IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 44/2023
[2023] NZSC 119

BETWEEN	NGOC HONG TRUONG Applicant
AND	THE KING Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: J N Olsen for Applicant
M R L Davie for Respondent

Judgment: 4 September 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] The applicant, Ms Truong, is a Vietnamese national with permanent residence status in New Zealand. She has two New Zealand-born children who are New Zealand citizens. Along with her husband she pleaded guilty to cultivating cannabis and theft of electricity.[1] She was sentenced to five months' community detention, eight months' supervision and ordered to pay reparations in relation to the electricity.[2]

[2] Just over three years later she received a letter from Immigration New Zealand. The letter advised that, due to her offending, she was liable to deportation pursuant to

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1 Mr Hoang, the applicant's husband, is also a Vietnamese national. He was living unlawfully in this country at the time and, after serving a sentence of home detention, was deported to Vietnam.

2 *R v Truong* [2019] NZDC 26677 (Judge Bergseng).

s 161(1)(b) of the Immigration Act 2009 and might receive a formal deportation liability notice (DLN). As the name suggests, a DLN would render Ms Truong liable to deportation at the direction of Immigration New Zealand. It appears that Ms Truong would have received her pre-DLN letter sooner but for the fact that she was suffering from significant mental health issues due to the enforced separation from her husband, the fact that she was pregnant at the time and the stress of the criminal proceedings.

[3] On receipt of the letter, Ms Truong brought a convictions and sentence appeal to the Court of Appeal over three years out of time.[3] The Crown did not oppose the application in that Court to bring the appeal out of time, or the admission of affidavits in support of the appeal setting out relevant background.

[4] Ms Truong sought discharge without conviction pursuant to s 106 of the Sentencing Act 2002. The only issue on appeal was whether the applicant's exposure to the possibility of deportation (a risk not appreciated at the time of her guilty plea) might have rendered the consequences of conviction out of all proportion to the gravity of the offence in terms of s 107 of the Sentencing Act.

Court of Appeal decision

[5] The Court of Appeal found that the risk the applicant might be deported pursuant to s 161(1)(b) of the Immigration Act was not a consequence out of all proportion to the gravity of her offending.[4] The Court came to this view primarily because the Immigration Act has its own procedures for the consideration of the circumstances of a potential deportee both prior to the issue of a DLN and after a notice is given. At the first stage, those at risk of receipt of a DLN may make submissions to the Minister of Immigration in that respect before it is issued; and, should a DLN be issued, there is a right of appeal on humanitarian grounds to the Immigration and Protection Tribunal pursuant to s 206(1)(c) of the Immigration Act. Perhaps the most significant consideration was that s 172 of the Immigration Act authorises the Minister at any time to cancel a person's liability for deportation or to suspend a residence class visa holder's liability to deportation. Suspension may be for

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3 *Truong v R* [2023] NZCA 97 (Gilbert, Ellis and Davison JJ).
4 At [55].

a period not exceeding five years, subject to compliance with any conditions stated in a written suspension notice.

[6] These contingencies meant, that Court considered, the wider circumstances of the applicant and her family may be taken into account when relevant immigration decisions are made about her. The Court concluded:

> [55] As the appellant's convictions do not inevitably result in her being deported, there is a statutory process by which the merits of the appellant's grounds for cancellation or suspension of her deportation will be considered before a decision is made that she be deported, and she will have a right of appeal to the Tribunal against such a deportation decision if one is made, we find that those consequences of conviction are not out of all proportion to the gravity of the offences.
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> [56] While there is cogent evidence supporting the appellant's claim to have suffered significant mental health issues as a result of her anxiety over her husband's deportation and the prospect that she too may be deported, those matters together with other factors, such as: the welfare interests of her two children; the absence of any further offending; and the appellant's now established and settled life with her children in New Zealand, are best considered by the Minister in deciding whether or not deportation should proceed, or if deportation is to be suspended what conditions are appropriate to impose. The Minister and the Tribunal (if there is an appeal) will be better informed than the Court is to assess and determine the merits of the appellant's case and her grounds for not being deported, in light of the offending for which she was convicted.
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> [57] We accordingly find that the appellant has failed to show the direct and indirect consequences of conviction would be out of all proportion to the gravity of the offence. Where the requirement in s 107 of the Sentencing Act is not satisfied, the Court must not grant a discharge under s 106.

Submissions

[7] The applicant submits that the Court of Appeal failed properly to apply the s 107 test when it found that the risk of deportation, on conviction, was not so significant as to establish that the consequences were out of all proportion to the gravity of her offending. The effect of such reasoning, it is submitted, was to lead the Court to fail to apply the 'real and appreciable risk' test as to the consequences of conviction.[5]

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5 *R v Taulapapa* [2018] NZCA 414 at [22].

[8] The Crown submits that the 'real and appreciable risk' test was not misapplied, rather the applicant failed the test on the facts. That is, when the seriousness of the offending was balanced against the nature and dimension of the risk.

Analysis

[9] While it might have taken a different view on different facts, the Court of Appeal rejected evidence adduced by the applicant from an immigration lawyer, suggesting that Ms Truong would invariably be served with a DLN and any appeal would be highly likely to fail. This was a factual assessment.

[10] The Court concluded that the offending was moderately serious (a finding the applicant does not challenge). But since deportation was not an inevitable consequence of the statutory procedures, and the Minister of Immigration had intermediate options short of deportation, it could not be said that the risk of deportation was out of all proportion to the gravity of offending. The important assessment was for the Minister, taking into account all relevant considerations including the difficulties Ms Truong has faced.

[11] No issue of principle arises in this case and we see no risk of miscarriage if the application is not granted.[6]

Conclusion

[12] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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6 Senior Courts Act 2016, s 74(2)(a) and (b).