

**IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI**

SC 25/2023

BETWEEN

**ELIZABETH MARIA BOLEA
Appellant**

AND

**THE KING
Respondent**

APPELLANT'S OUTLINE OF ORAL ARGUMENT

“The direct and indirect consequences of a conviction”

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1. Likelihood of adverse outcome is relevant to the degree/level of consequence: refer *Iosefa etc. & Maraj v Police* [2016] NZCA 279: “the Judge did not make any error in assessing the likelihood of negative consequences materialising. That is a legitimate part of the proportionality exercise.”
2. The higher the likelihood of an adverse outcome occurring, the more significant the consequence (all other things being equal).
3. Availability, if any, of avenues to avoid deportation may affect the likelihood of adverse outcome and can therefore be relevant.
4. The relevance of such avenues extends no further: c.f. *Truong v R* [2023] NZCA 97 at [56]:
 - “*...best considered by the Minister*”
 - Similarly, *Zhang v Ministry of Economic Development*: “There is nothing that requires the courts to intervene to try and impose their perception of what the right immigration consequence should be. That is *best left* to the immigration authorities”: at [14]
 - Section 107 SA test does not permit such deference. *Rahim v R*: “The consequences are just the consequences, either direct or indirect or both. Once they are identified, the question is whether those consequences are “out of all proportion” to the gravity of the offending.”
 - In cases like *Bolea*, the outcome of the PROPORTIONALITY ASSESSMENT determines whether or not matters are “best considered by the Minister” or “best left to the immigration authorities”.
 - “*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...*”
 - (i) What are the “*merits*” of the appellant’s case?
 - Sok v R*: “Courts usually assume, in the absence of evidence to the contrary, that immigration authorities will take *relevant considerations* into account.”: at [49].

-*Zhu v R*: “If a [deportation liability] notice issues it will be a product of a process in which Mr Zhu’s conduct and *circumstances....are examined on their merits*”: at [26].

(ii) Minister/Immigration (re whether to issue a deportation liability notice):

-no statutory test, or specific statutory guidance, but *Ye v Minister of Immigration* is informative:

“In summary, the position reached to this point is as follows. Immigration officers making the discretionary decision envisaged by s 54 of the Act [equivalent to a serving of a deportation liability notice under the current s 170] whether to make a removal order, must, to the extent practicable at that stage, consider whether the s 47(3) criteria apply to the case [equivalent to the now s 207].”: at [28].

“It cannot have been intended that a lower threshold than that set out in s 47(3) [s 207] should operate outside the RRA [Immigration and Protection Tribunal] regime. That would simply encourage those concerned to bypass the specified statutory process and the applicable test.”: at [17].

“The explanation for this apparently surprising omission [in the Immigration questionnaire] must be that those who drafted the questionnaire did not realise the linkage between the decision to be made and the s 47(3) [s 207] criteria.”: at [45].

-Also, s (3)(1) of the Act: “...national interest, *as determined by the Crown...*”

(iii) Immigration Tribunal – different statutory test/guidance (to s 107 Sentencing Act test).

- Immigration/Immigration Tribunal – “exceptional circumstances of a humanitarian nature”: see *Jooste* at [45].
- Section 107 SA – *R v Hughes* at [23]: “We do not consider descriptions of the disproportionality test such as “very stiff”, “exceptional”, or “extreme” to be helpful.”

(iv) N.B: No appeal rights against the *merits* of the decision of Immigration to issue a deportation liability notice c.f. s 106 applications.

7. The *Zhu/Sok/Bolea* approach

a) The distinction drawn in *Zhu*:

-*Zhu* holds that “liability to deportation is a consequence of conviction” (at [23], [27]), but not deportation itself (at [25], [28]).

-However, exposure to deportation *per se* seldom suffices for s 106 applications and was/is not relied on for *Bolea*.

-The effect of *Zhu* is that if there is a “process” involved before deportation can occur then it operates to causatively “cleanse” the conviction.

-The *Sok/Zhu* approach appears limited to Immigration cases only: *Sok* at [45], [47], *Zhu* at [25]. Unclear why.

b) When does the *Zhu/Bolea* approach apply c.f *Truong* approach?

-*Zhu* holds that the *Zhu/Bolea* approach is “usually” adopted (at [25]).

-*Truong* demonstrates the arbitrary nature of determining when this approach applies. No difference between *Zhu/Bolea* and *Truong*.

-*Truong* also demonstrates that the *Zhu/Sok/Bolea* approach is not “usually” adopted.

c) Appellant’s position:

- Both exposure to deportation (direct consequence) and risk of deportation (indirect consequence) are s 107 consequences.
 - Sok/Zhu/Bolea* “usually” excludes the latter and are therefore bad law in this respect.
- The risk of deportation and the consequences which would flow if deportation occurred determine the level of (Immigration) consequence.
 - Truong* appears to accept this and is therefore good law in this respect.
- Section 107 does not permit courts to, in effect, delegate this assessment.
 - Sok/Zhu/Bolea/Truong* are bad law in this respect.

8. What is the likelihood of the appellant being deported?

-Both High Court & Court of Appeal made no assessment of this.

-(Unchallenged) affidavit evidence of Rory Hennessy: “...she will almost certainly be sent a Deportation Liability Notice”: CA COA at p 129.

-Section 172 IA:

-Such discretion should also be exercised in accordance with s 207 IA: *Ye v Minister of Immigration* at [17].

-“Absolute discretion of the Minister” – defined in s 11.

-Section 207 appeal – discussed above.

Dated this 31st day of October 2023.

Counsel certify that, having made appropriate inquiries to ascertain whether these submissions contain any suppressed information, to the best of our knowledge, they are suitable for publication (that is, these submissions do not contain any suppressed information).