IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2015] NZIPT 502356**

AT AUCKLAND

Appellant:	**DR (Iran)**
Before:	B L Burson (Member)
Counsel for the Appellant:	C Curtis
Date of Decision:	22 September 2015

DEPORTATION (NON-RESIDENT) DECISION

INTRODUCTION

[1] This is a humanitarian appeal by the appellant, a 13-year-old citizen of Iran, against his liability for deportation. The appeal is brought under subsections 194(5) and (6) of the Immigration Act 2009 (the Act) and was lodged by the appellant, as required by the Act, contemporaneously with his refugee and protection appeal.

[2] At the core of this appeal lies the fact that, should the appellant be deported from New Zealand, he would be separated from his mother who has been recognised by the Refugee Status Branch (RSB) of Immigration New Zealand (INZ) as a refugee under the 1951 *Convention Relating to the Status of Refugees* ("the Refugee Convention"). As such, she cannot be forcibly returned under the Act to Iran. The primary issue is whether the appellant's separation from his mother and the effect this would have on him amounts to exceptional circumstances of a humanitarian nature.

[3] In a departure from the Tribunal's normal practice, this decision is being released concurrently with the Tribunal's decision in the appellant's related refugee and protection appeal which has been declined. Under Article 3 of the

1989 *Convention on the Rights of the Child* (CRC), the best interest of the appellant as a child is to be a primary consideration in all matters affecting him, which is indubitably the case in relation to these proceedings. It is plainly in the appellant's best interest to have the Tribunal's decision on his humanitarian appeal released promptly, so as to avoid him experiencing any further stress and anxiety around his status in New Zealand. Given the clear view of the Tribunal that the appeal must succeed, there is no countervailing interest which requires weighting in relation to the timing of the Tribunal's decision.

BACKGROUND

[4] The appellant is 13 years of age. He arrived in New Zealand at the beginning of 2012 as the holder of a student visa and has remained at school in New Zealand since that time.

[5] The appellant's refugee and protection claim, along with that of his mother, was lodged in early 2015. This followed receipt by the appellant's mother in late 2014 of a number of emails from the appellant's father, from whom she is divorced, which contained a number of threats including a threat to bring to an end a power of attorney executed in Iran in favour of the mother which gave her full custody rights over the appellant. By decision dated 18 May 2015, the mother's claim was accepted by the RSB, which found that, as a woman with deeply held views about the predicament of women in Iran, she faced a well-founded fear of being persecuted on this basis.

[6] However, by decision of the same date, the RSB rejected the appellant's claim. It did not find credible the mother's assertion that the appellant's father believed he had been effectively "tricked" into signing the power of attorney, which she claimed had also given her power to obtain the divorce without his knowledge. It thus rejected her assertions that the emails received were indicative of genuine threats against her or the appellant. An appeal was lodged by the appellant to the Tribunal.

[7] After hearing from the mother and the appellant, the Tribunal found them to be credible as regards the assertion that the appellant's father was bitter at being, in his view, "tricked" into ceding custody to the mother and that the divorce had been obtained without his knowledge. In this regard the Tribunal noted it had the

benefit of a translation of a key document, something which was not available to the RSB. See *DQ (Iran)* [2015] NZIPT 800868 at [27]-[28]. At [42], the Tribunal accepted that Iranian law was configured so as to confer custody on the father unless certain exceptions existed, none of which applied in this case.

[8] Therefore, the largely secular and liberal upbringing the appellant has had from his mother would be fundamentally different from that which he would expect from his father, who was a low-ranking member of the *Ettela'at* – the Iranian domestic intelligence service. The upbringing he had experienced to date would be replaced by one which emphasised the importance of Islam and compliance with rules imposed around dress codes and social behaviour. He would also, in due course, be made by his father to undertake his period of compulsory military service.

[9] The Tribunal, at [50] and [55], accepted that, in such an environment, the appellant would likely suffer episodic low-level physical discipline from his father, and would inevitably experience some negative emotional and psychological harm from being required to live with his father, with whom he has not had any relationship since birth. Nevertheless, the Tribunal found that this did not constitute a well-founded fear of being persecuted. There was no evidence that this would create a real risk of him practising self-harm, nor would he experience harm amounting to cruel treatment for the purposes of Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) or section 131 of the Act.

STATUTORY GROUNDS

[10] 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."

[11] 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].

[12] 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

[13] The appellant's case can be summarised as follows.

[14] The appellant was conceived out of wedlock. To protect the mother's honour, her family compelled the father's family to oblige their otherwise recalcitrant son to marry the mother, but extracted from them a promise that he would divorce her as soon as the appellant was born. However, the appellant's father reneged on the agreement and the appellant and his mother were forced to live with the father for the first two years of his life. During this time, the appellant's father made clear that he wished to have nothing to do with the appellant and, true to his word, provided no emotional or financial support to the appellant as a child beyond providing for the basic necessities of the household.

[15] Eventually, the appellant's mother separated from the father and sought legal advice. A lawyer drafted a document granting her power of attorney over the appellant and included in the document a form of wording which would enable her to obtain a divorce from the husband without his consent. The appellant's mother bided her time and, at a time when the father's emotional guard was dropped, persuaded him that it was in his interests to sign the power of attorney.

[16] Thereafter, without his knowledge, the mother obtained a divorce. The appellant's father subsequently became aware of the divorce and made threats towards her. The appellant and his mother fled to another city where they

remained living without any problems from the father until their arrival in New Zealand. In the interim, the mother established a lucrative business.

[17] The appellant had no particular knowledge of any problem between his mother and father until he overheard his mother discussing problems with her family in Iran. In late 2014, the appellant's mother had begun to receive a number of threatening emails from the father. These made it clear that the father had been interfering with her business in Iran. He also stated he was aware that she had become an apostate by abandoning Islam, and had most likely caused the appellant to have the same belief. His true hand was revealed, however, in an email where he demanded the payment of a significant sum of money to let the various matters rest. In one email, he threatened to have the son taken away from her.

[18] Since being in New Zealand, the appellant has fitted well into school. He now performs music and dance in a Western pop music style. He does not wish to return to Iran. His mother is the only family he has known. The appellant has had no contact with his father at all and his family life is comprised exclusively of his interactions with his mother and her family. He does not wish to be brought up by his father whom he does not know and whom he believes will make him adopt beliefs which are fundamentally different from those which he has been taught by his mother. The appellant is passionate about his music and dance but would not be able to perform these in Iran at all. There are many public restrictions on performing the style of dance and music he performs, and he will not even be able to perform at home. His father will try to make him believe in and observe Islam, which he does not wish to do.

Material and Submissions Received

[19] On 2 June 2014, the Tribunal received the notice of appeal. In this document, counsel drew attention to the fact that the appellant has no memory of his father and does not wish to be separated from his mother, who is the only parent he has known. In support, counsel provided copies of the decisions made by the RSB in both the appellant's and his mother's cases.

[20] The Tribunal has given consideration as to whether, in the interests of justice, it is necessary to seek further submissions and evidence from the

appellant's counsel about the appeal. However, the Tribunal has determined that this is not necessary as it is satisfied on the facts that the appeal should succeed.

ASSESSMENT

[21] The Tribunal has also considered the appellant's RSB file in relation to his application for refugee status and INZ files in relation to his student visa applications.

[22] Under section 231(1)(a) of the Act, the Tribunal is entitled to rely on findings of credibility or fact made by it in the appeal in relation to the appellant's refugee and protected person claim. In that appeal, the Tribunal accepted that the appellant would be required by law to live with his father until he reached the age of majority. This arguably amounted to a breach of the obligation of the state to protect family which, in the circumstances of this case, comprises the appellant and the mother.

[23] This appellant has not lived with his father since the age of two. He has effectively spent all of his life under the sole care and custody of his mother. His father is a father to him in only strictly biological terms, and has shown no interest in providing for the emotional, psychological and financial support and development of his son. Indeed, in one of the emails sent to the appellant's mother, the appellant's father expresses his antipathy towards the appellant and makes it clear he regards the appellant as being related to him in name only.

[24] It is clear that, if he associates with the appellant at all, the appellant's father intends to use him as a pawn in his power struggle against his mother, a successful businesswoman who rejects him and his beliefs, from whom he is trying to extort a significant sum of money. In these circumstances, although there is no evidence that the appellant's father will treat him in a manner amounting to a cruel, inhuman or degrading treatment for the purposes of Article 7 of the 1966 *International Covenant on Civil and Political Rights*, the environment in which the appellant would be required to live could well result in him being subjected to emotional and psychological neglect and episodic, if minor, bouts of physical assaults.

Conclusion on exceptional circumstances

[25] The Tribunal is satisfied that the circumstances amount to exceptional circumstances of a humanitarian nature. The appellant is only 13 years of age. He is, and has always been, emotionally and financially dependent on his mother who has been recognised as a refugee in New Zealand. She cannot return to Iran where she faces a real chance of being persecuted. It is plainly in the best interests of the appellant to continue to reside with his mother here in New Zealand.

[26] Also, if the appellant is forced to leave, the appellant's mother would be put in a position of having to return to Iran to keep the family together, or accepting that she will be separated from the appellant until such time as the appellant is able to leave Iran on his own accord. This is likely to be many years hence. The stress and other psychological harm that this would cause the mother, not to mention the risk to her if she were to return to Iran, as she has indicated she will do as the only option for keeping the family intact, is significant. The facts of this case are "well outside the normal run" as contemplated by *Ye*.

Public Interest

[27] Separation from family is one of the most keenly-felt impacts of having to flee abroad to avoid being persecuted. There is a public interest in allowing refugee families to remain together to assist with resettlement and help cope with trauma. On family reunification generally, see *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* (1952) A/CONF 2/108/rev 1, at Recommendation B; K Jastram and K Newland "Family Unity and Refugee Protection" in E Feller, V Turk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) at p564.

[28] Given the age of the appellant it is not possible to obtain a police certificate for him from New Zealand. As the appellant was a minor at the time he lived in Iran, the Tribunal is satisfied there is no sound basis for obtaining police certificates in respect of his time spent as a minor in Iran.

[29] The Tribunal finds that it would not be contrary to the public interest to allow the appellant to remain in New Zealand.

DETERMINATION

[30] 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. The Tribunal also finds that it would not in all the circumstances be contrary to the public interest for him to remain in New Zealand.

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

[32] The appeal is allowed on those terms.

"B L Burson"
B L Burson
Member

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B L Burson
Member