IN THE SUPREME COURT OF NEW ZEALAND

SC 144/2013
[2014] NZSC 6

BETWEEN	HAO ZHANG Applicant
AND	THE MINISTER OF IMMIGRATION First Respondent
	THE IMMIGRATION AND PROTECTION TRIBUNAL Second Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: T Ellis and C Curtis for Applicant
M J Andrews for First Respondent
D L Harris for Second Respondent

Judgment: 19 February 2014

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, a Chinese national, was granted a residence permit in 2003. In November 2009 he was sentenced to 18 months imprisonment for conspiracy to import a class C controlled drug.[1] Because the offending occurred within five years of the granting of the residence permit, he was eligible for deportation and a deportation order was made against him by the Minister of Immigration on 5 July 2010. The Immigration and Protection Tribunal confirmed the order.[2] That decision was challenged in the High Court by both appeal and judicial review.[3] The applicant was successful. The decision of the Tribunal was set aside and the

1 *R v Zhang* DC Auckland CRI-2009-004-2594, 19 November 2009.
2 *Zhang v Minister of Immigration* [2012] NZIPT 500078.
3 *Zhang v Minister of Immigration* [2013] NZHC 790.

Tribunal was directed to reconsider his appeal. This is because the Judge concluded that the Tribunal had not given adequate reasons for its conclusion that it would not be unduly harsh to deport the applicant. That judgment was in turn reversed by the Court of Appeal.[4] That Court concluded that the reasons were adequate. The applicant now seeks leave to appeal against the Court of Appeal judgment.

[2] The proposed grounds of appeal are that (a) the Tribunal was improperly constituted and (b) Article 10(3) of the International Convention of Civil and Political Rights (ICCPR) has not been taken into account.

[3] The jurisdiction argument arises in this way. The case before the Tribunal fell to be determined in accordance with the Immigration Act 2009. Under that Act, the default position is that all appeals are to be heard by a tribunal consisting of one member unless the Chair directs that it be heard by a panel of two or three members. Such direction can only be given on the basis of "exceptional circumstances".[5] Under the transitional provisions of the Act, appeals such as the applicant's which were current but had not been set down for hearing "must be determined by a member of the Tribunal" unless the chair determines otherwise.[6] Apparently the chair of the Tribunal gave a general direction that all pending appeals which had not been set down for hearing were to be determined by panels consisting of three members. This was for training purposes in respect of new members and to meet the expectations of appellants who would have expected their cases to be heard by three members when their appeals had been lodged. The jurisdiction argument is in effect a challenge to the determination of the chair. The suggestion is that the determination is invalid and that the Tribunal panel which heard the appeal was improperly constituted. This argument was fully addressed by the Court of Appeal and rejected on its merits, concluding that in light of the transitional provisions, the chair's discretion was not limited to cases involving "exceptional circumstances".

[4] Article 10(3) of the ICCPR provides that:

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4 *Minister of Immigration v Zhang* [2013] NZCA 487.
5 See s 221 of the Act.
6 See s 446(5).

> The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

This article was not mentioned in the decisions of the Tribunal and High Court – presumably because it was not relied on before them. It was relied on by the applicant in the Court of Appeal but is not mentioned in that Court's judgment – apparently because it was not raised until the day of the hearing. As well, it does not have any apparent relevance to the immigration context in which this case falls to be determined.

[5] We are of the view that the case does not raise any issue of public or general importance and see no appearance of a miscarriage of justice.

Solicitors:
Marshall Bird & Curtis, Auckland for Applicant
Crown Law Office, Wellington for Respondents