IN THE SUPREME COURT OF NEW ZEALAND

SC 124/2014
[2015] NZSC 132

BETWEEN	JIAXI GUO First Appellant	
	JIAMING GUO Second Appellant	
AND	MINISTER OF IMMIGRATION Respondent	

Hearing: 9 July 2015

Court: Elias CJ, William Young, Glazebrook, Arnold and Blanchard JJ

Counsel: R M Dillon for Appellants
C A Griffin and M F Clark for Respondent

Judgment: 2 September 2015

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The appellants are granted leave to appeal to the High Court against the dismissal by the Immigration and Protection Tribunal of their appeals on the question whether the Tribunal erred in law in concluding that it would not be unjust or unduly harsh to deport them from New Zealand.**

C **All issues as to costs, including the order for costs made in the High Court, are reserved. Any application in respect of costs is to be made within 10 working days.**

REASONS

(Given by William Young J)

The nature of the appeals

[1] The appellants were unsuccessful in their appeals to the Immigration and Protection Tribunal against deportation liability notices.[1] They subsequently sought to appeal to the High Court under s 245(1) of the Immigration Act 2009 (the 2009 Act). Such appeal is limited to questions of law and requires the leave of the High Court or, if it refuses leave, of the Court of Appeal. The appellants' applications for leave to appeal were dismissed in the High Court,[2] as were their subsequent applications to the Court of Appeal.[3]

[2] The appellants' challenge in this Court to the refusal of the Court of Appeal to give leave to appeal to the High Court raised jurisdictional issues. These were resolved in their favour and they were granted leave to appeal against the Court of Appeal's judgment.[4]

[3] This is a distinctly unusual appeal. All that is in issue is whether the appellants should have leave to appeal to the High Court. As will be apparent, we are of the view that such leave is appropriate. To explain why we differ from the Court of Appeal, we must explain why we consider that leave should be granted. It is not, however, our role to determine whether the Tribunal's decision should be set-aside. We note in passing that s 245(1A) of the 2009 Act now provides that decisions of the Court of Appeal as to leave are final.[5]

Background

[4] The appellants' parents are Jianyong Guo and Meihua Hong. They are Chinese citizens who came to live in New Zealand in March 2002. They were accompanied by Jiaxi, the first appellant, who was then 11 years of age. Their second child, Ellen was born in New Zealand on 18 February 2004 and is a New Zealand citizen. Their third child Jiaming, the second appellant, was born on

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1 *Guo v Minister of Immigration* [2013] NZIPT 600006-7, 600029, 600049, 25 July 2013 [*Guo* (IPT)].
2 *Guo v Immigration and Protection Tribunal* [2014] NZHC 804 (Gendall J) [*Guo* (HC)].
3 *Guo v Minister of Immigration* [2014] NZCA 513 (O'Regan P, Ellen France and Miller JJ) [*Guo* (CA)].
4 *Guo v Minister of Immigration* [2015] NZSC 76 [*Guo* (SC leave)].
5 Section 245(1A) was inserted on 7 May 2015 by s 61(1) of the Immigration Amendment Act 2015.

25 May 2006 and is not a New Zealand citizen.[6] The family was granted residency on 6 September 2006 on an application made by Mr Guo which listed Mrs Hong, Jiaxi and Jiaming as secondary applicants.

[5] Mr Guo is subject to deportation under s 91(1)(a) of the Immigration Act 1987 by reason of his conviction and sentence of imprisonment on charges associated with his importation of pseudoephedrine. He had embarked on this enterprise prior to residency being granted[7] and had not disclosed this to Immigration New Zealand. His non-disclosure of his involvement in drug importation was material to the grants of residency in favour of Mrs Hong, Jiaxi and Jiaming. For this reason, they too are subject to deportation; in their cases under s 158(1)(b)(ii) of the 2009 Act. Deportation liability notices were accordingly served on them.

[6] Mr Guo appealed against the deportation order and Mrs Hong, Jiaxi and Jiaming appealed against the deportation liability notices.

[7] Some of the complexities of the processes which followed are immaterial for present purposes. What is relevant is that:

(a) Mr Guo's appeal was pursuant to s 105 of the 1987 Act and the other appeals were on grounds which included s 207 of the 2009 Act.[8] These two sections provide for an appeal in relation to deportation to be allowed on humanitarian grounds. They are in similar but not identical terms. For the purposes of the present appeal to this Court it is s 207 which is material and the relevant portion of that section is reproduced later in these reasons.

(b) In the end the four appeals were heard together by the Tribunal in

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6 In 2005 the Citizenship Act 1977 was amended to the effect that, subject to narrow exceptions, children born in New Zealand after 1 January 2006 who did not have a citizen parent were not entitled to New Zealand citizenship by birth: see s 5 Citizenship Amendment Act 2005.

7 He was arrested on 6 September 2006 on these charges, that is the same day as residency was granted.

8 The parties who are the appellants in the present case also appealed to the Immigration and Protection Tribunal on the facts under s 201(1)(a) of the Immigration Act 2009 [the 2009 Act]. This ground was unsuccessful: see *Guo* (IPT), above n 1, at [115].

December 2012.

(c) On 4 July 2013, Mrs Hong left New Zealand for China for what she intended to be a temporary visit. Her departure, however, had the effect of withdrawing her appeal (under s 239 of the 2009 Act). On 10 July, the Tribunal, then unaware of Mrs Hong's departure, issued a decision dismissing all appeals.[9]

(d) On 15 July Mrs Hong was served with a deportation order at Shanghai Airport and as a result is now an "excluded person" and subject to a permanent prohibition on entry into New Zealand.[10]

(e) On learning of Mrs Hong's departure from New Zealand, the Tribunal recalled its 10 July decision.

(f) On 25 July, the Tribunal reissued a revised decision dismissing the appeals of Mr Guo and Jiaxi and Jiaming.[11]

(g) Applications for leave to appeal to the High Court were refused by that Court and the Court of Appeal.[12]

(h) This Court subsequently refused Mr Guo leave to appeal to this Court from the Court of Appeal decision but granted Jiaxi and Jiaming leave to do so.[13]

The legal context

[8] The humanitarian ground on which the appeals of Mrs Hong, Jiaxi and Jiaming were argued is provided for by s 207(1) of the 2009 Act:

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9 *Guo v Minister of Immigration* [2013] NZIPT 600006-7, 600029, 600049, 10 July 2013.

10 Mrs Hong is also ineligible for visa or entry permission to enter or be in New Zealand: see ss 10(3)(a)(ii), 15(1)(c) and 179(1) of the 2009 Act.

11 *Guo* (IPT), above n 1.

12 See *Guo* (HC), above n 2 and *Guo* (CA), above n 3.

13 *Guo* (SC leave), above n 4.

> **207 Grounds for determining humanitarian appeal**
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> (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.

As noted, s 105 of the 1987 Act on which Mr Guo sought to rely is not in identical terms but, for present purposes, the differences are of no significance.

[9] The language of s 207(1) (and similar language in other provisions relating to deportation and removal) has received considerable attention in the courts. It has been held that the expression "unjust or unduly harsh" is composite in nature and that the Tribunal need not inquire separately as to whether deportation would be (a) unjust or (b) unduly harsh.[14] Whether deportation would be "unjust or unduly harsh" is to be assessed in light of the reasons why the appellant is liable for deportation and involves a balancing of those considerations against the consequences for the appellant of deportation. The public interest is not immaterial to the application of s 207(1)(a) but is primarily relevant to the application of s 207(1)(b). In determining whether deportation would be unjust or unduly harsh, the primary focus is on the personal circumstances of the person in respect of whom deportation is proposed and those of immediate family members who will be affected by that person's deportation.

[10] Eligibility for deportation is usually associated with fault on the part of the person to be deported, most obviously, the commission of offences or misrepresentations on applications for residency. In this context, the present appeals have the unusual feature that those to be deported (Jiaxi and Jiaming) are without any fault. For this reason, it could fairly be said that the circumstances in relation to them were "exceptional". This was accepted by the Tribunal.[15]

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[14] See for instance *Patel v Removal Review Authority* [2000] NZAR 200 (CA) at 204; *Esau v Minister of Immigration* HC Wellington AP 320/98, 5 October 2000 at [12]; *Faatafa v Minister of Immigration* HC Christchurch CIV-2005-409-1494, 17 October 2005 at [50]; and *Pal v Minister of Immigration* [2013] NZHC 2070, [2013] NZAR 1240 at [57]–[59].

[15] *Guo* (IPT), above n 1, at [134].

[11] Another feature of the case was the reliance which Mr Guo and, to a lesser extent, Mrs Hong placed on the hardship which their children would suffer if they (either both Mr Guo and Mrs Hong or just Mr Guo) were deported. Such hardship consisted of either separation from their father if they stayed in New Zealand or the upheaval associated with them being required (whether practically or legally) to go to China. Absent that consideration, the claim of Mr Guo to remain in New Zealand was tenuous to say the least.

[12] Such arguments, however, could carry Mr Guo (and Mrs Hong for that matter) only so far. This is because:

(a) The s 207(1)(a) exercise must focus on the personal circumstances of the person to be deported and in particular whether the deportation of that person would be unjust or unduly harsh. For this reason a finding as to a high level of hardship for Jiaxi or Jiaming if Mr Guo were deported would not in itself necessarily justify the conclusion that Mr Guo's deportation was therefore unjust or unduly harsh; in particular having regard to his high level of culpability.

(b) That deportation would be unjust or unduly harsh to a third party would not be determinative if the conclusion was reached under s 207(1)(b) that deportation of Mr Guo was nonetheless required in the public interest. It would thus have been open to the Tribunal to have upheld the deportation of Mr Guo (on the basis of either or both of s 207(1)(a) and (b)) but to have allowed the appeals of Jiaxi and Jiaming.

The proceedings before the Tribunal

[13] At the hearing before the Tribunal, Mr Guo, Mrs Hong, Jiaxi and Jiaming were represented by the same counsel. The first three gave evidence. Jiaxi at this stage was 22 and was close to completing a university degree. She speaks fluent English, retains at least some Mandarin (in the view of the Tribunal, rather more than

she acknowledged)[16] and has a reasonable measure of competency in Japanese which she was then studying at university.[17] Jiaming was then six. He had never been out of New Zealand. He primarily speaks English although he also has some Mandarin (given that this is the language which his parents primarily use).[18]

[14] Because Ellen is a New Zealand citizen, she is not subject to deportation and was thus not a party to the appeals. She also has never been out of New Zealand and English is her first language. At the time of the hearing before the Tribunal, she was eight.

[15] A question addressed at the hearing was whether Mrs Hong would stay in New Zealand with the children if their appeals were allowed but that of Mr Guo was dismissed. This question was not answered definitively by Mrs Hong in her evidence.[19] The possibility that Jiaxi might stay in New Zealand despite all other family members going to China was not pushed at all. It was also assumed that if both Mr Guo and Mrs Hong were deported, there would be no practical mechanism by which Ellen and Jiaming could remain in New Zealand.

[16] The approach of the Tribunal in the reissued decision was relevantly as follows:

(a) The humanitarian appeal of Mr Guo was dismissed on the basis that the seriousness of the offending was such that "taking into account his family and the impact upon them of his deportation", such deportation, "while … harsh … is neither unduly harsh nor unjust".[20]

(b) In relation to the appeals of Jiaxi and Jiaming, the Tribunal concluded that there were exceptional circumstances of a humanitarian nature in that neither had been a party to Mr Guo's deceit in relation to the residency application but that their deportation would not be unjust or

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16 See *Guo* (IPT), above n 1, at [141].
17 See at [48]–[52].
18 See at [131].
19 See at [42].
20 At [84].

unduly harsh. In reaching this view, the Tribunal relied on the following considerations:

(i) The integrity of the immigration system was important and "it cannot be the case that no consequences flow from Mr Guo's conduct, solely because the beneficiaries are innocent".[21]

(ii) Jiaxi would be able to cope in China, in light particularly of what they assumed would be a completed university degree and her ability to communicate in Mandarin, English and Japanese.[22]

(iii) Deportation would be harsh for Jiaming "for a short period" but not "unduly harsh".[23]

[17] The position of Ellen was separately addressed in this way:

> [161] We acknowledge that the departure of all of her family members will effectively mean Ellen must leave New Zealand, where she has a right to live. We have given specific consideration to the question of allowing all of the appeals, given that that outcome would be the only way in which Ellen could avoid either separation from part of her family (her father) or moving with her family to China. We have weighed carefully the significance of that outcome against the factors that have brought the family to this position. They are the departure of Mrs Hong for China, from where she cannot now return, Mr Guo's involvement in the drug trade and his failure to disclose the same on his residence application (or to advise Immigration New Zealand that his circumstances had undergone a material change that rendered him ineligible for residence), which resulted in four of the family members obtaining resident visas for which they were not eligible. We are satisfied that these factors outweigh Ellen Guo's rights at international law, both as a citizen and as a child. As to her right to reside in New Zealand as a citizen, she will not lose that right, and need not decide whether to surrender it until she is an adult, able to make that choice for herself.
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> [162] Deportation, in the circumstances of this family, is not disproportionate. Again, we do not accept that the father's offending, on the scale we are addressing here, can be without consequences because of the existence of a New Zealand-citizen child or other innocent family members.

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21 At [137].
22 At [144].
23 At [156].

[18] In the case of Jiaxi, the Tribunal removed the prohibition on entry to New Zealand that would otherwise have applied under s 179 of the 2009 Act.[24]

The current situation

[19] Two years on from the Tribunal's decision, Mr Guo remains in New Zealand (or at least he did at the time of the hearing of the appeal). Mrs Hong is still in China. Jiaxi is now 24 and has completed her degree. She is married to a New Zealand citizen and the mother of a New Zealand child. It is not likely that she will be, or even could be, required to leave New Zealand.

Should leave to appeal to the High Court be granted?

[20] The basis upon which the leave decision should be made is provided for by s 245(3) of the 2009 Act:

> **245 Appeal to High Court on point of law by leave**
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> …
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> (3) In determining whether to grant leave to appeal under this section, the court to which the application for leave is made must have regard to whether the question of law involved in the appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to the High Court for its decision.
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> …

[21] As noted, the Tribunal concluded that it would not be unjust or unduly harsh to deport Jiaxi and Jiaming from New Zealand. At first sight, this conclusion appears to be a little surprising. By the time the Tribunal reached its decision, the family, including Jiaxi, had been living in New Zealand for more than 11 years. Jiaxi and Jiaming were both well-settled. Forced removal to China would be a considerable upheaval. As well, their future prospects in China (and particularly those of Jiaming) might be thought to have been less favourable than they would be in New Zealand. Given that they had done nothing wrong, it is distinctly arguable that a comparatively low level of injustice and hardship would suffice to meet the s 207(1)(a) test. These considerations warrant careful analysis of the basis upon which the decision was reached.

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[24] At [169].

[22] Such analysis does reveal some areas of legal concern:

(a) Although the expression "unjust or unduly harsh" is composite in nature,[25] it is not to be read as simply meaning "unduly harsh". While the Tribunal did refer correctly to the statutory text, its application of s 207(1)(a) in relation to Jiaxi and Jiaming was by reference solely to the extent of the hardship they would face if deported. There was no explicit consideration to whether, in light of the absence of fault on their part, it was just that they face such hardship or whether such hardship was, for this reason, undue.[26]

(b) The Tribunal's focus on whether deportation would be unduly harsh was in terms which suggested a comparison of the level of hardship which Jiaxi and Jiaming would suffer as against that of anyone who was required to go to another country as opposed to the proportionality of that hardship in respect of the basis upon which they were liable to deportation.[27] Indeed, the only proportionality analysis explicitly carried out, at [162] of the decision, was in the context of the family as a whole and was not carried out appellant by appellant.

(c) Allied with the points just made are the references at two places in the decision of the Tribunal to the proposition that the offending of Mr Guo could not be without "consequences".[28] Such a consideration might be thought to be material in the cases of Jiaxi and Jiaming, if at all, to the application of s 207(1)(b), rather than s 207(1)(a). We say "if at all" because the basis for deportation of Jiaxi and Jiaming was not the offending itself but rather the fact that it had not been disclosed. Even if the Tribunal had been concerned with ensuring that there were "consequences" for Mr Guo's deception, it is not clear that

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25 As is clearly indicated by the case law: see footnote 14 above.
26 See *Guo* (IPT), above n 1, at [136]–[156].
27 See at [139]–[156].
28 At [137] and [162].

such consideration would be relevant when considering the deportation of the children.

(d) Although the Tribunal correctly looked at the position of each appellant separately, there is, as we have indicated, scope for the view that it approached the case on the basis that what is in issue was whether the family as a whole should be deported or not. This is at least consistent with [162] of the decision. As well, the far from obvious conclusion that deportation of Jiaxi and Jiaming would not be unjust or unduly harsh becomes more explicable if based on the approach that (i) Mr Guo's offending could be brought to bear against them on this question and (ii) a conclusion that their deportation would be unjust or unduly harsh would or might translate into a conclusion that the deportation of Mrs Hong and/or Mr Guo would likewise be unjust or unduly harsh. Such reasoning, if it did underpin the Tribunal's decision, is arguably not sound.

[23] In those circumstances we consider that there is an arguable question whether the Tribunal erred in law in concluding that it would not be unjust or unduly harsh to deport Jiaxi and Jiaming from New Zealand.

[24] We see this question as warranting a grant of leave under s 245(3) of the 2009 Act given the practical significance of the issues raised as to the application of the "unjust or unduly harsh" test to those whose liability to deportation arises through no fault of their own.

Why we differ from the Court of Appeal

[25] As we have explained, this is a most unusual appeal in that the point at issue is simply whether the appellants should have leave to appeal to the High Court against the decision of the Tribunal. We are, however, addressing this issue in the context of an appeal from a judgment of the Court of Appeal refusing leave. It is appropriate, therefore, to explain why we differ from the approach taken by that Court, albeit that, given the very particular context, this is best kept brief.

[26] The reasons why we differ from the approach and conclusion of the Court of Appeal are primarily to be found in the explanation we have given as to why we consider that leave to appeal should be granted. There is also the further consideration that the focus of the argument which was put to the Court of Appeal seems, at least on our reading of the judgment, to have been very much addressed to avoiding deportation for Mr Guo and may have obscured the merit of some of the points to be made in favour of the children.

Disposition

[27] The appeal is allowed.

[28] The appellants are granted leave to appeal to the High Court against the dismissal by the Immigration and Protection Tribunal of their appeals on the question whether the Tribunal erred in law in concluding that it would not be unjust or unduly harsh to deport them from New Zealand.

[29] We reserve all issues as to costs, including the order for costs made in the High Court. Any application in respect of costs is to be made within 10 working days.

Solicitors:
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Crown Law Office, Wellington for Respondent