NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE COMPLAINANT PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA679/2020
[2021] NZCA 252

BETWEEN	PHEASETH SOK Appellant
AND	THE QUEEN Respondent

Hearing: 24 March 2021

Court: Miller, Brewer and Dunningham JJ

Counsel: E P Priest for Appellant
B F Fenton and S E Trounson for Respondent

Judgment: 18 June 2021 at 10.00 am

JUDGMENT OF THE COURT

A The application to adduce fresh evidence on appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

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[1] Mr Sok was denied a discharge without conviction under s 107 of the Sentencing Act 2002[1] on a charge of injuring a five-month old baby with reckless disregard for the baby's safety.[2] He says on appeal that Judge Skellern was wrong to deny him a discharge, principally because he will likely face deportation to his native Cambodia and he says that is a consequence of his conviction.

Gravity of the offence[3]

[2] The victim was in Mr Sok's care for a brief period on 20 March 2018, with Mr Sok's own infant child, when he was injured. The summary of facts records that

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1 *R v Sok* [2020] NZDC 24481 [DC Judgment].

2 Crimes Act 1961, s 189(2).

3 It is settled law that "gravity of the offence" in s 107 of the Sentencing Act 2002 takes into account the aggravating and mitigating circumstances of the offending and the offender: *Z (CA447/2012) v R* [2012] NZCA 599, [2013] NZAR 142 at [27]–[28], citing *A (CA747/2010) v R* [2011] NZCA 328 at [25] and affirmed in *DC (CA47/2013) v R* [2013] NZCA 255 at [34]–[35].

Mr Sok's acts resulted in the "rapid acceleration and deceleration movement" of the baby's head. In other words, the baby appears to have been shaken.

[3] Ms Priest resisted this inference, suggesting that the injury may have resulted from being dropped. But the charge necessarily imports that Mr Sok injured the baby with reckless disregard for its safety; that is, he knew the risk of injury but went ahead anyway. The most lenient view of it is that he suffered a momentary loss of control when dealing with an unsettled baby and responded by shaking it. There is evidence that he was tired and under significant stress at the time, partly because of conflict between him and his wife, on the one hand, and her parents, on the other.

[4] However it was inflicted, the injury was very severe. The baby began to convulse. Mr Sok called his cousin (because his English is poor) and had her summon an ambulance. Medics found the baby floppy and unconscious. He ceased breathing for a period and had seizures. Investigation, including a subsequent pathologist's report, confirmed a significant head injury. The baby suffered a subdural bleed. The left eye did not fix and follow normally, and both eyes exhibited multiple haemorrhages. There was evidence of trauma in neck ligaments and upper thoracic vertebrae.

[5] The baby continues to suffer serious after-effects, though the full impact of the injury cannot be known until developmental milestones have been reached. It appears seizures are under control with medication. The baby is receiving speech therapy, specialist treatment for the left eye, occupational therapy for play and fine motor skills, and physiotherapy for balancing. The need for this kind and degree of rehabilitative support speaks for itself.

[6] Mr Sok exercised his right not to speak to the police. He was charged (on 11 April 2018) with wounding with intent to cause grievous bodily harm. He pleaded not guilty. On 12 March 2020, not long before trial, he pleaded guilty to the lesser charge of injuring with reckless disregard. Ms Priest explained that he never accepted that he intended to harm the baby and she was not prepared to recommend a plea until she had obtained her own expert report.

[7] We accept what counsel says. The point remains that Mr Sok cannot claim he accepted responsibility at an early stage. He did not need an expert's report to tell him the injury was non-accidental. On the contrary, he maintained initially that the baby had choked on milk. (We record that there is no evidence the baby's prognosis would be better had doctors been told at once what had happened.)

[8] A reluctance to admit responsibility is regrettably still evident. In his affidavit in support of the discharge application Mr Sok admits hurting the baby but does not say how it happened. He claims, incompatibly with his plea, that he did not know "it" would harm the baby. Further, a restorative justice report records Mr Sok telling the mother of the baby on 9 November 2020 that the injury happened when he was playing with the baby. He said that he "had been bouncing [the baby] on the baby bouncer which could possibly have been too hard for him". That cannot be true. The medical investigations excluded the reasonable possibility of an accidental cause.

[9] Against that, other considerations collectively reduce significantly the gravity of the offence. We have accepted that this was an isolated incident driven by stress. Mr Sok did plead guilty and did engage in restorative justice with the baby's mother. It is evident that this has resulted in a reconciliation. We accept that he experiences remorse.

[10] Mr Sok was able to point to otherwise good character. He has no previous convictions and he tendered references describing him as a person of humble and caring disposition who is very responsible and treats others well, including staff at the family café. He is well integrated into his community and has volunteered with the RSA and Lions Club and provided food to those in need. At the time of sentencing he had completed more than 100 hours of community work. He could also point to a commitment to rehabilitation and low risk of reoffending. He undertook a parenting course on his own initiative.

[11] We accept Ms Priest's submission that the sentence ultimately imposed (community detention and supervision) reflected these mitigating circumstances. There is much to be said for Mr Sok's character, this offence notwithstanding, and we accept he is an asset to his community.

[12] The Judge was nonetheless plainly right to characterise this as serious offending. As she recognised, s 9A of the Sentencing Act was engaged and several of the aggravating factors listed there were present: defencelessness, harm and breach of trust. Of these, the serious harm done is the most significant factor in this case. We are prepared to accept that the offending was not concealed.[4]

Consequences of conviction

[13] Mr Sok points to several consequences he says he will suffer from conviction. They concern deportation from New Zealand, employment and travel. Of these, the immigration consequences are by far the most important and we will examine them first.

Immigration status then and now

[14] When the Judge declined a discharge and entered the conviction on 13 November 2020 Mr Sok's immigration status was as follows. He had entered New Zealand on a general visitor visa on 17 January 2017. In November 2017 he was granted a temporary entry class visa. Such a visa is issued for a fixed period for certain purposes. In this case the visa allowed Mr Sok to remain and work while his application for permanent immigration status was processed.

[15] Mr Sok applied for another temporary entry class visa, this time on a partnership basis. That application was held in abeyance after he was charged. He has now been advised, by letter of 12 March 2021, that Immigration New Zealand (INZ) declined his application for a new visa. The reason given was that he does not meet good character requirements.

[16] Mr Sok was allowed to remain in New Zealand while his application for a new visa was processed. It appears INZ simply extended his existing temporary visa from time to time. It was eventually extended until 1 December 2020, when it expired. The record does not explain why the visa was not further extended pending hearing of this appeal.

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4 Sentencing Act, s 9A(2)(e).

[17] His existing visa having expired and his application for a new visa having failed, Mr Sok is now unlawfully in New Zealand[5] and under a statutory obligation to leave.[6] He may be served with a deportation order.[7]

Evidence of immigration consequences

[18] The evidence in the record addresses the consequences of conviction for Mr Sok's immigration status while he retained a temporary entry class visa. At the hearing we were given a copy of the letter of 12 March, which evidently came as a surprise to counsel. We asked counsel to clarify Mr Sok's precise status and identify the immigration pathways that may now be followed. They filed a joint memorandum. Ms Priest also sought leave, which we grant, to adduce fresh evidence in the form of an affidavit of Daniel Kruger, an experienced immigration lawyer who had also sworn an affidavit in the District Court.

The evidence in the District Court

[19] Mr Kruger's opinion in his District Court affidavit (dated 30 July 2020) was to the effect that there was a real risk a conviction would lead to Mr Sok's deportation. He explained that a temporary entry class visa holder is liable for deportation if INZ decides there is sufficient reason to deport them.[8] Sufficient reasons include criminal offending and other matters relating to character.[9] Under the INZ Operational Manual (the Manual) a person convicted of an offence in New Zealand, for which a court might impose a term of three months' imprisonment or more, is generally considered to fail the character requirements. Such a person is usually ineligible for a visa unless INZ grants a character waiver. In Mr Kruger's experience, character waivers are seldom granted even when applicants have family in New Zealand.

[20] Mr Kruger explained that INZ may issue a deportation liability notice in such cases. It may do so if the offence has been committed whether or not the person is convicted, but he thought it unlikely that INZ would issue a deportation liability notice

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5 Immigration Act 2009, ss 9(1)(a) and 9(2)(b).
6 Section 18.
7 Section 175.
8 Immigration Act, s 157(1).
9 Section 157(5).

to someone who had been discharged without conviction. On the contrary, he considered, INZ would likely not insist on a character waiver in this case and Mr Sok would likely be granted a further visa.

[21] A person served with a deportation liability notice is given an opportunity to offer reasons why a deportation should not proceed, but in Mr Kruger's opinion INZ would likely conclude that Mr Sok should be deported having regard to the maximum sentence for the offence.

The sentencing Judge's assessment

[22] Judge Skellern accepted that Mr Sok faced a real and appreciable risk of deportation. She found that a result of the offending, but accepted Mr Kruger's opinion that a conviction increased the risk. The Judge accepted that the issue of a deportation liability notice would obviously be a very significant consequence, but in this case it was not out of all proportion to the gravity of the offence. She explained that:[10]

> [30] The issuing of a deportation liability notice is obviously a very significant consequence. However, I note that this family is fractured already. One of his children has now been living in Cambodia for three years. That child is living with Mr Sok's parents. There are clearly close family ties remaining in Cambodia. In terms of employment, there is no particular evidence to suggest that Mr Sok has any different career aspirations from running the café with his wife as he is currently. I accept that stigma and shame are consequences for Mr Sok but certainly in New Zealand, given the size of the Cambodian community, that is likely to be more as a result of the actual offending than a conviction. I accept there will be additional hurdles for Mr Sok with travel but they are not insurmountable and neither does he appear to have any concrete plans to travel.

It will be seen that so far as consequences of deportation are concerned the Judge relied on the fact that the family is already split, with some members living in Cambodia. We return to this point at [74] below.

The new evidence in this Court

[23] We refer here principally to the joint memorandum of counsel. We mention Mr Kruger's new affidavit, dated 7 April 2021, where it supplements what counsel

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[10] DC Judgment, above n 1.

have told us. We refer also to the Immigration Act 2009 (the Act) and the Manual, in which is found instructions authorised under sections 22–25 of the Act. By way of example, s 22(6) provides that rules or criteria relating to visa eligibility may include "matters relating to character". Instruction A5.1 of the Manual specifies that applicants for all visas "must be of good character". The Manual goes on to prescribe that character checks must be carried out on applicants for a temporary entry visa who are over 17 years of age and intend to stay in New Zealand for 24 months or more, or on any other applicant for a temporary entry visa where INZ decides it is necessary.

[24] The Act precludes a visa for persons convicted within the preceding 10 years of an offence for which they were sentenced to a term of imprisonment of 12 months or more.[11] Applicants for a temporary entry class visa who have been convicted of certain other offences do not face an automatic prohibition. Rather, they are normally ineligible unless granted a character waiver. Instruction A5.45 provides that:

> **A5.45 Applicants normally ineligible for a temporary entry class visa unless granted a character waiver**
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> Applicants who will not normally be granted a temporary entry class visa, unless granted a character waiver include any person who:
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> …
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> (c) at the time of application:
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> (i) has been charged with an offence, which on conviction, would make section 15 of the Immigration Act 2009 apply to that applicant; or
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> (ii) is under investigation for such an offence; or
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> (iii) is wanted for questioning about such an offence; or
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> (d) has been convicted at any time of:
>
> (i) any offence for which they have been imprisoned; or
>
> (ii) an offence in New Zealand for which the court has the power to impose imprisonment for a term of three months or more; or
>
> …

[11] Immigration Act, s 15(1)(b). See also s 15(1)(a), which precludes a visa for persons sentenced to a term of imprisonment at any time for five years or more.

It will be seen that Mr Sok would normally require a character waiver to obtain a visa because the offence of which he was convicted carries a maximum term of more than three months' imprisonment.

[25] The Act and Manual do not specify what must be considered when assessing character in a given case. The Manual does state that applicants for a temporary entry class visa must provide a police certificate "if required". It does not require that they declare offences that have not resulted in convictions. Nor does it preclude INZ taking into account conduct that was disposed of otherwise than by conviction, including conduct that resulted in a discharge.

[26] The Manual provides in Instruction A5.45.1 that an immigration officer must not automatically decline an application for a character waiver. Rather, the officer must make and record a reasoned decision whether to waive the requirement or not.

[27] In this case, the decision was recorded in the letter of 12 March and associated character waiver assessment template. Although described as a template, the latter document contained a reasoned merits assessment. It recorded that on 20 March 2019 Mr Sok filed an application for a temporary work visa, declaring that he had been charged with an offence. The police advised that they had recorded a family harm episode in his family environment and he had been charged. Details of further enquiries made of the police and Mr Sok as the case progressed were noted, including the extent of the child's injuries, details of the summary of facts and the outcome of the restorative justice conference. Submissions made to INZ by Mr Sok's lawyer were summarised. They included details of his family circumstances and his argument that returning to Cambodia would be disastrous for him, his wife and family.

[28] The fact that Mr Sok had been found guilty was recorded, but the immigration officer's reasons went on to record that the offence was serious in nature as it involved injury against a defenceless person in circumstances where Mr Sok was in a position of trust and left the child with ongoing health conditions. The officer accepted that Mr Sok has emotional and physical ties in New Zealand to his partner, his child and his employment, although he also has ties to Cambodia where his daughter and

immediate family live. Mr Sok's remorse and rehabilitative steps were recorded. Against that:

> … there are significant factors that [weigh] against granting a character waiver. The applicant has been convicted of an offence causing injury to a 5 month old baby. I have considered the sentencing was at the lesser end of the scale, however the conviction is serious considering the age of the victim, and the position of trust the applicant was placed in. The applicant, while showing remorse has also shown an element of minimisation in regards to the offending. The victim has ongoing health problems and requires specialist care. While I have considered the applicant's ties to New Zealand, the applicant also has immediate family in Cambodia. His daughter is currently living in Cambodia, and while the applicant has stated that the daughter will return while the trial continues, she is currently still offshore. While some time has passed since the conviction, the seriousness of the offence outweighs the positive circumstances surrounding the application. I have considered that an appeal is in process, however at the time of assessing the waiver, the conviction and sentencing stands, and I have made an assessment based on the information at hand. I have considered all of the relevant factors. I am not satisfied that the surrounding circumstances of the application are compelling enough to justify waiving the character requirement.

[29] The waiver was accordingly declined, and with it fell Mr Sok's application for a new temporary entry class visa. The letter of 12 March notified him accordingly, stating that his application had been declined because he did not meet the good character requirements and INZ had declined to waive them.

[30] The letter advised Mr Sok that he might seek reconsideration of the decision to decline his application for a visa provided he was still lawfully in New Zealand and met certain other requirements. While that advice was strictly accurate so far as it went, Mr Sok could not meet the requirement that he be lawfully in New Zealand at the time he requested reconsideration. It is a statutory requirement found in s 185(2)(b) of the Act and it is inflexible. It follows that a discharge without conviction could not now return Mr Sok to the position he was in before his application for a new visa was declined.

[31] The central premise of the application for discharge was that, absent the conviction, Mr Sok would not require a character waiver and so would likely be granted a work visa. This claim may have had some merit previously to the extent that, notwithstanding what the legislation and Manual have to say about character requirements, INZ does not in practice require a character waiver where a person who

has committed an offence carrying a maximum term of more than three months imprisonment is subsequently discharged without conviction. It cannot avail Mr Sok now that his application for the visa to which the character waiver related has been declined and he is ineligible to seek reconsideration.

[32] As a person liable to deportation under s 154 of the Act Mr Sok might have appealed to the Tribunal on humanitarian grounds. In such an appeal the Tribunal may seek information from any source and may take into account the facts of any criminal proceeding, however it was disposed of.[12] If the appeal succeeds the Tribunal may grant the appellant a resident visa or a temporary visa for a period not exceeding 12 months.[13] However, it appears to counsel that Mr Sok may now be too late to bring an appeal. A 42-day time limit began to run on the second day after his temporary visa expired on 1 December 2020.[14] This was avoidable. The temporary visa might have been extended or, if INZ declined to do so, a timely appeal might have been filed. The material before us does not explain why nothing was done. What matters now is that a discharge could not reinstate the right of appeal.

[33] There are other routes for reconsideration.[15] If he were to leave New Zealand (provided he did so voluntarily, without being deported) Mr Sok might make a fresh application from offshore for a temporary entry class visa on a partnership basis. He would be in the same position under the Manual in that he would have to disclose a conviction for this offence, but if granted a discharge he would not have to disclose the offence and the requirement for a character waiver would not be triggered by Instruction A5.45(d). The general requirement for good character would remain, however, and INZ might take the offending into account as explained at [25] above.

[34] Mr Sok may also apply to the Minister of Immigration for the grant of a visa under s 61 of the Act, provided he is unlawfully in New Zealand but not yet subject to

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12 Immigration Act, s 228(1).
13 Section 210(1).
14 Section 154(2).
15 Counsel did not discuss s 177, under which an immigration officer has a discretion to cancel a deportation order, as one of the avenues presently available to Mr Sok, presumably because he is not yet subject to such order. Counsel did include judicial review as a possible pathway, but they did not suggest it would offer Mr Sok better prospects of obtaining a visa and we do not discuss it here.

a deportation order. And Mr Sok may ask the Minister to cancel or suspend conditionally his liability to deportation under s 172. In both cases the decision is in the Minister's discretion and we understand the decision may be delegated to an official.

[35] The Associate Minister of Immigration may also give a Special Direction under s 378 of the Act, the effect of which is to require INZ to issue a visa. We are told that in practice the Associate Minister would usually refuse to consider an application unless all other avenues, including s 61, have been exhausted, and it does not appear that it is easier to obtain a Special Direction than it is to obtain a visa under s 61.

[36] Mr Kruger acknowledges that it is generally a pre-requisite for a visa application that the applicant already holds a valid visa, meaning that Mr Sok must rely on s 61 if he is to obtain a visa while still in New Zealand. In his opinion applications under s 61 succeeded only in rare circumstances and those which are "clouded" by issues of character almost always fail. We return to this evidence at [56] below.

[37] In Mr Kruger's opinion a discharge without conviction would significantly increase Mr Sok's prospects of obtaining a visa under s 61 (or a Special Direction under s 378). That is so, he believes, because the underlying reason for Mr Sok's unlawful immigration status is that he failed to meet the good character requirement, and that happened because Instruction A5.45 was "effectively" triggered by the conviction. If the conviction was set aside, Mr Sok could again meet the good character requirement. It is also his opinion that a discharge would significantly increase Mr Sok's prospects of successfully obtaining a visa from offshore. We return to this evidence at [58] and [61]–[62] below.

Submissions

[38] Mr Sok says the Judge discounted the risk of deportation and ought to have accepted not merely that he is at risk of deportation but that it is in fact the likely end result. Ms Priest referred us to several decisions, including one of this Court, in which

a discharge was granted for deportation risk.[16] She submitted that the Judge understated Mr Sok's ties to New Zealand and overstated those to Cambodia, pointing to his evidence that had it not been for the pandemic his daughter would have returned to live permanently in this country.

[39] For the Crown, Ms Fenton pointed to authorities to the effect that courts should not anticipate the decisions of immigration authorities charged with considering all the circumstances of the offender and their family, especially since the same consideration that inform a discharge decision may or must be taken into account in deportation decisions.[17] Counsel argued that cases in which this Court or the High Court have been willing to grant a discharge for deportation risk are distinguishable.

Immigration consequences and s 107 disproportionality

[40] Section 107 of the Sentencing Act provides that a court must not discharge an offender without conviction unless satisfied that the direct and indirect consequences of conviction would be out of all proportion to the gravity of the offence. The general approach to this test is well settled.[18] The leading authority remains *R v Hughes*, in which the Court held, among other things, that the language of disproportionality does not mean the jurisdiction is to be sparingly exercised.[19]

Real and appreciable risk that a consequence will happen

[41] There is no onus on the offender to establish that the disproportionality test has been met; the Court must be "satisfied", meaning that it has made up its mind.[20] But the offender must be prepared to identify consequences of conviction and point to evidence of a "real and appreciable risk" that the consequence will happen. That

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16 *Jeon v Police* [2014] NZHC 66; *Chand v Police* [2017] NZHC 2188; *Kumar v Police* [2015] NZHC 3293; *Rahim v R* [2018] NZCA 182; *R v Tang* [2019] NZHC 2056; and *Sunda v Police* [2019] NZHC 756. She also relied on *George v Police* [2014] NZHC 1725 at [46], where the Court held that the risk of deportation could sometimes be taken into account.

17 *Waine v R* [2017] NZCA 287 at [32]; *Ho v R* [2016] NZCA 229 at [15]; *Ji v R* [2015] NZCA 308 at [14]; *Zhang v Ministry of Economic Development* HC Auckland CRI-2010-404-453, 17 March 2011; *Solicitor-General v Mohib* [2016] NZHC 1908 at [49]–[50]; *Chawla v Police* [2017] NZHC 1368 at [42]–[44]; *Isaj v Police* [2018] NZHC 1689 at [28]; and *Singh v Police* [2020] NZHC 368 at [43].

18 See n 3 above.

19 *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [23].

20 *R v Hughes*, above n 19, at [49].

standard recognises that the Court is gauging the likelihood of a future event, something that will happen following conviction.[21] A court may require evidence of matters of which it is not prepared to take judicial notice. Where a consequence rests on a matter of present fact, such as a requirement that a conviction be disclosed, proof of that fact may be required under s 24 of the Sentencing Act.[22]

Causation

[42] The legislation does not confer a general power of dispensation. Under s 107 a court may not discharge an offender unless a given outcome is a consequence of conviction. The consequence may be "direct or indirect". That language is traceable to *Fisheries Inspector v Turner*, in which Richardson J declined to draw a distinction between direct and indirect consequences, reasoning that it would introduce an undesirable degree of uncertainty in the day-to-day application of the important jurisdiction to discharge without conviction.[23]

[43] The language of indirect causation signifies that the jurisdiction to discharge extends to cases where the happening of a given consequence may require some intervening event or action, such as the decision of a third party in which the conviction is relevant: by way of example, decisions of a prospective employer or a disciplinary or qualifications authority or an immigration officer.

[44] To state that causation may be indirect is to establish that the conviction need only be one of several conditions necessary to make the consequence happen. It does not follow that the legislation admits any connection between conviction and consequence, however weak or remote. Nor is a but-for connection necessarily sufficient, as this case and others demonstrate. Causation is a question of substance

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21 *DC (CA47/2013) v R*, above n 3, at [43]; and *R v Taulapapa* [2018] NZCA 414 at [22].

22 *Edwards v R* [2015] NZCA 583 at [25].

23 *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) at 241–242. The legislation at the time simply provided that a discharge might be granted in a Magistrate's discretion after inquiring into the circumstances of the case: see the Criminal Justice Act 1954, s 42(1). See too the judgment of Somers J at 243. We observe that *Turner* is no longer good law to the extent that it held (at 242) the jurisdiction should be sparingly exercised: see *R v Hughes*, above n 19.

and degree, requiring judicial judgment.[24] Like disproportionality, causation is an evaluative rather than a discretionary consideration.[25]

[45] The Sentencing Act does not treat immigration consequences differently from others, but it is necessary to recognise that those consequences are found in, or authorised by, immigration legislation. As this Court said in *Ho*, Parliament has decided a foreign national enjoys no general right to stay in New Zealand.[26] The legislation authorises the Minister to impose character requirements on those seeking visas to live in New Zealand, and it contemplates that the commission of a qualifying offence may lead to deportation. It establishes or authorises institutions and processes to assess the circumstances and decide what is to be done in any given case. Those processes are intended to accommodate New Zealand's international obligations.[27] In this setting, close attention must sometimes be given to causation.

[46] To begin with, as a matter of law liability to deportation sometimes turns on conviction and sometimes not, depending on the person's status. Conviction triggers liability where the holder of a residence class visa commits a qualifying offence.[28] The position is otherwise for a temporary entry class visa holder such as Mr Sok. As a matter of law, his liability depended not on conviction but on an INZ character assessment. We accept that the conviction triggered the administrative requirement for a character waiver in connection with Mr Sok's application for a partnership visa. However, the Manual required that INZ evaluate his character at that juncture in any event and the conviction is not conclusive evidence of bad character, nor would a discharge preclude denial of a visa on character grounds. It is presumably for this reason that the immigration officer chose to determine the character waiver while Mr Sok's appeal to this Court was still pending.

[47] It is usually the case that immigration processes must be commenced, and adverse decisions made by immigration authorities, before a person who has committed an offence is compelled to leave the country. A court may accept that

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24 *Contact Energy Ltd v Jones* [2009] 2 NZLR 830 (HC) at [133], citing *Fleming Securities Commission* [1995] 2 NZLR 514 (CA) at 524.
25 *H (CA680/2011) v R* [2012] NZCA 198 at [30], citing *R v Hughes*, above n 19.
26 *Ho v R*, above n 17, at [15].
27 Immigration Act, s 3(2)(d).
28 Immigration Act, s 161.

during a given process the person will be heard on mitigating and personal circumstances and the outcome will be determined by those circumstances rather than the fact of conviction. The offending is a fact that has been admitted or proved and the Court's view of its gravity will be a matter of record. In such cases courts usually find the outcome a consequence of the offending behaviour rather than the conviction.[29]

[48] This approach is sometimes justified for reasons of institutional competence and comity, as Katz J remarked in *Singh v Police*.[30] Immigration authorities possess expertise and enjoy access to information — for example, concerning conditions in a prospective deportee's country of origin — that is generally not available to courts. Their processes allow them to scrutinise humanitarian circumstances that are said to justify allowing a person to remain in New Zealand. By contrast, a court's knowledge is usually based on an affidavit from the applicant and perhaps another from an immigration lawyer. Rarely is evidence of this kind tested.

[49] Courts usually assume, in the absence of evidence to the contrary, that immigration authorities will take relevant considerations into account.[31] But there are cases in which courts have accepted that authorities may decide the offender's status on the conviction alone, ignoring the circumstances of an offence that is a minor example of its kind. In such cases, as Lang J observed in *Clarabel v Police*, courts may be willing to base the decision to convict or discharge on the probability that the offender will be deported.[32]

[50] The cases sometimes caution against "usurping" or "pre-empting" immigration powers.[33] It is strictly inaccurate to speak of a discharge usurping the authority of

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29 *Zhang v Ministry of Economic Development*, above n 17, at [24] and [14], citing *R v Foox* [2000] 1 NZLR 641 (CA). See also *Edwards v R*, above n 22, at [21]; *Rahim v R*, above n 16, at [31]; and *Bong v R* [2020] NZCA 94 at [32], all distinguishing the consequences of conviction from the consequences of offending.

30 *Singh v Police*, above n 17, at [37].

31 *Zhang v Ministry of Economic Development*, above n 17, at [24] and [27].

32 *Clarabal v New Zealand Police* [2020] NZHC 1518 at [17]. See also *Zhang v Ministry of Economic Development*, above n 17, at [14].

33 See for example *Ho v R*, above n 17, at [15]; *Foox v R*, above n 29, at [39]; *Edwards v R*, above n 22, at [27]; *Zhang v Ministry of Economic Development*, above n 17, at [14]; *Liang v Police* HC Wellington AP38/02, 16 April 2003 at [20]; and *Steventon v Police* HC Auckland A108/01, 2 November 2001, at [22].

officials or the Minister or the Tribunal; the Court is exercising its own jurisdiction under s 106 of the Sentencing Act, and that is so even in cases where an offender is not liable to deportation unless a conviction is entered. It is more accurate to say that legislative policy decisions and statutory powers and processes may not only establish consequences for an offender but also determine whether those consequences are the product of a conviction and influence the proportionality assessment.

[51] Courts may distinguish between liability to deportation and the risk that a person will ultimately be deported, holding that they do not "usurp" immigration powers by granting a discharge where the offending is not serious and exposure to deportation liability would be a disproportionate consequence in itself.[34] In such cases the court need not make predictions about what immigration authorities will do. This Court's decision in *Rahim v R* appears to fall into this category.[35] The cases involve offending that was not intrinsically serious, or which was not a serious example of its kind, and in which there were substantial personal mitigating features.

[52] Finally, the causation question can sometime be brought into focus by asking whether a discharge will eliminate or mitigate a risk of deportation. This is such a case, as we explain when dealing below with the unhappy circumstances in which Mr Sok finds himself.

Expert evidence of immigration processes and practice

[53] A practice has developed of offering evidence from lawyers specialising in immigration. Such evidence is frequently helpful. It may identify an offender's immigration status and associated rights and it may explain otherwise opaque administrative processes. It may identify considerations that a decisionmaker must or may consider.

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34 *George v Police*, above n 16, at [46]; *Jeon v Police*, above n 16, at [21]; and *Kumar v Police*, above n 16, at [41]–[42].

35 *Rahim v R*, above n 16, at [31]. The decision does not record the appellant's immigration status or summarise the evidence about immigration decisions in his case, but we infer from [24], [25] and [31] that Mr Rahim had a residence visa and it was a liability to deportation case, though the Court did not draw that distinction.

[54] Mr Kruger's evidence goes further than that. It invites us to find that the Minister will decline Mr Sok's application under s 61 notwithstanding that the Minister will consider the mitigating circumstances of the offending and Mr Sok's family circumstances and personal ties to New Zealand. Mr Kruger also predicted in his District Court affidavit that the Tribunal would likely dismiss an appeal brought on humanitarian grounds.

[55] Courts have admitted broadly similar evidence in some cases.[36] It is relevant, and so potentially admissible, in the sense that it addresses what is said to be a consequence of conviction.[37] However, we do not find it substantially helpful, principally because our decision does not turn on an estimate of the likelihood that Mr Sok will be deported. We are also unwilling to rely on predictions about what other decisionmakers, such as the Minister, may do. The caution expressed at [48] above is apposite. To the extent that it is relevant, the risk of deportation is sufficiently established by the facts that Mr Sok is unlawfully in New Zealand and must rely on the Minister's s 61 discretion. The risk is plainly real.

[56] We elaborate briefly on our reluctance to predict what the Minister may do. Mr Kruger's evidence does not explain what analysis underlies his opinion that s 61 applications that are clouded by character issues almost always fail. Coincidence is not causation. Evidence that s 61 applications seldom succeed — a reasonable assumption given an applicant under s 61 has presumably already failed to secure a visa through normal processes — does not establish that Mr Sok's will fail for character reasons, let alone because of his conviction.

Assessment: immigration consequences in Mr Sok's case

Failure of character waiver

[57] We accept Ms Fenton's submission that as a matter of law it was the offending, rather than the conviction, that exposed Mr Sok to the risk of deportation for cause under s 157(5) of the Act.

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36 See *Rahim v R*, above n 16, at [30]–[31]; and *Bong v R*, above n 29, at [17].

37 *Maraj v Police* [2016] NZCA 279 at [31]. Unusually, it was the offender in that case who argued that it was wrong to evaluate the risk that he would actually be deported.

[58] We will assume that if granted a character waiver Mr Sok likely would have obtained the new temporary visa that he sought. But the immigration officer did not base the decision to decline a waiver on the maximum sentence associated with the offence for which Mr Sok was convicted. Nor was the District Court decision treated as conclusive evidence of bad character. The officer examined the merits, traversing the circumstances of the offence in detail and including the mitigating circumstances. That being so, Mr Sok's failure to secure a character waiver was not a consequence of his conviction.

[59] As noted earlier, it is in any event too late to obtain a character waiver. A discharge cannot turn back the clock. Mr Sok is liable to deportation and at risk of being served with a deportation order.

Application for a temporary visa from offshore

[60] As we have explained above, Mr Sok may apply for a temporary visa from offshore. The evidence goes some way to explain how that application may be handled by INZ.

[61] As noted at [20] above, Mr Kruger considered that INZ likely would not have required a character waiver had Mr Sok been granted a discharge without conviction in the District Court. He also thought it likely that INZ would grant Mr Sok a further visa. The evidence confirms both that applicants need not declare offences that have not resulted in convictions and that applicants who have been convicted of a qualifying offence are normally not granted a temporary entry class visa unless they secure a character waiver. Were Mr Sok to apply from offshore after receiving a discharge, he would not have to disclose the offence and would not require a character waiver. That might suggest that a discharge without conviction would significantly assist Mr Sok in an application for a temporary entry class visa or, put another way, the need for a character waiver would present a significant barrier.[38]

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[38] *Bong v R*, above n 29, at [32].

[62] The difficulty with this argument is that it invites the Court to grant a discharge in order that Mr Sok need not disclose his offending to INZ when he makes an offshore application. Courts usually refuse to grant discharges sought for that purpose.[39] It is no answer to point to INZ processes under which a character waiver may not be required for a person without convictions, for the good character requirement remains and the offending is a relevant consideration. As noted at [25] and [33] above, the Manual prescribes that character checks must be carried out and INZ may consider conduct that resulted in a discharge. In any event, the evidence does not persuade us that if a discharge were granted INZ would overlook the offending when considering an offshore application.

[63] We will assume that the absence of a conviction could have a positive influence on the mind of a decision-maker.[40] We recognise too that in *Bong v R*, in which the offender's immigration status also changed for the worse between charge and appeal, this Court accepted INZ would learn of the offending but found that a discharge might nonetheless substantially improve his prospects of obtaining a visa. It seems the Court accepted Mr Bong's application for a temporary (visitor) visa had failed because of the conviction,[41] which is not the position on the facts before us. It appears too that the Court may have accepted Mr Bong would likely no longer fail INZ's character requirements if discharged.[42] We have accepted on the material before us that while Mr Sok would not be presumptively ineligible if discharged, the good character requirement must still be met. The overall gravity of his offending is greater than Mr Bong's and INZ has already assessed his character.

[64] It follows that there is no reason to think a discharge would materially alter Mr Sok's prospects of obtaining a visa from offshore. We are not prepared to accept that failure to obtain a new visa would be a consequence of conviction.

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39 *Foox v R*, above n 29, at [39]; *Liang v Police*, above n 33, at [20]; and *Steventon v Police*, above n 33, at [22].

40 Relying for this purpose, in Mr Sok's favour, on *Bong v R*, above n 29, at [25].

41 At [27].

42 At [29] and [32].

Application to the Minister under s 61

[65] Turning to the impact of a discharge on Mr Sok's application under s 61, we have accepted that the Minister would consider the circumstances of the offending and the humanitarian circumstances. We have assumed that the absence of a conviction could have a positive influence on the mind of a decision-maker, but it cannot be said that a discharge would materially increase Mr Sok's prospects of obtaining a visa under s 61. Put another way, were his application to fail it would not be in consequence of the conviction.

Employment and travel

[66] We can deal with these grounds shortly because the appeal falls well short of showing that the District Court Judge was wrong in her assessment that they do not justify a discharge without conviction.

Employment

[67] Ms Priest submitted that an offender need not point to specific employment consequences. Courts may take judicial notice of the attitude of prospective employers and the likelihood that a conviction would permanently blight an offender's life.[43] In this case, Mr Sok already faces hurdles because he is a foreign national with poor English. She suggested the conviction would also be a barrier to employment in Cambodia.

[68] We accept that a conviction of this kind carries a stigma. The offence is one of serious violence. But as the Judge pointed out, there is no evidence to suggest that Mr Sok has any different career aspirations from running the café with his wife, as he does at present. We are not persuaded that adverse employment consequences are a real and substantial risk.

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[43] *R v Taulapapa*, above n 21, at [42].

Travel

[69] Ms Priest could point only to general travel consequences, in that a conviction of this kind might prevent entry into other countries in the future. Mr Sok has family overseas and would like to travel, though he understandably has no immediate plans to do so. The evidence falls well short of identifying any consequence, in terms of inability to travel or an obligation to navigate difficult immigration processes, that is a real and appreciable risk of conviction.[44] The Judge was right to conclude that any travel barriers there may be are "not insurmountable".[45]

The balancing exercise

[70] The grave and potentially lifelong harm done to a vulnerable victim is the most significant feature of Mr Sok's offending. Against that, the offence was the result of a momentary loss of control, and he has participated in restorative justice and engaged in rehabilitation. We have accepted that there is much to be said for his character. Nonetheless, the Judge was unquestionably right to find the offending serious.

[71] This is not a case in which it can be said that liability to deportation and the associated processes is a wholly disproportionate consequence of conviction. The question is whether the Court is satisfied that there is a real and substantial risk that immigration processes will in fact end in Mr Sok's deportation as a direct or indirect consequence of conviction.

[72] Mr Sok faces a real risk of deportation. It would have very serious consequences not only for him but also for his family, who must accompany him or accept separation. However, we are not prepared to accept that these are consequences of the conviction. They are consequences of the offending. A discharge would not now prevent them or materially reduce the risk that they will happen.

[73] Accordingly, Mr Sok has not been able to point to consequences for his immigration status that flow from conviction. Nor has he been able to point to a real and appreciable risk that conviction will have serious consequences for his

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44 *Edwards v R*, above n 22, at [25]–[26]; and *R v Taulapapa* above n 21, at [56].
45 DC Judgment, above n 1, at [30].

employment prospects and travel plans. It follows that we are not satisfied that the consequences of conviction would be out of all proportion to the gravity of his offence.

[74] Our reasons differ from those of the Judge, who discounted family separation because the family is already split. We have noted Mr Sok's evidence that but for circumstances beyond his control his daughter would have returned to New Zealand. We prefer to leave assessment of the family's New Zealand nexus to immigration authorities, who will consider it when assessing Mr Sok's next application, whether that be made under s 61 or s 172, or from offshore.

Disposition

[75] The application to adduce fresh evidence on appeal is granted. The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent