

AT AUCKLAND

Appellant: **DEVI, Sangeeta**

Before: V J Shaw (Member)

Representative for the Appellant: H Singh

Date of Decision: 21 April 2015

DEPORTATION (NON-RESIDENT) DECISION

[1] This is a humanitarian appeal by the appellant, a citizen of Fiji, against her liability for deportation which arose when she became unlawfully in New Zealand.

THE ISSUE

[2] The appellant, aged 30 years, has formed a same-sex relationship with a New Zealand resident. The primary issue in the appeal is whether this relationship gives rise to exceptional humanitarian circumstances that would make it unjust or unduly harsh for her to be deported from New Zealand.

[3] For the reasons that follow, the Tribunal allows the appeal and grants the appellant a work visa.

BACKGROUND

[4] The appellant has her parents and a brother living in Fiji. Her sister resides in America.

[5] The appellant first entered New Zealand as a visitor in October 2007. For the period November 2008 until August 2011 she held various student visas.

[6] Between August 2011 and March 2014 she held graduate job search and graduate work experience visas. During this period she worked as an aged or disabled personal care assistant.

[7] On 10 April 2014, Immigration New Zealand declined to grant the appellant a work visa under the Essential Skills work category to enable her to continue in her position as a personal care assistant. This was because the employer had not established that no New Zealand citizen or resident was available to undertake the position.

[8] As the appellant had been living in New Zealand since October 2007 Immigration New Zealand granted her a one-month visitor visa as an exception to instructions to enable her to leave New Zealand.

[9] On 23 April 2014, the appellant married her partner, aged 42 years, in Auckland.

[10] On the basis of her partnership, the appellant lodged an application for a work visa on 7 May 2014. Immigration New Zealand declined this application on 23 June 2014 as it was not satisfied that the couple was living together in a genuine and stable relationship. Immigration New Zealand was concerned that although the couple claimed to have been living together since 2010 the appellant had never declared that she was in a partnership in her previous applications and most of the evidence of joint finances and utility accounts were from around the period of the marriage.

STATUTORY GROUNDS

[11] 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.

[12] 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].

[13] 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

[14] The grounds of appeal, as set out in the representative’s submission, can be summarised as follows:

- (a) The appellant has been in a relationship with her New Zealand-resident partner since April 2010. They are both mature and deeply in love.
- (b) Gay relationships in the Indian community are often judged wrongly.

[15] The appeal was supported by the following information:

- (a) Letter (7 September 2014) from the appellant and her partner in which they describe their love for one another and their distress at the prospect of being separated. Despite the embarrassment many people feel about their relationship they say that they have a tight and true unity and love and they want to go ahead in their lives together.
- (b) Copies of letters written by both the appellant and her partner in support of the unsuccessful work visa application. In these letters they outline their daily activities and explain that together, with the partner’s two daughters, now aged 19 and 15 years, they are a happy family unit.

- (c) Letters (undated) from the partner's two daughters confirming their mother's relationship with the appellant, the emotional support they receive from her and their distress if the appellant was to be separated from them.
- (d) Letter (24 July 2014) from the principal of the partner's younger daughter's school confirming that the appellant and her partner live together and the appellant is the emergency school contact for the daughter.
- (e) Letters from two friends from the couple's church confirming their knowledge of the relationship since 2010 and their attendance at the couple's wedding and other associated celebrations.
- (f) Letter (2 June 2014) from the senior pastor at the church attended by the appellant and her partner and two daughters. He confirms that he met them all at a local Indian church four years ago and over time became good friends with them and became aware of the nature of their relationship. In March 2011 both the appellant and her partner were baptised. On 20 April 2014 the couple held a church function and he performed a blessing prayer for their marriage. On 22 April there was an Indian henna night and on 23 April they were united as a couple. On 25 April there was a prayer service to bless their new life and home. He was present on all these occasions along with others. He considers the appellant and her partner to be a stable and genuine couple. There is also similar letter from a church committee member confirming the couple's relationship.
- (g) Photographs, cards and baptism certificates.
- (h) Partner's dissolution of marriage and the couple's marriage certificate.

[16] In response to the Tribunal's invitation to provide updated information, the Tribunal has been provided with:

- (a) Further letters from the appellant and her partner and the partner's two daughters (15 February 2015) confirming their continued life together and the benefits they feel from having now publicly revealed their identity and relationship. They also discuss their plans for

running a courier business. They do not believe that they can live without each other.

- (b) Letters from various friends and neighbours confirming their knowledge of the relationship.
- (c) Documents to corroborate that the appellant and her partner have been living together at the same address and/or demonstrate financial independence. These include telephone bills, joint bank statements, life insurance policies, loan agreements, power bills, airline tickets and various receipts that cover the period 2011 to 2014.
- (d) Statement from the couple (31 March 2015) explaining their respective families' attitude towards same-sex relationships and the difficulties for them if they had to live together in Fiji.

ASSESSMENT

[17] The Tribunal has considered all the submissions and documents provided by the appellant. It has also considered the appellant's Immigration New Zealand file in relation to her temporary visa applications.

Whether there are Exceptional Circumstances of a Humanitarian Nature

Relationship with New Zealand resident

[18] Because the appellant failed to declare her relationship on previous applications and the fact that the couple's legal marriage in April 2014 followed immediately after the appellant being declined another work visa, Immigration New Zealand was rightly concerned as to the actual period the couple had been in a committed relationship.

[19] However, the Tribunal has reviewed all of the available evidence and accepts that the relationship has been in existence for some years. It is also accepted that the appellant's failure to previously declare the relationship reflected the reticence the couple felt about openly acknowledging being in a same-sex relationship because of the prejudice towards such relationships displayed by many in the Indian community.

[20] The partner, has been a New Zealand resident since 2008. She has written that she separated from her husband in March 2009 after a violent marriage. She and the appellant later met in an Indian night club, exchanged phone numbers and a friendship developed over the following months. In 2010 she invited the appellant to live with her and her two daughters. They fell deeply in love, provided a shoulder for each other to lean on and shared their problems.

[21] The couple attended functions together, though they were not always open about the nature of their relationship. This they say was because in Indian culture a same-sex relationship is largely “behind doors” and many people were embarrassed about their relationship. Rather they “always saved our humiliation for each other”.

[22] The appellant and her partner have both written with apparent sincerity of their love for each other, the bond they share, their sense of being a small tight-knit family together with the partner’s two daughters and the happiness that their open marriage has now brought them. Besides the evidence of their living together there is support for the closeness of their relationship over the past five years in that the partner took out a loan in July 2010 to pay for the appellant’s study for a diploma in health care and in July 2013 the partner’s life was insured with the appellant and the partner’s older daughter named as the policy holders.

[23] The Tribunal is satisfied on the available evidence that the appellant and her partner are living together in a genuine and stable relationship.

[24] If the appellant was deported the couple would likely be separated as they could not readily live together for any period in Fiji.

[25] Although the couple have now been open about their relationship and marriage with members of their church and close friends, they have explained that they lost a lot of their friends after disclosing their true relationship. The situation with their families is also problematic. The appellant has not declared her relationship to her family in Fiji. She describes them as typical villagers and very religious. They have little knowledge of same-sex relationships which are not acceptable in Indian culture so they would be heavily critical and ashamed. She fears that their shame could be so extreme that they might even contemplate suicide. If she was in Fiji and the family knew of the true situation, she expects that they would treat her badly.

[26] The only family member the partner has declared her relationship to, is her sister living in Fiji, to whom she is very close. She could not attend their wedding as she could not tell her husband why she wanted to come here. If he knew he would not let her again speak to her sister and the appellant.

[27] The appellant acknowledges that she does not know if any word of her relationship and marriage has reached her or her partner's family in Fiji, though to date they have not been confronted by their parents.

[28] The couple say they know people in the gay community from Fiji who have had to move abroad as they could not live openly. They are in love with one another and could not hide their feelings for any length of time, always pretending to be someone different. It was hard for them to come out openly about being gay in this country, but having done so they are now "tough" if people cannot accept them. Even so, they fear how they would be treated as a gay couple in Fiji and especially fear being physically abused.

[29] The Tribunal notes that, in recent times, the Fijian government have taken steps to improve the human rights situation for LGBTI individuals in Fiji. Same-sex sexual conduct was decriminalised in Fiji in 2010 and the 2013 constitution makes discrimination on the basis of sexual orientation unlawful (see United Kingdom Foreign and Commonwealth Office *2013 Human Rights and Democracy Report – Fiji* (10 April 2014)).

[30] While these progressive steps and changing social attitudes indicate the situation for LGBTI individuals is improving in Fiji, the appeal still needs to turn on the appellant's personal circumstances. Social discrimination against LGBTI individuals still occurs and strong views against LGBTI rights are still held amongst Fiji's religious community (see United States Department of State *Country Reports on Human Rights Practices 2013: Fiji* (27 February 2014); Freedom House *Freedom in the World 2014 – Fiji* (4 August 2014)). Given the deeply religious nature of the appellant's parents, her ability to return to Fiji and be open about her sexual orientation and same-sex marriage would impose considerable difficulties.

[31] As well as having to confront prejudice, the couple say that it is not practical for the partner to accompany the appellant to live in Fiji. She cannot afford to give up her full time employment as a home care support worker or live for any time out of New Zealand as her 15-year-old daughter is still at school. Her daughter is dependent on her mother for financial and other support and the partner needs to be here for her daughter.

[32] The Tribunal finds that the appellant's relationship with her New Zealand-resident partner, the difficulties the couple would experience living openly as a gay couple in Fiji and the partner's commitment to caring for her teenage daughter amount to exceptional humanitarian circumstances.

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

[33] For the reasons discussed the outcome of the appellant's deportation is that she would be separated from her partner with whom she shares a close and loving bond.

[34] From Fiji the appellant could lodge another application supported by her partner. However, Immigration New Zealand has already declined such an application so that determining any further such application could involve lengthy delay. Not only would both parties suffer the pain of separation but there is a risk that the appellant's relationship will come to the attention of her family thereby potentially compromising her safety.

[35] In these circumstances the appellant's deportation would be unjust or unduly harsh.

Public Interest

[36] The appellant has no criminal convictions in Fiji or this country. She is also in good health.

[37] The Tribunal is also mindful that it is in the public interest to maintain family unity. It is clear from the evidence provided to the Tribunal that there is a close and loving bond between the appellant, her partner and her partner's two children. The appellant is seen as a parental figure in the eyes of her partner's children and she takes an active role in their lives. Given the difficulty in the appellant and her children relocating with the appellant to Fiji, family unity is best maintained by allowing the appellant to remain in New Zealand.

DETERMINATION

[38] 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 her to be deported from New Zealand.

[39] The Tribunal also finds that it would not in all the circumstances be contrary to the public interest for her to remain in New Zealand on a temporary basis so as to enable her to make any further applications under the Family (Partnership) residence instructions.

[40] Pursuant to section 210(1)(b) of the Act, the Tribunal orders that the appellant be granted a work visa for a period of 12 months.

[41] The appeal is allowed on those terms.

"V J Shaw"
V J Shaw
Member

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