IN THE SUPREME COURT OF NEW ZEALAND

SC 72/2013
[2015] NZSC 28

BETWEEN	SAMUELA FALETALAVAI HELU Appellant
AND	IMMIGRATION AND PROTECTION TRIBUNAL First Respondent
	MINISTER OF IMMIGRATION Second Respondent

Hearing:	4 March 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	A Schaaf and H N Ratcliffe for Appellant U R Jagose and J Foster for Respondents
Judgment:	26 March 2015

JUDGMENT OF THE COURT

A The appeal is allowed.

B The Tribunal's confirmation of the deportation order is quashed.

C The appeal to the Tribunal is remitted to it for reconsideration in the course of which the Tribunal is to apply the test under s 105 of the Immigration Act 1987 that is set out in paras [167] to [176] of the reasons.

D Costs are reserved. Application may be made in writing if necessary.

REASONS

Elias CJ	[1]
McGrath J	[106]
Glazebrook J	[202]
William Young and Arnold JJ	[216]

ELIAS CJ

[1] Conscientious decision-makers commonly seek to organise their exercise of statutory powers of decision according to sequences, tests, and balances which they take from close analysis of the statutory text and scheme. Such methodology allows them to demonstrate fidelity to the legislative purpose and promotes consistency and better justification of conclusions. Care is needed however, to ensure both that the methodology is consistent with the terms of the statute and that it avoids over-refinement through such elaboration, especially when contextual value-judgment is inescapable. The risk then is not only that the methodology may mask the ultimate value-judgment required with a show of objective rationality, but that it may itself compel outcomes which would not be accepted if the choice for the decision-maker was recognised to be constrained only by the need to reach the decision he or she believes to be right after taking into account all considerations contextually relevant. I think the present appeal illustrates the trap.

[2] The appellant, Samuela Faletalavai Helu, was eligible for deportation under the Immigration Act 1987 because he had committed an offence for which he was sentenced to more than 12 months imprisonment within five years of obtaining a residency permit. The offending and further subsequent offending entailed violence or aggression, although not at the higher end of the scale. After the Minister of Immigration ordered Mr Helu's deportation to Tonga, the country of his birth, he appealed under s 104 of the Act to the Immigration and Protection Tribunal.[1]

[3] The Tribunal is empowered by s 105 to quash an order for deportation "if it is satisfied that it would be unjust or unduly harsh to deport the appellant from New Zealand and that it would not be contrary to the public interest to allow the appellant to remain in New Zealand". In Mr Helu's case, the Tribunal considered that it was obliged by s 105 to undertake two sequential and distinct inquiries.

[4] The Tribunal first addressed whether it would be "unjust or unduly harsh" to deport Mr Helu by "weighing the seriousness of the offending giving rise to the deportation order and any other offending, with the compassionate factors favouring

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1 *Helu v Minister of Immigration* [2011] NZIPT 500056.

the appellant remaining in New Zealand, having particular regard to the matters set out in section 105(2)".[2] It concluded that it would be "unjust or unduly harsh" for him to be deported.[3]

[5] The Tribunal came to that conclusion, notwithstanding the violent offending against which the comparative standards of "unjust" and "unduly harsh" were to be assessed. The circumstances that weighed with it were:

- Mr Helu, 17 years old at the time of the qualifying offending and 20 years at the time of the Tribunal's decision, had lived in New Zealand since the age of six and Tonga was "culturally different and comparatively unfamiliar to him";[4]

- if deported to Tonga, Mr Helu would be permanently separated, with little prospect of even occasional visits, from his immediate family, to whom he is close and which is a "strong supportive" family;

- loss of direct contact with his family would be a significant loss to Mr Helu and damaging to his rehabilitation;

- the separation would be distressing for Mr Helu's family, especially his mother;

- Mr Helu would have no clear means of financial support in Tonga and had no relatives there apart from an aunt and her husband whom he did not know;

- Mr Helu would find it difficult to adapt to a life in Tonga isolated and without the support of his immediate family and dependent on extended family whom he does not know, particularly given his own lack of confidence and difficulty in coping with the stress that would be involved in living in an unfamiliar environment.

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2 At [7]. The factors in s 105(2) are set out at [23].
3 At [50]–[60].
4 At [56].

[6] As a second and distinct step in the s 105 determination, the Tribunal next turned to the question whether it was satisfied that it "would not be contrary to the public interest" for the appellant to remain in New Zealand". In this "public interest" inquiry it did not weigh the "compassionate factors" personal to Mr Helu and his family that had led it to find that deportation would be "unjust or unduly harsh". The considerations which had led to its conclusion that removal would be unjust and unduly harsh were treated as spent unless they were also of "public" interest and only to that extent. Only one such overlapping matter was identified by the Tribunal: a public interest (confirmed by international covenants to which New Zealand is a party) in protection of the family.

[7] The Tribunal identified as relevant to the public interest both the removal of someone who posed a risk to public safety (because of the danger of further offending) and the public interest in protecting family unity. It indicated its approach was that "[g]iven the nature of the appellant's violent offending, the Tribunal finds that only a degree of risk [of recidivism] at the low end of the scale would suffice to preclude the public interest being engaged".[5] Since the assessment of a psychologist was that Mr Helu's risk of reoffending in similar manner was "moderate", the Tribunal concluded that "the positive public interest considerations relating to the appellant's separation from his family" did not outweigh "the public interest in removing from New Zealand a person who, because of his violent offending, poses an unacceptable risk to public safety".[6]

[8] For the reasons given in what follows, I have concluded that the Tribunal erred in its approach in two principal respects.

[9] First, s 105 does not require two separate and distinct inquiries in which a conclusion that it would be unjust and unduly harsh to deport is simply a threshold qualification for a public interest determination taken without reference to all the factors that make deportation unjust and unduly harsh. The purpose of the control is that, despite the injustice or undue harshness, it may nevertheless be contrary to the public interest to allow the person to remain in New Zealand (so that the Tribunal

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5 At [65].
6 At [75].

cannot be satisfied of the condition imposed by s 105). That was the approach taken in relation to an identically structured condition in s 47(3) of the Immigration Act by this Court in *Ye v Minister of Immigration*.[7] It is an assessment that, in the context of human rights, imports proportionality analysis which cannot ignore the considerations which led to the conclusion that deportation would be unjust and unduly harsh. In concluding that *Ye* should be adhered to (so that the Tribunal must consider whether deportation is required in the public interest against the datum that it is unjust and unduly harsh), I differ from the approach taken by McGrath, Young and Arnold JJ in this Court.

[10] Secondly, the test adopted by the Tribunal wrongly constrained its inquiry into the public interest by a formula which compelled the outcome when, on the basis of a "sliding scale" of seriousness applied to prediction of re-offending, it took the view that only a low risk of recidivism would "preclude the public interest being engaged".[8] By "being engaged", it is clear that the Tribunal did not mean that recidivism above a low level was merely relevant when assessing whether it was not contrary to the public interest to allow Mr Helu to remain. Rather, risk above a low level was treated by the Tribunal as determinative because, as it said explicitly, it considered such risk "unacceptable". I do not think the approach accords with the statute. I consider the statute and the public interests in fair and humane treatment of immigrant communities and those lawfully in New Zealand require an approach less formulaic, more tailored to the facts of the individual case. In this, I come to the same conclusion as McGrath and Glazebrook JJ, with the result that the appeal is allowed on this point.

[11] In addition, I am of the view that the Tribunal's conclusion failed to take into account a number of matters that ought to have been considered either because the law requires them to be taken into account or because, in the context of the case, they necessarily bore on assessment of the public interest. In particular, the disruption to the family unit, Mr Helu's youth, and his identity and connection with New Zealand

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7 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [30] per Blanchard, Tipping, McGrath and Anderson JJ.

8 *Helu v Minister of Immigration* [2011] NZIPT 500056 at [65].

should all have been taken into account as highly relevant to assessment of whether it was contrary to the public interest to permit him to remain in New Zealand.

[12] Finally, I consider that the decision was substantively unreasonable in permitting the deportation of this young man when New Zealand was his only home and he had no real connection with the country of his birth. If Mr Helu's immigration status had been regularised while he was a child (a matter beyond his control) he would not have been eligible for deportation. And, even so, he was only just within the time frame for deportation provided for in the Act, a circumstance that is not acknowledged at all in the Tribunal's decision. The strict time limits for deportation even following criminal offending are legislative recognition that deportation of those who are settled in New Zealand impacts on human identity and human dignity. In the case of the appellant, who has no other home but New Zealand and whose offending is "home-grown",[9] deportation was in my view a disproportionate response. In this conclusion I differ from all other members of the Court, and would quash the deportation order without remitting the matter for further consideration by the Tribunal. I am of the view that, acting reasonably, it could not but conclude that Mr Helu's deportation was unjust and unduly harsh and that it was not contrary to the public interest to permit him to remain in New Zealand.

[13] Since however I agree with McGrath and Glazebrook JJ that the Tribunal erred in its approach to the decision (for reasons which differ on the correct application of s 105(1) but are in substantial agreement in respect of the "sliding scale" approach taken by the Tribunal), I join with them in the judgment to quash the Tribunal's decision and remit the matter for its further consideration.

Background

[14] Mr Helu was born in December 1990 in Tonga. He came to New Zealand with his parents and sister in 1996 when six years old, and has lived in New Zealand ever since. Two more siblings have been born in New Zealand and are New Zealand citizens. Apart from six months spent at a boarding school in Tonga at the age of 13 (an experience that was not successful and which he found alienating because of his

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9 See *Secretary of State for the Home Department v BK* [2010] UKUT 328 (IAC).

unfamiliarity with the culture and his homesickness), Mr Helu has little familiarity with Tonga. Other than a maternal aunt he does not know, he has no relatives still in Tonga. His surviving grandparents and other uncles and aunts live in New Zealand.

[15] The family entered New Zealand on temporary visas. The parents did not regularise their immigration status or that of their elder children until 23 April 2003 when the non-New Zealand nationals in the immediate family were granted New Zealand residency. Mr Helu was then 12 years old.

[16] On 11 January 2008, a month after his 17th birthday, Mr Helu participated with others in the aggravated robbery of a shop in which there was an attempt to snatch three packets of cigarettes from the hands of a shopkeeper and some chips and sunflower seeds were taken from the shelves. Mr Helu had waved a realistic-looking toy pistol and "fired" it.

[17] In May 2009, Mr Helu was sentenced for the offending committed in January 2008 to two years' imprisonment. A pre-sentence report prepared on 22 January 2009 had indicated that he was assessed at low risk of reoffending but, following its preparation, Mr Helu had committed further offences.

[18] In February 2009, while on bail awaiting sentencing for the January 2008 offending, Mr Helu committed further offences of disorderly behaviour, being unlawfully on an enclosed yard and behaving threateningly (all arising out of the same incident when the appellant, who was intoxicated, urinated in a private backyard and was confronted by the householder). In April 2009, also while on bail, the appellant committed further offences of assault with intent to rob and common assault when he punched a youth in the street (causing a black eye but no further injury) and tried to hit another. An updated sentencing report obtained before sentencing on the additional charges in May 2010 reassessed his risk of reoffending as high. For the additional offending in 2009, and after pleading guilty, the appellant was sentenced to further terms of imprisonment totalling 12 months and one week, all of which were ordered to be served cumulatively with the sentence imposed in May 2009 for the aggravated robbery and theft charges. The further offending in

2009 was not qualifying offending for deportation, because it was committed more than five years from Mr Helu's obtaining a residency permit.

Deportation

[19] Because Mr Helu was sentenced to more than 12 months imprisonment for the offending in January 2008 and because it occurred two months short of the fifth anniversary of his obtaining a resident's permit, he became eligible for deportation on the order of the Minister of Immigration under s 91(1)(c) of the Immigration Act.

[20] Section 91 is contained in Part 4 of the Act which is headed "Deportation of criminal offenders". Section 91(1) provides:

> **91 Deportation of holders of residence permits following conviction**
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> (1) Subject to sections 93 , 93A and 112 of this Act, the Minister may, by order signed by the Minister, order the deportation from New Zealand of any holder of a residence permit who—
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> (a) is convicted (whether in New Zealand or not) of an offence committed at any time when that person was in New Zealand unlawfully or was the holder of a temporary permit or was exempt under this Act from the requirement to hold a permit, or within 2 years after that person is first granted a residence permit, being an offence for which the Court has power to impose imprisonment for a term of 3 months or more; or
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> (b) is convicted (whether in New Zealand or not) of 2 offences committed within 5 years after that person is first granted a residence permit, each of those offences being an offence for which the Court has power to impose imprisonment for a term of 12 months or more; or
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> (c) is convicted (whether in New Zealand or not) of an offence committed within 5 years after that person is first granted a residence permit and is sentenced to imprisonment for a term of 12 months or more, or for an indeterminate period capable of running for 12 months or more; or
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> (ca) is convicted of an offence against section 39(1) or section 39A(1) of this Act committed within 10 years after the person is first granted a residence permit.
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> (d) is convicted (whether in New Zealand or not) of an offence committed within 10 years after that person is first granted a residence permit and is sentenced to imprisonment for a term of 5 years or more, or for an indeterminate period capable of running for 5 years or more.

[21] The scheme of the Immigration Act makes it clear that deportation of New Zealand residents for criminal offending is strictly time-limited. Depending on the length of the prison sentence imposed, the qualifying offending under s 91 must have occurred within two years, five years, or 10 years of obtaining a residency permit. Further emphasis on time is found in s 93, to which s 91 is expressly subject. No deportation order can be made after six months from release from prison for the sentence imposed on a single qualifying offence or upon conviction (if no prison sentence is imposed). (In cases where eligibility depends on the commission of two offences the six months is calculated under s 91 from the date of the later release or conviction, as relevant). No power is conferred upon the Minister to order deportation of someone sentenced to an otherwise qualifying term of imprisonment for an offence after the expiry of 10 years from the date on which he or she obtained a residence permit. Had the appellant's residency status been regularised in September 1997, when his visa expired, he could not therefore have been deported under the provisions of the Immigration Act for any offence, no matter how serious, committed after September 2007.

[22] On 17 March 2010, Mr Helu, then aged 20 years, was served with an order for his deportation signed by the Minister. He appealed to the Immigration and Protection Tribunal under s 104 of the Act, which permits any person in respect of whom a deportation order is made under s 91 to "appeal to the Tribunal for an order quashing the deportation order".

[23] Under s 105, the Tribunal has power to set aside the deportation order:

> **105 Tribunal may quash deportation order**
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> (1) On an appeal under section 104 of this Act, the Tribunal may, by order, quash the deportation order if it is satisfied that it would be unjust or unduly harsh to deport the appellant from New Zealand, and that it would not be contrary to the public interest to allow the appellant to remain in New Zealand.
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> (1A) Without limiting subsection (2), in deciding whether it would be unjust or unduly harsh to deport the appellant from New Zealand, and whether it would not be contrary to the public interest to allow the appellant to remain in New Zealand, the Tribunal must have regard to any submissions of a victim, in accordance with s 105A.

> (2) In deciding whether or not it would be unjust or unduly harsh to deport the appellant from New Zealand, the Tribunal shall have regard to the following matters:
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> (a) the appellant's age:
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> (b) the length of the period during which the appellant has been in New Zealand lawfully:
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> (c) the appellant's personal and domestic circumstances:
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> (d) the appellant's work record:
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> (e) the nature of the offence or offences of which the appellant has been convicted and from which the liability for deportation arose:
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> (f) the nature of any other offences of which the appellant has been convicted:
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> (g) the interests of the appellant's family:
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> (h) such other matters as the Tribunal considers relevant.

[24] The circumstances the Tribunal must consider under s 105(2) also emphasise matters of time. It identifies as mandatory considerations "the appellant's age" and "the length of the period during which the appellant has been in New Zealand lawfully". These constitute legislative recognition that lapse of time of itself may cause or contribute to deportation being unjust or unduly harsh.

The hearing in the Tribunal

[25] The Tribunal heard evidence from Mr Helu and members of his family and received letters on his behalf from his church and from an employer. It also obtained a psychological assessment from Mr Woodcock, an experienced clinical psychologist, who took the view that the appellant was at "moderate" risk of reoffending. I summarise the evidence set out in detail in the Tribunal's decision.

[26] In his evidence, the appellant described his early years, his offending, his drinking (to which he attributes his offending), and the influence of his friends. He obtained little in the way of qualifications from his schooling. Although he had been in trouble before, he said he had never expected to end up in prison and had hated the experience. He described how he had grown closer to his family during his imprisonment.

[27] In prison, Mr Helu had completed a foundation course to improve his literacy and had undertaken some occupational training that he hoped might lead to his obtaining training and employment as a carpenter on his release.

[28] The Tribunal recorded Mr Helu's reaction to his deportation to Tonga:

> [16] As for the prospect of having to return to Tonga, the appellant does not think he could cope. He has lived in New Zealand most of his life and all of his family are here. The only extended family he knows who still live in Tonga are a maternal aunt and her husband and their children. He assumes they would have to take him in. He does not know what he would do for employment.

[29] Mr Helu's mother confirmed that the only member of her immediate family still living in Tonga is a sister. Her mother, the appellant's grandmother, and a brother live in New Zealand. The family purchased their own home in 2001. It has struggled financially, but paid for the appellant to attend boarding schools in Tonga and New Zealand in an attempt to get him away from his friends and improve his behaviour. The mother, who had worked as a primary school teacher in Tonga, worked in New Zealand as a nurse-aid up to 80 hours a week before having a stroke in 2005. At the time of the Tribunal hearing she was studying for a Diploma in Business Administration, in an attempt to improve her employment options. She attributes the appellant's behavioural problems to his immaturity and choice of friends. She spoke of how he had matured while in prison and had become closer to his family. The family wanted to support the appellant and had taken steps to try to find employment for him in anticipation of his release from prison. She hoped to encourage her son to undertake further study. Mrs Helu expressed deep distress at the prospect of the appellant's deportation to Tonga. As the Tribunal recorded:[10]

> His imprisonment has been hard enough for her to bear, but she has at least been able to see him regularly. It would not be possible for the family to financially assist the appellant in Tonga, nor could they afford for her and other family members to visit him there. Mrs Helu has been affected emotionally, physically and spiritually by her son's imprisonment and the stress of how he will survive in Tonga is something she cannot face.

[30] The appellant's father confirmed that all his immediate family have permanently left Tonga. His mother and two sisters live in New Zealand (further

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[10] *Helu v Minister of Immigration* [2011] NZIPT 500056 at [22].

siblings are in Australia and the United States). A sister who was adopted out when a baby still lives on an island in the Ha'apai group, where the family originated and where it still has land but no habitations or plantations. The father acknowledged his relationship with the appellant, his oldest son, had been difficult because of his behaviour. He had however visited him regularly in prison and considered that his son had changed. They are now much closer.

[31] Mr Helu's 21 year old sister also expressed the view that Mr Helu's attitude has changed as a result of his imprisonment. She described him as having struggled with low self-esteem in the past but thought he had become more confident and confirmed he was now closer to his father. The sister described the appellant's imprisonment as having been hard for the family. Her perception is that he would not be able to survive by himself if deported to Tonga. The sister expressed concern for her mother if the appellant is deported. She thinks her mother blames herself for what has happened:

> [27] … At first she just sat in her room crying, she would not talk or go to church and appeared detached from what was happening around her. After about a month, when she was able to visit the appellant in prison, she began to improve. Her mother has already had a stroke and the stress of the appellant's deportation will adversely affect her physical and mental health.

[32] The psychologist, Mr Woodcock, prepared a report for the Tribunal on the instructions of Mr Helu's counsel. It addressed "Mr Helu's risk to the community … in regards to his propensity to violent behaviour". In preparing the report, Mr Woodcock drew on a probation report prepared in about May 2010 for the purposes of parole, for which Mr Helu was eligible from 19 May 2010. He also reviewed the sentencing notes of 20 May 2009 and 27 November 2009 and the summary of criminal history provided by the Police. In addition, Mr Woodcock undertook a clinical interview with Mr Helu and administered psychometric testing to him. He made assessment of the likelihood of his reoffending based on the Historical Clinical Risk Management-20 test (HCR-20). Mr Helu was at the time of the interview and tests still in prison.

[33] The May 2010 Probation report advised that Mr Helu had scored 0.70031 on the Roc/RoI assessment for risk of reoffending which, on a scale of 0 to 1 put

Mr Helu at a 70 per cent risk of reoffending. The Roc/RoI assessment is a statistically-based measure of likely recidivism. Risk factors include youth and number and type of offences. The report-writer noted that Mr Helu had not completed any programmes to address his offending needs of "violence, alcohol and drugs, and offending supportive associates" although he was "waitlisted" to attend the Special Treatment Unit programme. The Probation Services supported programmes before his release and noted that there was little suitable post release support of this sort available.

[34] Mr Helu's parents, with whom he would live on release, had been interviewed by the Probation Service and were described as "a very warm and accommodating couple who are still clearly distressed by their son's situation" and who were committed to supporting him on release. The Probation Service had no concerns with the proposal that he live with his parents: "It is felt that on his release, Mr Helu will be residing in a supportive environment that will enhance his ability to comply with any conditions set by the New Zealand Parole Board." Under the heading "relationships" the report-writer noted that "Mr Helu will be well supported by his parents. Mrs Helu also advised that his grandparents live close-by, as well as other family members who are prepared to extend their support to him on his release."

[35] Mr Woodcock found no indications at interview of disordered thinking and Mr Helu's attitude was described as "open and productive". The appellant's family and personal history were described in the report. His behaviour was described as having deteriorated from intermediate school years when he was involved in fighting. His parents in 2003, in what Mr Woodcock described as an apparently "desperate act" to modify his behaviour, had sent him to a boarding school in Tonga and on his return to New Zealand after his suspension from Northcote College, enrolled him at a church boarding school in Auckland.

[36] Although Mr Helu had left school without qualifications, he had found employment with a construction company. His offending brought the employment to an end after four months (although there were indications in some of the material before the Tribunal that the company was prepared to have him back).

[37] The report records the appellant's description of alcohol abuse and drug taking and his description of personality traits which were impulsive and volatile. He was described as having fluctuating self-esteem and to be lacking in confidence. Peer influence had played a part in his offending. More positively, Mr Woodcock identified that Mr Helu's environment was relatively low-stress, and that his level of social support was relatively good. He commented that "the reasonably low stress environment and the intact social support system are both favourable prognostic signs for future adjustment".

[38] On the Interpersonal Reactivity Index to measure empathy, described as "a critical variable in the assessment of offenders, the analysis of that offending and, in particular, the analysis of violent offending", Mr Helu scored well against the control group. This test is said to be "a prediction of a positive outcome to therapeutic intervention" and, in Mr Woodcock's view was a positive indication of the appellant's "ability to make a successful adjustment". The appellant also scored well by comparison with the control group on tests for hostility. Again, this was "a positive prognostic sign". There was no indication of psychopathy.

[39] Risk assessment was undertaken by Mr Woodcock using the HCR-20 tool, used to make treatment decisions. Mr Woodcock explains in the report that it is less subjective and better focussed than earlier testing methods. The historical area of assessment is explained as anchoring the instrument. It contains 10 "domains": previous violence, young age at first violent incident, relationship instability employment problems, substance use problems, major mental illness, psychopathy, early maladjustment or exposure to family and social disruptions during childhood, personality disorder, failure to respond to clinical supervision or treatment in past.

[40] The clinical interview looked at lack of insight, negative attitudes, active symptoms of major mental illness, impulsivity, and unresponsiveness to treatment. Risk management measures used included the feasibility of the subject's plans, exposure to destabilising conditions (such as lack of family support or availability of alcohol and drugs), lack of personal support, refusal to attend counselling and stress.

[41] Mr Woodcock explained the use to be made of the HCR-20:

The HCR-20 does not allow for a definite prediction of violence. Predictions based on the HCR-20 are estimates of the likelihood of violence, and should be presented in terms of low, moderate, or high probability of violence. Probability levels should be considered conditional, given short- and long-term time-frames, and should be considered in relation to relevant factors the individual may encounter. These factors include situations and states of being that may dispose a person to violence or help insulate them against it. Consideration of such factors can aid in reporting the type and extent of risk presented by a person and in selecting intervention strategies intended to reduce the probability that an individual will demonstrate violence. These strategies when taken as a whole are called a risk management plan.

Ultimately, HCR-20 results are intended to provide information for decision-makers, so that criminal and mental health-related decisions can be based on the best available estimates of risk of violence.

On the basis of Mr Helu's results on the HCR-20, I would conclude that he poses a moderate risk of offending in a like manner. This risk assessment takes into consideration both the positive and negative aspects that have been identified in the body of this report (see above). They have all been factored into my HCR-20 analysis. Because one of those domain measures "substance abuse problems" the writer cannot say that his risk profile is exacerbated significantly by his abuse of substances.

CONCLUSION

Motivation for Treatment

Mr Helu's interest in and motivation for treatment is typical of individuals being seen in treatment settings, and he appears more motivated for treatment than adults who are not being seen in a therapeutic setting. His responses suggest an acknowledgement of important problems and the perception of a need for help in dealing with these problems. He reports a positive attitude towards the possibility of personal change, the value of therapy, and the importance of personal responsibility. However, the nature of some of these problems suggest that treatment would be fairly challenging, with a difficult treatment process and the probability of reversals.

If treatment were to be considered for this individual, particular areas of attention or concern in the early stages of treatment could include:

> He may have initial difficulty in placing trust in a treating professional as part of his more general problems in close relationships.

I am of the opinion that Mr Helu possesses a moderate risk of further violent behaviour/offending.

The Tribunal decision

[42] The Tribunal held that it was necessary for it to undertake sequential and distinct inquiries in applying s 105. In this, it seems to have followed High Court authority.[11]

[43] First, it considered that it was necessary for it to decide whether it was "unjust or unduly harsh" by "weighing the seriousness of the offending giving rise to the deportation order and any further offending, with the compassionate factors favouring the appellant remaining in New Zealand, having particular regard to the matters set out in section 105(2)".[12] The offending included the aggravated robbery and the additional offending committed by Mr Helu while he was on bail which entailed threatening behaviour and gratuitous aggression.

[44] The Tribunal concluded that it would be unjust and unduly harsh to deport the appellant notwithstanding the serious nature of the offending which was offending of violence (although it was accepted not to be at the higher end of the scale). It reached that view because of a number of circumstances:

> [56] The appellant came to this country when only six years old, so he has spent almost all of his formative years in this country. He will have some familiarity with Tongan culture from growing up in a Tongan immigrant family and contacts with the local Tongan community. He is also familiar with the Tongan language. However, his socialisation, education and work experience has occurred in the context of contemporary urban New Zealand culture. He spent six months at school in Tonga when aged 13-14 years and said that even at that age he found the experience alienating. If deported he will have to return to a country where he has spent comparatively little of his life, is culturally different and comparatively unfamiliar to him.
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> [57] The appellant will also be permanently separated from his immediate family with little prospect of even occasional visits from them. He is the oldest son of his parents and they look to him to play a key role in the family. His is a strong supportive family and the appellant identifies his parents as the most important people in his life. His parents believe he has matured during his incarceration and this is reflected in his expressing a motivation to address his addiction and behaviour problems. The support and encouragement of his parents and siblings will be important to his rehabilitation. To be deprived of direct contact with his family will be a

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11 See *Prasad v Chief Executive of the Department of Labour* [2000] NZAR 10 (HC); *Zanzoul v Removal Review Authority* HC Wellington CIV-2007-485-1333, 9 June 2009; and *O'Brien v Immigration and Protection Tribunal* [2012] NZHC 2599, [2012] NZAR 1033.

12 *Helu v Minister of Immigration* [2011] NZIPT 500056 at [7].

> significant loss for the appellant. It will also be distressing for his family, especially his mother.
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> [58] In Tonga the appellant would have no clear means of financial support. He expects that he will have to be taken in by his aunt's family who are strangers to him. His uncle is a builder and may be able to provide some assistance to the appellant in finding employment, but he has eight children of his own in Tonga, some now adults, and he and his wife are relatively poor. The appellant's family in this country would find it difficult to provide him with financial support given their own limited means. The appellant though, is a young healthy man, capable of working hard, so in time he could be expected to find some form of employment.
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> [59] Adapting to a life in Tonga, isolated from and without the support of his immediate family and dependent on extended family whom he does not know, will be challenging for the appellant. This is particularly so given that his history of addiction and associated self-destructive behaviours and his lack of confidence in social interactions do not equip him to cope with the stresses that will be involved in establishing a life in an unfamiliar environment.
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> [60] Weighing all of the above, the Tribunal finds that it would be unjust or unduly harsh for the appellant to be deported.

[45] As a second and separate step, the Tribunal next considered whether it could be satisfied that it "would not be contrary to the public interest" for the appellant to remain in New Zealand. This second step the Tribunal treated as turning on matters of "public" interest which were to be contrasted with the matters of personal interest relevant to its first inquiry into whether deportation would be unjust and unduly harsh. It identified "the degree of risk posed by the appellant in terms of his reoffending in like manner" as "an important factor in the assessment of public interest":

> [63] The degree of risk of future offending which the public can be expected to tolerate varies according to the severity of the offending. There is a sliding scale, in that the more serious the crime, the lower the chance of reoffending that triggers an adverse public interest finding.

[46] Although it accepted that the offending in issue was serious, the Tribunal acknowledged that it was "not at the higher end of the scale" and "not in the most serious category". Nevertheless, its approach to the public interest assessment was:

> [65] Given the nature of the appellant's violent offending, the Tribunal finds that only a degree of risk at the low end of the scale would suffice to preclude the public interest being engaged.

[47] Two matters only were identified by the Tribunal as going to the public interest and which required "weighing" in the "public interest" inquiry, because they pulled in opposite directions. They were:

- "the degree of risk of future offending which the public can be expected to tolerate" (and which the Tribunal considered varied "according to the severity of the offending", so that there was "a sliding scale, in that the more serious the crime, the lower the chance of reoffending that triggers an adverse public interest finding");[13] and

- "the public interest in family unity and treaty obligations" (which depended on whether the deportation was proportionate and necessary in the circumstances).[14]

[48] The seriousness of the offending and the impact on Mr Helu and his family of the separation his deportation would entail were therefore considered by the Tribunal at both stages of the inquiry it undertook, although only to the extent that they engaged the public interest at the second stage of the inquiry. But other considerations which had been taken into account by the Tribunal in considering whether deportation would be unjust or unduly harsh were not taken into account by the Tribunal at all in determining whether it "was not contrary to the public interest for the appellant to remain in New Zealand".

[49] Counsel for Mr Helu submitted to the Tribunal that "even a moderate rate of re-offending does not make it contrary to the public interest for the appellant to remain in New Zealand, when balanced against the compassionate features relating to his family situation".[15] The Tribunal rejected this submission. It pointed out that it had already accepted that the separation of the appellant from his family would be unjust or unduly harsh.

[50] Although the Tribunal acknowledged that the protection of family unity was itself a public interest, affirmed by arts 17 and 23(1) of the International Covenant on

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13 At [63].
14 At [72].
15 At [72].

Civil and Political Rights,[16] it pointed out that whether the rights of the appellant and his family were breached depended "on whether the appellant's deportation is reasonable, that is proportionate and necessary in the circumstances".[17] It concluded that it was "not satisfied that it would not be contrary to the public interest for the appellant to remain in New Zealand"[18]:

> [75] We must weigh the positive public interest considerations relating to the appellant's separation from his family against the public interest in removing from New Zealand a person who, because of his violent offending, poses an unacceptable risk to public safety. We find that the public interest is in favour of deportation. It follows that deportation is reasonable in this case, so no breach of New Zealand's obligations with respect to family life arises.

[51] The conclusion was inevitable. The Tribunal had indicated at the outset of the second stage of its inquiry that "[g]iven the nature of the appellant's violent offending, the Tribunal finds that only a degree of risk at the low end of the scale would suffice to preclude the public interest being engaged".[19] And the updated assessment of the likely recidivism of the appellant by Mr Woodcock (based on the HCR-20 assessment tool) was that Mr Helu posed a "moderate risk of offending in a like manner".[20]

[52] The Tribunal pointed out that Mr Helu had yet "to adequately address a key driver of his offending, namely his alcohol addiction".[21] The positive factors mentioned by the psychologist, Mr Woodcock, in his report and emphasised in submissions by his counsel (his capacity for empathy, lack of hostility and the intact social support available to him) did not displace the assessment that he remained a "moderate risk". The Tribunal considered that it had "no basis … to depart from Mr Woodcock's assessment of a moderate risk of re-offending".[22] Beyond referring to the conclusion expressed by the experienced psychologist that he assessed the appellant at "moderate" risk of reoffending, the Tribunal did not engage further with the report. Since it had indicated at the outset that only a low risk would satisfy it

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16 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).
17 *Helu v Minister of Immigration* [2011] NZIPT 500056 at [74].
18 At [76].
19 At [65].
20 At [66].
21 At [71].
22 At [71].

that it was not contrary to the public interest for Mr Helu to remain in New Zealand, that opinion was decisive.

Judicial review in the High Court and Court of Appeal

[53] Mr Helu applied for judicial review of the decision of the Tribunal. He claimed that the Tribunal erred in law in not properly taking into account arts 17 and 23(1) of the International Covenant on Civil and Political Rights, concerning the protection of the family unit from arbitrary interference. It was also said to be in error in its conclusion that the deportation complied with New Zealand's international law obligations in protecting the family unit because deportation was reasonable, being proportionate and necessary in the circumstances. In addition, Mr Helu claimed that the decision was erroneous in law because the Tribunal did not consider whether there was a breach of art 12(4) of the International Covenant on Civil and Political Rights, relating to the right of a person to enter "his own country" (and, by necessary inference, not to be removed from it). New Zealand was claimed by the plaintiff to be his own country because of his connection with it and his lack of similar connection with any other country. Mr Helu claimed that the Tribunal had misapplied s 105 in applying a "sliding scale" in which the risk of offending in like manner had dominated its assessment of the public interest.

[54] In the High Court, Toogood J took the view that the criticism of the Tribunal's approach to arts 17 and 23(1) of the International Covenant on Civil and Political Rights was not material because the Tribunal had applied the principles of protection of the family unit in reaching its decisions under both limbs of s 105.[23] The Judge was satisfied that the Tribunal had properly weighed the relevant public interest factors and that the "sliding scale" analysis was appropriate. The Tribunal had appropriately taken into account Mr Helu's youth when assessing the question whether deportation was "unjust or unduly harsh" and was well aware of that circumstance. It was not in error in not weighing it again in the public interest assessment. The application for judicial review was accordingly declined.

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[23] *Helu v Immigration and Protection Tribunal* [2012] NZHC 1270 (Toogood J).

[55] Mr Helu appealed to the Court of Appeal. Again he argued that the Tribunal had failed to properly take into account New Zealand's obligations under the International Covenant on Civil and Political Rights in relation to protection of family and the right not to be excluded from one's "own country". He argued that the Tribunal had failed properly to take into account his youth when considering the seriousness of the offending. He also maintained that it had adopted the wrong approach in assessing the public interest on the basis of assessment of risk of reoffending.

[56] The Court of Appeal approved the division of concerns between what it saw as the two limbs of s 105.[24] In assessing the "control or qualifying consideration" provided by the public interest limb, "humanitarian factors" were "not irrelevant" because they may have "public" features, so there can be overlap. But the "focus" was not the same because at that stage the Tribunal was "looking 'more sharply' at the community's interests", including such factors as the risk of reoffending.[25] With that focus, the Court of Appeal considered that the Tribunal had properly identified and weighed the public interest factors for and against deportation.

[57] The Court rejected Mr Helu's argument that art 12(4) of the International Covenant on Civil and Political Rights was engaged and that therefore it was necessary to consider the public interest in the right to maintain connection with a country properly to be regarded as Mr Helu's own. It pointed out that s 18(2) of the New Zealand Bill of Rights Act 1990, which is enacted in fulfilment of art 12(4), confines the right of entry into New Zealand to those who are New Zealand citizens. Although it acknowledged that there might be exceptional cases where it would be right to take into account the connections of non-citizens, the Court of Appeal did not think Mr Helu's case was exceptional and contrasted it with the decision of the United Nations Human Rights Committee in *Nystrom v Australia*.[26] Although there the offence of aggravated rape had been much more serious violent offending than in the present case, the offender, who had been born in Sweden (to which his mother

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[24] *Helu v Immigration and Protection Tribunal* [2013] NZCA 276 (Ellen France, Wild and Ronald Young JJ).

[25] At [43].

[26] Human Rights Committee *Views: Communication No 1557/2007 CCPR/C/102/D/1557/2007* (2011).

and sister had returned), had been in Australia since he was 25 days old. He had never visited Sweden and spoke no Swedish. He identified as Australian and while in State care from the age of 13 no steps had been taken to obtain him citizenship.

[58] The Court of Appeal also considered that the Tribunal had properly taken into account the appellant's age at the time of offending. It considered the interference with family was not disproportionate to the legitimate purposes served by removal. And it considered youth could only have been relevant when considering the public interest in his removal if it was a factor which lowered his risk of reoffending (and there was no such evidence). It held that the Tribunal had not erred in its approach to s 105 or in adoption of the "sliding scale" analysis. It therefore dismissed the appeal.

The appeal to the Supreme Court

[59] Mr Helu appeals with leave to this Court. The questions approved for the appeal are whether the Tribunal, in concluding that it was not satisfied that it would not be contrary to the public interest to allow Mr Helu to remain in New Zealand, failed to take into account all relevant considerations and applied the wrong test.[27]

[60] It is argued for Mr Helu that the Tribunal incorrectly approached the assessment required under s 105 by adopting a test that did not accord with the statute and was too rigid, particularly in artificially constraining consideration of the factors that had led it to conclude that deportation would be unjust and unduly harsh. It was contended, too, that the Tribunal failed properly to consider art 12(4) of the International Covenant on Civil and Political Rights by recognising that New Zealand is Mr Helu's "own country" and that it failed properly to take into account his age and its relevance to the protection of family contained in arts 17 and 23(1) of the Covenant.

[61] Counsel for the Minister supported the approach taken by the Tribunal. They maintained that the two limbs of the s 105 test "each … has its own threshold". The first limb is said to be "an exception to the general policy of deporting holders of

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[27] *Helu v Immigration and Protection Tribunal* [2013] NZSC 91.

residents' permits who commit certain crimes within 10 years of residence" and the threshold there is said to be a high one. The second limb is said to have "an intentionally lower threshold":

> The appellant does not have to show that his remaining is in the public interest, nor does the Crown respondent have to show that his departure is in the public interest. Neutrality is sufficient.

[62] Since however the focus in the second limb is "on the public, not the appellant", counsel for the Minister argued that "a greater than negligible risk of violent offending will weigh heavily in the balance against the appellant remaining". Counsel submitted that it was correct for the Tribunal to take as its starting point the likelihood of the appellant's reoffending and it was right for it to consider any overlapping factors between the two limbs (properly confined to those with "a public interest element") "with a different lens".

[63] Counsel for the Minister argued that this approach meant that the Tribunal was right not to take the appellant's youth into account in weighing the public interest limb because it had already been taken into account in the first limb of the test and was already factored into the risk assessment. The only way in which age would be relevant to the second limb was suggested to be if there was evidence it would reduce the appellant's risk of reoffending (and there was no such evidence). In any event, they submitted that although youth might be relevant to the public interest, it was not necessary for the Tribunal to mention youth separately. The submissions for the Minister suggested that deportation is "a sanction under the Act for some criminal convictions". The second limb of the test is said to be a deliberate control on the humanitarian exception "intended to prevent unacceptable levels of public harm". The risk of reoffending is argued to be "as a matter of logic" usually the most important factor in assessing public interest under s 105. The "sliding scale" approach has been approved by the High Court[28] and is supported by the second respondent.

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[28] *Pulu v Minister of Immigration* [2008] NZAR 429 (DRT) at [103]–[114] and by the High Court at [12].

Decision

[64] As indicated at the outset, I am of the view that the Tribunal failed properly to apply the statute in context when it excluded, as irrelevant to the public interest control in s 105(1), consideration of Mr Helu's youth, the disruption to this family, and the fact that New Zealand was Mr Helu's "own country". Further circumstances which bore upon assessment of the public interest in context were also not taken into account, because of the narrow view taken of the inquiry into the public interest. These failures to take into account relevant considerations were in my view, a consequence of errors in approach to the Tribunal's functions under s 105(1) which wrongly constrained the scope of the inquiry. These errors all contributed to a result I am unable to accept to be reasonable.

(i) The relevance of "own country"

[65] Under s 18 of the New Zealand Bill of Rights Act "everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand". While only New Zealand citizens have the right to enter New Zealand under s 18(2), s 18(4) provides:

> (4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

[66] At issue in the present appeal is whether the Tribunal's approval of the deportation order made by the Minister was lawfully made (and is therefore "a decision taken on grounds prescribed by law"). Section 18(4) of the New Zealand Bill of Rights Act is however of more general significance. It affirms that human rights are engaged in removing someone who is lawfully in New Zealand. Their observance requires removal to be justified as a proportionate response to a legitimate end which is a reasonable restriction on human rights in a free and democratic society. Removal decisions therefore take place against the background of heightened concern that is appropriate for human rights. Under s 3 of the New Zealand Bill of Rights Act the Immigration and Protection Tribunal must also observe the rights and freedoms contained in the New Zealand Bill of Rights Act in the performance of its functions under the Immigration Act.

[67] The Bill of Rights Act was enacted to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights", as the long title of the Act makes clear, the preamble to the Covenant recites the recognition in the Charter of the United Nations of "the inherent dignity of the human person". By art 2 the States party to the Covenant undertake to ensure to "all individuals within its territory and subject to its jurisdiction" the rights recognised "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

[68] Articles 12 and 13 of the Covenant deal with rights to be present in a country:

> (1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> (2) Everyone shall be free to leave any country, including his own.
>
> (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public) public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present covenant.
>
> (4) No one shall be arbitrarily deprived of the right to enter his own country.

[69] Article 13 provides that an alien who is lawfully in the territory of a State party may be expelled "only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority".

[70] In *Nystrom v Australia* the United Nations Human Rights Committee explained that the reference in Article 12(4) to "own country" is more than a reference to nationality:[29]

> It embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered

[29] Human Rights Committee *Views: Communication No 1557/2007 CCPR/C/102/D/1557/2007* (2011) at [7.4].

> to be a mere alien … there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words "his own country" invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.

[71] In giving effect to art 12(4) of the Covenant, Parliament has conferred a right to enter New Zealand only upon those who are New Zealand nationals. I do not consider however that New Zealand's obligation to recognise that a connection which makes New Zealand the "own country" of someone whose immigration status is in issue is exhausted by the specific protection of entry for its nationals. Indeed, it is clear from the scheme of the Immigration Act itself that it respects the connections between individuals and countries which are affirmed in art 12(4). The time limits to deportation even of those who have offended seriously against New Zealand's criminal laws and the mandatory considerations identified in s 105(2) of age and length of time in New Zealand are consistent with the international obligation and are statutory recognition of the importance of connection in matters to do with deportation or exclusion.

[72] Once deportation is effected, Mr Helu's residency permit is cancelled by operation of law[30] and he will be prevented from re-entering New Zealand without special authority of the Minister.[31] His right of connection with New Zealand will therefore be effectively severed.

[73] Connection with country is an aspect of human identity and dignity. And where deportation entails severing ties with an individual's "own country", in the substantive sense the United Nations Human Rights Committee confirms to be covered by art 12, it is directly relevant to the dignity of the individual and his sense of identity. The inclusion in the New Zealand Bill of Rights Act of s 18(4) and the obligation undertaken in art 12 makes considerations such as these intensely relevant to whether deportation in a particular case is a reasonable response to a legitimate social end.

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30 Immigration Act 1987, s 111.

31 Immigration Act 1987, s 7(1)(d) and 7(3)(a)(ii) and Immigration Act 2009, ss 15 and 17.

[74] Observance of human rights and international obligations are both important aspects of the public interest. I consider that the Tribunal was in error in not taking into account the facts that Mr Helu has no country of his own other than New Zealand when assessing whether it was not contrary to the public interest for him to remain in New Zealand. It is to my mind a troubling feature of the case that the Tribunal did not engage with this consideration at all in its discussion of the public interest. In part that is a result of, and indicates the artificiality of, its strictly bifurcated approach to matters relevant to the individual and matters relevant to the public interest (with which I express disagreement from paragraph [81]–[90]). But even if the focus of the inquiry at the second stage is exclusively on matters relevant to the public interest and individual circumstances are properly treated as irrelevant, it is difficult to see that an order amounting to one of banishment was not seen to engage the public interest in the observance of human rights and the public interest in humane treatment of individuals and immigrant communities.

(ii) The relevance of family and age

[75] Articles 17 and 23 of the International Covenant on Civil and Political Rights protect family. The family is recognised by art 23 to be "the natural and fundamental group unit of society and is entitled to protection by society and the State". Article 17 provides:

> *Article 17*
>
> (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks.

[76] A decision to deport which has the necessary consequence of removing someone from immediate and extended family must be justified as an interference with human rights. Observance of the international obligation to protect the family unit is a matter of public interest. And quite apart from international obligation, protection of the family is a value that runs through New Zealand law and is properly to be treated as a necessary incident of the public interest. As is the case with the human rights which bear on connection with country, there is also public interest in

ensuring that immigrant communities are not at risk of less care in protection of their family units than other members of the New Zealand community.

[77] Age is self-evidently closely connected with what it is reasonable to expect by way of protection for a family unit. When the offending occurred Mr Helu was a youth. Indeed the nature of the offending may properly be characterised as youth offending although no less serious for all that. At the time of the Tribunal hearing Mr Helu was a very young man, still clearly very dependent on his family support. The closeness of the family meant that removal of the appellant inevitably would impact on him and on the other family members.

[78] Protection of family was something the Tribunal took into account in considering the public interest only in abstraction, disconnected from the circumstances of the particular family (which it thought relevant only to the limb of its inquiry concerned with whether deportation would be unjust or unduly harsh). As is explained at paras [81]–[90], I think this sharp division of focus was wrong in approach under s 105. It also however deprives the human right recognised by the Covenant of any real content. It takes the human out of the human right. In my view the Tribunal was in error in failing to take into account the impact on Mr Helu and his family of his deportation when considering whether it was not contrary to the public interest to allow him to remain in New Zealand. Failure to take this important consideration into account skewed the assessment made.

(iii) Error in approach to s 105 determination

[79] As already foreshadowed, I consider that the Tribunal made two principal errors in approach in application of s 105(1). First, it treated the two aspects of s 105(1) as separate and distinct inquiries so that the considerations which made it unjust and unduly harsh to deport Mr Helu were treated as irrelevant to the public interest in permitting him to stay unless they were factors which had a public interest dimension, in which case they were relevant only to that extent. Secondly, its "sliding scale" approach to the seriousness of offending meant that only a low likelihood of similar reoffending would be acceptable and would outweigh the public interest in deportation.

[80] It should be acknowledged immediately that although I consider the approach taken by the Tribunal to be wrong in both respects, it followed earlier decisions by other panels which have received some measure of appellate approval.[32] The particular panel in the present case, which was very careful in its consideration of the circumstances which made it unjust and unduly harsh to order deportation of Mr Helu, is not to be singled out for criticism in following the same path.

(a) Distinct inquiries

[81] I consider it was wrong for the Tribunal to regard s 105 as requiring two distinct and separate assessments so that the factors personal to him which made it "unjust and unduly harsh" to deport Mr Helu were treated as irrelevant in the conclusion that it was not contrary to the public interest to allow him to remain in New Zealand. Although it is conceivable that in some cases there may be public interest considerations wholly extraneous to whether it is unjust and unduly harsh to permit an appellate to remain in New Zealand, such cases are likely to be highly unusual. The high standard set by the legislation ("unjust and unduly harsh") is, rather, the measure against which the Tribunal must consider whether it is satisfied that it is not contrary to the public interest to allow an appellant to stay. The control imposed by s 105 as to the public interest is not a distinct inquiry

[82] I do not therefore accept the submissions on behalf of the Minister that the control sets a "low threshold", if by that it is meant that the overall public interest in not permitting an appellant whose deportation is unjust and unduly harsh is a matter of fine balance. Nor do I accept the related submission that, in the second limb of s 105(1), "neutrality is sufficient". There is no inexorable policy of deportation of offenders in the Act and it is wrong to suggest that deportation is "a sanction under the Act for some criminal convictions".[33] The power to deport is not a sanction for criminal offending, such sanctions are provided in the criminal justice statutes.

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[32] See *Pulu v Minister of Immigration* [2008] NZAR 429 (DRT) at [103]–[114] and by the High Court at [12]; *Prasad v Chief Executive of the Department of Labour* [2000] NZAR 10 (HC); *Zanzoul v Removal Review Authority* HC Wellington CIV-2007-485-1333, 9 June 2009; and *O'Brien v Immigration and Protection Tribunal* [2012] NZHC 2599, [2012] NZAR 1033.

[33] Compare *Oto v Minister of Immigration* HC Wellington, CIV 2008-485-2183, 13 March 2009 at [82].

Rather deportation is a power provided for immigration purposes to remove those who have demonstrated they are not fit for residency.

[83] The Minister has a discretion whether to order deportation if the terms of eligibility for deportation of offenders apply. If an order is made, the Tribunal may quash it if the high threshold that deportation would be unjust and unduly harsh is met. Once that threshold is met, there is no legislative policy in deportation if the Tribunal is satisfied that it would not be contrary to the public interest for the offender to remain in New Zealand. The datum against which the Tribunal must consider whether it would not be contrary to the public interest for the offender to remain is the determination that deportation would be unjust and unduly harsh.

[84] That is not the approach taken by the Tribunal. It treated the unjust and unduly harsh determination as a hurdle which, once cleared, gave it jurisdiction to quash the Minister's order but was otherwise spent. It treated the separate public interest inquiry as starting again with the qualifying offending (already taken into account in deciding that deportation would be unjust and unduly harsh) and the risk of recidivism. Other considerations were then relevant only if and to the extent that they were matters of public interest, as opposed to "compassionate" matters personal to the offender, which had weighed most heavily in the decision that deportation was unjust and unduly harsh.

[85] I am of the view that this approach was wrong. Given that there is undoubted public interest in immigration outcomes which are not "unjust and unduly harsh", it is likely to take something exceptional if the Tribunal is nevertheless unable to be satisfied that it is not contrary to the public interest that the offender be permitted to stay. Contrary to the submission for the Minister that it is unnecessary "for the appellant to show that his remaining is in the public interest" or for the Crown respondent to show that "his departure is in the public interest", in my view the scheme of the legislation is that the Tribunal must form the view that, notwithstanding the fact that it is unjust and unduly harsh to deport the offender permitting him to remain is not contrary to the public interest. The use of the negative does not suggest "neutrality". It means, rather, that where deportation would be unjust and unduly harsh, apart only for provision for the margin of doubt

which is entailed in the Tribunal's being satisfied, the offender is not to be deported unless his remaining is contrary to the public interest. And given that human rights are engaged in such cases, such public interest consideration would have to be such as to make the deportation a proportionate and reasonable response notwithstanding that it is unjust and unduly harsh.

[86] I consider that the correct approach is that taken to the second stage of the inquiry by this Court in *Ye v Minister of Immigration.* The Tribunal must be satisfied that "despite the injustice or undue harshness, it would in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand".[34] The Court in *Ye* was unanimous in this interpretation of what was required of the Tribunal in undertaking the second, controlling, assessment required by s 47(3) of the Immigration Act, which in the public interest control is indistinguishable from s 105.[35]

[87] *Ye* endorsed a sequenced approach to the application of s 105(1). Although often convenient, strict sequencing may not in fact be required by the subsection. It scans perfectly well if the test it provides is seen as a composite one, with the conjunctive "and that" being understood in the sense in which it is often used, as expressing a consequence. On this approach, the otherwise awkward negative ("not contrary to the public interest") is intelligible in its own terms without the inversion that had to be adopted in *Ye* to make sense in the sequenced approach. On this view, which I regard as entirely tenable in construction of the provision, "not contrary to the public interest" is effectively the measure of what is unjust and unduly harsh deportation for the purposes of the subsection. Such an approach also avoids the very narrow comparator of "the seriousness of the offence" which the Tribunal was driven to use (because "unjust and unduly harsh" require some such comparison).

[88] The sequenced approach, as applied in *Ye*, is substantially the same as a composite inquiry and may be conceptually simpler. The two are substantially the same because, under a composite approach as under the sequenced approach applied in *Ye* ("despite the injustice or undue harshness, it would in all the circumstances be

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34 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [30].

35 I expressed disagreement only in relation to paragraphs [34]–[38] of the reasons of the majority, dealing with the requirement in that legislation of "exceptional circumstances".

contrary to the public interest to allow the person to remain in New Zealand"), the public interest is controlling. A sequenced test also allows for the possibility, to which I have already alluded, that there may perhaps be matters of public interest which are not readily identified with injustice or undue harshness. So I do not think a sequenced approach as adopted in *Ye* is wrong. But that is because *Ye* makes it clear that the second stage refers back to and is linked to the first stage: the public interest in deportation must be "despite" the injustice and undue harshness. The risk in adopting a two stage process while not adhering to the linkage recognised in *Ye* is demonstrated in the present case where a public interest in removal of an appellant at moderate risk of violent reoffending swamped all other considerations.

[89] The approach adopted by McGrath J does not adhere to *Ye.* Under it, the matters which have been taken into account by the Tribunal in concluding that deportation would be unjust and unduly harsh are simply matters which are "relevant" to the second stage of the inquiry and only if bearing on the public interest. The assessment that deportation would be unjust and unduly harsh is taken into account in determining the public interest in deportation only to the extent that there is a general public interest in avoiding results which are unjust and unduly harsh and only as one matter to be weighed, not as the datum against which the Tribunal is to consider whether it is not contrary to the public interest to permit the appellant to remain. In my view, the approach in *Ye* accords with the statute and ought not to be modified.

[90] The considerations which led the Tribunal to conclude that deportation would be unjust or unduly harsh are necessarily relevant in coming to the conclusion that the public interest nevertheless requires deportation. I agree with Glazebrook J that this is an assessment of proportionality in the response of deportation so that the more serious the reasons which make it unjust or unduly harsh to deport, the more serious must be the public interest factors which nevertheless favour deportation. It is antithetical to such an approach to exclude from consideration, as they were excluded here, the appellant's connection with New Zealand (and lack of connection with Tonga), his age, and the impact upon him and his family of the separation entailed.

(b) Recidivism

[91] Predictions of likelihood of reoffending, although crude, may be necessary tools in decisions to do with prisoner management and release. They are also considerations which are relevant both to whether it is unjust and unduly harsh to deport an offender and whether, nevertheless, the offender's remaining in New Zealand is contrary to the public interest.

[92] The Tribunal treated the seriousness of the offending as the starting point in considering whether deportation would be unjust and unduly harsh but did not explicitly in that exercise consider risk of reoffending. For immigration purposes (as opposed to criminal justice purposes) however it seems to me that the seriousness of offending is difficult to disengage from the appropriateness of continued residency (against which what is unjust or unduly harsh treatment in this context is measured). If, as I think, some consideration of future behaviour is inescapably bound up with deciding that it would be unjust or unduly harsh to deport, there is a danger of double-counting of the risk of future offending in a second, public interest inquiry.

[93] That danger is greatly exacerbated if in the second inquiry the risk of reoffending is de-contextualised from the circumstances which led to the conclusion that deportation is unjust and unduly harsh and assumes a dominant significance because it is measured only against other public interest factors, themselves shorn of the personal circumstances of those most affected. In supporting the approach taken by the Tribunal, counsel for the Minister indeed submitted that the risk of reoffending was "as a matter of logic usually the most important factor in assessing public interest under s 105".

[94] I consider there is no basis in the statutory scheme for predictions of risk of reoffending to be allowed to dominate the public interest control under s 105 in the way they have dominated the Tribunal's decision in the present case through removal of the context. The decision of the Tribunal was based almost entirely on assessment of risk of reoffending.

[95] That was largely brought about by the division in focus adopted by the Tribunal between "compassionate factors" personal to the appellant and his family

(relevant to whether it was unjust and reasonable for him to be deported) and matters recognised to be of public interest (and relevant to the control). Although protection of the family unit was acknowledged to be a relevant aspect of the public interest, there was no attempt to assess its importance in the context of this family. The exercise, unlike the assessment of risk of future offending, was abstracted from the circumstances of the case. It is not surprising that in the public interest balancing undertaken by the Tribunal the risk of offending dominated an abstract public interest in protection of family. There was no attempt to assess the importance of the likelihood of reoffending against the human rights interests in recognition of "own country", and the youth of the appellant and the actual family detriment entailed. There was no consideration of whether deportation was a proportionate response.

[96] The use of a "sliding scale approach" to assess the relationship between past offending and the risk of reoffending is one approved by the High Court in *Pulu v Minister of Immigration*.[36] It is supported by the submissions for the Minister. It meant that in the present case the Tribunal considered that, given the violent offending, "only a risk at the low end of the scale would preclude the public interest being engaged".[37] It considered it had no basis to depart from the expert assessment that there was a moderate risk of violent reoffending. It did not engage with the expert reports further. It did not weigh the circumstances of the particular offending (which, though serious, might properly have been characterised as youth offending and which were acknowledged to be not at the more serious end of the scale). It applied a necessarily imprecise and crude predictor of reoffending on a scale which classified the offending as serious without more. And, on the basis that it had decided that only a low risk would not be "unacceptable", its decision not to quash the deportation order was the inevitable outcome.

[97] I consider that the approach taken was not in accordance with the statutory scheme. It meant that the public interests in fair and proportionate treatment of those whose human rights were engaged were not properly addressed. It was a formula which precluded consideration of the facts of the individual case.

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[36] *Pulu v Minister of Immigration* (2008) NZAR 429 (DRT) at [103]–[114] and by the High Court at [12].

[37] *Helu v Minister of Immigration* [2011] NZIPT 500056 at [65].

Matters not taken into account

[98] Because of the approach taken, some highly relevant factors were overlooked when the Tribunal decided that it was "not contrary to the public interest" for Mr Helu to be allowed to stay in New Zealand. I can be brief in identifying them because they overlap with the other matters and have already been mentioned.

[99] The obvious factor not weighed in the public interest control was Mr Helu's identification with New Zealand and his lack of identification with Tonga. In my view it was the overwhelming human rights and immigration consideration. Mr Helu's formative years have been spent in New Zealand, all his family is in New Zealand. It required something exceptional to justify the deportation of someone who had no other home than New Zealand and whose qualifying offending was properly to be regarded as "home-grown". In *Maslov v Austria*, the European Court of Human Rights suggested that in the case of settled immigrants, where offending is committed as a juvenile, very serious reasons are required to justify deportation.[38] In such cases of "home-grown" offending, as the English Court of Appeal has recognised, there is little to be gained in deportation by way of deterrence or in maintaining the integrity of the immigration system.[39]

[100] The Tribunal did not take into account the policies in the Act which support recognition of connection and the importance of the time frames. As a child, Mr Helu was vulnerable to parental omission in regularising his immigration status. There is no consideration by the Tribunal of the time limits in the legislation, despite the facts that, if not for parental omission, Mr Helu may well not have been eligible for deportation at all for offending in January 2008 and that, in any event, he was only two months short of having been a resident for five years.

[101] It has been suggested that general deterrence is a policy of the legislation. In some cases deterrence may well be an appropriate consideration. But it too is not a consideration that can be applied out of context. It must be questioned whether deterrence is realistic in the case of a young man who believes he is a New Zealander and whose offending is properly regarded as "home-grown". Mr Helu's youth was

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38 *Maslov v Austria* (2008) 47 EHRR 20 (ECHR) at [75].

39 *Secretary of State for the Home Department v BK* [2010] UKUT 328 (IAC) at [14].

excluded from consideration of the public interest control. Indeed, because of the emphasis on likelihood of reoffending and the suggestions that youth could only be relevant to the public interest if there was evidence it would reduce the risk of reoffending, his youth could only have been a factor in favour of deportation. That is because in both the Roc/RoI measurement the HCR-20 tool, youth is a significant risk factor (reflecting the statistics of the age profile of offenders).

[102] It strikes me as a perverse outcome that a youthful offender, whose formative years have been spent in New Zealand, should be more readily deported on such reasoning than an older offender. Youth may not be a decisive circumstance but it is unarguably a relevant consideration in determining whether deportation is a proportionate response to offending.[40]

[103] As has been discussed, family unity considerations were taken into account not in the circumstances of and as they applied to the particular family but in abstraction because of the recognition of protection of the family unit in international covenants.

[104] All these considerations should have been taken into account by the Tribunal in deciding whether permitting Mr Helu to remain was not contrary to the public interest. They were not weighed because of the narrow view taken of the public interest.

Decision was unreasonable

[105] If the Tribunal had properly approached its task and taken into account all relevant considerations against the background of human rights, I consider that it could not reasonably have reached the conclusion to deport. The overwhelming considerations in my view are Mr Helu's identification with New Zealand, his youth, and the family relationships that would be severed, serving no legitimate purpose of the legislation and amounting to disproportionately severe treatment of him and his family, destructive of their dignity as human beings. Such a result cannot be in the

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[40] *Maslov v Austria* (2008) 47 EHRR 20 (ECHR).

public interest. I would therefore quash the deportation order without remitting the matter for further consideration by the Tribunal.

McGRATH J

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Introduction

[106] This appeal concerns the deportation of the appellant, a Tongan citizen, who when 17 years of age, committed an aggravated robbery. The offence was committed within five years of the appellant being granted a residence permit. On the basis of that qualifying offence, for which he was convicted and sentenced to two years' imprisonment, the Minister of Immigration, acting under s 91(1)(c) of the Immigration Act 1987, ordered that the appellant be deported.

[107] The appellant appealed to the Immigration and Protection Tribunal. Under s 105 of the Immigration Act, the Tribunal had power to quash the deportation order if it was satisfied that:[41]

> … it would be unjust or unduly harsh to deport the appellant from New Zealand, and that it would not be contrary to the public interest to allow the appellant to remain in New Zealand.

The Tribunal concluded that the former of these requirements was met, but the latter was not. The Minister's order was accordingly confirmed.[42]

[108] The appellant sought judicial review. The Tribunal's decision was upheld by the High Court[43] and, on appeal, by the Court of Appeal.[44] The further appeal with leave of this Court concerns the manner in which the statutory test was applied by the Tribunal.[45]

Factual background

[109] The appellant was born in Tonga on 4 December 1990. In December 1996, he came to New Zealand with his family. Since then he has lived in New Zealand, apart from periods of four months in 2004 and two months in 2005, which he spent in Tonga, and a few weeks during a trip to Sydney in 2007. Initially, the appellant was in New Zealand under a visitors' permit. He remained without any permit from September 1997 until March 2001, when he was granted a student permit.

[110] On 23 April 2003, the appellant and his family were granted residence permits. The appellant's immediate family comprises his parents and their five children, including the appellant, all of whom live in New Zealand. Two of his siblings were born here and are New Zealand citizens.

[111] On 11 January 2008, when he was 17 years old, the appellant with others committed the aggravated robbery of a convenience store in Auckland. He presented

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41 Immigration Act 1987, s 105(1).

42 *Helu v Minister of Immigration* [2011] NZIPT 500056 [*Helu* (IPT)].

43 *Helu v Immigration and Protection Tribunal* [2012] NZHC 1270, [2012] NZAR 688 (Toogood J) [*Helu* (HC)].

44 *Helu v Immigration and Protection Tribunal* [2013] NZCA 276, [2013] NZAR 923 (Ellen France, Wild and Ronald Young JJ) [*Helu* (CA)].

45 *Helu v Immigration and Protection Tribunal* [2013] NZSC 91 [*Helu* (leave)].

a small black pistol at the proprietor and "fired" it twice. The gun was a toy but when fired made a loud noise. On 20 May 2009, following a guilty plea, the appellant was sentenced to two years' imprisonment for this offending.

[112] A pre-sentence report had assessed the appellant as being at low risk of reoffending. But while he was on bail pending sentence for the aggravated robbery, the appellant committed further offending on two separate occasions. The first incident led to charges of and convictions for disorderly behaviour, threatening behaviour and being unlawfully in an enclosed yard. On 20 May 2009, the appellant was also sentenced to seven days' imprisonment for this offending, cumulative on his two year sentence for aggravated robbery.

[113] The second incident led to charges of common assault and assault with intent to rob following an encounter with passers-by in the street. He was convicted and sentenced to 12 months' imprisonment for this offending, again cumulative on his other sentences.

[114] The aggravated robbery had taken place less than five years after the grant to the appellant of his residence permit. Conviction of the offence qualified him for deportation in the discretion of the Minister of Immigration under s 91(1)(c) of the Immigration Act. The Minister ordered his deportation on 17 March 2010.[46]

The statutory provisions

[115] At the relevant time, s 91(1)(c) of the Immigration Act provided that, subject to certain procedural restrictions not in issue in this appeal, the Minister of Immigration may order the deportation from New Zealand of any holder of a residence permit who:

> … is convicted (whether in New Zealand or not) of any offence committed within 5 years after that person is first granted a residence permit and is sentenced to imprisonment for a term of 12 months or more … [.]

[46] The order was served on the appellant on 9 April 2010.

[116] Under s 104 of the Immigration Act, a person made the subject of a deportation order under s 91(1) may appeal to the Tribunal for an order quashing it. Section 105 relevantly provides:

> **105 Tribunal may quash deportation order**
>
> (1) On an appeal under section 104 of this Act, the Tribunal may, by order, quash the deportation order if it is satisfied that it would be unjust or unduly harsh to deport the appellant from New Zealand, and that it would not be contrary to the public interest to allow the appellant to remain in New Zealand.
>
> (1A) Without limiting subsection (2), in deciding whether it would be unjust or unduly harsh to deport the appellant from New Zealand, and whether it would not be contrary to the public interest to allow the appellant to remain in New Zealand, the Tribunal must have regard to any submissions of a victim, in accordance with s 105A.
>
> (2) In deciding whether or not it would be unjust or unduly harsh to deport the appellant from New Zealand, the Tribunal shall have regard to the following matters:
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> (a) the appellant's age:
>
> (b) the length of the period during which the appellant has been in New Zealand lawfully:
>
> (c) the appellant's personal and domestic circumstances:
>
> (d) the appellant's work record:
>
> (e) the nature of the offence or offences of which the appellant has been convicted and from which the liability for deportation arose:
>
> (f) the nature of any other offences of which the appellant has been convicted:
>
> (g) the interests of the appellant's family:
>
> (h) such other matters as the Tribunal considers relevant.

[117] It is convenient at this point to set out the provisions of the International Covenant on Civil and Political Rights on which the appellant relies:[47]

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[47] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 17

1 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2 Everyone has the right to the protection of the law against such interference or attacks.

Article 23

(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

…

[118] The New Zealand Bill of Rights Act 1990 was enacted to affirm and protect human rights and freedoms in New Zealand and to give effect to the Covenant. Section 18 of the Bill of Rights Act reflects art 12 of the Covenant:

18 Freedom of movement

(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

The Bill of Rights Act does not, however, include a right to privacy or to family life of the kinds in arts 17 and 23 of the Covenant.[48]

The appeal to the Tribunal

[119] The appellant appealed to the Tribunal against the deportation order under ss 104 and 105 of the Immigration Act. The Tribunal heard evidence from the appellant, his parents, a sister and a brother and received supporting letters from senior members of his family's church and one of the appellant's employers. The Tribunal also considered an updated assessment of the appellant from a clinical psychologist, which concluded that he posed a moderate risk of further offending in a like manner.[49]

[120] In determining the appeal, the Tribunal first addressed whether it would be unjust or unduly harsh to deport the appellant from New Zealand having regard to the mandatory statutory criteria in s 105(2).[50] It decided that deportation would be unjust or unduly harsh, principally because of the length of time the appellant had lived in New Zealand, his relative lack of familiarity with Tongan culture, his personal circumstances including both his previous use of alcohol and cannabis, the effects on him, his rehabilitation and his family of a permanent separation, the limits imposed by his and his family's likely financial circumstances and the difficulty of adapting to life in Tonga without his family.[51]

[121] Next, the Tribunal addressed whether it was satisfied that it would not be contrary to the public interest to allow the appellant to remain in New Zealand. An important factor in that assessment was the degree of risk that the appellant would reoffend in a similar manner. On that, the Tribunal observed, "[t]here is a sliding scale, in that the more serious the crime, the lower the chance of reoffending that triggers an adverse public interest finding".[52] In applying this approach the Tribunal said:

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48 The right to be free from unreasonable search and seizure in s 21 of the New Zealand Bill of Rights Act 1990 affirms certain interests protected by art 17 of the Covenant.

49 See *Helu* (IPT), above n 42, at [8]–[30].

50 At [31]–[60].

51 See at [50]–[60].

52 At [63].

> [64] The index offending in this case is the aggravated robbery. It was serious offending, albeit not at the higher end of the scale. It did not result in any actual injury, but the threat of violence was distressing for the victim. The further two incidents which resulted in additional sentences of imprisonment involved threatening behaviour and assault. Again, they are not in the most serious category, but did involve unprovoked verbal and physical aggression. All his offending occurred while the appellant was heavily intoxicated. The appellant also has a history of, mainly minor, offending throughout his teenage years.
>
> [65] Given the nature of the appellant's violent offending, the Tribunal finds that only a degree of risk at the low end of the scale would suffice to preclude the public interest being engaged.

[122] The Tribunal next considered the public interest in protecting family unity and weighed it against the public interest in removing the appellant in particular because of the risk to public safety posed by his violent offending.[53]

[123] The Tribunal stated that whether deportation would breach the appellant's rights to recognition and support of family, in terms of arts 17 and 23(1) of the Covenant, depended on whether deportation was reasonable, in the sense that it was necessary and proportionate in the circumstances.[54] It concluded that deportation was reasonable in the appellant's case, so that no breach of New Zealand's international obligations in respect of family life arose.[55]

[124] Accordingly, the Tribunal was not satisfied that it would not be contrary to the public interest for the appellant to remain in New Zealand.[56] It confirmed the deportation order.

The High Court decision

[125] The appellant applied to the High Court for judicial review of the Tribunal's decision.[57] The basis of the challenge was that in finding that, although it would be unjust or unduly harsh to deport him from New Zealand, it would be contrary to the public interest for him to remain, the Tribunal had erred in law. The appellant argued that the Tribunal's error arose in its consideration of the Covenant and its finding that

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53 At [74]–[75].
54 At [74].
55 At [75].
56 At [76].
57 *Helu* (HC), above n 43.

deportation was reasonable and consistent with arts 12(4), 17 and 23(1). The appellant said the finding that the "moderate" risk of reoffending identified by the Tribunal posed an unacceptable risk to safety was a further error.

[126] In his judgment, Toogood J described the Tribunal's decision as "comprehensive and careful".[58] Although no express reference had been made to New Zealand's obligations under the Covenant in considering whether it would be unjust or unduly harsh for the appellant to be deported, by acknowledging the family break-up that would follow deportation, the Tribunal had recognised the principles in arts 17 and 23(1) in reaching its decision.[59] It had also revisited these concerns more expressly in its assessment of the public interest.[60] Overall, Toogood J was satisfied that the Tribunal's treatment of New Zealand's international obligations was appropriate.[61]

[127] Toogood J was also satisfied that the Tribunal had given appropriate weight to the relevant public interest factors and was entitled to adopt a "sliding scale" approach to the gravity of offending and future risk in assessing the requirements of the public interest.[62] The Tribunal had also properly considered the appellant's youth.[63] Overall, the Tribunal's conclusion that the risk of his reoffending justified deportation had a proper basis.

The Court of Appeal decision

[128] The appellant appealed to the Court of Appeal.[64] The grounds of his appeal concerned whether proper effect had been given to Covenant rights, whether the Tribunal took proper account of the appellant's age, and whether the Tribunal had taken too formulaic an approach to the assessment of risk relevant to the public interest.[65]

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58 At [34].
59 At [36].
60 At [44].
61 At [47].
62 At [37]–[43] and [47].
63 At [47].
64 *Helu* (CA), above n 44.
65 At [22].

[129] The Court identified underlying principles that had emerged from cases considering s 105 and other similar provisions involving discretionary decisions in immigration or related legislation:[66]

> (a) The reference to the public interest is intended to impose a control or a qualifying consideration. In other words, the fact deportation raises humanitarian concerns is not the end of the inquiry.
>
> (b) Humanitarian factors are not irrelevant in the consideration of the public interest because those factors may have "public" features.
>
> (c) The focus however is not exactly the same because the Tribunal is looking "more sharply" at the community's interests in the second limb. Hence, the Tribunal will look at factors such as the appellant's risk of reoffending.
>
> (d) The Tribunal will need to consider the public interest in the particular case; it is not a "generic focus on the public interest".

[130] The Court of Appeal saw the Tribunal's approach as consistent with these underlying principles.[67] The Tribunal had accepted that humanitarian concerns might be relevant in assessing the public interest. In doing so it had recognised that protecting the family was a social benefit and in the public interest. Thereafter it had made its assessment under the Immigration Act by weighing all public interest factors telling against deportation against those which favoured it.[68]

[131] In response to the submission that the Tribunal erred in not considering art 12(4) of the Covenant, the Court of Appeal said that s 18(2) of the Bill of Rights Act confines the protection to New Zealand citizens only.[69] To the extent that art 12(4) may protect persons who are not New Zealand citizens, this would be limited to "exceptional" cases where there were special ties to New Zealand, but these were not present in the appellant's case.[70] The Court's analysis on this point involved consideration of the jurisprudence of the United Nations Human Rights Committee, including the case of *Nystrom v Australia*.[71]

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66 At [43] (citations omitted).
67 At [44].
68 At [42].
69 At [28].
70 At [29].
71 At [27] and [30]–[35], discussing Human Rights Committee *Views: Communication No 1557/2007 CCPR/C/102/D/1557/2007* (2011) [*Nystrom v Australia*].

[132] In addressing the submission that the Tribunal erred in its approach to arts 17 and 23 of the Covenant, the Court of Appeal considered cases decided under art 8 of the European Convention of Human Rights,[72] which states that there is to be no interference with the right to respect for family life except "such as in accordance with the law and necessary in a democratic society". The Court discussed criteria seen by the European Court of Human Rights as relevant to when deportation will be an interference with family life that is necessary in a democratic society.[73] The criteria were the nature and seriousness of the offence, the length of the applicant's stay in the host country, the time that had elapsed since the offence was committed and the applicant's conduct during that period and the solidity of social cultural and family ties with the host country and with the country of destination. The European Court also saw the age of the person concerned as relevant when applying these criteria.[74]

[133] The Court of Appeal also referred to the opinion of the United Nations Human Rights Committee that deportation could be regarded as an arbitrary interference with family life if, in the circumstances, the separation of the individual from family was disproportionate to the objectives of removal.[75]

[134] The Court of Appeal saw the analysis required by s 105 as encompassing the sort of factors identified by the European Court of Human Rights and Human Rights Committee. It concluded that the Tribunal had effectively addressed those factors. It also agreed with the High Court that the weight to be given to such criteria would vary according to the circumstances.[76]

[135] The Court of Appeal saw no error in the way in which the Tribunal had considered the appellant's age at the time of his offending.[77] Nor did it have any difficulty with the Tribunal's "sliding scale" approach, which had involved

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72 Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953).

73 *Helu* (CA), above n 44, at [45]–[50].

74 *Maslov v Austria* (1638/03) Grand Chamber, ECHR 23 June 2008; and *Balogun v United Kingdom* (60286/09) Section IV, ECHR 10 April 2012.

75 Human Rights Committee *Views: Communication No 1959/2010* CCPR/C/l02/D/1959/2010 (2011) [*Warsame v Canada*].

76 *Helu* (CA), above n 44, at [51]–[53].

77 At [54]–[56].

consideration of the circumstances of the particular case.[78] Accordingly, it dismissed the appeal.

Issues and submissions

[136] This Court granted the appellant's further application for leave to appeal on the following questions:[79]

> (a) Did the Immigration and Protection Tribunal, in assessing whether it would not be contrary to the public interest to allow Mr Helu to remain in New Zealand:
>
> (i) fail to take into account all relevant considerations; or
>
> (ii) apply the incorrect test.
>
> (b) Even if either or both of those questions are answered in the affirmative would the Tribunal nevertheless necessarily have come to the same decision, given its findings of fact?

[137] In this Court, the appellant submitted that the Tribunal had failed to properly consider art 12(4) of the Covenant. The Tribunal had also failed to give proper consideration to the appellant's age when he committed the qualifying offence, which the appellant says is relevant to whether or not deportation would breach the rights in arts 17 and 23(1) of the Covenant.

[138] Counsel for the appellant also submitted that the Tribunal applied the incorrect test in assessing the public interest. As well as challenging the Tribunal's consideration of New Zealand's international obligations, counsel for the appellant submitted that the "sliding scale" approach to the risk of reoffending in assessing the public interest was too rigid. In particular, it left insufficient room to weigh humanitarian factors such as the closeness of an offender's ties to New Zealand.

[139] Finally, counsel for the appellant submitted that, had the Tribunal taken the correct approach, it would not have reached the same decision.

[140] Counsel for the respondent Minister submitted that the Tribunal had correctly applied the test in s 105. The respondent supported the Tribunal's use of the "sliding

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78 At [62].
79 *Helu* (leave), above n 45.

scale" as a legitimate approach to assessing the risk of reoffending and whether it would be contrary to the public interest for the appellant to remain. The sliding scale approach had not been applied in a formulaic way and the Tribunal had considered the appellant's particular circumstances.

[141] The respondent also submitted that the Tribunal properly observed the requirements of the applicable international instruments. Article 12(4) of the Covenant was not applicable because New Zealand is not the appellant's "own country". The Tribunal had given proper consideration to arts 17 and 23(1) of the Covenant. The Tribunal had properly considered the appellant's age at both stages of the s 105 inquiry. While the appellant's age was relevant, it could not be determinative, particularly given the violent nature of the offences and the risk of reoffending.

[142] It was the respondent's case that, even if the Tribunal has erred in some way, it would, on a correct approach, nevertheless have reached the same outcome.

International obligations and New Zealand legislation

[143] Parliament takes differing approaches to the implementation of international obligations.[80] It sometimes gives them effect by incorporating their exact terms into New Zealand law. At other times, it enacts legislation, with the purpose of giving effect to such obligations, using language which differs from the terms or substance of the international text. In such cases, the legislative purpose is that decision-makers will apply the New Zealand statute rather than the international text. Resort may still be had to the international instrument to clarify the meaning of the statute under the long-established presumption of statutory interpretation that so far as its wording permits, legislation should be read in a manner consistent with New Zealand's international obligations.[81] But the international text may not be used to contradict or avoid applying the terms of the domestic legislation.

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80 See Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996).

81 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]; and *New Zealand Airline Pilots Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289.

[144] Accordingly, if the legislation confers a discretion in general terms, without overt links to pertinent international obligations, the application of this principle of consistency may, depending on the statute and, in some instances, the nature of international obligation,[82] require that the power is exercised in a manner consistent with international law.[83] Or it may require that a decision maker take into account particular considerations arising from international instruments to which New Zealand is a party.[84] If, however, Parliament has provided that a decision-maker is to have regard to specific considerations drawn from international obligations, the legislation must be applied in its terms, although they may be clarified by reference to the international instrument.

[145] There is an important feature of the international obligations relevant in the present case.[85] Article 12(4) of the Covenant says that no person should be "arbitrarily" deprived of the right to enter his or her own country. Similarly, art 17 protects only against "arbitrary" interference with a person's family and home.[86] Therefore, the interpretive presumption of consistency does in respect of those obligations not require New Zealand legislation to be interpreted in such a way as to give absolute protection to a person's ability to enter his or her own country or of a person's family life. The individual's interests are rather to be protected from any interference that is arbitrary.

Section 18 of the Bill of Rights Act

[146] With these fundamental principles in mind, we first consider the scope of s 18 of the Bill of Rights Act. To the extent that s 18 is relevant, it must inform the interpretation and application of s 105 of the Immigration Act.[87]

[147] Section 18(2) incorporates into New Zealand law the protection given by art 12(4) of the Covenant. It is expressed in a way that gives the right of entry into

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82 See *New Zealand Air Line Pilots' Association Inc*, above n 81.

83 See Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

84 See *Ye*, above n 81, at [24]–[25]; and *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266 per Cooke P.

85 Set out above at [117].

86 In contrast, article 23 is not qualified in its terms.

87 New Zealand Bill of Rights Act, s 6.

New Zealand only to New Zealand citizens. Article 12(4) is arguably wider in its scope as it is expressed in terms of a person's right to enter "his own country".

[148] The United Nations Human Rights Committee has stated that the scope of "his own country" is broader than the concept of nationality.[88] In *Nystrom v Australia*, the Committee held that the applicant's rights under art 12(4) had been breached by his expulsion from Australia, even though he was not an Australian citizen.[89] The Committee in its majority opinion said that the art 12(4) right:[90]

> … embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. In this regard, it finds that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words "his own country" invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.

In that case, the Committee was satisfied that, in light of the applicant's "strong ties", with Australia, it was "his own country" within the terms of art 12(4).[91]

[149] But even if the right protected by the Covenant is broader, s 18(2), which was enacted with the purpose of incorporating the Covenant provision in New Zealand domestic law,[92] is expressed in terms which cannot be given a meaning that extends the right to an appellant who is not a New Zealand citizen although he or she has lived the greater part of his or her life here. This is so even on a generous and purposive approach to its interpretation.[93]

[150] Under s 18 of the Bill of Rights Act, the rights to freedom of movement and residence in New Zealand of those who are not New Zealand citizens are not governed by s 18(2) but by s 18(4). Such persons have the right under that provision

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88 Human Rights Committee *CCPR General Comment No 27: Freedom of Movement (Art 12)* CCPR/C/21/Rev.1/Add.9 (1999) at [20].

89 *Nystrom v Australia*, above n 71.

90 At [7.4].

91 At [7.5]. See also *Warsame v Canada*, above n 75, where the Committee applied the same approach.

92 The long title of the New Zealand Bill of Rights Act states that it was enacted "to affirm, protect, and promote human rights and fundamental freedoms in New Zealand" and "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

93 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 268, quoting *Minister of Home Affairs v Fisher* [1980] AC 319 (PC).

not to be required to leave New Zealand except under a decision taken on grounds prescribed by law. The grounds on which their departure from the country may be required are set out in the Immigration Act.[94] Most relevant for present purposes are ss 91 and 105.

Section 105 of the Immigration Act

A sequential approach

[151] Under s 105 of the Immigration Act, the Tribunal must determine an appeal against a deportation order by addressing two considerations. They are whether deportation would be unduly harsh to an appellant and whether allowing him to remain would not be contrary to the public interest. This statutory formula, expressed in similar although not always identical terms, has appeared elsewhere in immigration legislation in recent years.[95] Parliament has adopted this mechanism for certain decisions made under immigration law to ensure that they comply with international humanitarian obligations. Its application, in the context of legislation providing for removal of those who remain in New Zealand after expiry of permits permitting them to be here, was addressed by this Court in *Ye v Minister of Immigration*.[96]

[152] The applicable provision for an appeal against a removal order in *Ye* was s 47(3) of the Immigration Act, which provided:

> An appeal may be brought only on the grounds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

[153] The judgment of the majority of the Court in *Ye* held:

> [30] The subsection is drafted on the basis of two sequential considerations. The first step is to determine whether there are exceptional

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94 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [16.5.14].

95 See s 63B(2) of the Immigration Act 1987, repealed in 1999 by s 34 of the Immigration Amendment Act 1999 and s 47(3) of the Immigration Act 1987. The current version of the Immigration Act also has a similar provision: s 207 Immigration Act 2009.

96 *Ye v Minister of Immigration*, above n 81.

> circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person concerned to be removed from New Zealand. If that is not shown, the inquiry ends there and removal takes place. If it is shown that it would, on the statutory basis, be unjust or unduly harsh to remove the person from New Zealand, the decision maker must move to the second inquiry. This concerns whether, despite the injustice or undue harshness, it would in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand. A person seeking to avoid removal must demonstrate not only qualifying injustice or undue harshness but also that it would not be contrary to the public interest for them to be allowed to remain in New Zealand.

[154] "Despite" is a preposition of concession which refers to something contrary to expectation.[97] In the passage cited from *Ye* it carries its normal meaning of "notwithstanding" and indicates the overriding nature of the requirement to demonstrate that it would not be contrary to the public interest for a person to be allowed to stay in New Zealand.

[155] The provision considered in *Ye* differed from s 105 in that the first step under s 47(3) required "exceptional" circumstances making removal unjust or unduly harsh. Otherwise the two provisions are essentially the same, although they operated in different contexts. In interpreting s 105(1), there is no reason to depart from the sequential structure of the provision that was recognised by the Court in *Ye*, nor that aspect of its scheme which allows for the public interest consideration to prevail over a finding that deportation would be unduly harsh.

[156] The structure of s 105 also supports treating the unjust and unduly harsh limb and the public interest limb as involving two distinct considerations. Section 105(2) stipulates mandatory considerations the Tribunal must take into account "in deciding whether or not it would be unjust or unduly harsh to deport the appellant from New Zealand". It does not, however, direct that the same considerations must be considered in assessing the public interest. By contrast, s 105(1A), inserted in 2002,[98] stipulates that a victim's submissions must be considered "in deciding whether it would be unjust or unduly harsh to deport the appellant from New Zealand, and whether it would not be contrary to the public interest to allow the

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97 See RW Burchfield *Fowler's Modern English Usage* (Revised 3rd ed, Oxford University Press, Oxford, 1998) at 169-170 on "concessive".

98 By s 53 of the Victims' Rights Act 2002.

appellant to remain". Parliament contemplated that the two considerations in s 105(1) are separate, and the factors relevant at each stage may differ.

[157] Accordingly, in applying s 105, the Tribunal must first decide whether "it is satisfied that it would be unjust or unduly harsh to deport the appellant". If the Tribunal is so satisfied, it must go on to consider "whether it would not be contrary to the public interest for the appellant to remain in New Zealand". These decisions involve original inquiry by the Tribunal. While the two tests are distinct, and the outcome on neither limb is to be determinative of that on the other, the factors relevant to each overlap. Both tests must be met before the Tribunal may quash a deportation order. The standard of proof is the balance of probabilities.

Section 91 of the Immigration Act

[158] The immediate statutory context of s 105 is s 91, which provides for the making of deportation orders. Section 91(1)(c), set out above,[99] provides that a person who is convicted of an offence committed within five years of first being granted a residence permit and who is sentenced to imprisonment for 12 months or more may be deported at the discretion of the Minister of Immigration. Section 91(1) also provides that the Minister may order the deportation of a person holding a residence permit where, within two years of the permit first being granted, the person is convicted of an offence punishable by a term of three months' imprisonment or more[100] or where, within ten years of the permit first being granted, the person is convicted of an offence and sentenced to five years' imprisonment or more.[101] Part of the scheme of s 91 is accordingly that the longer a permit holder has been settled in New Zealand, the more serious the offending he or she must commit before becoming eligible for deportation.

[159] The policy considerations underlying this provision for deportation by Ministerial order are the maintenance of public safety and public confidence in the administration of the immigration system. The statutory scheme does not have a punitive or denunciative purpose. That is rather the function of the criminal justice

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99 See above at [115].
100 Immigration Act, s 91(1)(a).
101 Section 91(1)(d).

process which has been completed with the conviction and sentence of an appellant that triggers the operation of s 91. The application of s 91 nevertheless has serious impacts on those to whom it applies and the purpose of the provision for appeal to a statutory tribunal is to enable those impacts to be assessed against the overall public interest of the case.

Assessing whether deportation would be unjust or unduly harsh

[160] The first threshold that a person appealing against a deportation order must meet is that of satisfying the Tribunal that deportation would be unjust or unduly harsh. While they are separate concepts in this case the focus is on undue harshness.

[161] The Tribunal's determination of this issue will focus on a number of matters relating specifically to an appellant. Factors indicating the effect of deportation on the appellant and the family of the appellant including the unity of the family are to be considered. This is evident from the nature of the mandatory statutory considerations in s 105(2).[102] Under that subsection, regard must be had to certain personal and domestic circumstances of an appellant, including his or her work record. His or her age at the time of the Tribunal decision is important together with the length of the time during which he or she has been in New Zealand lawfully.

[162] As well, under s 105(2)(e) and (f), factors which go to an appellant's culpability are also made relevant to whether deportation would be unduly harsh. The nature of the offences committed by an appellant that bring him or her within s 91 must be considered in the decision on the first question, along with any further offences of which he has been convicted. This requires the Tribunal to assess the gravity of the particular offending and its effects, not merely the kind of offence involved. The Tribunal must assess the degree of an appellant's culpability in all the circumstances. As well, regard must be had to any submissions from a victim of such offences under s 105A.

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[102] Set out above at [116].

[163] The Tribunal is also specifically required to have regard to the interests of an appellant's family under s 105(2)(g). Finally, under s 105(2)(h) it must have regard to such other matter as it considers relevant.

[164] This is a case of the kind explained above, where Parliament has sought to give effect to New Zealand's international obligations by requiring the Tribunal to have regard to particular considerations emanating from those obligations.[103] The statutory direction in s 105(2) that the Tribunal must consider the interests of an appellant's family incorporates the protection of the family unit in arts 17 and 23(1) of the Covenant. Parliament has expressly provided that the Tribunal must take this into account in deciding whether deportation would be unjust or unduly harsh. As well, s 105(2) requires the Tribunal to consider matters such as the age, nature and seriousness of the offence, and the length of the appellant's stay in New Zealand, which have been seen as relevant to whether interference with family life will be arbitrary.[104]

[165] Similarly, the mandatory considerations in s 105(2) incorporate matters of the kind that the Human Rights Committee has considered relevant to assessing the strength of a person's ties to a country under art 12(4) of the Covenant.[105] Long residence in New Zealand, as part of a family that continues to live here, the absence of ties elsewhere, and other factors that may lead an appellant to see New Zealand as his or her "own country" are brought within the scope of the inquiry into undue harshness. So far as relevant, they must be considered by the Tribunal and, in this way, will have bearing on when a non-citizen may be required to leave New Zealand.

[166] The structure of s 105(2) accordingly requires that final assessment of whether deportation would be unjust or unduly harsh to be made in light of both the interests and circumstances of an appellant and his or her family, and the appellant's history of offending. The Tribunal's assessment of this first limb of the s 105 test is not in issue in this appeal.

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103 See above at [144].
104 See *Maslov v Austria*, above n 74; and *Balogun v United Kingdom*, above n 74.
105 See the discussion above at [148] regarding *Nystrom v Australia*, above n 71.

Assessing the public interest

[167] There is an underlying policy in the Act that those who commit serious crimes while in New Zealand under a residence permit become eligible for deportation and will be deported if the Minister so directs. Where, however, deportation would be unjust or unduly harsh the Act provides for a humanitarian exception to the application of the policy on an appeal against the Minister's decision. But there is also a control on the operation of the humanitarian exception which involves a further and separate inquiry by the Tribunal into the public interest.[106] Although qualifying injustice or undue harshness has been shown, before it can allow the appeal the Tribunal must also be satisfied of the further requirement that it "would not be contrary to the public interest to allow the appellant to remain in New Zealand".

[168] This test is to be applied in those terms. In applying it the Tribunal is required to make an overall judgment of the circumstances. Its assessment of the likelihood of recidivism and the nature and seriousness of prospective future offending will be important factors. In the end the Tribunal must be satisfied that it is not contrary to the public interest for the appellant to remain in New Zealand before a finding favourable to the appellant can be made. If it is so satisfied it must allow the appeal.

[169] The earlier finding that deportation would be unjust or unduly harsh is not irrelevant to the decision as to whether it would be contrary to the public interest for an appellant to remain. Matters that were relevant to the finding that it was unjust or unduly harsh to deport the appellant must be considered in assessing the public interest where they are relevant to it, along with the general public interest in avoiding unjust or unduly harsh outcomes. However, the consideration given to the finding that deportation would be unjust or unduly harsh may not undermine the function of the second public interest inquiry as a control on the humanitarian test that the first limb of s 105(1) sets out.

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[106] See *Prasad v Chief Executive of Department of Labour* [2000] NZAR 10 (HC), per McGechan J.

[170] By contrast with the first limb of s 105(1), Parliament has not prescribed in the Immigration Act factors that must be considered in assessing whether it would be contrary to the public interest for an appellant to remain in New Zealand. What considerations are properly relevant to the exercise of the Tribunal's discretion at this stage must be ascertained in accordance with the principles of statutory interpretation and administrative law, particularly those set out above.[107] The terms of s 105(1) direct that the focus at this second stage of the Tribunal's process will accordingly be on the community's interests. While some of the same factors as have been considered in assessing whether deportation would be unjust or unduly harsh will fall for consideration, in this step they are to be viewed through a different lens. International obligations, or the interests they protect, fall to be considered to the extent that the language of s 105(1) permits: that is, to the extent that they affect the public interest.

[171] For example, while the members of a family have a private interest in maintaining its unity, there is also a public interest in maintaining the unity of families which contributes to the well-being and stability of the community. The Tribunal must accordingly address the interests of an appellant's family and the interests of the appellant in not being separated from his or her family as they relate to the public interest in the individual case. This reflects the affirmation in art 23(1) of the Covenant of the importance of the family unit.

[172] Similarly, in cases engaging their situation, the position of children or young persons, including in relation to their families, will be relevant because of the particular public interest in the protection of young members of society, which is affirmed both by domestic legislation and the United Nations Convention on the Rights of the Child.[108]

[173] A key factor in the assessment of where the public interest lies is the risk of recidivism: future offending by an appellant. It is a factor which will count against an appellant. Further punishment of an appellant is not part of the purpose of s 105 and is accordingly not relevant. The consideration of past offending in relation to the

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[107] See above at [143]–[144].

[108] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

public interest is rather focused on the likelihood and likely gravity of offending in the future, including the likelihood of escalation of offending. While the nature of past offending and an appellant's culpability will often helpfully inform assessment of the future risk, it should not be permitted to displace assessment of the risk of future offending or harm to the public.

[174] The Tribunal's decisions indicate that it sometimes adopts, as it did in respect of the appellant, a "sliding scale" approach to assessing the impact of the risk of reoffending on the public interest under which "the more serious the crime, the lower the chance of reoffending that triggers an adverse public interest finding". I accept that a sliding scale approach can be useful in assessing the public interest. If future offending is likely to be serious, then a lower probability of reoffending may carry significant weight in assessing the public interest. The converse is also true, because the public interest may tolerate a higher risk of less serious reoffending.

[175] This form of sliding scale approach can accordingly properly provide some assistance as long as it is applied in consideration of the particular case, as it affects the public interest, and not in a rigid way. It is not, however, in itself a means of determining the public interest and it should not be permitted to take the place of an overall evaluation of all factors relevant to the public interest of which risk of harm to the public is an important but not the only consideration.

[176] Another factor which in some cases will be relevant to the assessment of whether it would be contrary to the public interest for an appellant to remain in New Zealand is the effect of allowing him to remain on the credibility of the immigration system in the eyes of reasonable members of the public. A general concern about the integrity of New Zealand's immigration system and the policy that deportation will follow serious criminal offending will not, however, be itself sufficient to demonstrate that it would be contrary to the public interest for an appellant to stay. Otherwise, this would undermine the overall role of s 105 as the humanitarian restriction that Parliament has set on the operation of the policy in s 91, in order to give effect to New Zealand's international human rights obligations.

Conclusion on s 105

[177] Overall, and as recognised by the Court of Appeal and the High Court, the right of appeal to the Tribunal under s 105 enables a person who is subject to a deportation order to have an independent review of that decision which first involves assessing his or her individual circumstances to determine if deportation would be unjust or unduly harsh and, if that is the case, next requires examination of relevant underlying public interest considerations. By this means, Parliament has provided a statutory framework for review of decisions to deport persons holding residence permits who have committed criminal offences, in order to give effect to New Zealand's international obligations. The nature of the inquiry the Tribunal must undertake and the factors it must consider in applying s 105(1) ensure that no interference, as a result of a deportation order, with an appellant's family life or entitlement to be in New Zealand will be arbitrary, as proscribed by the Covenant.[109]

Assessment of the Tribunal's decision

The right to enter New Zealand

[178] The appellant's first submission was that the Tribunal had not taken into account that New Zealand was "his own country" which, under art 12(4) of the Covenant, he had a right to enter and, implicitly, to remain in. Parliament has given effect to the art 12 right in s 18 of the Bill of Rights Act in terms that give an absolute right to enter New Zealand only to New Zealand citizens. On the basis explained above,[110] the Tribunal was not required to consider the international instrument. It is accordingly not necessary to consider the meaning of the words of art 12(4) or to address the views expressed on that point in *Nystrom v Australia*. I would, however, add that I agree with the Court of Appeal that the facts in *Nystrom* differed significantly from those in the present case.

[179] The rights of those who are not New Zealand citizens are accorded protection under s 18(4) and it is not suggested that this right has been breached in this case.

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109 See above at [145].
110 See above at [143] and [146]–[150].

Articles 17 and 23(1) of the Covenant

[180] The appellant next submitted that the Tribunal did not give due consideration to arts 17 and 23(1) of the Covenant, which concern the right to be free from arbitrary or unlawful interference with family life and protection of the family as the natural and fundamental group unit of society.

[181] In considering whether deportation would be unjust or unduly harsh, the Tribunal, as directed by s 105(2)(g), addressed the humanitarian circumstances of the appellant and his family in some detail. It considered the interests of the appellant's family and the effect that deportation would have on his relationship with them.[111]

[182] Further, when considering the public interest, the Tribunal referred back to its earlier discussion and, importantly, took into account the social benefit of protecting family unity as a public interest. Articles 17 and 23(1) of the Covenant were specifically addressed.[112] The Tribunal then weighed what it described as "the positive public interest considerations relating to the appellant's separation from his family" against the public interest in removal of a person who posed an unacceptable risk to public safety. It decided that the overall public interest favoured deportation.[113] I return to this assessment shortly.

The appellant's age

[183] Another submission concerned the Tribunal's consideration of the appellant's age. The appellant was 20 years old at the time of the hearing of the appeal to the Tribunal. Age is a mandatory consideration under s 105(2)(a) and of particular relevance in cases involving children and young persons such as the appellant. It was relevant that the appellant was immature, which the Tribunal noted,[114] lacked life experience and was very dependent on his family emotionally as well as materially.

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111 *Helu* (IPT), above n 42, at [35]–[36], [46]–[48] and [57]–[58].
112 At [74].
113 At [75].
114 At [32].

[184] Although the Tribunal did not make express mention of the appellant's age in its final assessment, it was clearly fully aware of his age and the implications of it. The Tribunal identified the importance to the appellant of his family's encouragement and financial support, and the effect that deportation would have on that relationship,[115] and was also conscious of the appellant's age in evaluating the seriousness of his offending.[116] Although the Tribunal did not specifically refer to the immaturity of the appellant, it did consider the difficulty he would face adjusting to life in Tonga isolated from the support of his family, particularly because of his lack of confidence.[117] These factors contributed to the finding that deportation in his case would be unjust or unduly harsh.

[185] In deciding whether it would be contrary to the public interest for the appellant to remain in New Zealand, the Tribunal gave particular consideration to the most recent report by a clinical psychologist assessing the risk of reoffending.[118] In making that assessment, the psychologist took into account the appellant's young age at the time of offending. The psychologist, while noting the appellant's acknowledgment of his problems and positive attitude, was also concerned that treatment would be "fairly challenging", with a difficult process and the possibility of reversals.[119]

[186] The Tribunal gave independent consideration to whether there was any reason to depart from the psychologist's risk assessment and decided that there was no reason to do so.[120] Counsel for the respondent pointed out that there was no evidence before the Tribunal that the appellant's age would reduce the risk of future reoffending. While the Tribunal considered the psychologist's report, which had taken into account the appellant's age as it related to the risk of reoffending, this was not the only way in which the appellant's age may have engaged the public interest.

[187] As the Tribunal had acknowledged, the appellant was dependent upon his family emotionally and financially and would face difficulties adjusting to life in

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115 At [57]–[58].
116 See at [41], [43] and [54].
117 At [59].
118 See at [66].
119 At [67].
120 At [71].

Tonga because he lacked confidence.[121] There was also evidence that the appellant's parents had "until recently" considered him to be "relatively immature".[122] Those factors might count in the assessment by engaging the public interest in the protection of young people. Although the appellant was, aged 17, a "child" in terms of the Convention on the Rights of the Child at the time of the offending, he was 20 years old at the time of the Tribunal's decision, and accordingly was no longer, in legal terms, a child or young person. I see no error in failing to give the appellant's age broader consideration than the Tribunal did in assessing whether it would be contrary to the public interest for him to remain in New Zealand.

Sliding scale approach

[188] The final submission of the appellant is that the Tribunal's approach was formulaic and too rigid, in particular its use of the sliding scale approach. The appellant's argument was that the sliding scale approach adopted by the Tribunal was not appropriate given the special circumstances in this case, such as the age of the appellant and the length of time he had spent in New Zealand. Before the Tribunal, the appellant's counsel had submitted that the moderate risk of reoffending should be balanced against "the compassionate features relating to his family situation".[123]

[189] To the extent that the appellant's argument is based on a reading of s 105(1) that would balance the factors leading to a finding that deportation would be unjust or unduly harsh against the public interest factors favouring deportation, it is not sound. This is not what the Immigration Act provides for. As indicated above, the individual circumstances of an appellant are only relevant at the second stage to the extent that they bear on the public interest.[124] In assessing the public interest, the Tribunal referred to the fact that it had found that separation of the appellant from his family would be unjust or unduly harsh. It considered again the humanitarian factors that led to that finding which indicates that it saw them as relevant to the family considerations that had a public interest.[125] This approach was in accordance with

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121 See above at [184].
122 See above at [183].
123 *Helu* (IPT), above n 42, at [72].
124 See above at [169]–[170].
125 *Helu* (IPT), above n 42, at [73]–[74].

what s 105(1) requires, which is a focus on considerations that affect the public interest rather than the personal interests of the appellant and his family.

[190] The Tribunal stated its sliding scale approach in the following terms:

> [63] The degree of risk of future offending which the public can be expected to tolerate varies according to the severity of the offending. There is a sliding scale, in that the more serious the crime, the lower the chance of reoffending that triggers an adverse public interest finding.

[191] The Tribunal described the gravity of the appellant's past conduct as "serious offending, albeit not at the higher end of the scale".[126] It considered that:

> [65] Given the nature of the appellant's violent offending, the Tribunal finds that only a degree of risk at the low end of the scale would suffice to preclude the public interest being engaged.

The Tribunal then assessed the risk of the appellant reoffending "in like manner" with reference to the assessment of the clinical psychologist and, as already indicated, saw no reason to depart from the psychologist's view that there was a "moderate risk of re-offending".[127] In this respect, by referring to the risk of offending "in like manner", the Tribunal properly used the nature of the appellant's past offending to indicate the possible nature of any future offending.[128]

[192] But the Tribunal's earlier reference to a sliding scale under which the more serious the crime, the lower the chance of re-offending that "triggers an adverse public interest finding" suggests that the public interest turns solely on the risk of future offending. This was inappropriate. Such an approach is too simplistic a way of determining where the public interest lies. A better approach, as explained above,[129] is that a sliding scale assessment of the gravity and probability of future offending may helpfully indicate the weight to be given to the risk of reoffending when assessing the public interest.

[193] In reaching its decision on the public interest, the Tribunal first set out the main reasons why it had found that separation of the appellant from his family would

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126 At [64].
127 At [66] and [71].
128 See above at [172].
129 See above at [174]–[175].

be unjust or unduly harsh. He had been living in New Zealand with his family, to which he was closely bonded, since he was six years old. In his personal circumstances, coping with an unfamiliar society without the support of his family would be difficult for the appellant. It was appropriate for the Tribunal to remind itself of its finding that deportation would be unjust or unduly harsh as that decision is part of the context in which the public interest is to be addressed.

[194] The Tribunal took into account, correctly, that "the social benefit of protecting family unity" is relevant to the public interest under s 105(2). It also considered the rights in arts 17 and 23(1) of the Covenant to be free from unlawful or arbitrary interference in family life and to support for the family as the fundamental unit of society.[130] These rights were relevant to the extent that they relate to the public interest, rather than the individual appellant's interests, as is the proper focus at this stage of the s 105(1) determination.

[195] The Tribunal, however, decided that, while those factors weighed in favour of allowing the appellant to remain in New Zealand, they were outweighed by the risk that he presented. In the Tribunal's words:

> [75] We must weigh the positive public interest considerations relating to the appellant's separation from his family against the public interest in removing from New Zealand a person who, because of his violent offending, poses an unacceptable risk to public safety. We find that the public interest is in favour of deportation. It follows that deportation is reasonable in this case, so no breach of New Zealand's international obligations with respect to family life arises.

[196] The Tribunal was here, properly, seeking to balance the positive and negative public interest factors relevant to whether the appellant should be allowed to remain in New Zealand. But in its decision, the Tribunal had already concluded that the risk to public safety was "an unacceptable risk" because it was "moderate" rather than "a risk at the low end of the scale".[131] This finding precluded the Tribunal from giving due weight to both values in determining the overall public interest.

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130 *Helu* (IPT), above n 42, at [74].

131 See above at [191].

[197] In the circumstances of this case, the public interest in family unity carried considerable weight because of the unusual circumstance that s 91 of the Immigration Act had been applied to someone who had lived in New Zealand with his family since his early childhood. The risk of reoffending in a similar manner had to be assessed and weighed against that factor. But by treating the "moderate" risk of reoffending as "unacceptable", a determination which it reached as a consequence of applying the sliding scale, the Tribunal erred and as a result distorted the balancing process it had otherwise properly undertaken.

[198] Finally, I note that, in assessing the public interest, the Tribunal did not expressly have regard to the credibility of the immigration system.[132] This was not a case where this factor had any obvious relevance, given the strength of the competing public interest considerations which meant that neither outcome, if reached as a result of proper application of the law, could reasonably be said to undermine the system's credibility.

Conclusion

[199] This is not a case in which the Court can be satisfied that the risk to public safety posed by allowing the appellant to remain inevitably outweighs the public interest in family unity in the appellant's particular circumstances. I accordingly do not accept the Crown's submission that the Court should hold that, on a correct approach, the Tribunal would nevertheless necessarily reach the same outcome.

[200] For these reasons I would allow the appeal and remit the appeal against the Minister's decision to the Tribunal for reconsideration.

[201] William Young and Arnold JJ agree with the test to be applied under s 105 that is set out in these reasons for judgment. They differ, however, from my further conclusion that on the proper application of the test the Tribunal's order should be quashed and the appeal remitted for reconsideration by the Tribunal. The Chief Justice and Glazebrook J, however, reach the same conclusion as I have reached as to the outcome of the appeal and orders that should be made, albeit on

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[132] See above at [176].

different views of the test. Accordingly, in accordance with a majority comprising the Chief Justice, McGrath and Glazebrook JJ, the Court orders that the appeal to this Court is allowed, and the appeal to the Tribunal against the Minister's direction is remitted to it for reconsideration. On that reconsideration, by a majority comprising McGrath, William Young and Arnold JJ, the Tribunal is to apply the test under s 105 that is set out in these reasons.

GLAZEBROOK J

[202] I agree with the Chief Justice and McGrath J that the appeal should be allowed. I set out my reasons briefly below.

[203] Under s 105 of the Immigration Act 1987, the first task of the Tribunal is to determine whether it would be unjust or unduly harsh to deport an individual from New Zealand. There is no challenge to the Tribunal's approach to that question or to the result reached in this case.

[204] The next stage of the inquiry, as explained in relation to a similar provision by this Court in *Ye v Minister of Immigration*, is for the Tribunal to consider whether "despite the injustice or undue harshness, it would in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand".[133] The *Ye* formulation of the Tribunal's task at the second stage of the inquiry presupposes that the factors that would make deportation unjust or unduly harsh are to be taken into account and evaluated against any public interest factors pointing against the person being allowed to remain in New Zealand.[134]

[205] The evaluative task of the Tribunal at the second stage of the inquiry is to ensure that deportation is a proportionate response, taking into account the particular

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133 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [30] per Blanchard, Tipping, McGrath and Anderson JJ. Elias CJ did not disagree with the majority's reasoning on this point: see at [1]. *Ye* involved the interpretation of s 47(3) of the Immigration Act 1987. The words "in all the circumstances" are contained in s 47(3) but are not contained in s 105. However, the absence of these words is not significant. A decision cannot be made in a vacuum and it is a standard requirement that decision makers must take into account all mandatory relevant considerations and may take into account other relevant factors: see Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 948.

134 I agree with the Chief Justice's comments at [82]–[86] on this point.

humanitarian features that favour the person not being deported and the particular public interest factors against the person remaining in New Zealand. This accords with the approach taken both in New Zealand[135] and internationally.[136] Logically, the more serious the humanitarian issues if deportation were to occur, the more serious the countervailing public interest factors must be to justify deportation, even though it would be an unduly harsh and unjust result.[137]

[206] I find the Crown's suggested approach (of isolating the factors that might have been considered in the first stage of the test and viewing them at the second stage of the test through a different public interest lens) conceptually difficult.[138] By contrast, the *Ye* formulation applies the statutory language in a way that is simple to apply. This is important. It must be remembered that a similar test is now applicable in a wide variety of situations and not just in the context of deportation following criminal offending.[139]

[207] I do not consider that the Crown's approach is required by the statutory language. As McGrath J acknowledges, there is a public interest in avoiding unjust or unduly harsh outcomes, where that is possible.[140] There is also of course a public interest in ensuring that New Zealand fulfils its international human rights obligations. And it is now accepted that, if possible, statutes should be interpreted

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135 The proportionality approach has been applied in New Zealand even where there was no explicit public interest limb in the legislation: see *Minister of Immigration v Al Hosan* [2008] NZCA 462, [2009] NZAR 259 at [63]–[64].

136 See the application of the proportionality principle by the European Court of Human Rights in deportation cases: see *Berrehab v the Netherlands* (1988) 11 EHRR 322 (ECHR) at [24]–[29] and *Beldjoudi v France* (1992) 14 EHRR 801 (ECHR). See also Office of the United Nations High Commissioner for Human Rights *The Rights of Non-citizens* HR/PUB/06/11 (2007) where, in a publication detailing the rights of non-citizens, the Office of the United Nations High Commissioner for Human Rights stated, at 20, "deportation is justified only if the interference with family life is not excessive compared to the public interest to be protected".

137 The second part of the test does, however, recognise that deportation may not be a disproportionate response even though it would be unduly harsh or unjust if the individual circumstances were considered by themselves without regard to wider public interest factors.

138 See the submissions detailed by the Chief Justice at [61]–[62]. This approach was to a degree applied by the Tribunal in this case (see [45] above), by the Court of Appeal (see [56] above) and by McGrath J at [170]. I do comment, however, that most of the cases at both tribunal and appellate level have taken individual circumstances into account and that McGrath J also sees these factors as relevant at the second stage of the inquiry: see at [169]. William Young and Arnold JJ also see those factors as relevant. See at [218].

139 See ss 206 and 207 of the Immigration Act 2009. For further discussion on the generality of this test, see Doug Tennent *Immigration and Refugee Law* (2nd ed, LexisNexis, Wellington, 2014) at 495–502.

140 See McGrath J's judgment above at [169] .

consistently with international obligations.[141] But ensuring consistency with international obligations does not mean that the factors contributing to the assessment at the first stage of the inquiry under s 105 should be viewed differently (or even not considered at all) at the second stage.

[208] One of the dangers with the Crown's approach is that the factors taken into account at the second stage of the inquiry may become abstract and divorced from the particular circumstances of an appellant.[142] I consider that this occurred in this case.[143]

[209] The main reason the first stage of the s 105 case was decided in Mr Helu's favour was because he was a young person who had lived in New Zealand with his family since he was six years old. He was immature for his age, had limited experience of Tonga and limited wider family support there. He would suffer financial and emotional hardship if deported to an unfamiliar environment without the support of his immediate family. These factors arose, albeit in a more extreme form, in *Nystrom v Australia*.[144]

[210] The Tribunal, in its decision, outlined those factors when summarising why it had found "separation of the appellant from his family" would be unjust or unduly harsh.[145] It went on, however, to characterise the "social benefit" as being "protecting family unity".[146] This is an abstract concept, if unrelated to the particular family. The societal benefit of protecting family unity will vary depending on the

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141 See for example, JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 495–499 and Tennent, above n 139, at 38–45. In the immigration context, see for example *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA) at 552; and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90]–[91].

142 The most striking example is from the Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990). Article 3 of that Convention states that the "the best interests of the child shall be a primary consideration". In conducting the second stage of the inquiry in s 105(1), the importance of the best interests of the child cannot be considered in the abstract, without considering the best interests of the particular child.

143 I thus disagree with the analysis on this issue of McGrath J at [189] and of William Young and Arnold JJ at [220].

144 Human Rights Committee *Views* Communication No 1557/2007 CCPR/C/102/D/1557/2007 (2011) [*Nystrom v Australia*]. See also Human Rights Committee *Views Communication No 1959/2010 CCPR/C/102/D/1959/2010* (2011) [*Warsame v Canada*].

145 *Re Helu* [2011] NZIPT 500056 [*Helu* (IPT)] at [32]–[38] and [50]–[60].

146 At [74].

circumstances of the particular family.[147] For example, the societal interest in protecting family unity will be greater where there are young children or disabled persons in the family needing special care.[148] While those factors were not present here, Mr Helu was still young and relatively immature.[149] Mr Helu was also a child in terms of the Convention on the Rights of the Child at the time of the index offence.[150] Characterising the issue as family unity meant that the Tribunal did not take these factors into account. It also meant that the hardship to Mr Helu's family members who remained in New Zealand (and particularly his mother) was not properly considered.[151]

[211] More importantly, however, the Tribunal's characterisation of the concern (family unity) does not capture the real gravamen of Mr Helu's position: the fact that he had been in New Zealand since he was six years old and had relatively little familiarity with Tonga as a result. As McGrath J says, it is unusual for s 91 of the Immigration Act to be applied to someone who has lived in New Zealand with his family since his early childhood and this factor should have been accorded considerable weight.[152]

[212] This is particularly the case as his offending can essentially be seen as "home-grown" as the Chief Justice points out.[153] I agree with the Chief Justice that deportation impacts on human identity and human dignity, particularly for a person

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147 For example see Baroness Hale's comments in *Naidike v Attorney-General of Trinidad and Tobago* [2005] 1 AC 538 (PC) at [75] where, in discussing the conflict between the right of the State to deport non-citizens and the right to respect for family life, she said "[t]he decision-maker has to balance the reason for the expulsion against the impact upon the other family members, including any alternative means of preserving family ties. The reason for deporting may be comparatively weak, while the impact on the rest of the family, either of being left behind or of being forced to leave their own country, may be severe. On the other hand, the reason for deporting may be very strong, or it may be entirely reasonable to expect the other family members to leave with the person deported."

148 This is in line with the Convention on the Rights of the Child, above n 142, and the Convention on the Rights of Persons with Disabilities A/RES/61/106 (opened for signature 30 March 2007, entered into force 3 May 2008).

149 See *Helu* (IPT), above n 145, at [32].

150 And he was still relatively young at the time of the Tribunal decision. In the domestic context, youth can be a relevant mitigating factor in sentencing, partly because of increased long-term rehabilitation prospects: see *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [76]–[92]. See also s 8(g) of the Sentencing Act 2002 and s 25(i) of the New Zealand Bill of Rights Act 1990. I thus disagree with McGrath J's assessment of this issue at [187].

151 See discussion in the Chief Justice's judgment at [29] and [31] and her discussion of the relevance of family, including for our immigrant communities, at [75]–[78].

152 See McGrath J's judgment above at [197].

153 At [12].

like Mr Helu who has been in New Zealand since early childhood.[154] In addition, it is significant that Mr Helu, being a child, had no realistic means of regularising his immigration position before 2003 when he and his family were granted residence permits.[155]

[213] The task of the Tribunal at the second stage of the inquiry was to evaluate whether, despite the factors that made it unduly harsh or unjust to deport, deportation was nevertheless a proportionate response. The Tribunal did describe its task as being to undertake a proportionality analysis.[156] However, it did not in fact do so.[157] Applying its sliding scale,[158] the Tribunal had already decided that "only a degree of risk at the low end of the scale would suffice to preclude the public interest being engaged".[159] It later described Mr Helu as a "person who, because of his violent offending, poses an unacceptable risk to public safety".[160] I agree with the Chief Justice and McGrath J that, by treating the moderate risk of reoffending as "unacceptable", the Tribunal distorted the evaluation process.[161]

[214] This is not to suggest that the risk of recidivism is not relevant. Nor is it to suggest that the nature of the likely reoffending is irrelevant to the assessment. What is the problem is the rule of thumb used by the Tribunal in this case that, because of the violent nature of the offending, only a low risk of reoffending would suffice. This meant that deportation was inevitable, despite the strength of the humanitarian

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154 See at [12]. I also essentially agree with the Chief Justice's discussion at [65]–[74].

155 Mr Helu was granted a residence permit on 23 April 2003 and committed his first index offence on 11 January 2008. Had that offence been committed after 23 April 2008, Mr Helu would not have been able to be deported under s 91(1)(c) as the offending would have occurred over five years after he was granted his residence permit. Given that Mr Helu was a child, he had no control as to when his residence permit was applied for and no fault can be attributed to him for the delay in seeking a residence permit. Mr Helu was not eligible for deportation under s 91(1)(d) as he was only sentenced to two years imprisonment. I agree with the Chief Justice on this issue: see at [12].

156 *Helu* (IPT), above n 145, at [74].

157 I agree with the analysis of the Chief Justice in this regard: see at [90]–[101].

158 In my view, there are two possible dangers with the sliding scale. First, as this Court noted in *Ye*, above n 133, at [32], public interest considerations should not be generic but rather fact specific and assessed in light of all the circumstances of a case. The second danger is that a decision maker using such a scale may see such a test as determinative. I agree with McGrath J's comments on this issue at [174] and [175] of his judgment.

159 *Helu* (IPT), above n 145, at [65]. I agree with the Chief Justice that the Tribunal meant by this phrase that this was determinative: see at [10] above.

160 At [75].

161 See the Chief Justice's judgment at [10], [88] and [91]–[94]. See also McGrath J's judgment above at [196]. I also agree with the points made at [191]–[192] and [197] of his judgment.

factors in this case and in particular the fact that Mr Helu has been in New Zealand since early childhood and also despite the fact that, as recognised by the Tribunal, the index offence and the other offending taken into account by the Tribunal were not at the higher end of the scale.

[215] I would therefore allow the appeal. I would remit the matter to the Tribunal for reconsideration in light of the factors outlined in this judgment.

WILLIAM YOUNG AND ARNOLD JJ

[216] We agree with the approach proposed by McGrath J in relation to s 105 of the Immigration Act 1987, in particular, his view that a sequential approach is required and as to the factors which are material in relation to the two questions which the Tribunal must address.[162] We do, however, disagree with the conclusion he reaches as to the disposition of the appeal.

[217] On this aspect of the case, the critical passages from the decision of the Tribunal[163] are as follows:

> [65] Given the nature of the appellant's violent offending, the Tribunal finds that only a degree of risk at the low end of the scale would suffice to preclude the public interest being engaged.
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> …
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> [71] … There is no basis for the Tribunal to depart from Mr Woodcock's assessment of a moderate risk of re-offending.
>
> *Public interest in family unity and treaty obligations*
>
> [72] [Counsel for the appellant] submits that even a moderate [risk] of re-offending does not make it contrary to the public interest for the appellant to remain in New Zealand, when balanced against the compassionate features relating to his family situation.
>
> [73] The Tribunal has already found that the separation of the appellant from his family would be unjust or unduly harsh. The appellant has been living in New Zealand with his parents and siblings since he was six years old, he is closely bonded to them and the only source of family support available to him in Tonga is a maternal aunt and her family. For this appellant, with his history of self-destructive behaviour, coping with the

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162 See above at [160]–[176].

163 *Helu v Minister of Immigration* [2011] NZIPT 500056 (*Helu* (IPT)).

> stressors involved in living in an unfamiliar society without the support of his immediate family will be difficult.
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> [74] The social benefit of protecting family unity is a public interest. New Zealand has also undertaken to respect the right to be free of unlawful or arbitrary interference in one's family life and to recognise and support the family as the fundamental group unit of society … The right to family life though, is not absolute. Whether the rights of the appellant and his family would be breached depends on whether the appellant's deportation is reasonable, that is proportionate and necessary in the circumstances … .
>
> [75] We must weigh the positive public interest considerations relating to the appellant's separation from his family against the public interest in removing from New Zealand a person who, because of his violent offending, poses an unacceptable risk to public safety. We find that the public interest is in favour of deportation. It follows that deportation is reasonable in this case, so no breach of New Zealand's obligations with respect to family life arises.

[218] There is an issue as to whether the Tribunal's assessment of the public interest brought into consideration the conclusion that deportation would be unjust or unduly harsh and the factors upon which that conclusion was based. We agree with McGrath J that for the reasons he gives such consideration was required.[164]

[219] The heading before [72] of the Tribunal's decision, the first two sentences of [74] and the first sentence of [75] can be read as suggesting that the Tribunal's focus was on the interests of protecting family unity. On the other hand, [73] refers to both the conclusion that deportation would be unjust or unduly harsh and the primary reasons why this is so. This was said in the context of the Tribunal's assessment of the public interest. If these factors were seen as irrelevant, there was no occasion to mention them. As well, [74] refers to a proportionality assessment. Some looseness of expression is understandable given that the appellant's arguments as to the factors which were personal to him were largely associated, directly or indirectly, with the separation from his immediate family which deportation would bring about. Given all of this, we are not persuaded that the Tribunal failed to take into account its conclusion that the appellant's deportation would be unjust or unduly harsh and the reasons for that conclusion. This was a very simple case in that the public interest considerations against deportation were, as just explained, primarily associated with preservation of the family unit (viewed from the perspectives of both the appellant and other family members) and the only public interest consideration in favour of

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[164] See above at [169].

deportation was the risk of re-offending. There is no reason to think that the Tribunal lost track of what the case was about. Observations made by the Tribunal in relation to one set of considerations were plainly made with an awareness of the competing considerations. It follows that when the Tribunal said in [65] that "only a degree of risk at the low end of the scale would suffice to preclude the public interest being engaged", it must have been conscious of the countervailing argument. As well, it is worthy of note that the Tribunal used the word "engaged", which simply means "raised": it does not indicate that that the Tribunal considered that the public interest evaluation was necessarily determined by a degree of risk above the low end of the scale.

[220] There is no reason to suppose that what was said in [65] was not properly personalised to the appellant and his family circumstances. The Tribunal's conclusion as to the risk of re-offending at [71] was not the end of its analysis. Rather, the Tribunal went on to address the appellant's argument that a moderate risk of re-offending did not make it contrary to the public interest for the appellant to remain in NZ, when balanced against the compassionate features relating to his family situation which it then reviewed. It recognised that the social benefit of protecting family unity was a public interest. It also proceeded on the basis that the appeal would have to be allowed unless deportation was "reasonable, that is proportionate and necessary in the circumstances" (at [74]).

[221] We accept that the conclusory description in [75] of the balancing exercise was not happily expressed. A risk to public safety which is "unacceptable" might be thought necessarily to outweigh competing public interest factors. That said, the only fault of the Tribunal in this regard was that its use of the expression "unacceptable risk" anticipated the conclusion which is expressed in the next sentence. We see this as no more than an infelicity of expression. Given that the competing considerations were incommensurable, the ultimate decision of the Tribunal (which had to decide between them) was not susceptible of much, if any, explanation.

[222] It follows from what we have said that we do not consider it fair to characterise the Tribunal's finding as to deportation as "inevitable" given its

acceptance that the appellant presented a modest risk of reoffending, as the Chief Justice[165] and Glazebrook J[166] have done. Rather, we consider that the Tribunal did turn its mind conscientiously to the relevant factors, and reached its assessment of the public interest having taken them into account.

[223] We would dismiss the appeal.

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Crown Law, Wellington for the Respondents

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165 At [51].
166 At [214].