IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 25/2023
[2024] NZSC 46

BETWEEN	ELIZABETH MARIA BOLEA Appellant
AND	THE KING Respondent

Hearing:	31 October 2023
Court:	Glazebrook, O'Regan, Ellen France, Williams and Kós JJ
Counsel:	A J Bailey, E Huda, R J T George and A G F Lange for Appellant R M A McCoubrey and M C M Nash for Respondent
Judgment:	3 May 2024

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The conviction for participating in an organised criminal group is quashed.**

C **The application for a discharge without conviction is remitted to the High Court for reconsideration.**

REASONS
(Given by Ellen France J)

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Introduction

[1] This appeal concerns how a sentencing court is to treat the risk the defendant will be deported when considering an application for a discharge without conviction under s 106 of the Sentencing Act 2002.

[2] Elizabeth Bolea, an Australian national, pleaded guilty to a charge of participation in an organised criminal group.[1] At sentencing, Ms Bolea sought a discharge without conviction.[2] Under s 107 of the Sentencing Act, before discharging an offender without conviction the court must be "satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence". Ms Bolea said that the likely prospect she would be deported to Australia, resulting in the separation of her family, was a consequence of her conviction that would be out of all proportion to the gravity of her offence.

[3] In the High Court, the sentencing Judge declined to grant Ms Bolea a discharge without conviction and imposed a sentence of four months' home detention.[3] In doing so, the Judge accepted that Ms Bolea's liability to deportation would be a consequence of her conviction. However, the Judge drew a distinction between liability for deportation and the risk of actual deportation in considering the availability of a discharge without conviction. In particular, the Judge said that if she was ultimately deported, this would be a consequence of her offending, not of her conviction, with the result that the risk of actual deportation was not taken into account in the s 107 analysis.

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1 Crimes Act 1961, s 98A.
2 Sentencing Act 2002, s 106.
3 *R v Bolea* [2022] NZHC 2998 (Campbell J) [HC judgment] at [31] and [49].

[4] The Court of Appeal dismissed Ms Bolea's appeal against sentence. It concluded that "in a very real sense" deportation resulting from a process in which the immigration decision maker can consider the gravity of the offending and the appellant's personal circumstances "can validly be regarded as a consequence of the offending and not the conviction".[4]

[5] The principal issue on the appeal is whether the Court of Appeal was correct in the way it treated the risk of exposure to deportation. In particular, given the distinction drawn by the Court of Appeal, was the Court right to treat the risk of actual deportation as a consequence of the offending, and not of conviction? If there has been an error such that Ms Bolea's conviction should be quashed, there is a further issue as to whether or not this Court determines the application for a discharge, or whether the application should be remitted back to the High Court.

Context

[6] At the time of the offending Ms Bolea was in a relationship with Rhakim Mataia, a nominee of the Comancheros Motorcycle Club. She was at that point 22 years old and pregnant with their daughter.

[7] At the direction of Mr Mataia, Ms Bolea hired a rental car on 4 August 2020. Along with Mr Mataia and another co-offender, Diamond Katoa, she drove to Christchurch. A covert police search, which took place during the Cook Strait crossing, located a quantity of methamphetamine in the boot of the car (at least 500 grams was found). No steps were taken to stop the trip at that point and Mr Mataia, Ms Bolea and Mr Katoa arrived in Christchurch the next day, at which time Ms Bolea went to stay at Mr Mataia's family home while the two men went to a gang pad to supply the methamphetamine.

[8] As an Australian national, for immigration purposes Ms Bolea is treated as having held a residence class visa from the time of her arrival in New Zealand in May 2019. As the holder of a residence class visa, under s 161(1)(b) of the Immigration Act 2009, she is liable for deportation if convicted of an offence for which

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4 *Bolea v R* [2023] NZCA 39 (French, Ellis and Churchman JJ) [CA judgment] at [46].

a court may impose imprisonment for a term of two years or more, provided the offence was committed no later than five years after the individual first held the visa. The offence committed by Ms Bolea meets these criteria.[5]

[9] Mr Mataia was deported from Australia several years ago under s 501 of the Migration Act 1958 (Cth). As a result, under Australian law he is unable to return to Australia.[6] If Ms Bolea is deported to Australia, their daughter will go with her. Accordingly, deportation would mean in practical terms that the family would be split. The family's ability to meet in another country would be problematic at best, given both parents' convictions.

The High Court sentencing

[10] In dealing with Ms Bolea's application for a discharge without conviction, the sentencing Judge explained it was necessary to consider the application in three stages.[7] The first stage was to determine the gravity of Ms Bolea's offending. The second stage was to determine the direct and indirect consequences of conviction. The final stage was to determine whether these consequences were out of all proportion to the gravity of the offending. If satisfied that the consequences of conviction were out of all proportion, a discharge without conviction was open.

[11] In terms of the gravity of the offending, the Judge accepted that Ms Bolea's offending was limited to the short period of the trip to Christchurch in early August 2020. As to aggravating features, among other matters, the High Court considered that Ms Bolea knew there was methamphetamine in a commercial quantity in the car. There were also some mitigating features, lessening Ms Bolea's culpability. In particular, Ms Bolea acted at the direction of Mr Mataia; her participation was relatively brief; and there was no suggestion she received any direct personal benefit.

[12] There were also several personal mitigating factors. These factors included the absence of any prior convictions; references attesting to Ms Bolea's work ethic and

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5 Crimes Act, s 98A(1).

6 Migration Act 1958 (Cth), s 503(1). See also Migration Regulations 1994 (Cth), sch 5 (Special Return Criteria) cl 5001(b).

7 HC judgment, above n 3, at [6].

general good character; a susceptibility to entering manipulative relationships; and the fact that Mr Mataia was manipulative and domineering, at least at the time of the offending. The Judge considered these factors impaired Ms Bolea's decision-making function, and so reduced her moral culpability. In addition, the Judge referred to Ms Bolea's age at the time of the offending, and saw her as having good rehabilitation prospects. Finally, she had pleaded guilty. When these factors were taken into account, the Judge considered that the overall gravity of the offending was moderate to low. That assessment was not altered by the Court of Appeal.

[13] In addressing the direct and indirect consequences of a conviction, the Judge assessed the likelihood of deportation to Australia and consequences for Ms Bolea's future employment. As to how the prospect of deportation was factored into the equation, Campbell J applied the Court of Appeal's approach in *Zhu v R*.[8] On that approach, the Judge said Ms Bolea's conviction "would give rise to a liability to deportation" but it was not inevitable that Ms Bolea would actually be deported.[9] Rather, the Judge stated that Ms Bolea:[10]

> … would first have an opportunity to account for [herself] and [her] family circumstances. Immigration authorities would consider the circumstances that are said to justify a discharge without conviction, including the gravity of the offending and [her] personal circumstances. The Court of Appeal said that if deportation were the outcome, that would be a consequence of [her] offending, rather than a consequence of the conviction.

[14] That led the Judge to accept that while liability to deportation would be a consequence of Ms Bolea's conviction, deportation itself would be a consequence of the offending, not of the conviction. For the purpose of the discharge without conviction analysis, this meant the risk that Ms Bolea would actually be deported was not factored into the s 107 balancing exercise.

[15] When weighing up the liability to deportation as against the gravity of the offending, the Judge was not satisfied that liability to deportation would be out of all proportion. The Judge concluded this part of the sentencing remarks in this way:[11]

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8 *Zhu v R* [2021] NZCA 254.
9 HC judgment, above n 3, at [24].
10 At [24] citing *Zhu v R,* above n 8, at [23]–[26].
11 HC judgment, above n 3, at [30].

> A conviction would expose you to liability to deportation, but I do not consider that to be out of all proportion to offending that was of moderate to low gravity. It may be that you will ultimately be deported, but that would be a consequence of your offending, and it would be a decision made by immigration decision-makers after consideration of all the circumstances, including the gravity of your offending and your personal and family circumstances.

[16] On this basis, the application for a discharge without conviction was declined, and a conviction entered.

The Court of Appeal decision

[17] Ms Bolea appealed against sentence to the Court of Appeal. The primary ground of appeal was that the sentencing Judge was wrong to find that the risk of her actual deportation was not a consequence of conviction. In rejecting Ms Bolea's challenge, the Court of Appeal addressed first the argument that the legal position adopted by the Court of Appeal in recent cases was wrong and contrary to previous case law. The Court of Appeal discussed the Court's earlier judgments in *Zhu v R*,[12] *Sok v R*,[13] and *Anufe v R*.[14] The Court did not consider that these cases reflected any departure from previous case law, and nor was there any reason to revisit the existing approach.

[18] It is useful to set out in full the way in which the Court of Appeal analysed the decisions in *Zhu*, *Sok* and *Anufe*. The Court said this:[15]

> [41] The key points to emerge from the three decisions for present purposes are as follows:
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> (a) *Zhu* does not assert the absolute proposition that liability to deportation or the risk of actual deportation can never be an operative consequence justifying a discharge without conviction. The decision in fact expressly acknowledges that it can be an operative consequence on the basis of "but for" causation reasoning. At the same time the decision also notes that in other cases it will not justify discharge.
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> (b) The latter category is identified as including cases where the Court is satisfied that immigration decision makers will consider the circumstances that are said to justify a discharge,

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12 Above n 8.
13 *Sok v R* [2021] NZCA 252, (2021) 29 CRNZ 962.
14 *Anufe v New Zealand Police* [2021] NZCA 253.
15 Footnotes omitted.

including the gravity of the offending (in relation to which the decision maker has the benefit of the sentencing court's assessment) and the offender's personal circumstances. In those sorts of cases, the courts "usually" reason that the outcome is a consequence of the offending, rather than the conviction.

(c) Although this approach is sometimes justified in the case law on the basis of institutional competence and comity, strictly speaking it is inaccurate to speak of a discharge without conviction usurping the authority of 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. We interpolate to note that the point made by Mr Bailey on the issue of institutional comity is thus expressly recognised.

(d) Rather than invoke institutional comity, 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.

(e) There are cases where the courts have held that the mere exposure to the risk of deportation and the associated processes is in itself a wholly disproportionate response without needing to draw a distinction between liability to deportation and the risk that a person will ultimately be deported. Such cases involve offending that was not intrinsically serious or which was not a serious example of its kind and in which there were substantial mitigating factors. *Rahim v R* – one of the decisions cited to us by Mr Bailey – is identified as in that category.

(f) There is another category of case where discharges have been granted on the basis that deportation is a consequence of conviction because it is considered the immigration authorities will not look beyond the fact of the conviction and so fail to consider the circumstances of the offending.

[19] The Court of Appeal accepted that conviction would expose Ms Bolea to the risk of actual deportation and the associated process. But the Court was not satisfied that "this is one of those cases where the mere existence of that risk is in itself a sufficiently disproportionate consequence" in light of the gravity of her offending.[16] In this respect, the Court noted this was not minor offending.

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16 CA judgment, above n 4, at [42].

[20] Nor did the Court see this as a case where there was a basis to believe that the immigration authorities would decline to go beyond the fact of the conviction and ignore the circumstances of Ms Bolea's offending, including the mitigating features of the offending, her personal circumstances, and the interests of her daughter. Instead, the Court said:[17]

> … this is in our view a case where the risk of deportation must be balanced against the existence of pathways whereby deportation can be avoided and which will without doubt allow the immigration decision maker to consider the gravity of Ms Bolea's actual offending and all her personal circumstances, including her lack of criminal history and family situation.

[21] The Court considered that the fact of those pathways distinguished Ms Bolea's case from those concerning potential employment or overseas travel consequences. The Court stated that while the latter cases also involve an outcome which is determined by another person, such as a prospective employer or a visa authority, "they do not involve a comparable rights based process, the existence of which, on any view, must significantly weaken the causative link between conviction and deportation".[18]

[22] It was on this basis that the Court considered that the risk of deportation arising as a result of this process should be treated as a consequence of the offending and not of the conviction. The appeal was dismissed.

The case for each of the parties

[23] We deal with the issues arising from the submissions in our assessment which follows. Before we undertake that discussion, we briefly summarise the case for each party.

[24] Ms Bolea says that, for the purpose of the s 107 analysis, the exposure or liability to deportation was a direct consequence of conviction. It is her case that the risk of actual deportation is an indirect consequence of the conviction and that both consequences should be taken into account in the s 107 analysis. The approach taken in *Zhu* (and this case in applying *Zhu*) in "usually" treating risk of deportation as a

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17 At [44].
18 At [45].

consequence of the offending is not good law and is inconsistent with prior case law. Further, the appellant argues that in relying on the rights-based process undertaken by immigration officials, the Court has effectively abdicated its own decision-making responsibilities. That is so where the end result is that no assessment has been made of the likelihood that Ms Bolea would be deported.

[25] As to the likelihood of deportation, the appellant refers to the evidence of Rory Hennessy, an immigration lawyer. This evidence is to the effect that Ms Bolea will "almost certainly" be issued with a deportation liability notice. Although the evidence does not directly address this, the appellant's analysis, particularly given the nature of the available appeal rights, is that she will therefore be deported.

[26] The respondent supports the approach taken by the Court of Appeal and submits that the relevant consequence of conviction is liability to deportation, not the risk of deportation itself. The respondent stresses that the assessment of whether a possible immigration outcome is a consequence of conviction rather than of the offending is a fact-specific assessment. In cases like Ms Bolea's, where there is an intervening decision maker who follows a prescribed rights-based process, and where deportation is not inevitable, deportation itself is generally a consequence of the offending.

[27] The respondent says that the observations in *Zhu* and the other cases challenged by the appellant are simply empirical statements of what the courts have usually found, and do not purport to express rules. The respondent's case is that there comes a point where the court is no longer looking at something which is a consequence of the conviction, simply because that possible outcome is too contingent. The relevant consequence here is liability to deportation, and that consequence is not disproportionate to the gravity of the offending.

[28] Alternatively, the respondent submits the process that will be followed by the immigration authorities to determine whether or not Ms Bolea is deported weakens the causative link such that the risk of deportation is not out of all proportion to the gravity of the offending. In other words, if this Court accepts the appellant's submission that actual deportation is a correct consequence to consider, it will be

relevant to the s 107 inquiry that there cannot be any certainty that Ms Bolea will be deported.

Discussion

[29] To assess the correctness of the approach taken by the Court of Appeal it is helpful to begin by setting out the relevant statutory provisions and what we know about the process that would be followed in relation to those various statutory stages.

[30] We note first that the statutory purpose of the Immigration Act "is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals".[19] Accordingly, the executive has both domestic and international rights-based obligations which are relevant to the decision-making in this area, as well as responsibility for policing the borders.

The process applicable to Ms Bolea

[31] As we have said, if convicted of the offence to which she pleaded guilty, as a residence class visa holder Ms Bolea would become liable for deportation under s 161(1)(b) of the Immigration Act.[20] There are several steps that precede the decision to deport which we now discuss.

[32] As the Court of Appeal observed, once the immigration authorities are aware of a qualifying conviction relating to a residence class visa holder, Immigration New Zealand prepares "a detailed briefing paper".[21] That paper goes to the Minister of Immigration, or more commonly the Minister's delegate, who will then decide whether to order that a deportation liability notice be served. As discussed in the present case, and in other authorities such as *Truong v R*, as part of the process of preparing a briefing paper, a residence class visa holder is given an opportunity to be

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19 Immigration Act 2009, s 3(1). See also subss 3(2)(a)(ii), (d) and (e).

20 A residence class visa holder is liable for deportation for up to 10 years after liability for deportation arises: Immigration Act, s 167.

21 CA judgment, above n 4, at [11].

heard and make submissions on matters such as their personal circumstances and the impact of their potential deportation.[22]

[33] The practice, as recorded in the authorities, is that these submissions are included in the briefing paper, as are the summary of facts and the sentencing notes. In *Truong*, which also related to the holder of a residence class visa, the Court of Appeal set out excerpts from a letter Immigration New Zealand wrote to Ms Truong about the process to be followed once she had become liable for deportation under s 161(1)(b). That letter said amongst other matters that:[23]

> A Delegated Decision Maker (DDM) will now decide whether your deportation should proceed. You are invited to make submissions on this matter, which will be considered by a DDM before a decision is made. You may wish to comment on the grounds for your deportation liability, your personal circumstances, or the circumstances of your family.
>
> A deportation questionnaire is enclosed for you to complete should you wish to do so. You and your family are also welcome to provide additional submissions and documents in support of your case. …
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> …
>
> If a DDM decides that you should be deported, he or she will sign a deportation liability notice which will be served on you. Your right to appeal against your liability for deportation, if applicable will be outlined in the deportation liability notice. If a delegated decision maker decides that your deportation should not proceed, your deportation liability will be suspended or cancelled.
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> …

[34] As is apparent from this excerpt, after considering the briefing paper the Minister or their delegate decides whether a deportation liability notice should be issued and served.

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22 *Truong v R* [2023] NZCA 97 [*Truong* CA judgment] at [15]. Leave to appeal to this Court was declined: *Truong v R* [2023] NZSC 119. See also *Anufe*, above n 14, at [12]; and *Zhu*, above n 8, at [12], which refers to the preparation of a briefing paper. For the information included in the briefing paper, see Michael Heron *Independent Review of Immigration New Zealand's Residence Deportation Liability Process* (Ministry of Business, Innovation & Employment | Hīkina Whakatutuki, 25 September 2019) at 14–15 and 20–21; and Immigration New Zealand and Ministry of Business, Innovation & Employment | Hīkina Whakatutuki "Process for deportation liability decisions for residents who are automatically liable (decisions made by Delegated Decision Makers)" <www.mbie.govt.nz>.

23 As reproduced in *Truong*: CA judgment, above n 22, at [15].

[35] Under s 161(2)(a) of the Immigration Act, a person liable for deportation under s 161 may, within 28 days after being served with a deportation liability notice, appeal to the Immigration and Protection Tribunal (the Tribunal) against liability for deportation on humanitarian grounds. Section 207(1) of the Act sets out the basis on which a humanitarian appeal is determined. Section 207(1) provides as follows:

> The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—
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> (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.

[36] As a resident, Ms Bolea is entitled to an oral hearing on appeal to the Tribunal.[24]

[37] In addition, this process is subject to the residual discretion of the Minister of Immigration under s 172 of the Act. Under s 172, by written notice the Minister may cancel a person's liability for deportation[25] or suspend a residence class visa holder's liability for deportation for a maximum of five years.[26] Section 172(5) of the Act provides that a decision to cancel or suspend liability for deportation "is in the absolute discretion of the Minister". What is meant by "absolute" discretion is defined in s 11 as including the absence of an obligation to consider an application, or to give any substantive reasons for a decision made in the exercise of this discretion.[27]

[38] Finally, as the respondent notes, with leave it is possible to appeal to the High Court from the Tribunal on a point of law and/or to seek judicial review.[28]

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24 Immigration Act, s 233(1).
25 Section 172(1).
26 Section 172(2).
27 Subsections 11(1)(b) and 11(1)(c)(i). See also s 4.
28 Sections 245, 249 and 249A.

Relationship between these processes and the discharge decision

[39] The case before us proceeded on the basis that the decision whether to grant a discharge without conviction under s 107 is to be determined in the way identified by the High Court. That is, the court considers the aggravating and mitigating features of the offence and of the offender to assess the gravity of the offending. The court then identifies the direct and indirect consequences of conviction. The next step is to evaluate whether those consequences are out of all proportion to the gravity of the offence. If the court decides that the consequences of conviction are out of all proportion to the gravity of the offending, the court must still consider whether to grant a discharge without conviction; although the current approach is that it is rare to decline to do so in that situation.[29]

[40] As we have indicated, our focus is on that part of the s 107 analysis which addresses the consequences advanced to support the application for a discharge. In particular, we examine whether the Court of Appeal was correct to treat the risk of actual deportation as a consequence of Ms Bolea's offending (rather than of her conviction) essentially because of the "rights based process" that would be undertaken by the immigration authorities.[30] As we shall explain, we differ from the Court of Appeal on this question.

[41] Our view is that where, as here, there is unchallenged evidence that the issue of a deportation liability notice will "almost certainly" occur, then (in the absence of other evidence) both the liability for deportation and the risk of actual deportation should be treated as consequences of conviction under s 107. It follows that we do not agree that, for persons in Ms Bolea's position, the process followed by the immigration authorities means that the "usual" position is that the prospect of deportation will be a consequence of the offending rather than the conviction.

[42] We now set out our reasons.

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29 Mathew Downs (ed) *Adams on Criminal Law – Sentencing* (looseleaf ed, Thomson Reuters) at [SA106.02] and [SA107.01]. We make no comment on the correctness of this approach.

30 CA judgment, above n 4, at [45].

Assessment

[43] First, the appellant is right that what constitutes a consequence of conviction should be construed in a manner reflecting the statutory responsibility of the court to determine whether the person being sentenced for any offence is "more appropriately dealt with" by a discharge without conviction.[31] Section 11(1) of the Sentencing Act states that, whether or not a discharge is sought, where a person is charged with an offence and is found or pleads guilty, "before entering a conviction and imposing a sentence the court must consider whether the offender would be more appropriately dealt with" by way of a discharge. The obligation to consider whether a discharge would be the appropriate outcome applies whether or not there is any other later process that may or may not consider similar factors.[32] It necessitates an individual assessment of the particular person's circumstances.

[44] The analysis of the risk of actual deportation in the present case, is accordingly better treated as part of the proportionality exercise, rather than effectively taking it outside of the proportionality exercise by treating it as a consequence of the offending.

[45] Second, the relevant features of the statutory scheme support the view that for Ms Bolea, the risk of deportation is a consequence of her conviction. As we have seen, for the holder of a residence class visa, the possibility that a deportation liability notice may be issued is triggered by a conviction for an offence coming within s 161 of the Immigration Act. Importantly, s 170(1) states that a deportation liability notice must be served on a person who is liable for deportation "if it is intended to execute the deportation of the person". The key point is that the deportation liability notice is issued when it is "intended" to actually deport that individual.

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31 Sentencing Act, s 11(1).

32 We see no reason to distinguish in this context between deportation cases and those involving travel restrictions. There may be differences in the processes undertaken by the relevant decision makers—by immigration authorities in contrast to, say, an employer—but we do not see those differences as providing a basis for distinction.

[46] Other aspects of the statutory process (namely, the nature of the Minister's discretion[33] and the high threshold for an appeal)[34] also suggest that, absent indications to the contrary, the risk of actual deportation for Ms Bolea will be a consequence of her conviction. That is because these aspects support her argument that deportation will be a likely outcome. In other words, neither the ministerial discretion nor the appeal rights generally change the risk of exposure to deportation in a meaningful way.

[47] It follows, at least as a general proposition, that we do not accept the observation by the Court of Appeal that the relevant legislative powers and associated processes "may not only establish consequences for an offender but also determine whether those consequences are the product of a conviction".[35] Rather, subject to any evidential indications to the contrary, the effect of those processes will usually be a matter to be considered in the proportionality exercise envisaged by s 107 of the Sentencing Act.

[48] *Sok v R*, which involved the requirement for good character, is an example of a case where the evidence made it clear the conviction was not the actual barrier to the outcome of concern to the person liable to deportation. Mr Sok's visa application had been declined on the basis he failed the good character requirements that were applicable to him. In determining the good character requirements were not met, the decision maker had relied on the conduct which formed the basis of the charge against Mr Sok. The position was further complicated by the fact that, the visa application having been declined, Mr Sok was then unlawfully in New Zealand and it was too late for him to seek a character waiver. In that situation the Court, with the benefit of

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33 For a discussion of the scope of this discretion the parties referred us to *Dean v Associate Minister of Immigration* [2019] NZCA 343. Leave to appeal to this Court was declined in that case: *Dean v Associate Minister of Immigration* [2019] NZSC 119.

34 In relation to the predecessor provision to s 207 of the Immigration Act, this Court described that the appeal test "was designed to be strict": *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 per Blanchard, Tipping, McGrath and Anderson JJ at [36], and see at generally at [30]–[38]. In the present case, the Court of Appeal cited *Minister of Immigration v Q* [2020] NZCA 288 at [33] for the proposition that the "unjust or unduly harsh" limb of the test requires the court to balance the reasons for liability for deportation against the consequences of deportation for that person: CA judgment, above n 4, at [16]. We add that because of the outcome we reach, it has not been necessary to consider the argument made by the appellant regarding the effect of *Ye* on matters to be considered in the course of the deportation process.

35 CA judgment, above n 4, at [41(d)].

evidence as to the immigration pathways available to Mr Sok to try to regularise his position, said that there was "no reason to think a discharge would materially alter Mr Sok's prospects of obtaining a visa".[36]

[49] On the other side of the coin, there will also be some cases where it is obvious that immigration authorities will not look beyond the conviction. The cases envisage situations where it will be apparent that the immigration authorities will not consider all of the circumstances of the offending. In those situations it will be clear that the risk of deportation will be a consequence of conviction as that will be the determining factor.[37]

[50] There is some support for our view in the legislative history. In referring to consequences that may be direct or indirect, s 107 reflects language used in *Fisheries Inspector v Turner*.[38] In that case, the Court of Appeal was considering whether a discharge without conviction was unavailable on the basis that forfeiture of a fishing vessel on conviction for a fisheries offence was an express minimum penalty, as the Fisheries Inspector argued. The Court found that a discharge was available and that the possibility of forfeiture was a consequence of conviction. In that context, Richardson J rejected the idea that it would be necessary to create a "proximity test" distinguishing between direct and indirect consequences, because this would create "an undesirable degree of uncertainty".[39] The logic of applying that approach to cases applying s 107 suggests there may be intervening events, such as the decision of a prospective employer or, as in the present case, of an immigration officer, which may comprise a consequence of conviction within the terms of s 107.

[51] The approach we take is consistent with that taken in both *Truong* and in *Bong v R*.[40] In *Truong*, the risk of actual deportation was treated as a consequence of

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36 *Sok*, above n 13, at [64].
37 See by way of example the discussion in *Anufe*, above n 14, at [20].
38 *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA). Clause 96(1) of the Sentencing and Parole Reform Bill 2001 replicated what became s 107. The explanatory note to the Bill recorded that the clause was "intended largely to reflect existing case law": Sentencing and Parole Reform Bill 2001 (148-1) (explanatory note) at 23.
39 *Fisheries Inspector v Turner*, above n 38, at 242.
40 *Truong CA judgment*, above n 22; and *Bong v R* [2020] NZCA 94.

conviction, but not one that was out of all proportion to the moderately serious offending.

[52] In *Bong,* Mr Bong had been in New Zealand on a work visa which had expired by the time of his sentencing. His wife and children proposed to remain in New Zealand if he left New Zealand for Korea, so the family would be split if he could not get another work visa to enable him to stay in New Zealand. By the time the matter came before the Court of Appeal, his immigration status had altered for the worse and he was by then unlawfully in New Zealand. The Court of Appeal treated "the severity of a conviction for Mr Bong's future immigration status as significant", accepting that a discharge might improve his chances of obtaining a visa.[41] The Court also accepted the expert evidence that a conviction would "make it very difficult" for Mr Bong to have a deportation order cancelled.[42] On balance, the Court was satisfied that the consequences of a conviction were likely to be out of all proportion to the gravity of his offending which was seen as "very low-level".[43]

[53] Treating the risk of actual deportation as a consequence of conviction does not, of course, mean that a discharge will be granted. As is common ground, in undertaking the proportionality exercise, the court must be satisfied there is "a real and appreciable risk" that the consequences of a conviction identified by a defendant could occur.[44] It is in this context that the respondent's point that a risk may be so contingent as to cease being a consequence of conviction is to be addressed. In other words, in this part of the s 107 analysis, it may become apparent there is no real and appreciable risk that the consequences of conviction feared will materialise. Statistical information as to the likelihood of deportation for someone who has offended in a particular way may shed some light on whether that real and appreciable risk is met.[45] But the assessment remains an assessment of the defendant's individual circumstances.

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41 *Bong*, above n 40, at [32].

42 At [32].

43 At [30].

44 *R v Taulapapa* [2018] NZCA 414 at [22] citing *DC (CA47/2013) v R* [2013] NZCA 255 at [43]. See also *Iosefa v New Zealand Police* HC Christchurch CIV-2005-409-64, 21 April 2005.

45 See for example the discussion of the approach to first-offence driving cases in the report by Michael Heron, above n 22, at 38. That indicates that in 2018, of the 97 persons liable for deportation following first offence driving cases, 96 had their deportation suspended and only one was deported. The figures for 2016 and 2017 were similar.

[54] We add that there may be situations where mere exposure to the procedures relating to deportation may be a disproportionate consequence.[46] That type of case aside, a "real and appreciable" risk of deportation will suffice.

[55] As we now discuss, in allowing the appeal we will remit the application for a discharge without conviction back to the High Court. Because of that, we say nothing further about the application of the proportionality part of the analysis to Ms Bolea.

Conclusions

[56] We summarise the position in relation to s 107 as it applies here as follows:

(a) What is required is an individual assessment of the particular circumstances of the defendant as is apparent from both ss 11(1) and 107 of the Sentencing Act.

(b) If there is credible evidence based on past practice that, in the ordinary course, a deportation liability notice will be issued then, unless there is case specific evidence to the contrary both the liability to deportation and the risk of actual deportation should be treated as consequences of the conviction under s 107. The same approach applies where it is plain immigration authorities will not go beyond consideration of the conviction.

(c) The position may be different if it is clear a conviction does not add anything (as was the case in *Sok*).

(d) Once the court determines the exposure to deportation is a consequence of the conviction, the court must be satisfied there is a real and appreciable risk of that consequence occurring. This consideration is undertaken as part of the proportionality exercise required by s 107.

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[46] See for example *Jeon v New Zealand Police* [2014] NZHC 66 at [21], where the High Court said the issue was "whether [the defendant's] momentary inadvertence resulting in a driving offence of moderate seriousness, and assessed against an otherwise exemplary life, should have the automatic consequence of the risk of deportation hanging over [the defendant] and his family for possibly up to 10 years".

[57] Applying this approach to Ms Bolea, the Court of Appeal erred in not treating the risk of deportation as a consequence of her conviction.

[58] The issue then arises as to whether we should determine the application for discharge ourselves or remit the matter back to the High Court for reconsideration. The parties' submissions addressed both options. We consider that a court determining the application for a discharge would benefit from further evidence, particularly about the humanitarian aspects relied on by Ms Bolea. Therefore, we will allow the appeal but remit the matter back to the High Court for reconsideration of her application for a discharge without conviction.

Result

[59] The appeal is allowed.

[60] The conviction for participating in an organised criminal group is quashed.

[61] The application for a discharge without conviction is remitted to the High Court for reconsideration.

Solicitors:
Meredith Connell, Auckland for Respondent