IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2015] NZIPT 600002**

AT AUCKLAND

Appellant:	**AE (Myanmar)**
Respondent:	**THE MINISTER OF IMMIGRATION**
Before:	Judge P Spiller (Chair)
Counsel for the Appellant:	C Curtis and T Zohs
Counsel for the Respondent:	M Urlich
Date of Hearing:	4 March 2015
Date of Decision:	12 March 2015

DECISION

INTRODUCTION

[1] This is an appeal against liability for deportation on humanitarian grounds by the appellant, a 24-year-old citizen of Myanmar, under section 156(3)(b) of the Immigration Act 2009 ("the Act") on the ground that she is a residence class visa holder and it has been determined that she holds this visa under a false identity (see section 156(1)(b) of the Act).

[2] The primary issue of the appeal is whether the appellant's personal and family circumstances, including the best interests of her two children, amount to exceptional humanitarian circumstances that would make it unjust or unduly harsh for her to be deported from New Zealand, and whether it would not in all the circumstances be contrary to the public interest to allow her to remain in New Zealand.

[3] For the reasons that follow, the Tribunal allows the appeal, with the grant of a visitor visa for a period of 12 months.

BACKGROUND

[4] The appellant was born in Myanmar in 1990. As a child, she was betrothed by her parents to her cousin. She had very little contact with him but knew of the parental arrangements and, over the years, they spoke on the telephone. She attempted to finish high school but was unsuccessful. From the age of 15, she worked on family farms in Myanmar. Later she was forced to work in the government oil plantation. Her father is deceased. Her grandmother, mother, sister and one brother live in Myanmar, and she has a brother living in Holland. She has an aunt living in New Zealand.

[5] In July 2009, the appellant left Myanmar under the name of AA (a name by which she was sometimes known) and went to Malaysia. She worked for five months packing gloves in a factory. While in Malaysia, she met her future partner, who was born in Myanmar in 1985.

[6] In September 2009, the New Zealand Refugee Quota Branch ("RQB") received a request from the appellant's betrothed cousin to sponsor her for residence and he described her as his wife. He was born in Myanmar in 1972. He was approved as a protected person under the Refugee Quota and was granted residence on arrival in New Zealand in August 2006. He declared that the appellant's name was BB and her date of birth was January 1977 (later changed to January 1981). He claimed to have married her in 1992 (this was later changed to 1996).

[7] In January 2010, the appellant was interviewed by the United Nations High Commissioner for Refugees (UNHCR) in Malaysia on behalf of Immigration New Zealand. She declared herself to be BB and married to her sponsor, and she provided an incorrect date of birth. In May 2010, the RQB approved the appellant's residence application under the Family Reunification Refugee Quota, based on her alleged marriage to her sponsor. She was issued with a certificate of identity in her false name and date of birth.

[8] In July 2010, the appellant (aged 19) came to New Zealand and was granted a residence permit. She initially stayed in a refugee camp. Refugee Services met the appellant to discuss plans for her resettlement in Nelson, where her sponsor resided. She advised that she did not want to live with him. She said that she had never met him and the only reason that she knew about him was that she had lived with his parents in Myanmar. She said that her true date of birth

was 1 October 1990. She wrote a letter confirming that she did not want to live with her sponsor and revealing that her true name was CC.

[9] In August 2010, the appellant was interviewed by the RQB. She stated that her real name was CC. She also produced a Burmese identification card which featured her name as AA. The RQB referred the appellant's case to the Fraud Branch.

[10] In September 2010, the Fraud Branch interviewed the appellant. She said that she and the sponsor had had an engagement ceremony in 1996. She was asked why she had given a false name and date of birth to the UNHCR in January 2010. She said that this was because her sponsor had given her that name and date of birth. She accepted that she knew that this information was false when she gave it.

[11] In November 2010, the appellant's future partner arrived from Malaysia as a quota refugee and was granted New Zealand residence on arrival. He and the appellant met at the refugee centre and began a relationship.

[12] In December 2010, the appellant was interviewed by the Compliance Operation of the Immigration Department. She stated that she would not be happy to return to Myanmar and would rather remain in New Zealand so that she could work and send money back to support her family. She said that her father in Myanmar was sick with diabetes and her brother in the Netherlands was also sick.

[13] On 14 November 2011, the respondent signed a Deportation Liability Notice for the appellant and this was served on 21 November 2011. The respondent ordered the appellant's deportation on the grounds that he had determined that the appellant held a visa under a false identity.

[14] On 1 December 2011, the appellant lodged an appeal against her deportation liability.

[15] In January 2012, the appellant married her partner. They have two children aged two years (born January 2013) and two months (born December 2014). Her husband and two children are New Zealand residents.

THE APPELLANT'S CASE

[16] The Tribunal heard evidence from the appellant and her husband.

Evidence of the Appellant

[17] The appellant's correct name is CC. She also came to be known under the name AA. Her tribal name is BB, but she does not use that name.

[18] The appellant has contact with her family in Burma about once a month, mainly by email and the internet. She has a younger brother who is studying engineering in Z. He lives with her mother and grandmother in the family home. She also has an older sister in Z who works as an office clerk, is married to a rice farmer and is four months pregnant. All her family are Christians. Another brother is in the Netherlands, but she is not in touch with him.

[19] The appellant left Burma because her parents wanted her to have a better life. There were no other reasons or problems that prompted her to leave. When she left Burma, she travelled to Malaysia with her Burmese passport under the name AA. The Malaysian police took her passport because she was seen to be an illegal migrant. She registered with the UNHCR and lived with her uncle for about a year.

[20] The appellant was forced into her betrothal by her parents, but she did not want to marry her fiancé. She understood the difference between betrothal and marriage. She told the UNHCR that she was married. They did not believe her at first. She then bought a false identification card in Malaysia. She did not claim refugee status with the UNHCR, and she does not remember expressing any fear for her safety or well being in Burma. Her application to come to New Zealand was that she was her fiancé's wife and that she wanted to be reunited with him. She decided to come to New Zealand because she could support her parents much better than in Malaysia. When she arrived in New Zealand in July 2010, she stayed at a refugee centre.

[21] When the appellant arrived at the refugee camp in Auckland, she was sick; she did not tell her whole story to Immigration New Zealand because she was fearful that they would send her back to Myanmar. Her sponsor telephoned her and said he could not come to see her because he was working. She did not want to marry him in any event, so she immediately advised Immigration New Zealand she was not as she was described and her sponsor was not her husband.

[22] The appellant has a large debt to repay to her parents and she hopes to work in New Zealand to repay this. Her father died in 2011 and her mother is at

home and has no income. Her sister looks after her family. The appellant will be disgraced as she has not paid her mother the money owed.

[23] The appellant also says that she cannot return to Myanmar as she has two small children and cannot support or look after them there, so they are very much at risk in Myanmar; she cannot be separated from them and they would be ill without their mother.

[24] The appellant now has fears for her safety. First, it is dangerous now for Christians in Myanmar. The appellant wants her daughters to be free as Christians.

[25] Secondly, since she has left, the appellant was told by her family via email that the police have been asking her family why she went to Malaysia and why she did not return home. She has deleted the emails. If she returns to Burma, she will be arrested as she will arrive under a different name from that in her previous passport.

Evidence of DD

[26] DD is a refugee. In 2007, he was living in Myanmar when the army came and collected him and other men, their names were taken and they were warned that if they ran away they would be killed; he managed to run away and went to Malaysia where he registered as a refugee. After that, he came to New Zealand and became a quota refugee and New Zealand resident. If he returned to Myanmar, he would be killed for running away. His parents live in X but he can never go back. He is Chin and his religion is Christian.

[27] DD's friendship with the appellant started in Malaysia in 2009. They started a relationship in November 2010 after they met again in the New Zealand refugee centre. They came to meet two to three times a week, often at church, and talked a lot together. In November 2011, they decided to get married, which they did in January 2012. At that time, he did not know that his wife has been served with a deportation liability notice as they did not talk about immigration matters. He discovered this only a few months later when he heard some friends talking.

[28] DD packs mussels and they struggle financially. If his wife has to return to Burma, he could not return for his own safety and he could not let his daughters go with their mother because they are raised as Christian and would be at risk; his children would be traumatised without their mother. He is aware that the police

have been looking for his wife. His contact with his parents in Burma tells him that he is still in danger.

[29] DD has a brother in Auckland. The brother is married with three young children.

Documents and Submissions

[30] The appellant has provided:

(a) submissions (18 February 2015) from her counsel;

(b) a statement (1 February 2015) from the appellant;

(c) a statement (1 February 2015) from the appellant's husband;

(d) a letter (16 February 2015) from the pastor of the appellant's Chin church, stating that she is an active and valued member of her church community; and

(e) copies of the birth certificates of the appellant's daughters; certification of the appellant's husband's permanent residence status and a copy of his residence visa; and a copy of the marriage certificate of the appellant and her husband.

[31] For the respondent, counsel has lodged submissions dated 25 February 2015. The Tribunal has also been provided with a copy of the file prepared for the Minister.

STATUTORY GROUND OF APPEAL

[32] The grounds for determining humanitarian appeals against deportation are set out in section 207 of the Immigration Act 2009, which provides:

> "(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."

[33] In relation to (the analogous) section 47(3) of the 1987 Act, the majority of the Supreme Court stated, in *Ye v Minister of Immigration* [2010] 1 NZLR 104, that three ingredients had to be established in the first limb:

(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.

[34] 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".

[35] In determining whether the exceptional circumstances of a humanitarian nature would make it unjust or unduly harsh for the appellant to be deported, the Tribunal must weigh the gravity of the offending, and any other adverse considerations, against the compassionate factors favouring the appellant remaining in New Zealand. See *Galanova v Minister of Immigration* [2012] NZIPT 500426 at [47]-[50].

[36] Where there are family interests at issue, 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 (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, para 9.8).

ASSESSMENT

Whether Exceptional Circumstances of a Humanitarian Nature

[37] The following relevant considerations arise on the facts.

Resident status

[38] In assessing the weight to be given to any relevant matters, the fact that the appellant is a New Zealand resident is important. The status of resident carries with it a number of rights. These include the right to remain in New Zealand and the right to enter and leave New Zealand. If the appellant is deported, she loses these rights. Further, the status of resident can affect other factors, making their humanitarian nature of greater or lesser significance.

[39] However, the Tribunal notes that the residence permit issued to the appellant did not record her correct name and date of birth, and so there is an issue as to its validity.

The appellant's personal circumstances

[40] The appellant has been in New Zealand for four years and eight months. She was born in Myanmar and came to New Zealand aged 19. She was granted residence under the Refugee Family Reunification category, based on her alleged marriage to her sponsor, a refugee. In fact, she was not married to him, and her residence permit was issued under a false name and date of birth provided by her. Soon after her arrival in New Zealand, she advised the New Zealand refugee authorities that she was betrothed, not married, to her sponsor and did not want to live with him, and also advised her true name and date of birth. Three years and four months ago, she was issued with a Deportation Liability Notice.

[41] Four years and four months ago, the appellant began a relationship with her partner, aged 24. He was also born in Myanmar and was newly arrived in New Zealand as a mandated refugee and a New Zealand resident. They married three years and two months ago, that is, only two months after the issue of a Deportation Liability Notice to the appellant. They have two daughters, aged two years and two months respectively.

[42] The appellant submits that she has fears for her safety should she return to Myanmar; she and her husband say that they have been advised by family members in Myanmar that the police have been looking for her. However, no supporting evidence has been produced of the alleged police inquiries. Further, even if there have been police enquiries for her, they appear to relate simply to her failure to return to Myanmar as she had indicated that she would. There is nothing to suggest she would be at risk of harm, beyond the ordinary operation of the law, if she has breached administrative rules relating to overseas travel. The Tribunal

also notes that, should the appellant return to Myanmar, she would not be alone there. Her grandmother, mother and two siblings live there and can be expected to provide her with some support.

[43] The Tribunal does, however, take account of two factors in regard to her possible return to Myanmar. The first is that her husband is a refugee and resident of New Zealand, and cannot be required to return with her to Myanmar (see section 164(1) of the Act). He has given an account of the circumstances of his escape from Myanmar and the dangers that he could face if he were to return. He and the appellant began their relationship a year before the appellant's Deportation Liability Notice was issued. They have now been married for over three years. The appellant's deportation would likely mean the end of their marriage.

[44] The second factor is that the appellant is now the mother of two small children, the second being an infant of two months. They are New Zealand residents. The best interests of these children lie with them remaining in their existing family unit with the support of both their parents. The appellant's deportation will mean that this family unit will come to an end, and that each parent will have to make the agonising choice of abandoning either one child or both children. The best interests of the appellant's children are a primary consideration in the consideration of this appeal. The Tribunal bears in mind article 3 of the 1989 *Convention on the Rights of the Child* in assessing the best interests of the appellant's children.

Conclusion on Exceptional Circumstances

[45] Weighing the above, the Tribunal is satisfied that there are exceptional circumstances of a humanitarian nature. The separation of families is not, of itself, an exceptional circumstance but it is noted that this is an appeal involving infant children who are entirely dependent on their parents. Also of particular relevance is the unusual circumstance of the appellant's husband being unable to return to Myanmar because of the risk of harm to him and his recognition as a refugee.

Whether Unjust or Unduly Harsh to Deport

[46] In considering whether it would be unjust or unduly harsh for the appellant to be deported from New Zealand, the Tribunal bears in mind the above circumstances of the appellant, her husband, and their infant children.

[47] The Tribunal recognises the valid reasons which caused Immigration New Zealand to issue the appellant a Deportation Liability Notice. This decision was correctly taken in light of the fact that the she holds a residence class visa under a false identity. This visa was granted on the basis of the false information which the appellant knowingly provided as to her marital status, name and date of birth. The appellant has acknowledged that she understood the difference between betrothal and marriage. She has accepted that her application to come to New Zealand was based on her false claim that she was her fiancé's wife and that she wanted to be reunited with him. She, in fact, decided to come to New Zealand because she could support her parents much better here than in Malaysia and wanted a better life for herself.

[48] The Tribunal also bears in mind that the appellant married her husband only two months after her Deportation Liability Notice was issued. She had clear knowledge of this Notice. Despite the denial of the appellant's husband, the Tribunal finds it implausible that he did not know of the Notice before their marriage. The Tribunal is led to the conclusion that the appellant's behaviour before and after her Deportation Liability Notice amounts to a manipulation of New Zealand's immigration system.

[49] In the absence of the appellant's children, the Tribunal would have found that her exceptional humanitarian circumstances would not make it unjust or unduly harsh for her to be deported from New Zealand. However, unlike their parents, the appellant's two infant children are not at fault in relation to the appellant's circumstances, and their needs must be taken into account.

[50] On balance, the Tribunal finds that the appellant's exceptional humanitarian circumstances would make it unjust or unduly harsh for her to be deported from New Zealand. The appellant has shown a level of harshness in relation to her children beyond that which is acceptable in order to preserve the integrity of New Zealand's immigration system.

THE PUBLIC INTEREST

[51] The Tribunal 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.

Risk of re-offending

[52] The risk of re-offending is a primary consideration in terms of the public interest. The degree of risk of future offending which the public can be expected to tolerate varies according to the severity of the offending. The appellant's offending is serious because the integrity of New Zealand's refugee and immigration system relies upon the provision of honest and truthful information by those who seek its protection. Her behaviour has fallen short in that regard.

[53] However, the Tribunal acknowledges that, in the four years and eight months that she has been in New Zealand, she has no recorded offending. On the contrary, she is regarded by the pastor of her faith community as an active and valued member. The Tribunal also recognises that there would be no need for the appellant to repeat her offending behaviour and therefore that the likelihood of it occurring again is low.

Family unity

[54] There is public interest in the preservation of family unity and in the observance of New Zealand's international obligations in that regard. As Hansen J held in *Garate v Chief Executive of Department of Labour* (HC 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."

[55] The Tribunal finds, in light of the refugee status of the appellant's husband and the circumstances of her two infant children, that it is in the public interest that her family should be permitted to stay together in New Zealand, and that New Zealand's international obligations in terms of the protection of family unity and the best interests of children are observed

Denunciation and deterrence

[56] Notwithstanding the low risk of further immigration fraud by the appellant, her actions were serious. There is a strong need for denunciation and deterrence

of immigration fraud because of the vulnerability which arises from the necessary dependence of the system on the scrupulous honesty of applicants. Further, the nature of the appellant's fraud was at the high end of the spectrum, given that it involved concealment of her real identity and the provision of a false identity. The integrity of New Zealand's immigration system is significantly undermined by such actions.

[57] It is acknowledged, however, that the appellant's use of a false identity was not the worst of its kind. She had no other criminal purpose (beyond securing residence) as an ulterior objective and the evidence before the Tribunal does not suggest that there was any real purpose or value in her adoption of a false name and details, which seems to have been at the instigation of her sponsor, whose lead she seems to have followed. She was prompt in coming forward to disclose her true identity once she was here and there is no evidence that she ever used the false identity for any other purpose.

[58] On balance, the Tribunal concludes that the public interest may be addressed by suspending the deportation liability of the appellant for a period of four years, subject to the condition that the appellant not be convicted of any offence in this period.

Conclusion on Public Interest

[59] Weighing the adverse public interest considerations (a low risk of further immigration fraud) against the positive public interest considerations (the preservation of a family unit including two infant children), the Tribunal is satisfied that it would not be contrary to the public interest to allow the appellant to remain in New Zealand.

DETERMINATION AND ORDERS

[60] The Tribunal finds:

(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 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.

Suspension of Deportation Liability

[61] 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 four years, subject to the condition that the appellant not be convicted of any offence in this period.

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

"Judge P Spiller"
Judge P Spiller
Chair

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Judge P Spiller
Chair