factors in this appeal. The appellant is liable for deportation because he is currently unlawfully in New Zealand. With the exception of his current unlawful status, the appellant has always complied with the requirements of his temporary visas and remained in New Zealand lawfully.
- (k) There is a positive public interest in the compassionate treatment of temporary migrants who lack family connections and support in their home country. There is also a public interest in upholding New Zealand's international obligations with regard to family unity

and the best interests of children pursuant to article 23(1) of the *International Covenant on Civil and Political Rights* and Article 3(1) of the *Convention on the Rights of the Child*.

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

- (a) The biodata pages of the passports of the appellant, his daughter, her husband and three children.
- (b) Certificates of New Zealand citizenship for the appellant's daughter, son-in-law and three children.
- (c) Birth certificates for the appellant's daughter, son-in-law and three children.
- (d) A certificate of marriage for the appellant's daughter and son-in-law (1 October 2008).
- (e) A death certificate for the appellant's wife (25 April 2019).
- (f) Employment-related information for the appellant's son-in-law, including a letter confirming his employment as a light maintenance aircraft engineer (23 September 2021) and a job description.
- (g) Employment-related information for the appellant's daughter, including an individual employment agreement for her role as a caregiver at a retirement village (30 March 2021).
- (h) A sale and purchase agreement for property in Fiji owned by the appellant's son-in-law and a settlement statement (29 October 2021).
- (i) Correspondence between the appellant's daughter and son-in-law concerning the construction of a new home in New Zealand (29 October 2021).
- (j) A printout from a google search concerning COVID-19 vaccination rates in Fiji (accessed 25 August 2022) conveying 71.1 per cent of the population of Fiji being fully vaccinated.
- (k) N Naivalurua "Fiji's First-Ever Retirement Village, the Sangam Retirement Village Expected to be Built in Nadi" *Fiji Village* (5 December 2019).

ASSESSMENT

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

Whether there are Exceptional Circumstances of a Humanitarian Nature

Family nexus to New Zealand and time spent here

[15] The appellant is a 69-year-old widowed citizen of Fiji. He has been living with his daughter, son-in-law and their three children, for almost four years. His daughter made arrangements for him to come to New Zealand three months after his wife died in 2019. The appellant has no other children, as his son tragically passed away some years ago, the precise details of which have not been provided to the Tribunal.

[16] The daughter, her husband and children have been living in New Zealand since 2014 and are New Zealand citizens. The daughter is employed as a caregiver in a retirement village and her husband as an aircraft engineer. They have sold their home in Fiji and made arrangements to build a family home in New Zealand. They are well settled in New Zealand in their careers, and the children are settled in school.

[17] As the only child of her father, the daughter shares a significant bond with her father and considers it her responsibility to care for him. After the death of her mother, the daughter held fears for her father's welfare, so she arranged for him to come to New Zealand so that he could live with her and her family and she could care for him. The daughter states on appeal that she had initially intended when coming to New Zealand herself in 2014 to arrange for her parents to later join through the Family (Parent) category of the residence instructions. However, from October 2016, selections of expressions of interest under that category were suspended, and options for the appellant to apply to remain permanently in New Zealand were narrowed. Counsel explains that a residence application (no category) was lodged on the appellant's behalf with the view to that application being declined by Immigration New Zealand and the appellant then being afforded an opportunity to appeal to the Tribunal on the basis of his having special circumstances. Notably, since lodging this appeal, selections of expressions of interest under the Family (Parent) category of the instructions have recommenced from November 2022.

[18] Over the past four years that the appellant has lived with his daughter and her family, they have shared companionship and time together, and the appellant has been able to be a part of his grandchildren's day-to-day lives.

[19] As a retiree, the appellant has become dependent on his daughter and her family to meet his living expenses. He has no assets of his own nor is he at an age where he is likely to be able to find or maintain employment sufficient to meet his needs. As he increases in age, he will become more vulnerable and need to lean more on the support of his family. He is well cared for in his daughter's household in New Zealand. He receives emotional and practical care and support from them. It is culturally important for the daughter, as the only child of her father, to be able to care for her father.

[20] The Tribunal must have regard to the grandchildren's best interest pursuant to article 3(1) of the 1989 *Convention on the Rights of the Child*. No detailed submissions have been made as to the appellant's particular relationship with his grandchildren (aged between 10 and 15 years), but they will know of the importance of his presence to their mother. They will have the opportunity to have him nearby.

[21] Given the extent of their settlement in New Zealand, it would be upsetting to the appellant and his daughter for the appellant to have to return to Fiji, find accommodation, and look for day-to-day support in his everyday life there, and for the daughter and her family to have to attempt to support him there. The family have transferred their assets from Fiji and made arrangements to build a family home. The daughter and her husband have been in longstanding, valued employment and the three children are fully immersed in the education system and community here.

Circumstances in Fiji

[22] Prior to coming to New Zealand, the appellant was recently widowed and living in a home owned by his son-in-law. His son-in-law has since sold this home, so that he can more adequately house the family in New Zealand, and therefore the appellant would be returning to Fiji without any assets or accommodation. As a retiree, he is no longer in a position to be employed and to earn an adequate income to maintain a standard of living there.

[23] The appellant has no family living in Fiji and does not have any support network there. Counsel has tendered country information conveying that there are no retirement homes that the appellant could reside in, in Fiji.

[24] Given the appellant's advancing age, his emotional well-being is likely to be heavily dependent on his ability to continue to access ongoing companionship and socialisation, which he is able to derive from his immediate and extended family in New Zealand. Without ready access to this familial companionship on return to Fiji it can be expected that the appellant's mental and physical health would deteriorate.

[25] Counsel submits that the appellant would also be returning to Fiji in the context of the COVID-19 pandemic and that his health may be jeopardised. Counsel also states that vaccination rates in Fiji are lower than in New Zealand and refers to a country source conveying that the rates sit at 70 per cent. However, having lived in New Zealand for the past four years, the appellant will have had the opportunity to be fully vaccinated. As at 15 March 2023, there were 1,009 cases of COVID-19 in Fiji; Worldometer *Coronavirus — Fiji* at www.worldometers.info. No health vulnerabilities other than his age, have been disclosed to the Tribunal.

Conclusion on exceptional humanitarian circumstances

[26] The Tribunal finds that the appellant's physical and emotional well-being is best ensured by him remaining with his New Zealand-citizen daughter in her well-settled family environment in New Zealand.

[27] The Tribunal finds that the appellant's status as a widower, the fact of his relationship with his only child who lives in New Zealand, her strong familial obligation to him, and the fact that she, her husband and three children have settled in New Zealand for nine years, combined with the appellant's lack of support in Fiji, create exceptional humanitarian circumstances.

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

[28] 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].

[29] The appellant is liable for deportation because he is currently unlawfully in New Zealand. This arose as he remained here after the expiry of his most recent visitor visa in June 2022. With the exception of his current unlawful status, the appellant has always complied with the requirements of his temporary visas.

[30] The Tribunal has already accepted that a long-term return to Fiji would create consequences for the appellant and his family which amount to exceptional humanitarian circumstances. The fact that he has remained unlawfully in New Zealand for a short time because he did not want to return to such circumstances is not a matter which seriously undermines the immigration system.

[31] Having regard to the appellant's exceptional humanitarian circumstances, the Tribunal is satisfied that it would be unjust or unduly harsh for him to be deported from New Zealand.

Public Interest

[32] 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].

[33] There are no character concerns for the appellant. He provided a clear police certificate from Fiji (20 December 2021) and the Tribunal has obtained a certificate from the New Zealand police (15 March 2023) which is also clear. The appellant was also considered to be of an acceptable standard of health with respect to his most recent visitor visa application.

[34] At his age, it can well be anticipated that the appellant may present some cost and demand in the future on the New Zealand public health system for his future health care needs. However, against this, the Tribunal has particular regard to the very close and dependent relationship the appellant shares with his New Zealand-citizen daughter, his advancing age, and the absence of support for the appellant from family members in Fiji.

[35] Weighing these matters, the Tribunal finds that it would not be contrary to the public interest for the appellant to continue to remain in New Zealand.

DETERMINATION

[36] For the reasons given, the Tribunal finds that the appellant has exceptional

circumstances of a humanitarian nature which would make it unjust or unduly harsh for him to be deported from New Zealand. It 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.

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

[38] The appeal is allowed on those terms.

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