**IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND** **[2022] NZIPT 505589**

**RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA**

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| **Appellant:** | **AQ (Thailand)** |
| **Before:** | L Wakim |
| **Representative for the Appellant:** | H Yin |
| **Date of Decision:** | 29 July 2022 |

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# DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellant, a 30-year-old citizen of Thailand, against her liability for deportation which arose when she became unlawfully in New Zealand.

## THE ISSUE

[2] The primary issue on appeal is whether the appellant's partnership with a New Zealand citizen and the business she has established in New Zealand constitute exceptional circumstances of a humanitarian nature.

[3] For the reasons that follow, the Tribunal declines the appeal. However, it directs the grant of a six-month work visa to the appellant, effective from the date of this decision, to allow the appellant to get her affairs in order, including having the processing of her residence application resumed.

## BACKGROUND

[4] The appellant was born in Thailand. She arrived in New Zealand in January 2019 as the holder of a visitor visa. After being granted a further visitor visa, and then a student visa in July 2019, in June 2020, the appellant was granted

a one-year work visa on the basis of her partnership with a (now) 40-year-old New Zealand citizen.

[5] In July 2020, the appellant incorporated a New Zealand company and established a retail massage business in the city where she lived with her partner.

[6] In March 2021, prior to the expiry of her work visa, the appellant applied for a resident visa (on the basis of her partnership) and, in April 2021, a new partnership-based work visa.

**Residence Application**

[7] Immigration New Zealand's electronic records indicate that, in May 2021, the officer assessing the appellant's residence application found that she met the health requirements under instructions, her supporting partner met the character requirements, the couple had been living together for the required duration (12 months), and their relationship was genuine and stable. The officer also recorded that the appellant had provided clear police certificates from New Zealand and Thailand and met character requirements of residence instructions.

[8] The officer's notes concluded that "the couple have demonstrated that they meet the requirements for this partnership residence application" but that a final decision would await the processing of the temporary visa application.

**Compliance**

[9] According to documents contained on the appellant's Immigration New Zealand file, around July 2021, Immigration New Zealand's compliance team began investigating an allegation that the appellant may have been involved in the commercial sex industry.

[10] A compliance officer's report recorded that, on 6 July 2021, two officers made a site visit to the appellant's massage business. The appellant admitted that, while she had been a student living in a different city, she had worked as a sex worker. However, she was now in a stable relationship and had established her own therapeutic massage business. She had not engaged in sex work since she had been a student. The report noted that there was nothing about the appellant's business which indicated she was offering sexual services and the business was consistent with a massage and spa-type experience.

[11] Immigration New Zealand officers conducted a second interview with the appellant on 26 October 2021.

[12] On 1 November 2021, Immigration New Zealand's electronic records indicate that the compliance officer informed the appellant's representative that her file had been given back to the immigration officer processing the appellant's temporary visa application. Nothing further was required from a compliance or investigations perspective.

**Concerns About Temporary Visa Application**

[13] On 2 November 2021, Immigration New Zealand informed the appellant that it had concerns about her work visa application. The appellant had admitted that she had been listed on an online escort website and had provided commercial sexual services at the time she held a student visa. Instructions at E7.40.a (Effect of provisions of the Prostitution Reform Act 2003) stated that "No visa may be granted to a person on the basis that the person has provided, or intends to provide, commercial sexual services…".

[14] In response, the appellant's representative explained that, at the time when the appellant engaged in sex work, she had to financially support her family to pay for her grandmother's medical, and then funeral expenses. She had cooperated with the compliance officers and provided information about the operator of the escort service. She was no longer providing any commercial sexual services, was in a genuine and stable partnership, and had established a small business which was contributing to the local economy.

[15] On 26 November 2021, Immigration New Zealand declined the appellant's work visa application. She was not eligible to be granted a temporary visa as per instructions at E7.40 because she had provided commercial sexual services.

**Request for Reconsideration**

[16] On 9 December 2021, the representative requested that Immigration New Zealand reconsider its decision. He submitted that instruction E7.40 was not intended to be a permanent prohibition to the grant of any further temporary visa for someone who had provided and that the appellant was not applying for a temporary visa *on the basis* of her previously provided sexual services, but rather on the basis of her partnership with a New Zealand citizen.

[17] In support, the representative provided commentary about the Prostitution Reform Act (2003) (the PRA), from the Honourable Tim Barnett who had proposed the law. He also provided a letter from Dame Catherine Healy, the National Co-ordinator for the New Zealand Prostitutes Collective, who noted that section 19 of the PRA (as replicated in instructions at E7.40) was included because of fears that migrant workers would be at greater risk of trafficking if they were allowed to provide commercial sexual services in New Zealand. Unfortunately, academic research indicated that the provision had had the opposite effect by creating two tiers of workers: those working legally (New Zealand citizens and permanent residents) and those working illegally (migrant workers who held temporary visas). This was inconsistent with the PRA's purpose to decriminalise sex work. It meant that those who worked in breach of section 19 were subject to the same risks and harms faced by other New Zealand-based sex workers prior to 2003, exacerbated by isolation from family and support networks, reluctance to engage with health services, language barriers, and reluctance to report crime.

[18] The representative submitted that the appellant had made a bad choice because she felt she had to financially support her family. She was deeply sorry for her behaviour, had been honest with the investigators, and had assisted Immigration New Zealand to gather evidence in relation to the operator of the services. Compliance had taken no action against her.

[19] On 20 January 2022, Immigration New Zealand declined the appellant's request for reconsideration. It accepted that the appellant had demonstrated she was in a genuine relationship and living with her partner. However, instruction E7.40 was clear when it stated that "no visa may be granted to a person on the basis that the person has provided, or intends to provide, commercial sexual services". By her own admission, the appellant had provided sexual services while the holder of a temporary visa and therefore engaged instruction E7.40.

[20] The appellant has been unlawfully in New Zealand since the decline of her work visa application in November 2021. The processing of her residence application has been suspended since this time.

## STATUTORY GROUNDS

[21] The grounds for determining a humanitarian appeal are set out in section 207 of the Immigration Act 2009 (the Act):

> (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—
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> (a) there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
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> (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

[22] The Supreme Court stated that three ingredients had to be established in the first limb of section 47(3) of the former Immigration Act 1987, the almost identical predecessor to section 207(1): (i) exceptional circumstances; (ii) of a humanitarian nature; (iii) that would make it unjust or unduly harsh for the person to be removed from New Zealand. The circumstances "must be well outside the normal run of circumstances" and while they do not need to be unique or very rare, they do have to be "truly an exception rather than the rule", *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34].

[23] To determine whether it would be unjust or unduly harsh for an appellant to be deported from New Zealand, the Supreme Court in *Ye* stated that an appellant must show a level of harshness more than a "generic concern" and "beyond the level of harshness that must be regarded as acceptable in order to preserve the integrity of New Zealand's immigration system" (at [35]).

**THE APPELLANT'S CASE**

[24] The appellant's case is set out in the appeal form and her representative's submissions lodged with the Tribunal on 3 February 2022 and can be summarised as follows:

(a) Immigration New Zealand's decision to decline the appellant's temporary visa was incorrect, and the reconsideration process was unfair. Her application was on the basis of her partnership with a New Zealand citizen, not on the basis of her previously provided sexual services. Although the appellant acknowledges that she breached the conditions of her student visa by working as an escort for a short time, E7.40 was not intended to permanently prohibit a person from being granted any type of temporary visa on other grounds if they had previously been a sex worker in New Zealand. Punishing someone for a previous occupation was inconsistent with the purpose of the PRA, which was to decriminalise prostitution.

(b) The appellant had only worked for a short time as a sex worker, and only because she needed to financially support medical care, and then funeral costs, for her grandmother. She had made a wrong choice and was deeply sorry but did so with the intention of assisting her family. She had been honest with investigators and assisted Immigration New Zealand to gather evidence in relation to the operator of the escort service. Compliance had taken no further action against her.

(c) The appellant is in a genuine and stable relationship with her New Zealand-citizen partner. She is well settled in New Zealand and has applied for residence. She has no criminal record in Thailand or New Zealand and is a person of good character. In New Zealand, she has registered and established a small business as a massage therapist. She has the support of her partner, his family and the customers of her business.

(d) In 2016, the appellant's partner contracted tuberculosis during a trip to Thailand. He has since endured several surgeries and nine months of chemotherapy. His doctor advises that the partner should never return to Thailand, where tuberculosis is endemic, because of the risk of recurrent infection. Deportation would therefore effectively separate the couple and cause them both considerable distress.

(e) The COVID-19 pandemic means that travel to Thailand is currently suspended.

[25] In support of the appellant's appeal, the representative provides copies of documents related to the appellant's temporary visa application, reconsideration request, and the following documents:

(a) A statement (2 February 2022) from the appellant, in which she describes her genuine relationship with her partner; how his health condition will prevent him from travelling to Thailand; and his inability to leave his job in New Zealand. He is her soulmate and she would be broken-hearted to be parted. Because she has no current work visa, she has temporarily suspended her massage business, which had taken her much time and investment to establish. She hopes to re-open the business if her immigration status is resolved but could

not establish a similar business in Thailand because there is significant competition in the industry, which had also been badly affected by the COVID-19 pandemic.

(b) A statement (24 January 2022) from the appellant's partner. He explains that he is aware that the appellant worked briefly as a sex worker but understood her reasons for doing so. They were best friends and very much in love. They were well settled and contributed to New Zealand through their employment, in the partner's case, through a role he had held for 20 years since leaving high school, and did not want to leave. His health condition and job meant he could not relocate to Thailand and it would be very difficult for the couple to maintain their relationship over long distance.

(c) Medical records relating to the partner's health, and a letter (26 January 2022) from the partner's doctor. The letter explains how the partner had contracted tuberculous in 2016, been extremely ill, and undergone several surgeries. The doctor strongly recommends that the partner never put himself at risk of a recurrent tuberculosis infection, and should not travel to Thailand, where tuberculosis is endemic.

(d) Hundreds of pages of chat records (dated between December 2019 and October 2021) between the appellant and her partner, and dozens of photos of the appellant and her partner, including with the partner's family, celebrating events and birthdays, and on holiday around New Zealand (August 2019 to November 2021).

(e) Evidence of the appellant's grandmother's death in December 2019, including translated chat records between the appellant and her mother and a copy (and translation) of the grandmother's death certificate.

(f) Eight letters of support (variously dated in January and February 2022) from clients of the appellant's massage business.

(g) Information provided to Immigration New Zealand as part of the appellant's reconsideration application including letters from Dame Catherine Healy and the Honourable Tim Barnett; evidence of the couple's relationship (including letters of support from the partner,

friends, family members, and the appellant's clients); a timeline of the partnership; utility bills and other evidence of the couple living together); and copies of the appellant's passport, Thai identification card, and evidence of her English-language studies.

## ASSESSMENT

[26] The Tribunal has considered all the submissions and documents provided by the appellant and has also considered the appellant's Immigration New Zealand file in relation to her temporary visa applications.

[27] In his submissions, the representative submits that Immigration New Zealand was incorrect to decline the appellant's temporary visa application because it had misinterpreted instruction E7.40 and asks the Tribunal to provide a clear interpretation of that provision.

[28] The Tribunal does not have jurisdiction on a humanitarian appeal against deportation liability to review, consider the merits of, or overturn visa decisions by Immigration New Zealand. This was affirmed by the High Court in *Li v Chief Executive of the Ministry of Business, Innovation and Employment* [2017] NZHC 2977, [2018] NZAR 265 at [13] and [19].

[29] Nevertheless, the Tribunal notes its findings in *MZ (Partnership)* [2016] NZIPT 202794 where the Tribunal (differently constituted) addressed provisions relating to the PRA in the context of residence instruction R5.18, which mirrors the language of E7.40, finding at [33] (emphasis added):

> The immigration officer concluded that, because the appellant had been found to have provided commercial sexual services, a residence class visa could not be granted. This is incorrect. *The appellant's residence application was on the basis of her partnership with a New Zealand citizen, not on the basis of her having provided or intending to provide commercial sexual services*. Section 19 of the Prostitution Reform Act 2003 aims to prohibit the provision or operation of, or investment in, commercial sexual services providing the basis for the grant of a visa under the Immigration Act 2009. A person who provides or intends to provide commercial sexual services cannot therefore rely on such employment to support an application for a work visa under the Essential Skills category or a residence visa under the Skilled Migrant category. *Section 19 of the Prostitution Reform Act 2003 and R5.18 do not prohibit the grant of a resident visa to a person who might at any time have provided commercial sexual services*.

[30] A similar finding was made in *JK (Skilled Migrant)* [2019] NZIPT 205306 in relation to instruction R5.18, where the Tribunal found at [33] (emphasis added):

> The appellant's intention to provide sexual services
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> [33] Immigration New Zealand next referred to instruction R5.18 above, and found that the appellant had the intention to provide commercial sexual services as per the advertisements he uploaded on several websites, and was therefore not eligible for the grant of a resident visa.
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> [34] However, instruction R5.18 provides that no visa may be granted to a person on the basis that they have, *inter alia*, provided, or intend to provide, commercial sexual services. *The appellant's application was not made on the basis that he intended to provide commercial sexual services. His application was made on the basis that he was engaged in skilled employment, in terms of the criteria under the Skilled Migrant category.* The advertisements that he placed on websites did not form the basis on which he applied for residence. Immigration New Zealand therefore incorrectly relied upon instruction R5.18 in declining the appellant's application.

[31] Although the appellant's case involves instruction E7.40 and a temporary visa application, the wording of that provision is the mirror of instruction R5.18 in the residence instructions. As the Tribunal's decisions make clear, any previous (or intended) provision of commercial sexual services invokes the provisions at R5.18 only when such services are "the basis" upon which the visa application is made.

[32] The basis of the appellant's temporary visa application was her partnership with a New Zealand citizen, not the commercial sexual services she had previously provided.

[33] It appears that Immigration New Zealand was not aware of the Tribunal's jurisprudence in relation to the residence instructions' mirror provision of E7.40, nor was it brought to its attention by the appellant's representative. Had that been done, the outcome of the appellant's partnership-based temporary visa application may have been different.

[34] However, as indicated above, the Tribunal does not have jurisdiction to correct errors made by Immigration New Zealand in the course of declining visa applications. The proper forum for disputing that error or decision is the High Court by way of judicial review. The Tribunal's focus must be on the consequences or effects of deportation and whether these establish there are exceptional circumstances of a humanitarian nature.

## Whether there are Exceptional Circumstances of a Humanitarian Nature

### *The appellant's relationship*

[35] The appellant has lived in New Zealand for three and a half years and has

been in a relationship with her partner for most of that time. She has no other family connections to New Zealand.

[36] The Tribunal accepts, as did Immigration New Zealand, that the couple are in a genuine and stable partnership. The evidence indicates that they live together and are committed to each other but the fact that the appellant has entered into a relationship with a New Zealand citizen while she has held a temporary visa is not, of itself, an exceptional humanitarian circumstance.

[37] If the appellant leaves New Zealand, it will have a more significant impact on this couple than many because of the partner's inability to visit or live in Thailand lest he contract tuberculous again. The medical evidence sets out the seriousness of the partner's original infection, and the doctor's advice that he does not return to Thailand.

[38] The Tribunal accepts that, if the appellant leaves New Zealand, her partner would be unable to travel with her and that separation would be distressing and upsetting for them both. However, the appellant has a pathway to residence through her current residence application, the processing of which can resume if she leaves New Zealand and is no longer unlawful. While there can be no certainty about the timeframe that Immigration New Zealand may take to conclude its processing of the residence application (or its outcome), given the processing that has already been completed, it is unlikely to be of a significant duration.

*Other circumstances in New Zealand*

[39] In July 2020, the appellant established a Thai massage business in the city where she lives with her partner. She is the sole director of that business (registered with the New Zealand Companies Office) which operates from a shop on a street of retail businesses. Many of the appellant's customers wrote letters in support of the appellant's visa application, reconsideration and appeal which describe the appellant's professionalism, the health and therapeutic benefits of the massage services she provides, and the cleanliness and hygiene standards in her clinic. The appellant's statement describes the investment she made in establishing the business and that it was running well with a loyal clientele. She has had to suspend the business since she lost her right to work after her temporary visa application was declined.

[40] Prior to being suspended, the appellant's business appears to have been a stable business with a regular and loyal customer base which contributed to the

local economy and community. The Tribunal acknowledges that, if the appellant leaves New Zealand, her business will likely have to close permanently, given it has already been suspended from trading since November 2021.

*Returning to Thailand*

[41] The appellant's family remains in Thailand where, aside from her time in New Zealand, she has lived all her life. She is familiar with its language and customs. Although she believes that establishing a massage business there would be difficult because there is significant competition, she has not provided any evidence why she would be unable to re-establish herself in Thailand with the support of her family.

[42] In her statement, the appellant expresses concern about returning to Thailand because of the prevalence of COVID-19. However, in the time since those submissions were made, COVID-19 has also overrun New Zealand. The Tribunal does not consider that the situation in New Zealand is any better than in Thailand; indeed the most recent information suggests that Thailand's case rate of 65,309 per 1 million people is significantly better than New Zealand's case rate of 317,783 per 1 million people: see Worldometer *Coronavirus Update (Live) — Tot Cases/1M Pop* (accessed 18 July 2022) at www.worldometers.info.

*Conclusion on exceptional humanitarian circumstances*

[43] What appears to the Tribunal to be an incorrect interpretation and application of instruction E7.40 by Immigration New Zealand is not relevant to its assessment of exceptional humanitarian circumstances.

[44] The Tribunal acknowledges that deportation would result in the likely closure of the appellant's business and that it may be difficult to establish a similar business in Thailand. It also recognises that, because of the partner's health condition, the appellant's deportation would likely mean the couple would be separated, at least on a temporary basis, and that this would cause them distress. However, given the advanced stage of the appellant's residence application, the need to remain offshore during the processing of the application is not likely to be of an extended duration.

[45] The Tribunal finds that these factors, considered both individually and cumulatively, do not establish exceptional circumstances of a humanitarian nature. The appellant has a current residence application which Immigration New Zealand

can resume processing if she is able to regularise her status through the grant of a visa or by leaving New Zealand.

[46] The Tribunal finds that the appellant has not established that there are exceptional circumstances of a humanitarian nature.

## DETERMINATION

[47] For the reasons given, the Tribunal finds that there are not exceptional circumstances of a humanitarian nature in terms of the statutory test.

[48] An appeal must fail if there are not exceptional circumstances of a humanitarian nature. The Tribunal's finding that there are none in this case makes it unnecessary to consider either the "unjust or unduly harsh" or "public interest" stages of the inquiry under the statutory test.

[49] The appellant has failed to meet the requirements of section 207(1) of the Act and her appeal is declined.

### Removal of Period of Prohibition on Re-Entry and Grant of a Temporary Visa

[50] Having declined the appeal, the Tribunal turns its mind to (a) its absolute discretion to order the reduction or removal of any period of prohibition on re-entry to New Zealand that might otherwise apply (section 215(1) of the Act) and (b) the option, in circumstances where the Tribunal considers it necessary to enable the appellant to remain in New Zealand for the purposes of getting her affairs in order, to delay deportation or order a temporary visa (section 216(1) of the Act).

[51] Although the Tribunal cannot consider Immigration New Zealand's incorrect interpretation of instruction E7.40 in relation to its assessment of whether the appellant has exceptional circumstances of a humanitarian nature, it is relevant context in its assessment of the appellant's current situation and the Tribunal's ability to make orders under sections 215 and 216.

[52] First, the Tribunal considers that Immigration New Zealand's interpretation and application of E7.40 in the appellant's case has meant she has become liable for deportation through no fault of her own. As a result, pursuant to section 215(1) of the Act, the Tribunal removes any period of prohibition on re-entry the appellant may face, should she be deported.

[53] Second, with respect to whether the Tribunal should grant a visa to the appellant under section 216, the Tribunal recalls what the High Court said about such orders in *Chief Executive of the Ministry of Business, Innovation and Employment v Singh* [2018] NZHC 272, [2018] NZAR 434.

[54] At [17], Courtney J noted (emphasis added):

> The phrases 'to get one's affairs in order' and its synonym, to 'put one's affairs in order' have not been the subject of previous judicial considerations. They are common vernacular expressions that, broadly, mean to organise one's personal, financial or legal affairs in anticipation of some event or change. *They are commonly used in connection with preparing for death or for an impending change in status that is either permanent or long-term.* Because of the variety of circumstances confronting people, what constitutes 'affairs' must depend on the nature of the circumstances; a person facing imprisonment will have different matters to attend to compared with a person suffering a terminal illness. A person planning to travel for an extended period has different considerations from someone moving overseas permanently. Whilst the phrases could be used in a wider sense of putting one's general personal affairs in an orderly state, this would be a less common use; *the ordinary meaning of this expression is associated with some impending change in one's circumstances.*

[55] The Court went on to hold that it was not necessary that the "affairs" to be put in order are "ones that will actually facilitate departure". However, the phrase "getting affairs in order" meant "organising those personal, legal or financial matters that, by reason of personal need or obligation (legal or moral) must be attended to so that deportation will not leave the individual concerned, or those associated with him or her, disadvantaged": see *Chief Executive of the Ministry of Business, Innovation and Employment v Singh* [2018] NZHC 272, [2018] NZAR 434 at [20].

[56] The appellant is in the very unusual situation of being unlawfully present in New Zealand, but with a clear pathway to residence through a well-advanced residence application based on her genuine partnership with a New Zealand citizen. Immigration New Zealand found that, at the time it conducted its assessment of the residence application, the appellant met all the requirements of instructions. As such, while she is liable for deportation, she also appears to be, *prima face,* eligible for residence, although her application can only be resumed and finalised if her immigration status is regularised (either by leaving New Zealand or becoming lawfully present here). She is, at the present time, and in the words of Courtney J, preparing for an "impending change" in her circumstances, either leaving New Zealand or being granted the right to reside permanently in this country.

[57] Therefore, in her particular circumstances, the Tribunal considers it appropriate to grant the appellant a six-month work visa which will restore her lawful immigration status for a short period of time. This will allow her time to address any legal or administrative issues in relation to her massage business (such as terminating lease/rent arrangements and other business obligations) if she leaves New Zealand, matters which are likely to be significantly impacted by Immigration New Zealand's finalisation of her residence application (which can resume with the grant of this visa). Regardless of the outcome of that application, the Tribunal considers that this is a matter to be attended to so that deportation will not leave the appellant disadvantaged, in that she will be exposed to the upheaval of deportation only to be able to return to New Zealand if her residence application is granted.

[58] Therefore, pursuant to section 216(1)(b) of the Act, the Tribunal orders that the appellant be granted a six-month temporary work visa, commencing on the date of this decision to allow her time to get her business affairs in order and for Immigration New Zealand to finalise the processing of her outstanding residence application.

[59] If Immigration New Zealand's processing of the residence application is not completed within the six-month validity of the Tribunal-ordered visa, the appellant may apply (prior to its expiry) for a new temporary visa. That will be a matter for Immigration New Zealand to determine at the time.

**Order as to Depersonalised Research Copy**

[60] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to her identification. This is because the decision contains personal information about the appellant, particularly her involvement in the provision of commercial sexual services.

Certified to be the Research Copy released for publication.

L Wakim
Member

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L Wakim
Member