In the Supreme Court of New Zealand

I Te Kōti Mana Nui o Aotearoa

SC25/2023

Between **Elizabeth BOLEA**

Appellant

And **The King**

Respondent

Respondent's submissions on appeal against conviction and sentence

21 September 2023

Judicial Officer: Glazebrook, O'Regan, Ellen France, Williams and Kós JJ

Next event: Substantive hearing, 31 October 2023

MC.

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COUNSEL FOR THE RESPONDENT CERTIFIES TO THE BEST OF THEIR KNOWLEDGE THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

Respondent's submissions on appeal against conviction and sentence

May it please the Court

1 Introduction

1.1 The appellant, Ms Bolea, pleaded guilty to one charge of participating in an organised criminal group in respect of her involvement in a drug dealing syndicate run by the Comanchero Motorcycle Club (**Comancheros**).[1]

1.2 At sentencing, the appellant advanced an application for a discharge without conviction. The application was founded primarily on potential adverse immigration outcomes that she argued would be consequences of any conviction, and in turn out of all proportion to the gravity of her offending. The High Court declined the application, instead sentencing the appellant to four months' home detention.[2] She then unsuccessfully appealed conviction and sentence in the Court of Appeal.[3]

1.3 The appellant now brings this second appeal against conviction and sentence.[4] She submits that the Courts below have incorrectly refused to take into account the risk of her actual deportation as a consequence of conviction. If no conviction is entered, she cannot be deported. Thus, a conviction creates a "real and appreciable risk" of deportation that would not otherwise exist, and this should be included in the assessment required by s 107 of the Sentencing Act 2002. She says that the Courts below have erred by weighing her liability to deportation in the s 107 exercise, rather than deportation itself. Her preferred course is for the appeal to be allowed and then remitted to the High Court.[5] Alternatively, she argues that if the risk of actual deportation were properly taken into

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1 Crimes Act 1961, s 98A.
2 *R v Bolea* [2022] NZHC 2998 [HC judgment] **[Supreme Court Casebook at 17]**.
3 *Bolea v R* [2023] NZCA 39 [CA judgment] **[Supreme Court Casebook at 6]**.
4 Leave was granted on 22 June 2023: *Bolea v R* [2023] NZSC 72 **[Supreme Court Casebook at 5]**.
5 Appellant's submissions at [95].

account, this Court would find that the consequences of conviction are out of all proportion to the gravity of the offence, and in turn could itself grant the application.[6]

1.4 The Crown opposes the appeal. Whether a potential outcome is a consequence of a conviction is a fact-specific assessment, requiring an exercise of judgement in each case. Here, the Court of Appeal carefully considered the facts and held that, based on all the circumstances, were deportation to occur it could "in a very real sense" validly be regarded as a consequence of the offending, rather than conviction.[7] In particular, the rights-based process mandated by the Immigration Act 2009, which involves separate consideration of the matter taking into account a broad factual matrix, means that deportation in the present case (were it to occur) can properly be viewed as a consequence of the offending. The relevant consequence is *liability* to deportation, which is not disproportionate. In the alternative, the respondent says that this process weakens the causative link such that a risk of eventual deportation cannot be said to be out of all proportion to the gravity of the appellant's offending. On either of those bases, the appeal must be dismissed.

2 Background

The offending

2.1 The appellant's partner, Mr Mataia, was a nominee[8] of the Comancheros. Prior to August 2020, the appellant knew that her partner, and others connected to the Comancheros, were participating in an organised criminal group that shared the objective of obtaining material benefits from the possession and supply of methamphetamine.[9]

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6 Appellant's submissions at [97]–[118].
7 CA judgment, above n 3, at [46] **[Supreme Court Casebook at 16]**.
8 Akin to a Prospect.
9 HC judgment, above n 2, at [3] **[Supreme Court Casebook at 18]**.

2.2 On 4 August 2020, the appellant hired a vehicle at Auckland Airport. She then drove her partner and another co-offender through the night to Christchurch. The appellant was aware that there was a quantity of methamphetamine in the car for the purpose of supply, but did not know the exact amount. A covert police search of the vehicle, conducted while it was on the Interislander ferry, found two containers in the boot, together containing at least 500 grams of methamphetamine.[10] The group arrived in Christchurch on 5 August 2020. The appellant stayed at Mr Mataia's family home, while Mr Mataia and the co-offender supplied the methamphetamine to the Rebels Motorcycle Club gang pad.[11]

Immigration process following conviction

2.3 The application for discharge without conviction, and subsequent appeal on this issue, centres on a possibility that the appellant could be deported if convicted of this offence. The appellant asserts that this is a risk that must be taken into account and that it would be out of all proportion to the gravity of the offending just described. It is useful therefore, by way of background, to set out the process by which any determination as to deportation would occur.

2.4 The appellant is an Australian national. She moved to New Zealand in May 2019 when Mr Mataia was deported from Australia. For immigration purposes, she is considered to have held a residence class visa since May 2019. As such, this section focusses on the process that is followed for those who are the holders of this type of visa.

2.5 Section 161(1)(b) of the Immigration Act provides that the holder of a residence class visa becomes liable for deportation if convicted of an offence carrying a maximum penalty of two years' or more imprisonment, provided the offence was committed no later than five years after the visa was granted. These criteria are satisfied in this case: the appellant was convicted of an offence with a maximum penalty of 10 years'

10 At [4] **[Supreme Court Casebook at 18]**.
11 At [5] **[Supreme Court Casebook at 18]**.

imprisonment, with the offending occurring within five years of arriving in New Zealand. There is therefore no dispute that, upon conviction, the appellant became liable for deportation. Likewise, were she not convicted, she would not be liable for deportation.

2.6 But being liable for deportation does not equate to being deported. Instead, as the Court of Appeal set out, there is a statutory regime prescribing steps and possible avenues for appeal before any deportation could occur.[12] This description was more complete than that provided by the appellant's immigration expert through affidavit.

2.7 On becoming aware of a qualifying conviction entered against a resident visa holder, Immigration New Zealand (**INZ**) prepares a detailed briefing paper for the Minister of Immigration (**Minister**) (or more commonly the Minister's delegate).[13] As part of the process of compiling the briefing paper, INZ officials give the resident visa holder an opportunity to be heard and make submissions. Those submissions can include issues about the gravity of the offending, the offender's personal circumstances and the impact that deportation would have on them. The submissions are included in the briefing paper, as are the summary of facts and the sentencing notes.[14]

2.8 Following consideration of the briefing paper, the Minister or their delegate decides whether a deportation liability notice (**DLN**) should be issued and served.[15]

2.9 If a DLN is issued and served, the resident visa holder then has 28 days to appeal to the Immigration and Protection Tribunal (**Tribunal**) on humanitarian grounds against their liability for deportation. Pursuant to s 207(1) of the Immigration Act, the Tribunal must allow such an appeal if it is satisfied both that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the

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12 CA judgment, above n 3, at [10]–[17] **[Supreme Court Casebook at 8–9]**.
13 At [11] **[Supreme Court Casebook at 8]**.
14 At [12] **[Supreme Court Casebook at 8]**.
15 At [11] **[Supreme Court Casebook at 8]**.

resident visa holder to be deported from New Zealand and it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in the country. In any other case, the Tribunal must dismiss the appeal.[16]

2.10 The Court of Appeal has held that the "unjust or unduly harsh" limb of s 207(1) 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.[17] The degree of culpability is also relevant to the second limb regarding the public interest.[18]

2.11 This entire process is also subject to the residual discretion of the Minister under s 172 of the Immigration Act. The Minister has the absolute discretion to, at any time, cancel a person's deportation liability or to suspend it for a period of up to five years subject to conditions, such as a condition that the person not re-offend.[19]

2.12 On appeal, the appellant does not appear to object to the Court of Appeal's description of the process in this case which is replicated above, though she has different points of emphasis.

2.13 In addition to the steps outlined in the Court of Appeal decision, it should also be noted that:

(a) as the appellant is a resident, the Tribunal must allow an oral hearing in any appeal under s 207;[20] and

(b) with leave, it is possible to appeal to the High Court from the Tribunal on a point of law and/or bring judicial review proceedings.[21]

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16 At [15] **[Supreme Court Casebook at 9]**.

17 At [16] **[Supreme Court Casebook at 9]**, referring to *Minister of Immigration v Q* [2020] NZCA 288 at [33].

18 CA judgment, above n 3, at [16] **[Supreme Court Casebook at 9]**, citing *Q*, above n 17, at [33].

19 CA judgment, above n 3, at [17] **[Supreme Court Casebook at 9]**.

20 Immigration Act 2009, s 233(1).

3 The Court of Appeal did not err in finding that, on the facts of this case, the potential immigration effects relied on by the appellant would not be consequences of her conviction

The issue

3.1 There is no dispute that, when determining an application for discharge without conviction, the court is required to take into account the direct and indirect consequences of a conviction. That is, of course, what s 107 of the Sentencing Act says. The Crown has consistently accepted that indirect consequences are relevant to such applications, from the decision in *Fisheries Inspector v Turner* right through to the decision under appeal.[22] And, contrary to the appellant's assertion,[23] the respondent's position is not that a consequence must be inevitable for it to be taken into account. Rather, the standard is whether there is a real and appreciable risk of it occurring—provided that it is a *consequence* in the first place.

3.2 The critical issue here is whether the Court of Appeal erred by finding that the risk of actual deportation was not a consequence of conviction. Because of that finding, any risk of actual deportation was not to be included in the s 107 exercise. Instead, the Court considered that the relevant consequence was the liability for deportation that the appellant, as the holder of a residence class visa, would accrue upon conviction. Such liability was not disproportionate.

3.3 The respondent supports this reasoning, which was based upon a careful analysis of the facts in this case. The correct immigration consequence to consider is liability to deportation which, as that Court found, is not at all disproportionate to this offending. Indeed, the appellant accepts that if

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21 Sections 245 and 249. See s 249A on the process where a person intends to both appeal against a determination of the Tribunal under the Immigration Act and bring review proceedings in respect of that same decision.

22 *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) [**App BOA at 34]**.

23 See appellant's submissions at [23].

the Court of Appeal's approach regarding the relevant consequences was correct, then the discharge application was correctly determined.[24]

The Court of Appeal drew logical distinctions between different types of cases, with this case properly being described as one where deportation would not be a consequence of conviction

3.4 The Court of Appeal in this case described the general characteristics of three broad groups of cases. The respondent submits that it logically distinguished between these groups, showing there is generally a spectrum along which potential immigration outcomes sit, and making clear each case—including this one—is to be determined on that case's own facts.

3.5 The Court first referred to what happens most often in cases involving those on residence visas.[25] It explained that there are circumstances where liability to deportation or the risk of actual deportation will not be an operative consequence justifying discharge, even if there could not be any deportation absent a conviction. This includes cases where the Court is 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.

3.6 In those sorts of cases, the Court explained, the outcome will generally be reasoned to be a consequence of the offending, rather than of the conviction. This is because "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".[26]

3.7 The respondent submits that this reasoning is correct. Where there are intervening decision makers, who follow a prescribed process, the eventual deportation decision is not *generally* properly regarded as a

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24 Appellant's submissions at [93].
25 CA judgment, above n 3, at [41(a)–(b)] **[Supreme Court Casebook at 14]**.
26 At [44(d)] **[Supreme Court Casebook at 15]**.

consequence of the initial entry of conviction. That is a pre-condition, but the decision makers after that point will not usually be concerned with it. They will simply be weighing up all the facts of the case, utilising the process outlined in the background section of these submissions. The court must be satisfied that this will actually happen, as the Court of Appeal was in this case.

3.8 The precise point at which the necessary relationship does not exist may vary. So, in some cases, it might be that it is simply obvious that entering a conviction will lead to a particular outcome. The Court of Appeal identified this category.[27] In such circumstances, it is sensible to describe that outcome as an indirect consequence. These are, however, likely to be rare; this because, as noted, there is a mandatory process that involves considering a large number of factors, including submissions from the affected visa holder.

3.9 There may also be cases where, as the Court further outlined,[28] the mere exposure to the risk of deportation and the associated processes is in itself a wholly disproportionate response. This is so without even considering any distinction between liability to deportation and the risk that a person will ultimately be deported. The Court noted that the likely circumstances involve offending that is not intrinsically serious, or which is not a serious example of its kind and has substantial mitigating factors. Being liable to deportation is still a weighty consequence for individuals, and they may be able to show that of itself this is out of all proportion to the offending. Importantly, though, in such cases the courts do not assess the likelihood of deportation, as the appellant wishes to occur in this case: they simply recognise that liability for deportation will occur, and find that it is disproportionate.

3.10 The respondent accepts that there is some attraction in the straightforward way that the appellant puts her case: that is, given that she cannot be deported unless she is convicted, the real and appreciable

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27 At [44(f)] **[Supreme Court Casebook at 15]**.

28 At [44(e)] **[Supreme Court Casebook at 15]**.

risk of deportation she faces will be a consequence of conviction. But this oversimplifies the relationship between causation and consequence—which we know, from everyday life, is complex. Even if everything further in a sequence of events could not have happened if the first step did not happen, at some point it does not make sense to describe all subsequent events as consequences of the first step.

3.11 Analysing the present case, the Court of Appeal was clear that liability to deportation alone was not sufficiently disproportionate. Nor did it consider this was a case where the authorities would not look beyond the fact of conviction and ignore other relevant circumstances. Instead, it was exactly the type of case where the "risk of deportation"—by which, based on its other reasoning, the Court must have meant "liability to 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".[29]

3.12 The Court also carefully distinguished this case from those involving potential employment or overseas travel consequences. It noted that they also involve an outcome determined by another person. But, the Court said, "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".[30]

3.13 This distinction is logical. By way of example, in employment cases it will often be impossible to have any certainty as to whether prospective employers would really take into account all surrounding information. In some cases, it will in fact seem likely that they would not, and in turn the offender may be able to show it is likely they will be screened out because of their conviction in future job applications.[31] But here, the

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29 At [44] **[Supreme Court Casebook at 16]**.

30 At [45] **[Supreme Court Casebook at 16]**.

31 Such as in some lines of unskilled or semi-skilled work: *R v Taulapapa* [2018] NZCA 414 at [42(d)], citing *Tahitahi v Police* [2012] NZHC 663 at [25] and [28]; and *Flavell v Ministry of Social Development* [2015] NZHC 214 at [16].

decision makers have a process by which they must take into account wider, relevant information. We know, then, that they will not generally leap from the fact of conviction to a decision on deportation, and instead will weigh this wider factual matrix as required in order to properly make the decision.

The key points from* Sok v R *and* Zhu v R *simply reflected existing case law, with which the decision under appeal remains consistent

3.14 Much of the appellant's focus in this appeal is directed at two relevant decisions issued by the Court of Appeal in 2021:[32] *Zhu v R*[33] and *Sok v R*,[34], rather than the decision under appeal. The appellant takes issue with some of the general statements made in those cases. In particular, in *Zhu* the Court of Appeal said that in a case such as the present, "courts usually reason that the outcome is a consequence of the offending, rather than the conviction".[35] That was in turn referenced to *Sok*, where the following paragraph appears (with emphasis as added in the appellant's submissions):[36]

> 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.

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32 These two decisions, along with a related decision, *Anufe v New Zealand Police* [2021] NZCA 253, were written by Miller J, but otherwise had differently constituted panels and were unanimous.

33 *Zhu v R* [2021] NZCA 254 **[App's BOA at Tab 6]**.

34 *Sok v R* [2021] NZCA 252, (2021) 29 CRNZ 962 **[App's BOA at Tab 4]**.

35 *Zhu*, above n 33, at [25] **[App's BOA, Tab 6, p 55]**.

36 *Sok*, above n 34, at [47] **[App's BOA, Tab 4, p 29]**. This passage is quoted at [31] in the appellant's submissions.

3.15 The appellant says these statements wrongly purport to express a "(usual) rule".[37] She submits that it was not "held" in any of the cases cited[38] following the emphasised sentence in *Sok* "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'".[39] In turn, the submission appears to be that *Sok* and *Zhu* were at least wrong on this point, and any reliance on them in this case undermines the outcome.

3.16 As will be apparent from the above, these general statements are not central to the present decision. Certainly, the Court of Appeal summarised their key points, but it also embarked on a fact-specific analysis. Nonetheless, it is worth noting that the statements, and the cases appearing in the corresponding footnote, perform a different function than that suggested by the appellant. She is correct that they do not hold what she has described—but nor did the Court of Appeal suggest that they did:

(a) The case cited, *Zhang v Ministry of Economic Development*, confirms that where a conviction affects an offender's immigration status, the courts often conclude that it is appropriate for the consequences of conviction to be resolved by the immigration authorities,[40] thereby indicating that the general description of what the courts do was true as of 2011. The specific facts of *Zhang* are then addressed, against an assumption that the Court said must be made that "immigration authorities will behave fairly and rationally".[41]

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37 Appellant's submissions at [38].

38 The cases appearing in the relevant footnote, n 29, were: *Zhang v Ministry of Economic Development* HC Auckland CRI-2010-404-453, 7 March 2011 at [24] and [14], citing *R v Foox* [2000] 1 NZLR 641 (CA); as well as *Edwards v R* [2015] NZCA 583 at [21]; *Rahim v R* [2018] NZCA 182 at [31]; and *Bong v R* [2020] NZCA 94 at [32]. These latter three were introduced by a "see also" and it was noted that they "all distinguish[ed] the consequences of conviction from the consequences of offending".

39 Appellant's submissions at [35].

40 *Zhang*, above n 38, at [14] **[App's BOA, Tab 7, pp 61–62]**.

41 At [24] **[App's BOA, Tab 7, p 64]**.

(b) The other three cases are referred to alongside an explanation that they each distinguish the consequences of conviction from the consequences of offending.[42] So, it appears the Court was citing these cases to illustrate that determining whether something is a consequence of conviction is not as straightforward as applying a "but for" test. For example, in *Bong*, as the appellant herself surmises,[43] even if the consequence could occur without a conviction being entered—even if, but for the conviction, that consequence might still occur—the Court held that it could still be a consequence of conviction.[44] A careful assessment is required.

(c) The appellant places the greatest emphasis on the Court of Appeal decision in *Rahim v R*.[45] She says that the ratio in this case is that "[i]f a conviction triggers the consequence, then that consequence is a consequence of conviction".[46] But this was not the espousal of a general rule. Rather, the Court of Appeal said that, *in that particular case*, it was the conviction rather than what Mr Rahim had done that would trigger the real and appreciable risk of deportation.[47] Again, this illustrates the nuanced approach taken by the courts to date.

(d) Moreover, insofar as *Rahim* refers to the wider context of discharge without conviction applications, it is again entirely consistent with *Zhu*, *Sok* and the present case. At [28], the Court of Appeal noted:[48]

> Courts assessing how a conviction might affect an offender's immigration status … may consider that it is appropriate for the consequences of conviction to be resolved by the specialist authorities, rather than by a Court pre-empting that

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42 *Sok*, above n 34, at [47], n 29.
43 Appellant's submissions at [34].
44 *Bong*, above n 38, at [32] **[App's BOA, Tab 10, p 94]**.
45 *Rahim*, above n 38 **[App's BOA, Tab 9]**.
46 Appellant's submissions at [34].
47 *Rahim*, above n 38, at [30]–[31] **[App's BOA, Tab 9, p 83]**.
48 Citation omitted.

decision-making process by a decision to discharge without conviction.

It said further that the reluctance of courts to intervene is most often evident where the outcome cannot reasonably be predicted.[49] The underlying facts of that case meant, however, that prediction was not difficult: the evidence established that, after undergoing all of the statutory processes, a conviction was likely to result in Mr Rahim being required to leave New Zealand.[50]

3.17 As such, the passages with which the appellant takes issue are simply empirical statements about what the courts have usually found. They are not rules. And, vitally, they expressly acknowledge—and even describe—"exceptions". It is really the description of the circumstances in which each outcome is reached, and the application of that to this case, that matters.

The different assessment currently undertaken by the courts as compared to INZ supports the conclusion that deportation is not a consequence of conviction under current settings

3.18 The appellant's submissions appear to suggest that a visa holder who has unsuccessfully applied for discharge without conviction will be disadvantaged during the process determining deportation under the status quo because the decision maker must proceed on the basis that the visa holder's circumstances did not meet the statutory threshold for a discharge without conviction.[51] Combined with analysis as to the limited circumstances in which appeals will be allowed under s 207 of the Immigration Act, this appears to be directed towards an argument that the court is therefore, in practice, something akin to the final decision

49 At [29] **[App's BOA, Tab 9, p 83]**.
50 At [30] **[App's BOA, Tab 9, p 83]**.
51 Appellant's submissions at [85].

maker.[52] It is thus essential that the court regards as a consequence and takes into account the actual risk of deportation.

3.19 The respondent accepts that, if the situation of a residence class visa holder who has applied for a discharge without conviction comes before INZ, it must be on the basis that the court has declined that application. But, importantly, under the status quo it would *also* be generally recognised that the courts have embarked upon a different inquiry. That is, as traversed, the immigration consequence that the courts will often have weighed will be the liability to deportation, rather than deportation itself. The court is therefore taking into account a different consequence than that considered in relation to a DLN. This difference will be clear on the face of the decision, just as it is in this case. The courts has not opined as to the ultimate merits of deporting the appellant. A person in the appellant's position is therefore unlikely to face prejudice in subsequent processes arising directly from the court's determination.

3.20 The process surrounding the decision of INZ—including the assembling of a briefing paper that includes submissions from the visa holder—is skipped over in this section of the appellant's submissions. So, too, is the discretionary power that the Minister has under s 172. She instead focusses on the "exceptional" test in the Immigration Act, seemingly suggesting once the matter is left to INZ, a person in the appellant's position is at great risk.

3.21 It may be difficult for some visa holders to avoid deportation at the s 207 step. However, when the process in its entirety is properly understood, it is clear that there is ample scope for deportation to be avoided even after a conviction is entered, provided that the circumstances taken as a whole actually support this. Where deportation then occurs under the status quo, it will usually be a consequence of the full factual matrix of events having been taken into account, rather than just the triggering conviction.

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52 Appellant's submissions at [86]–[88].

Because deportation would not be a consequence of the offending, the Court of Appeal was correct not to assess whether there was a real and appreciable risk of it

3.22 The appellant argues that the Court of Appeal failed in this case, as well as *Zhu*, by not assessing whether there was a real and appreciable risk of deportation occurring. This was, she says, inconsistent with *DC (CA47/2013) v R*.[53]

3.23 However, there was no need for the Court of Appeal to embark on such an assessment. As the appellant herself identifies,[54] given that the Court considered deportation would not be a consequence of the offending, the prospect of deportation became irrelevant. All that mattered was the real and appreciable risk that the appellant would become liable to deportation.

3.24 The point made by the appellant about *Iosefa v Police* is nonetheless relevant to the respondent's alternative submission.[55] That is, if this Court accepts the appellant's submission that actual deportation is the correct consequence to weigh, it will then be relevant that there cannot be any certainty that deportation will occur in this case.

4 Even if a risk of actual deportation was a consequence of the conviction, this would not be out of all proportion to the gravity of the offence

4.1 If the Court rejects the respondent's first submission that only the liability to deportation should be taken into account, the respondent nonetheless opposes the appeal on the basis that in this case the risk of actual deportation would not be out of all proportion to the gravity of the offending. It notes:

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53 *DC (CA47/2013) v R* [2013] NZCA 255.

54 Appellant's submissions at [52].

55 *Iosefa v Police* HC Christchurch CIV-2005-409-64, 21 April 2005. See appellant's submissions at [54].

(a) The High Court Judge assessed the offending in this case as of moderate to low gravity.[56] This was upheld on appeal by the Court of Appeal,[57] and is not challenged directly in this Court.[58] It was not minor offending.[59]

(b) The rights-based process mandated by the Immigration Act assists in securing a proportional outcome. Because of that process, this Court should recognise that if the eventual outcome is deportation, it will only be following a process where all relevant circumstances were taken into account but specialist decision makers determined that deportation was nonetheless appropriate. And, even if deportation is a "real and appreciable risk", the Court is entitled to discount that risk given the significant uncertainty involved.

4.2 To assist in the determination of this issue, the respondent first outlines the recent Court of Appeal judgment in *Truong v R*,[60] as well as the Supreme Court's decision declining leave to appeal from that judgment.[61] *Truong* concerned a similar factual matrix, with an offender who was the holder of a residence class visa,[62] but the Court of Appeal approached the s 107 exercise in a slightly different way. Adopting this alternative approach in this case would also result in the appeal being dismissed.

***A slightly different approach:* Truong v R**

4.3 In *Truong*, the appellant had pleaded guilty to one charge of cultivating cannabis and one charge of theft of electricity. Convictions were entered and she was sentenced to five months' community detention, eight months' supervision, and ordered to pay reparation of $2,532.55.[63]

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56 HC judgment, above n 2, at [19] **[Supreme Court Casebook at 22]**.
57 CA judgment, above n 3, at [32] **[Supreme Court Casebook at 12]**.
58 Appellant's submissions at [100].
59 CA judgment, above n 3, at [42] **[Supreme Court Casebook at 16]**.
60 *Truong v R* [2023] NZCA 97 [*Truong* (CA)] [**Resp BOA, Tab 1**].
61 *Truong v R* [2023] NZSC 119 [*Truong* (SC)] **[Resp BOA, Tab 2]**.
62 In this case, it was a permanent residence visa.
63 *Truong* (CA), above n 60, at [2] **[Resp BOA, Tab 1, p 4]**.

Some three years later,[64] Ms Truong received a letter from INZ advising she was liable to deportation and inviting her to make submissions and respond to a questionnaire.[65] Ms Truong said this came as a surprise: she stated that when sentenced she did not appreciate and had not been advised that the entering of convictions would trigger liability for deportation. She appealed to the Court of Appeal, this time applying for a discharge without conviction.[66]

4.4 The first step, as in any s 107 assessment, was to determine the gravity of the offending. The Court found that the offending was "moderately serious".[67] It warranted a starting point of two years' imprisonment.[68]

4.5 Turning then to the direct and indirect consequences, the Court noted that the principal consequence relied upon was her liability to deportation under s 161(1)(b) of the Immigration Act. On Ms Truong's behalf, it was argued that, once served with a DLN her prospects of a successful appeal to the Tribunal were poor because of the Tribunal's high threshold.[69] This drew in large part on an affidavit from an immigration practitioner, who had advised that Ms Truong would invariably be served with a DLN and any appeal would be highly likely to fail.[70] In other words, Ms Truong was highly likely to be deported.

4.6 Drawing upon the same steps in the process outlined in these submissions, the Court first explained that the immigration practitioner's description was incomplete. In particular, it overlooked the appellant's ability to make submissions to the Minister before a decision was made as to whether INZ would issue a DLN.[71] Issuing such a notice is not

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64 The delay was because INZ learned that the appellant had engaged with mental health services, and so having regard to the possible effect that the prospect of deportation could have on the appellant, INZ considered it was inappropriate to immediately pursue the matter: at [14] **[Resp BOA, Tab 1, p 5]**.

65 At [15] **[Resp BOA, Tab 1, p 7]**.

66 At [3] **[Resp BOA, Tab 1, p 4]**.

67 At [42] **[Resp BOA, Tab 1, p 16]**.

68 At [43] **[Resp BOA, Tab 1, p 16]**.

69 At [45] **[Resp BOA, Tab 1, p 16]**.

70 At [26] **[Resp BOA, Tab 1, p 10]**.

71 At [45] **[Resp BOA, Tab 1, p 16]**.

automatic.[72] Moreover, the Court noted that s 172 contains the power for the Minister, at any time, to cancel or suspend a person's liability for deportation.[73] These steps meant the outcome of the process, and the Minister's decision, "cannot be anticipated or predicted by the Court".[74] Additionally, if a DLN was served, Ms Truong would have a right of appeal to the Tribunal.[75]

4.7 Particular emphasis was placed by the Court on the submissions stage of the process. It noted that this meant that Ms Truong would have the opportunity to put her "whole history" before the Minister, and explain her concerns regarding the impact that her deportation would have on her and her children.[76] While conviction therefore made her subject to the deportation process, the following was also true:[77]

> … before a decision to proceed with deportation is made, the Minister is required to consider any written submissions made by the appellant, and to also consider whether to cancel or suspend the appellant's deportation liability so that deportation does not necessarily follow. The Minister can be expected to take all relevant considerations into account in making his or her decision.

4.8 The Court then concluded:

> [55] As the appellant's convictions do not inevitably result in her being deported, there is a statutory process by which the merits of the appellant's grounds for cancellation or suspension of her deportation will be considered before a decision is made that she be deported, and she will have a right of appeal to the Tribunal against such a deportation decision if one is made, we find that those consequences of conviction are not out of all proportion to the gravity of the offences.

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72 At [48] **[Resp BOA, Tab 1, p 17]**.
73 At [49] **[Resp BOA, Tab 1, p 18]**.
74 At [50] **[Resp BOA, Tab 1, p 18]**.
75 At [50] **[Resp BOA, Tab 1, p 18]**.
76 At [51]–[52] **[Resp BOA, Tab 1, p 18]**.
77 At [52] **[Resp BOA, Tab 1, p 18]**.

4.9 In the respondent's submission, the Court of Appeal therefore appears to have taken a slightly different approach to that in the present case—but still an approach that would reach the same result. That is, the Court seemingly accepted that actual deportation may be a consequence of conviction. But it emphasised that this would come at the end of a process. Considered together, these consequences were not out of all proportion to the gravity of the offences.

4.10 Ms Truong unsuccessfully applied for leave to appeal to the Supreme Court.[78] In its leave judgment, the Court described the Court of Appeal's approach as follows:

> [10] The Court concluded that the offending was moderately serious (a finding the applicant does not challenge). But since deportation was not an inevitable consequence of the statutory procedures, and the Minister of Immigration had intermediate options short of deportation, it could not be said that the risk of deportation was out of all proportion to the gravity of offending. The important assessment was for the Minister, taking into account all relevant considerations including the difficulties Ms Truong has faced.

4.11 The Court considered there was no issue of principle nor risk of miscarriage and so dismissed the leave application.[79]

4.12 As the two subsequent sections show, this case is remarkably similar. This appeal could be dismissed by instead adopting the *Truong* analysis, and finding that even though a risk of actual deportation is a consequence, it needs to be considered alongside the wider process and therefore significantly discounted. That consequence, alongside the others, would not then be out of all proportion to the gravity of the offending.

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78 *Truong* (SC), above n 61 **[Resp BOA, Tab 2]**.

79 At [11] **[Resp BOA, Tab 2, p 25]**.

This was not minor offending

4.13 The offending has already been described in the background section.[80] It is important, however, to contextualise this offending, particularly as the Courts below have not, due to other findings, been required to weigh it against a consequence approaching its significance.

4.14 The High Court adopted an adjusted starting point of 18 months' imprisonment.[81] There were then discounts of 20 per cent for the guilty plea, 15 per cent for good character, and 15 per cent for youth and upbringing.[82] Credit of one month for time on bail was also applied.[83] Together, this reduced the sentence to eight months' imprisonment.[84]

4.15 Because this was a sentence of less than two years' imprisonment, home detention was an available option. The appellant contended that something less than home detention was available, such as a conviction and discharge, or community detention. But the Judge rejected this, noting:[85]

> However, given the serious nature of the underlying methamphetamine offending, I consider that the principles of sentencing, in particular the deterrence principle, cannot be achieved by a sentence less than home detention.

4.16 The appellant was therefore sentenced to four months' home detention.[86]

4.17 Section 10A of the Sentencing Act provides that a sentence of home detention is the second most serious sentence the courts can impose.[87]

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80 See above at [2.1]–[2.2].
81 HC judgment, above n 2, at [36] **[Supreme Court Casebook at 25]**.
82 At [39]–[41] **[Supreme Court Casebook at 25–26]**.
83 At [43] **[Supreme Court Casebook at 26]**.
84 At [44] **[Supreme Court Casebook at 26]**.
85 At [45] **[Supreme Court Casebook at 27]**.
86 At [49] **[Supreme Court Casebook at 27]**.
87 Below it are community-based sentences of intensive supervision and community detention, community-based sentences of community work and supervision, sentences of a fine and reparation, and a discharge or order to come up for sentence if called on.

As mandated,[88] the Judge turned his mind to whether a less restrictive sentence was appropriate, but found that home detention was necessary in light of the serious nature of the underlying methamphetamine offending.

The process that must be followed before deportation could occur means that, if it did occur, it would not be disproportionate

4.18 As set out, there is an extensive process that must be followed before the appellant could be deported. To summarise:

(a) When INZ receives notice that the appellant has been convicted, it will prepare a briefing paper regarding the decision to issue a DLN.[89] The appellant will have the opportunity to make submissions about her circumstances and account for why she should not be deported.

(b) The Minister or their delegate will decide whether a DLN should be issued, taking into account all this information.

(c) If a DLN is issued, that decision can be appealed to the Tribunal, where an oral hearing must be held.

(d) At any time in this process, the Minister has the discretion to cancel the liability for deportation or to suspend it with conditions.

4.19 There are therefore obligations on several actors to take into account the appellant's circumstances. As discussed, obligations of this nature do not exist in the other spheres where discharges without conviction are commonly granted. Cases from those areas are therefore of limited value. A case like *Truong* is of more assistance.

4.20 As in *Truong*, the appellant's submissions in this case rely heavily upon the affidavit from an immigration practitioner provided in the High Court.

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88 Sentencing Act 2002, s 15A(1).

89 Although, as the example in n 64 above shows, it does not have to do this immediately.

But significantly, this affidavit likewise misses important details about the process:[90]

(a) There is no reference to the appellant's right to make submissions prior to being served with a DLN. Rather, the affidavit simply notes that if she was convicted of the offence, she would "almost certainly be sent a Deportation Liability Notice". Nothing further about that stage is mentioned.

(b) The Minister's discretion to cancel or suspend deportation liability at any time is not mentioned (with the relevant provision, s 172, not referred to).

(c) The prospect of an appeal is mentioned, but no details are provided about that.

4.21 The appellant acknowledges some of these shortcomings in her submissions, attempting to fill in the gaps with the following arguments:

(a) She extensively outlines case law showing that the threshold in s 207 is often not met,[91] so as to demonstrate that expert evidence regarding the likelihood of a successful appeal to the Tribunal was not necessary.

(b) She says that the evidence that a DLN will "almost certainly be sent" shows that the Minister will not step in before that point under s 172.[92] Thus, although the affidavit did not "specifically refer to s 172, [the] evidence addressed it".[93] However, the better interpretation is that s 172 was simply overlooked, such that the evidence does not address it at all. The right to make submissions also remains unmentioned.

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90 The affidavit can be found at **127 of the Case on Appeal.**
91 Appellant's submissions at [58]–[67].
92 Appellant's submissions at [71].
93 Appellant's submissions at [71].

(c) Further, she says that if the Minister does not step in prior to the serving of a DLN, the likelihood of a DLN being cancelled or suspended is "even more remote" because it involves the position of INZ or the Minister changing.[94] Unaddressed is the prospect that different people could be tasked with these decisions, such that they may not require "unforeseen and significant change in circumstances".[95]

4.22 In those circumstances, the respondent submits that the Court should put to one side the immigration practitioner's views on the likelihood of these different outcomes. Significant information surrounding the process upon which any assessment would be made is missing. The Court of Appeal's analysis of the process—either in this case or in *Truong*—is of greater assistance.

4.23 It is also not necessary for this Court to embark on its own fine-grained assessment of the "risk" of other decision makers reaching certain outcomes. This Court need only be satisfied that the requisite process will be properly followed, in which case if deportation does result it would, on these facts, not be out of all proportion to offending which was of moderate to low gravity and which attracted an end sentence of four months' home detention.

4.24 Approaching the exercise in this way is entirely consistent with the approach set out in *Iosefa* and adopted in subsequent cases, to which the appellant referred.[96] That is, the nature and seriousness of the consequences and the degree of likelihood of their occurring will be material to the Court's assessment. But that does not mean that it must determine exactly what that risk is in every case. Here, doing so would require the Court to attempt to step into the shoes of subsequent decision makers, albeit with less information, and predict the outcomes

94 Appellant's submissions at [72].
95 Appellant's submissions at [72].
96 Appellant's submissions at [54]–[55].

they will reach based on their separate roles. This would be a speculative exercise.

4.25 Thus, if this alternative approach is adopted, the respondent invites the Court to find that while there is a risk of deportation, it is only a "possibility". It is nowhere near approaching a certainty. Then, making the appellant subject to a deportation process that *may* ultimately result in deportation, but only following the consideration of all her circumstances, would not be out of all proportion—even for someone in the respondent's circumstances—to offending that entailed taking part in transporting a commercial quantity of methamphetamine down the country.

Adding employment consequences to the assessment does not change the outcome

4.26 The appellant seeks to reinforce her submission by relying upon general employment consequences. She notes that the Court of Appeal has found that absent evidence of specific consequences, a sentencing Judge is still entitled to take into account the general consequences of a conviction.[97]

4.27 While accepting that such general consequences can be taken into account, the respondent submits that these could only marginally advance the application. The appellant has received positive references from both her employer and a colleague in support of the application for a discharge without conviction. With full knowledge of the offending, the appellant's employer offered her a full-time position.[98] This employment history, including post-offending, substantially mitigates the general consequences. Additionally, there is no suggestion that she wishes to pursue a line of work where a conviction would have heightened relevance.

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97 Appellant's submissions at [111]–[112].

98 HC judgment, above n 2, at [27] **[Supreme Court Casebook at 23]**.

4.28 Finally, although it is true that a conviction for "participating in an organised group" is not a favourable conviction on a person's record, nor is any conviction. There is nothing misleading about this offence description, however.[99] The appellant participated in the group by driving the methamphetamine from Auckland to Christchurch. On the other hand, unlike an offence like kidnapping which may conjure up an image far from what actually happened, the offence description of participating in an organised group is likely to be one that people interrogate so as to understand what actually happened.

5 Disposition

5.1 The appellant has raised the possibility that, if this Court allows the appeal on the basis that the Court of Appeal erred in its approach to the discharge without conviction application, it could remit the necessary reassessment to the High Court. This is her preferred option.[100]

5.2 However, in the respondent's view, this Court already has before it all the information relevant to such an application. It would therefore be preferrable for the matter to be finally determined here.

6 Suppression

6.1 There are no suppression orders in place.

7 Conclusion

7.1 The assessment as to whether the consequences of a conviction are out of all proportion to the gravity of offending is fact-specific, requiring judicial assessment in each case. After assessing the gravity of the offending, the Court is required to identify the consequences of a conviction. It must then weigh the offending against the nature and seriousness of those consequences.

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99 Appellant's submissions at [113]–[114].

100 Appellant's submissions at [95].

7.2 Neither of the Courts below erred by finding that the risk of actual deportation was not a consequence of the offending in this particular case. Deportation will only occur if, at the end of a rights-based process involving separate decision makers, it is considered that the full factual matrix supports the deportation of the appellant. Such an outcome can "in a very real sense" validly be regarded as a consequence of the offending, rather than the conviction, and should therefore not be included in the assessment under s 107 of the Sentencing Act.

7.3 The rights-based process also means that, even if the deportation risk is a consequence relevant under s 107, its significance is lessened by that which comes before it. Just as the Court of Appeal recently held in *Truong*, these steps in the process can mean that the risk of deportation will not be out of all proportion to the gravity of offending. That applies here.

7.4 On either of these two bases, the appeal should be dismissed.

Date: 21 September 2023

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Mark Lillico | Robin McCoubrey | Maddy Nash

Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand

AND TO: The appellant