



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

3 MAY 2024

**MEDIA RELEASE**

ELIZABETH MARIA BOLEA v THE KING

(SC 25/2023) [2024] NZSC 46

**PRESS SUMMARY**

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).

**The issue on appeal**

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.

**Background**

The appellant, Elizabeth Bolea, pleaded guilty to one charge of participating in an organised criminal group. Ms Bolea is an Australian national and holds a New Zealand resident class visa. Under s 161(1)(b) of the Immigration Act 2009, she becomes liable for deportation if convicted of an offence for which a court may impose a term of two or more years' imprisonment. Participation in an organised criminal group is such an offence. Ms Bolea's liability for deportation means that she will be subject of an assessment undertaken by Immigration New Zealand to determine whether she should be deported, taking into account the gravity of her offending and her personal circumstances.

The events giving rise to her charge took place in August 2020, when Ms Bolea drove her partner (a nominee of the Comancheros Motorcycle Club), and another co-offender, to Christchurch in a car containing a commercial quantity of methamphetamine. When the three individuals reached Christchurch, Ms Bolea stayed at her partner's family home, while her partner and their co-offender went to a gang pad to supply the methamphetamine.

Ms Bolea applied for a discharge without conviction under s 106 of the Sentencing Act. If discharged, Ms Bolea would not be liable for deportation under the Immigration Act. Section 107 of the Sentencing Act provides that a discharge without conviction may only be granted if a court is “satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence”.

Ms Bolea argues that the likely prospect she would be deported to Australia, resulting in the separation of her young family, was a consequence out of all proportion to the gravity of her offending. Because of his immigration status, her partner would be unable to join her and their young child in Australia. The unchallenged evidence at sentencing was that if Ms Bolea was not granted a discharge without conviction, a deportation liability notice would “almost certainly” be issued.

### **The key issue**

As noted above, this appeal addresses the question of how a sentencing court should treat the risk that a defendant will actually be deported in determining whether to grant a discharge without conviction under ss 106 and 107 of the Sentencing Act.

### **Decisions of the Courts below**

In the High Court, the sentencing Judge did not grant Ms Bolea a discharge without conviction. The Judge drew a distinction between liability to deportation (referring to the exposure of Ms Bolea to the Immigration New Zealand processes associated with being liable to deportation) and risk of actual deportation (referring to the possibility that Ms Bolea is actually deported). While accepting that Ms Bolea’s liability to deportation was a consequence of her conviction for the purpose of s 107, the Judge determined that the risk that Ms Bolea was actually deported was a consequence of her offending, not of her conviction. This meant that the risk of actual deportation was not considered as part of the s 107 analysis.

Ms Bolea appealed the sentencing decision to the Court of Appeal, primarily on the basis that the sentencing Judge was wrong to find the risk of actual deportation was not a consequence of her conviction. The Court of Appeal dismissed Ms Bolea’s appeal, also concluding that the risk of actual deportation was a consequence of Ms Bolea’s offending.

### **The present appeal**

On 22 June 2023, the Supreme Court granted leave to appeal the decision of the Court of Appeal. The approved question is whether the Court of Appeal was correct to dismiss the appeal.

Ms Bolea submits that liability to deportation is a direct consequence of her conviction, and the risk of actual deportation is an indirect consequence of her conviction. Ms Bolea says both consequences should be taken into account for the purposes of s 107, and that in doing so, the consequences will be out of all proportion to her offending.

The respondent supports the approach taken by the Court of Appeal that liability to deportation, rather than risk of actual deportation, is the only relevant consequence of conviction to be taken into account in the s 107 analysis. In the alternative, the respondent submits that even if the risk of Ms Bolea’s actual deportation is treated as a consequence of

her conviction, a discharge should not be granted. This is because there cannot be any certainty that Ms Bolea will actually be deported, meaning that even as a consequence of her conviction it is not out of all proportion to her offending.

### **Decision of the Supreme Court**

The Supreme Court has unanimously allowed the appeal.

In reaching its conclusion, the Supreme Court emphasised the unchallenged evidence that if Ms Bolea was not granted a discharge without conviction, a deportation liability notice would “almost certainly” be issued. In such a situation, the Court determined that both the liability for deportation and the risk of actual deportation should be treated as consequences of her conviction for the purpose of the s 107 analysis. This is because under the Immigration Act a deportation liability notice is issued only when it is intended to deport the individual in question. Further, a judge’s obligation to consider a discharge under s 107 applies regardless of whether there is any later process in which a decision maker may consider similar factors – for example, the assessment undertaken by Immigration New Zealand.

The Supreme Court also highlighted several more general matters relating to the s 107 analysis. Significantly, the Court said that determining whether the risk of actual deportation is a consequence of conviction under s 107 requires an individual assessment of the defendant’s particular circumstances. 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 specific evidence to the contrary, the exposure to deportation should be treated as a consequence of a defendant’s conviction. The same approach should be followed where it is clear Immigration New Zealand will not look beyond the conviction to consider all the circumstances of the offending. The position may be different if a conviction would not affect the issuing of a deportation liability notice – for example, if a discharge without conviction would not change the fact that a defendant would still be liable for deportation for another reason.

Even where exposure to deportation is a consequence of conviction, the Supreme Court stated that this does not mean a discharge without conviction will necessarily be granted. In determining whether such a consequence would be out of all proportion to the offending in question for the purpose of s 107 of the Sentencing Act, the court must be satisfied that there is a real and appreciable risk of that consequence occurring.

The Court also noted that there may be situations where mere exposure to the procedures relating to deportation, including the assessment undertaken by Immigration New Zealand, could be a disproportionate consequence to the relevant offending.

In allowing the appeal, the Supreme Court quashed Ms Bolea’s conviction for participating in an organised criminal group. Ms Bolea’s application for a discharge without conviction is remitted to the High Court for reconsideration on the basis that the application would benefit from further evidence.

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