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

SC 25/2023

BETWEEN	**ELIZABETH MARIA BOLEA** **Appellant**
AND	**THE KING** **Respondent**

SUBMISSIONS OF THE APPELLANT

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Introduction

1. The appellant is an Australian national.[1] In May 2019, aged 21 years, the appellant moved from Australia to live in New Zealand. The reason for the appellant's move was that her partner, Rhakim Mataia, a New Zealand national, had been deported from Australia as a '501'.

2. On 2 December 2020, approximately 19 months after arriving in New Zealand, the appellant (and others, including her partner) was arrested on drug related allegations. The appellant was 22 years of age at the time of her arrest.

3. Mr Mataia's family lived in Christchurch at 137 Winters Road. This is where the appellant was arrested. The appellant and her partner previously lived at Winters Road but, earlier in the year, had moved to Auckland. However, some of the appellant's and Mr Mataia's possessions were yet to be transported to Auckland. At the time of her arrest the appellant was in the process of relocating her remaining possessions to Auckland.

4. When arrested by the Police the appellant was more than five months pregnant. On the afternoon of 2 December 2020 the appellant appeared in the Christchurch District Court. Her admission to bail was opposed by the Police.

5. The District Court Judge reserved his decision until 4 December 2020. In the interim the appellant was remanded in custody and spent two nights at Christchurch Women's Prison.

6. On 4 December 2020 the appellant was granted bail by the District Court. A number of bail conditions were imposed. The appellant was bailed to live at 137 Winters Road.

[1] See the appellant's affidavit for matters relating to her background and arrest: Court of Appeal COA at p 35 onwards.

7. On 18 July 2022, the appellant pleaded guilty to one charge of participating in an organised criminal group. Prior to sentencing (in the High Court) the appellant filed an affidavit detailing the effects of the events subsequent to her arrest[2]:

> 10. As noted, I had other bail conditions. These included conditions preventing me from travelling.
>
> 11. I understand why these conditions were imposed but they have probably changed my life in quite a considerable/long term way. This is because, as above, I am from Australia and the address I was arrested at in Christchurch (137 Winters Road) was my partner's families. My partner, Rhakim, was arrested at the same time and remanded in custody. Rhakim remained in custody for some time and was not granted bail until much later when he was granted EM bail (on appeal) effective from 18 February 2021.
>
> 12. After my arrest I intended to break up with Rhakim. I also wanted to be able to travel back to Australia so I had the support of my parents and family. However, the fact that I could not go back to Australia and that I was bailed to the address of Rhakim's family complicated this. Further, once Rhakim was granted EM bail to the same address on 18 February 2021 (something that I was in no way able to oppose given that it was his family's address) this made my situation very difficult.
>
> 13. Rhakim and I have resumed a relationship after he was granted bail. This was nearly 21 months ago.
>
> 14. As a result my situation has now changed. Rhakim has not got himself (or me) into any further trouble with the law and he has been very much a big part of our daughter's life. Our daughter, who was born on 19 April 2021, is now nearly 19 months old. Rhakim, as a result of obtaining bail, has been present in her life since she was born. He has been a stay-at-home dad whilst I have worked. Rhakim has also started his own clothing business.
>
> 15. Whilst I appreciate that Rhakim will soon be sentenced to a term of imprisonment I have now lived in New Zealand for more than three years. I am employed at KaiMeansFood and have worked there for some time. I have now established myself in New Zealand and wish to continue to remain living here. I intend to facilitate as much contact between my partner and our daughter as possible when he is in jail and resume living with my partner upon his release with our daughter. When I return to Australia my current intentions are that it would not be to live and I would come back to New Zealand.
>
> 16. In terms of my employment I intend to keep working at my current employment and then undertake some study in the area of business.

8. At sentencing the appellant sought to be discharged without conviction. The primary basis advanced in support of this application was that, if convicted, the appellant could, and likely would, be deported. The practical effect of this would be to not only separate the appellant and Mr Mataia, but also Mr Mataia from their child. The appellant sought to avoid this outcome.

[2] Court of Appeal COA at p 36-37.

9. On 16 November 2022, Campbell J declined the appellant's application. Instead, His Honour convicted the appellant and sentenced her to four months home detention.[3]

10. The appellant appealed against the refusal to discharge her without conviction. However, on 6 March 2023, the appellant's appeal was dismissed.[4]

11. The appellant then sought leave to appeal to this Court on the basis that her proposed appeal (i) involved a matter of general/public importance and (ii) a substantial miscarriage of justice would, unless leave was granted, occur.

12. On 22 June 2023 this Court granted leave, the approved question being "whether the Court of appeal was correct to dismiss the appeal".[5]

The appeal

13. Relying on Court of Appeal authority, in sentencing the appellant, Campbell J said[6]:

> But deportation itself, if that occurred, would be a consequence of your offending, not of the conviction.

14. This was pivotal to the appellant's discharge without conviction application being declined by Campbell J. Therefore, it was the focus of the appeal in the Court of Appeal. However, the Court of Appel found no error[7]:

> In our view, in a very real sense deportation arising as a result of such a process can validly be regarded as a consequence of the offending and not the conviction.

15. The appellant maintains this is wrong. Accordingly, the primary focus of these submissions relate to that issue and are directed at establishing that, if the appellant were to be deported it would, as a matter of law, be a consequence of conviction.

[3] *R v Bolea* [2022] NZHC 2998: Court of Appeal COA at p 137.
[4] *Bolea v R* [2023] NZCA 39: Supreme Court COA at p 6.
[5] *Bolea v R* [2023] NZSC 72: Supreme Court COA at p 5.
[6] *Bolea* (HC), above n 3, at [25]: Court of Appeal COA at p 143.
[7] *Bolea* (CA), above n 4, at [46]: Supreme Court COA at p 16.

Section 107 of the Sentencing Act 2002

16. The issue at the heart of this appeal has arisen because before an offender can be discharged without conviction the offender must meet the s 107 Sentencing Act 2002 threshold test/requirement. Section 107 of the Sentencing Act 2002 provides that a sentencing court:

> must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

What is a "direct and indirect consequence of a conviction"?

17. In *Sok v R*, referring to s 107 of the Act, Miller J observed[8]:

> 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.

18. In *Fisheries Inspector v Turner*[9], the issue on appeal related to the predecessor to s 107 of the Act, namely s 42(1) of the Criminal Justice Act. That section permitted a court to discharge an offender, "unless by any enactment applicable to the offence a minimum penalty is expressly provided for".

19. Two questions arose for consideration in that case. First, whether s 53 of the Fisheries Act 1908 engaged this exception. This was because, in the event of a conviction, s 53 of the Fisheries Act operated to result in the automatic forfeiture of relevant property.

20. The second question, which is of more relevance to this appeal, was whether the court was permitted to take into account the consequences *of forfeiture* in determining whether to discharge an offender without conviction. It was submitted, by the Crown, in that case that[10]:

[8] *Sok* v *R* [2021] NZCA 252, (2021) 29 CRNZ 962 at [42].
[9] *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA).
[10] At 242.

> …a distinction might be drawn between the direct statutory consequences attached to the conviction of a particular offence which must be ignored, and indirect statutory consequences which will or may flow from conviction, which may be taken into account.

21. However, this suggested approach was rejected by the Court, because[11]:

> A proximity test would inevitably create an undesirable degree of uncertainty in the day to day application of this important provision. But it is not necessary to give further consideration to the difficulties of that refined approach where, as here, there are much more direct ways in which Parliament can, and does, make it clear that s. 42 cannot apply to preclude statutory forfeiture of property in the particular class of case.

22. It will be noted that when *Fisheries Inspector v Turner* was argued, the type of consequences which the appellant relies on in this case[12] were the *only* type of consequences which the Crown said courts should be permitted to consider.

23. The practical effect of the position adopted by the Crown in the present case (at least to this stage) reflects a reversal in the position it advanced in *Fisheries Inspector v Turner*. That is, the Crown's position is that because the appellant's deportation is not inevitable, as it depends on the decisions of Immigration, any resulting deportation would not be a consequence of conviction. Deportation would not be, on the Crown's argument, even an indirect consequence of conviction.

24. However, as Miller J himself observed, in enacting s 107 of the Sentencing Act, Parliament intentionally adopted and endorsed the approach of *Fisheries Inspector v Turner* which rejected this "proximity test" distinction.

25. Subsequent to *Fisheries Inspector v Turner* the Sentencing Act 2002 was passed. This Act came into being via the Sentencing and Parole Reform Bill 2001. Clause 96 of that Bill replicates s 107 of the Sentencing Act 2002. The Explanatory note of that Bill said[13]:

> Clause 96 is new and sets out guidance for the court in deciding whether to discharge an offender without conviction**. This clause is intended largely to reflect existing case law**. It provides in general terms that the court must not discharge an offender without conviction unless

[11] At 242.
[12] Being consequences which "may flow from conviction".
[13] Sentencing and Parole Reform Bill 2001 (148-1) at p 23.

> the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence…[Counsel's emphasis].

If the appellant is deported, would it be a consequence of conviction?

26. With that legislative background in mind, the question whether, in the event the appellant is deported, this would be a consequence "of a conviction" is turned to.

27. In the High Court Campbell J said[14]:

> [24]… The Court of Appeal has recently, in a case called *Zhu v R*, addressed the risk of deportation that is said to arise as a consequence of conviction. The Court provided an account of the deportation process that was more detailed than that in Mr Hennessy's affidavit. The Court said that a conviction of the sort that you face would give rise to a liability to deportation. But it is not inevitable that deportation would be the outcome. You would first have an opportunity to account for yourself and your family circumstances. Immigration authorities would consider the circumstances that are said to justify a discharge without conviction, including the gravity of the offending and your personal circumstances. **The Court of Appeal said that if deportation were the outcome, that would be a consequence of your offending, rather than a consequence of the conviction.**
>
> [25] In summary, I accept that your liability to deportation would be a consequence of conviction. **But deportation itself, if that occurred, would be a consequence of your offending, not of the conviction.**
> [Counsel's emphasis; footnotes omitted]

28. There can be no scope to argue, in the appellant's submission, that Campbell J did not correctly apply *Zhu v R*.[15]

29. Campbell J referenced[16] the following passages of *Zhu v R* to His Honour's observation in bold at [24] above:

> [23] That brings us to what are said to be immigration consequences of conviction in Mr Zhu's case. Because he holds a residence class visa his liability to deportation arises as a matter of law under s 161(1)(b) of the Immigration Act 2009, which applies when the offence is one for which a court has power to imprison for two years or more and it was committed not later than five years after the visa was first obtained. It follows that Mr Zhu's liability to deportation is a consequence of conviction. Put another way, were he granted a discharge he would no longer face that risk. We also accept that the conviction will likely lead to an INZ investigation.
>
> [24] The position is otherwise when it comes to the issue of a deportation liability notice or a decision to suspend liability under s 172 on conditions. Mr Moses accepts that in either case Mr

[14] *Bolea* (HC), above n 3: Court of Appeal COA at p 142-143.
[15] *Zhu v R* [2021] NZCA 254.
[16] At footnote 11: Court of Appeal COA at p 143.

> Zhu will have an opportunity to account for himself and explain his family circumstances. An adverse decision is not inevitable.
>
> [25] The Court has recently considered the question of causation in *Sok v R*, concluding that a conviction may be an indirect cause of a consequence that will happen only in the event that a third party, such as an immigration officer, makes a decision in which the conviction is relevant. Such a causal connection may suffice under s 107 of the Sentencing Act. However, it is not always enough to show that but for conviction a given consequence would not happen. Causation is a question of substance and degree, requiring judicial judgement. Where satisfied that immigration decision-makers will consider the circumstances that are said to justify a discharge, including the gravity of the offending and the offender's personal circumstances, courts usually reason that the outcome is a consequence of the offending, rather than the conviction.
>
> [26] This is such a case. Mr Moses's evidence is careful and balanced. We find it helpful to the extent it explains relevant immigration processes. We do not find it necessary or helpful to estimate how likely it is that a deportation liability notice will issue. If a notice issues it will be the product of a process in which Mr Zhu's conduct and circumstances, including the fact that he has admitted committing the offences and his family nexus to New Zealand, are examined on their merits.
> [Footnotes omitted]

30. After making the above observations, the Court of Appeal in *Zhu v R* under the heading of "[t]he balancing exercise" said[17]:

> We accept that once liable to deportation Mr Zhu is at risk of being served with a deportation liability notice, which in turn may lead to deportation. However, we do not accept that these are consequences of conviction. They are consequences of the offending, which will be considered by immigration decision-makers along with his personal and family circumstances.

Analysis of the cases relied on for the above proposition

31. The underlined passage of Miller J's comments in *Zhu v R* at [25] above was referenced to [47] of *Sok v R*, an earlier Court of Appeal decision in which Miller J commented[18]:

> 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 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.

32. The following footnote attached to the underlined passage in *Sok v R* above[19]:

[17] *Zhu v R*, above n 15, at [28].
[18] *Sok v R*, above n 8.
[19] Footnote 29 of *Sok v R*, above n 8.

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.

33. The passages of the four cases cited in *Sok v R* above are set out below (in the order mentioned in *Sok*):

> In relation to a conviction affecting an offender's immigration status, or indeed ability to travel overseas, the courts often conclude that it is appropriate for the consequences of conviction to be resolved by the appropriate authorities, rather than the Court attempting to pre-empt that decision-making process by a decision to discharge without conviction: *R v Foox*, *Liang v Police* and *Steventon v Police*. There is nothing that requires the courts to intervene to try and impose their perception of what the right immigration consequences should be. That is best left to the immigration authorities. But a Court's assessment of culpability in the sentencing exercise may assist those authorities. And there will always be occasions where in a finely balanced case a discharge may be warranted on these types of grounds: *R v Hemard*. The case for discharge may not be so strong where the details of the offending will be known and closely examined by the relevant authority in any event, than where the query will be only as to prior convictions, for instance in an application for professional certification.
> …
> It is difficult to see how the entering or not entering of a conviction on these offences should be conclusive or indeed highly influential in the immigration process. The facts of the offending stand for themselves and will be able to be assessed by the immigration authorities. It has to be assumed that the fact that this low end offending by Ms Zhang is linked to a very high profile international incident where the use of shell companies in New Zealand has attracted international criticism, will not be turned to Ms Zhang's disadvantage. It can be said with certainty that the transport of the arms would have occurred with or without Ms Zhang's willingness to provide the wrong address. The Courts must assume that immigration authorities will behave fairly and rationally, and it would be unfair and irrational to punish her for this highly public event as distinct from her limited error in wrongly filling in the forms.
>
> [*Zhang v Ministry of Economic Development* HC Auckland CRI-2010-404-453, 17 March 2011 at [14] and [24]]
> …….
>
> We accept that Mr Edwards has personal reasons to travel to Canada and in his chosen career may be required to travel internationally, particularly to the United States, for work. However, the evidence of travel restrictions is unsatisfactory. Mr Newell referred us to s 36(2) of the Canada Immigration and Refugee Protection Act 2001, which states that a foreign national is inadmissible for criminality where he or she has committed "an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence…". He explained that sexual assault is an indictable offence under Canadian law. We observe that it is the act constituting the offence that causes inadmissibility. On the face of it, Mr Edwards is inadmissible to Canada whether or not he receives a discharge. Further, there is no evidence that inadmissibility is absolute, in the sense that there is no alternative visa available and no discretion that can be exercised in the applicant's favour at any time in the future.
>
> [*Edwards v R* [2015] NZCA 583 at [21]]
>
> …….
>
> It is important also to identify whether the consequences under scrutiny are

predicted to follow from the offending or from the fact of conviction. The s 106 cases founded on the risk of employment consequences provide a good illustration of the point. Often, in such cases, it is the offender's conduct and not merely the conviction which gives rise to consequences the offender wishes to avoid. In this case, however, it is the conviction rather than what Mr Rahim did that will trigger the real and appreciable risk that he is likely to be deported. [*Rahim v R* [2018] NZCA 182 at [31]]

…….

In that context we see the severity of a conviction for Mr Bong's future immigration status as significant. We accept Mr Laurent's evidence that the presence of a conviction will make it very difficult for Mr Bong to persuade an immigration officer to exercise her discretion to cancel a deportation order under s 177. We also accept that if Mr Bong leaves New Zealand, the need for him to obtain a character waiver will represent a significant barrier to him gaining a visa in future. We note that, absent a conviction, INZ will remain on notice as to the fact of the charges Mr Bong faced and the jury's verdict, but any future application will be assessed without the significant headwind of the character waiver requirement. On balance, we are satisfied on the basis of the updated information we now have that in terms of s 106 of the Sentencing Act and in these unusual circumstances, the consequences of Mr Bong's.

[*Bong v R* [2020] NZCA 94 at [32]]

34. The table below summarises the passages of those cases:

Case	***Ratio***
Zhang v Ministry of Economic Development	• It is usually appropriate for consequences of a conviction to be left to the appropriate authorities to determine. • Courts should assume that Immigration NZ will act fairly and rationally.
Edwards v R	• If a consequence will occur irrespective of whether a conviction is entered then the consequence will not be a consequence of conviction.
Rahim v R	• If a conviction triggers the consequence, then that consequence is a consequence of conviction.
Bong v R	• Even if a consequence can occur absent a conviction being entered, such a consequence may still constitute a consequence of conviction.

35. None of the cases Miller J referred to have held that if a consequence which a statutory body has the ability to effect *only* in the event of conviction eventuates it is "…usually…a consequence of the offending behaviour rather than the conviction". *Rahim v R* confirmed the opposite: "In this case, however, it is the

conviction rather than what Mr Rahim did that will trigger the real and appreciable risk that he is likely to be deported."[20]

36. Notwithstanding that, the Court of Appeal in the present case defended the approach of, and observations made in, *Sok* and *Zhu*[21]:

> We do not accept that correctly analysed the reasoning in [these] decisions represents a departure, let alone a radical one, from previous authority. In our view the decisions are simply a useful exposition of the existing case law and the legal reasoning underpinning different outcomes in different cases. We are not persuaded there is any reason to revisit the decisions.

37. In doing so, the Court said[22]:

> *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.

38. None of the above two passages are *per se* inconsistent with what Miller J said in *Sok/Zhu*. However, the Court of Appeal's comments emphasised the *exception*, rather than the apparent (usual) rule identified by Miller J, which is again repeated: "courts usually find the outcome a consequence of the offending behaviour rather than the conviction".

39. More importantly, despite the focus on the matter in the present appeal, the Court of Appeal again failed to identify *any* cases which have either adopted or endorsed that approach.

40. As outlined above, at [25] of *Zhu v R*, Miller J noted that the Court of Appeal "has recently considered the question of causation in *Sok v R*". In *Sok v R*, at [44], Miller J said[23]:

> 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.

[20] *Rahim v R* [2018] NZCA 182 at [31].
[21] *Bolea* (CA), above n 4, at [40]: Supreme Court COA at p 14.
[22] At [41](a).
[23] *Sok v R*, above n 8.

> Causation is a question of substance and degree, requiring judicial judgment. Like disproportionality, causation is an evaluative rather than a discretionary consideration. [Footnotes omitted].

41. In *Zhu v R*, it was immediately after Miller J referred to (and largely repeated) the comments in *Sok v R* above that His Honour stated that[24]:

> …courts usually reason that the outcome is a consequence of the offending, rather than the conviction.

42. The comments of Miller J in *Sok v R* at [44] *are*, as a matter of law, correct. This includes His Honour's observation that "[n]or is a but-for connection necessarily sufficient…". That is because in some cases the entry of a conviction may, for example confer jurisdiction on a statutory body, but nevertheless there still may not be a 'real and appreciable risk' such jurisdiction will be (adversely) invoked.

43. When an adverse outcome of a decision maker is contingent on the entry of a conviction the outcome will be a consequence of conviction, in each and every case, *unless* there is no 'real and appreciable' risk of it occurring.[25]

44. It is to state the obvious, but if a consequence arises from a conviction it must also be, by default, a consequence of the person's offending. The two are in no way mutually exclusive. The jurisdiction of a sentencing court can only be invoked, of course, if offending has first occurred. But, even if offending has occurred, no adverse consequence may result. If, for example, the offending is either not detected or not prosecuted then an adverse consequence, which is contingent on conviction, cannot result. That illustrates that, in cases such as the appellant's, it is the conviction which is all important. As discussed below, unless Ms Bolea is convicted she cannot be deported.

45. The comments of Campbell J in respect to the appellant are again repeated[26]:

> But deportation itself, if that occurred, would be a consequence of your offending, not of the conviction.

[24] *Zhu v R*, above n 15, at [25].
[25] Consistent with *DC (CA47/2013) v R* [2013] NZCA 255.
[26] *Bolea* (HC), above n 3, at [25]: Court of Appeal COA at p 143.

46. Again these comments were made in light of, and in reliance on, *Zhu v R*. Campbell J was thus bound by it. Accordingly, there is no criticism of Campbell J in this respect. The criticism pertains to the approach as outlined in the *Zhu/Sok* decisions which is both illogical and inconsistent with prior case law. The observation of Miller J that, even if a decision maker's jurisdiction requires the entry of a conviction, an adverse outcome can be classified as "a consequence of the offending, rather than the conviction" is wrong.

Deportation: the process

47. It has been accepted from the outset (including by Campbell J in the High Court) that a conviction exposes Ms Bolea to deportation.

48. The Court of Appeal in the present case, set out the deportation process as follows[27]:

> [10] Ms Bolea is an Australian national. For immigration purposes, she is considered to have had a resident visa from the time she first arrived in New Zealand in May 2019. Under s 161(1)(b) of the Immigration Act 2009, the holder of a residence class visa is liable for deportation if convicted of an offence for which 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 visa was granted. The offence committed by Ms Bolea meets all those criteria.
>
> [11] On becoming aware of a qualifying conviction entered against a resident visa holder, Immigration New Zealand prepares a detailed briefing paper for 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.
>
> [12] In *Zhu v R* and *Anufe v New Zealand Police*, this Court stated that as part of the process of compiling the briefing paper, the officials give the resident visa holder an opportunity to be heard and make submissions. The submissions can include issues about the gravity of the offending, their personal circumstances and the impact deportation would have on them. The submissions from the resident visa holder are included in the briefing paper as are the summary of the facts and sentencing notes.
> [Footnotes omitted].

49. The Court of Appeal then outlined[28]:

> [15] If a deportation liability notice is issued, then within 28 days of being served, the resident visa holder has the right to appeal to the Immigration and Protection Tribunal on humanitarian grounds against their liability for deportation. Section 207(1) of the Immigration Act states:

[27] *Bolea* (CA), above n 4: Supreme Court COA at p 8 and which, for the purposes of this appeal, the appellant proceeds on the basis is accurate.
[28] *Bolea* (CA), above n 4: Supreme Court COA at p 9.

> **207 Grounds for determining humanitarian appeal**
> (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—
>
> (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.

> [16] In *Minister of Immigration v Q* this Court held that the "unjust or unduly harsh" leg of s 207(1)(a) requires the Court to balance the reasons why the appellant is liable for deportation (to which their degree of culpability is relevant) against the consequences for the appellant of deportation. The degree of culpability is also relevant to the second leg regarding the public interest.
>
> [17] All of the above is subject to the residual discretion of the Minister under s 172 of the Immigration Act. Section 172 empowers the Minister in their absolute discretion at any time to cancel a person's deportation liability or to suspend it for a period of no more than five years subject to conditions, for example a condition that the person not re-offend.

The evidence as to the appellant's risk of deportation

50. In respect to the evidence filed on behalf of the appellant, the Court of Appeal summarised this as follows[29]:

> [18] In the High Court in this case, Ms Bolea provided the Judge with an affidavit from an immigration lawyer, Mr Hennessey. He opines that if Ms Bolea were convicted, she would "almost certainly" be sent a deportation liability notice. The affidavit does not address her prospects of success on appeal to the Tribunal.
>
> [19] It does however note that if unsuccessful in appealing the notice she would be deported and that in turn would mean she and the young child she has with Mr Mataia would be permanently separated from him and never be able to have face to face contact. Mr Matai is a deportee from Australia under that country's "501 policy" and under current Australian law unable to return there. The ability of the family to meet in another country would be problematic given the parents' convictions.

Assessing the appellant's Immigration consequences

51. One of the criticisms made by the appellant in the Court of Appeal was that *Zhu* is inconsistent with the well-established and regularly applied decision of *DC (CA47/2013) v R*[30]. Whilst not specifically referring to that earlier authority, the Court of Appeal recorded the appellant's position that[31]:

> …the reasoning in *Zhu* is also inconsistent with the well-established principle that for the purposes of a discharge, the Court is not required to be satisfied that the consequence relied on is certain to happen or inevitable. It is sufficient if there is a real and appreciable risk.

[29] *Bolea* (CA), above n 4: Supreme Court COA at p 10.
[30] *DC (CA47/2013) v R*, above n 25.
[31] *Bolea* (CA), above n 4, at [38]: Supreme Court COA at p 13.

52. Presumably, because of the conclusion it reached at [47] (namely that "…deportation arising as a result of such a process can validly be regarded as a consequence of the offending and not the conviction") the Court of Appeal, like Campbell J, did not attempt to assess whether there was a 'real and appreciable' risk that the appellant would be deported. As will be apparent from the submissions already advanced, the appellant's position is that this was an error.

53. Related to the approach taken in *Zhu/Sok* (and adopted in the present case), despite acknowledging that "[c]ourts have admitted broadly similar evidence in some cases", in *Sok* Miller J did not find it "substantially helpful" to rely on the expert evidence filed in that case relating to the likelihood of deportation, because[32]:

> …our decision does not turn on an estimate of the likelihood that Mr Sok will be deported.

54. This can similarly be contrasted to the approach endorsed by the Court of Appeal in *DC (CA47/2013) v R*. Following the 'real and appreciable' risk test being set out in *Iosefa v Police* (which was subsequently adopted in *DC (CA47/2013) v R*), the High Court added[33]:

> However, the nature and seriousness of the consequences and the degree of likelihood of their occurring will be material to the Court's assessment of whether those consequences would be out of all proportion to the gravity of the offence in other words, the higher the likelihood and the more serious the consequences, the more likely it is that the statutory test can be satisfied.

55. It can be noted the above comments (in *Iosefa*) have been endorsed by the Court of Appeal in several cases.[34]

56. The appellant does not seek to change the approach outlined in *DC (CA47/2013) v R* which, as noted, has been treated as settled law for a considerable period. Proceeding on that basis, the unchallenged evidence of Rory Hennessy that, if the

[32] *Sok v R*, above n 8, at [55].
[33] *Iosefa v Police* HC Christchurch CIV-2005-409-64, 21 April 2005 at [35].
[34] See, for example, *R v Hughes* [2008] NZCA 546; [2009] 3 NZLR 222 at [82], *Maraj v Police* [2016] NZCA 279 at [10], *Prasad v R* [2018] NZCA 537 at [18].

appellant is convicted she "will almost certainly be sent a Deportation Liability Notice"[35] is both relevant and important.

57. Accordingly, given that the appellant was relying (and still relies) on the risk of deportation[36], it is accepted that the ability for her to nevertheless avoid deportation if issued with a deportation liability notice is of potential relevance.

58. As noted by the Court of Appeal, Mr Hennessy's affidavit did "not address [the appellant's] prospects of success on appeal to the Tribunal"[37]. Given that the *Zhu* approach was adopted by the Court of Appeal in the present case, it does not appear that the absence of such an opinion affected the outcome of the appeal in any way. However, even if the Court of Appeal adopted a more conventional (and correct) approach, such evidence would have been unnecessary.

59. This is because appeals pursuant to s 207 of the Immigration Act have a very narrow ambit and the permitted considerations are specified. In other words, at least in a situation such as the appellant's, to the extent it is relevant, s 207 itself (and confirmed by case law) sufficiently provides the guidance and answer.

60. Section 207 of the Immigration Act 2009 is again set out:

> **Grounds for determining humanitarian appeal**
> (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—
> (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.
> (2) In determining whether it would be unjust or unduly harsh to deport from New Zealand an appellant who became liable for deportation under section 161, and whether it would be contrary to the public interest to allow the appellant to remain in New Zealand, the Tribunal must have regard to any submissions of a victim made in accordance with section 208.

61. Section 207(1)(a), as confirmed by this Court, has three ingredients[38]:
    (i) Exceptional circumstances

[35] Court of Appeal COA at p 129 (paragraph 10).
[36] As opposed to having to go through the process which has the ability to result in deportation.
[37] *Bolea* (CA), above n 4, at [18]: Supreme Court COA at p 10.
[38] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34]. The first two "ingredients" are, however, conjunctive: see *Minister of Immigration v Q* [2020] NZCA 288 at [28]-[30].

(ii) Of a humanitarian nature

(iii) That would make it unjust or unduly harsh for the person to be removed from New Zealand.

62. The Immigration Act 1987 was the predecessor to the Immigration Act 2009. Section 207 of the 2009 Act adopted the former s 47(3) test, a test that previously only applied to over stayers. As Katz J observed in *Minister of Immigration v Jooste*[39]:

> [24] Courts at all levels have accepted that the s 47(3) test was a "difficult one to meet" and was set at a "deliberately set at a high level". In *Zanzoul v Removal Review Authority*, Dobson J noted that the humanitarian limb of s 47(3) constituted a "high threshold" as "the basis for a very narrow exception to an overall policy of removing persons who are unlawfully in New Zealand". In *Patel v Removal Review Authority*, the Court of Appeal held s 47(3) to be a "stern test", expressed by "stringent statutory wording":
>
> > … The stringent statutory wording, 'exceptional circumstances of a humanitarian nature…unjust or unduly harsh', using strong words imposes a stern test. In its natural usage, 'exceptional circumstances' sets a high threshold necessarily involving questions of fact and degree.
>
> [25] The approach taken in these cases was affirmed by the Supreme Court in *Ye v Minister of Immigration*…
> [Footnotes omitted]

63. Applying this to the Tribunal's decision in *Minister of Immigration v Jooste*, Katz J said:

> [44] Turning now to the specific passages in the Tribunal's *Jooste* decision that are said to reflect an erroneous approach, Ms Griffin first relied on the two passages in which the Tribunal made observations to the effect that it saw its role as being to weigh the "gravity of the offending" against "compassionate factors" favouring Mr Jooste remaining in New Zealand. Indeed, the Tribunal stated at the outset of its decision that it saw this as the "crux" of the appeal. In a similar vein, the Tribunal stated that the "exceptional circumstances test" was simply "a threshold intended to prevent those with routine circumstances from arguing injustice or undue harshness" and that those with "genuinely concerning circumstances" were entitled to have "them held up against the backdrop of their offending".
>
> [45] In my view such comments reflect an erroneous view of the exceptional circumstances test. They effectively equate the stringent statutory test of "exceptional circumstances of a humanitarian nature" with "compassionate factors", circumstances that are more than simply "routine", or "genuinely concerning circumstances". The latter phrases fail, by a significant margin, to adequately capture the high threshold for a finding of exceptional circumstances of a humanitarian nature, as articulated in *Ye* and the other cases I have referred to.
>
> [46] Parliament has mandated that it is only where humanitarian circumstances are exceptional that the statutory threshold will be met. As McGechan J observed in *Nikoo v Removal Review Authority*:

[39] *Minister of Immigration v Jooste* [2014] NZHC 2882, [2015] 2 NZLR 765.

> … Circumstances which may cause difficulty, hardship and emotional upset to persons the subject of removal orders, or those associated with them, will not suffice to meet the requirement unless the circumstances themselves or their consequences can legitimately be characterised as exceptional.
>
> [47] The primary humanitarian factor identified by the Tribunal in Mr Jooste's case was his separation from his children if he were deported. **Unfortunately, cases involving the separation of parent and child are not unusual in the deportation context. Family separation through deportation will often cause "difficulty, hardship and emotional and upset" — but that in itself is not sufficient.** Although such difficulties, hardship and emotional upset will clearly be "compassionate circumstances" that may well be of "genuine concern" something more is required for a finding of exceptionality.
>
> [48] **As Simon France J observed in *O'Brien v Immigration and Protection Tribunal*, the focus must be on whether there is something in the child's particular circumstances that go beyond those inevitably involved in any forced separation…**
>
> [49] The Tribunal's view that it is possible (and indeed appropriate) to proceed from a finding that there are "genuinely concerning" or "compassionate" circumstances straight to the question of whether those circumstances would make deportation unjust or unduly harsh effectively removes the requirement for exceptionality from the analysis altogether. Such an approach risks conflating the separate (and sequential) inquiries regarding exceptionality and injustice or undue harshness, which was expressly rejected by the majority in *Ye*.
>
> [50] I also accept the Minister's submission that the Tribunal is, in effect, continuing to take the same, less stringent, approach to resident deportation appeals as was provided for by s 105 of the 1987 Act. Section 105 did not include a threshold requirement of exceptional circumstances. The approach taken under s 105 of the 1987 Act was summarised in *Oto v Minister of Immigration* as follows:
>
> There had to be a balancing exercise, weighing the seriousness of the offending giving rise to the deportation order and any other offending with the compassionate factors favouring the appellant remaining in New Zealand, having particular regard to the matters set out in s 105(2).
>
> [51] This mirrors the approach that the Tribunal has articulated in this case (using very similar wording). Continuing to follow an approach to resident deportation appeals that was appropriate in relation to s 105(2) of the 1987 Act overlooks that the clear **Parliamentary intention was to raise the bar for appeals against deportation by residents in the 2009 Act, by including an additional requirement (not present in s 105(2)) that the relevant humanitarian circumstances must be "exceptional".**
> [Counsel's emphasis; footnotes omitted].

64. In the present case, the Court of Appeal noted[40]:

> In *Minister of Immigration v Q* this Court held that the "unjust or unduly harsh" leg of s 207(1)(a) requires the Court to balance the reasons why the appellant is liable for deportation (to which their degree of culpability is relevant) against the consequences for the appellant of deportation. The degree of culpability is also relevant to the second leg regarding the public interest.
> [Footnotes omitted].

65. However, the difficulty with the above observation is that a s 207 Immigration Act appellant must *first* establish that there are "exceptional circumstances of a

[40] *Bolea* (CA), above n 4, at [16]: Supreme Court COA at p 9.

humanitarian nature" before the Tribunal can even consider whether it would be "unjust or unduly harsh". This was emphasised by Katz in *Minister of Immigration v Jooste*, including in the following paragraph[41]:

> Any appeal must fail at the first hurdle if there are no "exceptional circumstances" of a humanitarian nature. The significance of the initial threshold inquiry should not be minimised, however. Given the stringent nature of the "exceptionality" test, as articulated in *Ye*, the initial threshold is a high one. One would expect that only a minority of cases would progress to the "unjust or unduly harsh" stage of the inquiry.

66. As submitted, the words of s 207 speak for themselves. And the decisions of *Minister of Immigration v Jooste* and *Ye v Minister of Immigration* (and others) confirm the intention, and practical effect, of that section. That is, section 207 involves a very high, and seldom met, test. This is irrespective of the offending which may have triggered it.

67. In terms of the appellant, her situation would not meet the s 207 test and in particular the "exceptional circumstances of a humanitarian nature" threshold. In light of the clear test, and language used, in s 207 (and confirmed by case law) expert evidence was not, and is not, needed to establish that.

68. The Court of Appeal also referred to s 172 of the Immigration Act[42]. This section empowers a Minister to cancel or suspend a person's liability for deportation"[43]. It is in the Minister's "absolute discretion"[44].

69. The appellant is liable for deportation (pursuant to s 161 of the Act) "for a period of 10 years following the arising of the liability for deportation".[45] Section 170 of the Act provides "[a] deportation liability notice must be served on a person liable for deportation if it is intended to execute the deportation of the person".

[41] *Minister of Immigration v Jooste*, above n 39, at [53].
[42] *Bolea* (CA), above n 4, at [17]: Supreme Court COA at p 9.
[43] Section 172(1) and (2).
[44] Section 172(5).
[45] Section 167(1).

70. Section 172 enables a person's liability for deportation to be cancelled or suspended "at any time". As such, a Minister's s 172 power could, in theory, be invoked to either:

    (i) Prevent the serving of a deportation liability notice; or
    (ii) Cancel or suspend a deportation liability notice which has already been served.

71. However, the evidence of Mr Hennessy is again both relevant and helpful in respect to the above possibilities. Whilst Mr Hennessy's affidavit did not specifically refer to s 172, his evidence addressed it: "if the appellant is convicted….she will almost certainly be sent a Deportation Liability Notice".[46] In other words (i) above would "almost certainly" not occur.

72. Furthermore, the likelihood of (ii) occurring is even more remote than (i). That is because this scenario would involve (*following* the process outlined by the Court of Appeal at [12] being undertaken) the position of Immigration/the Minister changing from a determination that deportation *should be* affected to a determination that deportation should *not be* affected. As such, absent an unforeseen and significant change in circumstances, this would not (and will not) occur.

73. Therefore, neither the s 207 appeal avenue nor the Minister's s 172 discretion mitigate the "almost certain" risk that the appellant will be issued with a deportation liability notice and therefore be deported. The expert evidence of Mr Hennessy thus established, by a considerable margin, a 'real and appreciable' risk of deportation. Further, and relatedly, as per *Iosefa v Police/DC (CA47/2013) v R*, the extent of that risk was relevant to assessing the consequences because "the higher the likelihood….the more likely it is that the statutory test can be satisfied".[47]

[46] Court of Appeal COA at p 129 (paragraph 10).
[47] *Iosefa v Police*, above n 33, at [35].

The horse comes before the, differently designed, cart

74. In the appellant's submission there are two factors that confirm the *Zhu/Sok* approach is, as a matter of law, incorrect:
    a) In cases such as the appellant's, courts get the first (and possibly only) bite at the cherry; and
    b) In any event, the statutory criteria/test which guide the two (potential) decision makers differ.

75. The statutory test – or, as per the heading "guidance" – contained in s 107 of the Sentencing Act 2002 is descriptive and clear and is again set out:

> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

76. Unless an offence provides for a presumption (on conviction) in favour of a specific type of sentence[48], in every case, a sentencing court must turn its mind to whether it should enter a conviction against an offender. This is because s 11(1) of the Sentencing Act relevantly provides:

> If a person who is charged with an offence is found guilty, 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—
>
> (a) discharging the offender without conviction under section 106

77. The effect of this, absent a presumptive sentence, is that in all cases a sentencing Judge must turn his/her mind, however briefly, to the s 107 test (even if not requested to do so by an offender).[49]

78. Consideration of two matters thus becomes mandatory (i) "the direct and indirect consequences of a conviction" and (ii) "the gravity of the offence".

79. Making these two determinations, as well as the balancing exercise required by s107, must, and can only, be made by the sentencing Judge him/herself. It is the

[48] Section 11(2) Sentencing Act 2002.
[49] See *Cabuyao v R* [2021] NZHC 3395 at [32]; *R v Walsh* [2023] NZHC 680 at [8].

Judge's own assessment of these matters which matters. Section 107 does not permit this to be abdicated to another decision maker.

80. If an offender is deemed to meet the s 107 test, the only possible avenue to "bypass" the s 107 "guidance" is via the s 106 discretion: "the court *may* discharge the offender without conviction…". However, the law is also settled in this area and was summarised by the Court of Appeal in *Blythe v R*[50]:

> …it will be a rare case where an offender has passed through the s 107 "gateway", but is then not discharged under s 106(1).

81. As with the 'real and appreciable' risk test set out in *DC (CA47/2013) v R*, the appellant is not asking this Court to revisit this settled law.

82. Accordingly, and leaving aside the s 106 "residual discretion", the combined effect of ss 11 and 107 of the Sentencing Act is that a sentencing court must, as noted, make its own assessment. The fact that an adverse outcome is "not inevitable" cannot be used to alleviate a court of that duty.

83. Relatedly, the horse becomes before the cart. The powers provided by s 161 of the Immigration Act 2009 can only be activated in the event a court enters a conviction. This was a deliberate decision on the part of Parliament. The heading of s 161 refers to residence class visa holders who are '***convicted***'. It contrasts to other enactments, as well as other sections in the Immigration Act. Section 157 of the Act, for example, provides, "[a] temporary entry class visa holder is liable for deportation if the Minister determines that there is 'sufficient reason' to deport the temporary entry class visa holder." The section then provides that 'sufficient reason' includes '*criminal* ***offending***'[51].

84. Similarly, the position of the appellant in *Sok* contrasts to Ms Bolea's where, in that case, as the Court of Appeal noted[52]:

[50] *Blythe v R* [2011] NZCA 190, [2011] 2 NZLR 620 at [13].
[51] Section 157(5); counsel's emphasis.
[52] *Sok v R*, above n 8, at [46].

> … [the appellant's] 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.

85. This highlights the importance of a court, in a case such as the appellant's, making its own assessment. Indeed, the decision maker (whether Immigration or another statutory body) must, as a matter of law[53], proceed on the basis that the offender's situation did not meet the statutory threshold for a discharge if a conviction is entered.

86. Even if the statutory test/guidance was identical as between Sentencing Act and the Immigration Act, for the reasons discussed above, a court would still be left in the position of having to make its own assessment. However, and further supporting the correctness of the appellant's approach, Immigration is neither required to undertake, or directed to be guided by, the s 107 Sentencing Act test/guidance.

87. The s 107 test is not only unique to the Sentencing Act but is, intentionally, wide in scope. It is in contradistinction to s 207 of the Immigration Act. As the Court of Appeal said in *R v Hughes* (in relation to s 107 of the Sentencing Act)[54]:

> We do not consider descriptions of the disproportionality test such as "very stiff", "exceptional", or extreme to be helpful. While stating that the words "out of all proportion" point to an "extreme situation", Bisson J in *Roberts* also said (refer [19] above) that expressions suggesting the discretion should be "exercised sparingly" and "only in exceptional circumstances" tended to fetter the wide discretion under s 19, and are "hardly of any assistance": at 210. We agree with the latter statement. We note that Richardson J in *Turner* did not apply any such descriptors or qualifiers. The test is the test. Simply, under s 107 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, before it may consider the exercise of the discretion conferred by s 106 to discharge without conviction.

88. However, s 207 of the Immigration Act, as earlier discussed, does require an "exceptional" situation, namely "…exceptional circumstances of a humanitarian

[53] Subject to a discharge not being granted based on the s 106 "residual discretion".
[54] *R v Hughes*, above n 34, at [23].

nature…"[55]. Thus, in addition to the differing thresholds, different tests apply. In relation to courts all (direct and indirect) consequences are relevant. In relation to s 207 Immigration Act appeals, the statutory test is very circumscribed/specific.

89. Further underlining the importance of courts making their own independent assessment (via s 106/107 of the Sentencing Act), can be found in s 3 of the Immigration Act 2009. This sets out the purpose of the Act namely "to manage immigration in a way that balances the national interest, ***as determined by the Crown***, and the rights of individuals"[56]. The s 106/107 Sentencing Act assessment is required to be undertaken by an independent decision maker. However, if Immigration Act jurisdiction is conferred via the entry of a conviction, the outcome is largely left to the Crown to determine.

90. It is also observed that if a sentencing court discharges an offender without conviction then, pursuant to s 106(2) of the Sentencing Act, the discharge is "deemed to be an acquittal". Accordingly, discharges are, by their very design, intended to "usurp" consequences which are otherwise permitted, or expected, to occur. Courts have intentionally been given the power to prevent disproportionately severe outcomes occurring.

Disposition of the appeal

91. The appellant's appeal relates to the entry of a conviction. As such, s 232 of the Criminal Procedure Act 2011 applies. As the Court of Appeal said in *Jackson v R*[57]:

> the principled basis for determining an appeal against a discharge without conviction is to establish that a miscarriage of justice has occurred by virtue of a material error by the sentencing judge in entering a conviction. That is because a trial includes a proceeding in which the appellant has pleaded guilty. Alternatively, it can be said that a miscarriage of justice has occurred "for any reason" if the Judge has erred in applying the principles for discharging an offender without conviction found in s 107 of the Sentencing Act.

[55] As per s 207(1)(a) of the Immigration Act 207.
[56] Counsel's emphasis.
[57] *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144 at [12].

92. If the Court accepts that the approach adopted by Campbell J and upheld by the Court of Appeal involved an "error…that has created a real risk that the outcome…was affected" then it must allow the appeal. It is of some significance to note, at this point, that the appellant's discharge application was not dismissed on its "merits" by either of the courts below. Rather, it is clear that the adoption of the *Zhu* approach was, as earlier noted, pivotal to Campbell J's decision and of equal relevance to the dismissal of the appellant's appeal by the Court of Appeal.

93. If this Court finds that the *Zhu* approach represents good law, and was correctly applied to the appellant's situation, it is accepted that the appellant's discharge application, and appeal, have been correctly determined by the courts below.

94. However, if the appellant demonstrates that the adoption of the *Zhu* approach involved an error, then this Court has two options available to it. First, it could set aside the appellant's conviction and direct that her discharge application be reconsidered by the High Court. Alternatively, it could make its own s 106/107 determination.

95. The appellant's position is that, given the significance of the issue, the preferable course is for the appellant's discharge application to be remitted back to the High Court. The *Zhu* approach stymied the appellant's application from the outset and, again, was pivotal to the end outcome.

96. If this Court accepts an error has been established but nevertheless wishes to undertake the s 106/107 assessment itself, the submissions below are intended to address that exercise.

Undertaking the s 107 exercise on the correct legal basis

The gravity of the appellant's offending

97. As confirmed in *DC (CA47/2013) v R*, for the purposes of s 107, "…all relevant aggravating and mitigating factors relating to the offending and the offender come into play when considering the gravity of the offence".[58]

98. Accordingly, in assessing the gravity of the appellant's offending, it is important to have regard to the material filed on behalf of the appellant in the High Court particularly (i) the appellant's affidavit[59] and (ii) the psychological report of Dr Ralf Schnabel[60].

99. In the High Court Campbell J ultimately assessed the gravity of the appellant's offending as "moderate to low"[61].

100. There was a challenge to that finding in the Court of Appeal. However, the Court of Appeal concluded: "[w]e are unable to identify any error in the Judge's assessment and agree with the finding of moderate to low gravity".[62] The appellant, does not, for the purposes of this appeal, *per se*, challenge that assessment. However the appellant submits that the gravity of the appellant's offending, for the purposes of s 107, falls towards the lower end of that assessed range. This is consistent with the decision of *J (CA32/2021) v R* where, on appeal, the Court of Appeal held the appellant's offending was "properly characterised as low"[63] notwithstanding the sentencing Judge adopted a starting point of 18 months imprisonment which, following consideration of mitigating factors, was nominally reduced to eight-and-a-half months' imprisonment.[64]

[58] *DC (CA47/2013) v R*, above n 25, at [35].
[59] Court of Appeal COA at p 34.
[60] At p 122.
[61] *Bolea* (HC), above n 3, at [19] (Court of Appeal COA at p 142) and [30] (Court of Appeal COA at p 144).
[62] *Bolea* (CA), above n 4, at [32]: Supreme Court COA at p 12.
[63] *J (CA32/2021) v R* [2021] NZCA 690 at [34].
[64] At [35]. "Then, after rejecting the application for a discharge without conviction, [the sentencing Judge] ordered 12 months' supervision to ensure J's continuing engagement with mental health services."

The direct and indirect consequences of a conviction

101. As noted earlier, the primary consequence relied on by the appellant pertained to deportation. The second related to anticipated future barriers to the appellant, particularly in respect to her career/employment.

102. Because, as previously discussed, the *Zhu* approach was adopted by Campbell J (and the Court of Appeal), there has been no real assessment by the courts below as to the seriousness of the deportation consequences arising from the appellant's "offending".

103. The appellant's position, relying on the evidence of Rory Hennessy and the Immigration Act 2009 itself, is that, as earlier noted, the likelihood of the appellant being deported is very high.

104. Section 107 does not distinguish between direct and indirect consequences. All consequences, whether direct or indirect, must be considered and are relevant. However, the consequences of a conviction as it relates to the appellant's Immigration could be categorised as:

    a) Enabling Immigration New Zealand the ability to issue a deportation liability notice against the appellant which has the ability to lead to deportation. That consequence flows immediately on conviction. It is therefore a direct consequence.
    b) Deportation, because there is a 'real and appreciable' (the appellant says very high) risk of it occurring. Deportation if it were to occur would be, and thus is, an indirect consequence. It is dependent on the actions of (at least) another.

105. However, if categorisation is put to one side, for s 107 purposes it is submitted that the consequence of a conviction (in relation to Immigration) is appropriately assessed to be, at least, probable deportation.

106. It is, however, the (further indirect) consequences that would then flow which are more of moment. The consequences to the appellant, and her child, at that point, would be severe. They include:

- Loss of current employment and established livelihood in New Zealand.
- An inability for the appellant's child to remain in her country of birth.
- An inability for the appellant to remain in a relationship with her partner.
- An inability for the appellant's child to live with, or have meaningful ongoing/regular contact with, her father.

107. As recently observed by this Court, potential impacts on an offender's child/children is a relevant sentencing factor[65]:

> The provision for such discounts reflects both s 8(h) and (i) of the Sentencing Act. Section 8(h) requires the court to take into account circumstances of the offender that would mean an otherwise appropriate sentence "would, in the particular instance, be disproportionately severe". Section 8(i) directs the court to consider various personal circumstances, namely, "the offender's personal, family, whanau, community, and cultural background in imposing a sentence … with a partly or wholly rehabilitative purpose". A sentencing approach which recognises the importance to a child of the familial relationship is also supported by the United Nations Convention on the Rights of the Child (Children's Convention). The Children's Convention emphasises the importance for children of growing up in a family environment and imposes an obligation on courts to treat the best interests of the child as a "primary consideration".
> [Footnotes omitted].

108. This Court observed[66]:

> What is required is a consideration of all of the relevant circumstances which must include the child's interests. Those interests include, as our reference to the Children's Convention indicates, the importance for children of growing up in a familial environment.

109. For completeness, as confirmed in *R v Hughes*[67]:

> …in sentencing or otherwise dealing with an offender", the purposes and principles of sentencing set out in ss 7 and 8, the aggravating and mitigating factors which apply under s 9 and taking into account offer or agreement to make amends under s 10, are all factors relevant to the application of the disproportionality test under s 107.

[65] *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571 at [52].
[66] At [56].
[67] *R v Hughes*, above n 34, at [37].

110. Having regard to the appellant's circumstances, the consequences of deportation to both her and her child are, it is submitted, severe/serious.

111. Further, whilst Immigration consequences were, and are, the primary type of consequence relied on, employment/career considerations remain relevant. In the High Court Campbell J accepted that "[a] conviction would have some consequences on your general career prospects, but that should normally yield to an employer's right to know all relevant information in their hiring decisions".[68]

112. However, balancing that, as observed by the Court of Appeal in *J (CA32/2021) v R*[69]:

> [42] As for the consequences of conviction, we accept that absent evidence of specific consequences, a sentencing Judge is entitled to take into account the general consequences of a conviction. Examples from this Court and the High Court follow.
>
> [43] In *R v Taulapapa* this Court commented that, in the context of a young person looking for suitable employment, the consequences of conviction may still be severe even "where the offender points only to general consequences".
>
> [44] In *Nash v Police* the High Court accepted that in the context of a 24 year old charged with low level domestic offending where there was little "evidence of any specific damage to employment or other prospects", there were nevertheless general consequences operating to the appellant's disadvantage which were out of all proportion to the gravity of the offending.
>
> [45] In *Taavili v Police*, the High Court referred to previous decisions of that Court which had considered the impact of convictions on job applications was relevant, even though that was a general, rather than particular, consequence likely to flow from a conviction. Taking that approach to a 37 year old solo mother of three with no previous convictions, the negative consequences of the conviction on her employment prospects were considered to be out of all proportion to the offending.
>
> [46] In *Hamill v Police* the High Court recorded that, in relation to an appellant convicted of a single charge of assault, there was no evidence of any specific consequences of conviction. The Court noted that "the consequences are far from out of the ordinary". Given the low gravity of the offending, the Court considered that the general consequences of conviction would be disproportionate.
>
> [47] In *Albert v R* the High Court found that while the consequences of a conviction for a 17 year old were "general consequences of conviction for any offending" they should not be dismissed as a conviction was a significant consequence in itself.

113. Furthermore, a conviction for 'participating in an organised group' is not a favourable conviction to have on one's record. The offence description

[68] *Bolea* (HC), above n 43, at [30]: Court of Appeal COA at p 144.
[69] *J (CA32/2021) v R*, above n 63.

("***participating***"), as it pertains to the appellant's offending, is also somewhat misleading. As the appellant said in her affidavit[70]:

> I […] never actively assisted or encouraged Rhakim to be involved with or commit drug dealing offending. I have never tried to involve myself with drugs or gangs.

114. It is thus a case where a conviction "records a serious offence but does not fairly reflect the offender's character or culpability".[71]

115. The career/employment consequences add to the appellant's Immigration consequences. Again, it is the overall assessment of all consequences that matters for s 107 purposes.

116. Overall, it is submitted that the collective consequences of a conviction to the appellant, and her child, are very severe/serious.

Proportionality

117. Once the gravity of the appellant's offending and consequences have been assessed the Court must then determine whether those consequences "would be out of all proportion" to that offending.

118. If the appellant's submissions are accepted, the gravity of the appellant's offending is as low as "low" (and no higher than "moderate"). The consequences which would arise from a conviction would, in contrast, be "very severe/serious". That would lead to a finding that the s 107 disproportionality test is met.[72] There is also no "rare" reason for the Court to exercise its residual s 106 discretion to not discharge the appellant.[73]

[70] Court of Appeal COA at p 38 (paragraph 18).
[71] *R v Taulapapa* [2018] NZCA 414 at [42](b).
[72] See, for example*, R v Walsh*, above n 49, at [27] where Palmer J said: "I have assessed the gravity of your offending as low and the consequences of conviction for you and your family as moderately to highly serious. Accordingly, I consider the consequences are out of proportion to the gravity of your offending."
[73] *Blythe v R*, above n 50, at [13].

Conclusion

119. As a matter of law, the *Zhu* principle, which Campbell J adopted and applied, and the Court of Appeal endorsed, is wrong.

120. This was pivotal to the appellant's discharge without conviction application being declined. As a result of the application of *Zhu*, the appellant's discharge application effectively misfired from the start.

121. Consequently, the s 107 proportionality assessment needs to be undertaken afresh. This Court may find it preferable for that exercise to be undertaken by the High Court. This would involve this Court setting aside the appellant's conviction and directed that the High Court re-sentences the appellant.

122. In any event, the appellant submits that she both meets the s 107 proportionality test and that it is appropriate for her to be discharged without conviction.

Dated this 31st day of August 2023.

…….
A J Bailey, E Huda & R J T George
Counsel for the appellant

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

List of authorities to be cited by the appellant

Statutes

1. Criminal Procedure Act 2011, s 232
2. Sentencing Act 2002, ss 11, 106, 107
3. Immigration Act 2009, ss 3, 157, 161, 167, 170, 172, 207

Cases

4. *Sok v R* (2021) 29 CRNZ 962
5. *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA).
6. *Zhu v R* [2021] NZCA 254
7. *Zhang v Ministry of Economic Development* HC Auckland CRI-2010-404-453, 17 March 2011
8. *Edwards v R* [2015] NZCA 583
9. *Rahim v R* [2018] NZCA 182
10. *Bong v R* [2020] NZCA 94
11. *DC (CA47/2013) v R* [2013] NZCA 255
12. *Iosefa v Police* HC Christchurch CIV-2005-409-64, 21 April 2005
13. *R v Hughes* [2009] 3 NZLR 222
14. *Maraj v Police* [2016] NZCA 279
15. *Prasad v R* [2018] NZCA 537
16. *Ye v Minister of Immigration* [2010] 1 NZLR 104
17. *Minister of Immigration v Q* [2020] NZCA 288
18. *Minister of Immigration v Jooste* [2015] 2 NZLR 765
19. *Cabuyao v R* [2021] NZHC 3395
20. *R v Walsh* [2023] NZHC 680
21. *Blythe v R* [2011] 2 NZLR 620
22. *Jackson v R* (2016) 28 CRNZ 144
23. *J (CA32/2021) v R* [2021] NZCA 690
24. *Philip v R* [2022] 1 NZLR 571
25. *R v Taulapapa* [2018] NZCA 414

Legislative material

26. Sentencing and Parole Reform Bill 2001 (148-1)