IN THE SUPREME COURT OF NEW ZEALAND SC 72/2013

[2014] NZSC Trans 3

BETWEEN **SAMUELA FALETALAVAI HELU**

Appellant

AND IMMIGRATION AND PROTECTION TRIBUNAL
First Respondent

MINISTER OF IMMIGRATION
Second Respondent

Hearing:	4 March 2014
Coram:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	A Schaaf and H Radcliffe for the Appellant U Jagose and J Foster for the Second Respondent

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CIVIL APPEAL

MS SCHAAF:

May it please your Honours, Ms Schaaf appearing with Ms Radcliffe appearing for the appellant.

ELIAS CJ:

Thank you Ms Schaaf, Ms Radcliffe.

MS JAGOSE:

May it please your Honours, Ms Jagose appearing with Ms Foster for the second respondent in this matter.

ELIAS CJ:

Thank you Ms Jagose, Ms Foster. Yes Ms Schaaf.

MS SCHAAF:

I will be addressing paragraph A of the questions for determination and Ms Radcliffe will be addressing paragraph B, the factual situation.

I have summarised the arguments in the narrative facts. Do your Honours want me to go through that or go straight to the arguments?

ELIAS CJ:

We've read your submissions so I think you can go straight to your arguments Ms Schaaf, thank you.

MS SCHAAF:

I will start on the first page 8, paragraph 39, as to what considerations were not taken into account, of my submissions. And first argument is that the Tribunal did not take into account the relevant consideration which is Article 12 of the International Covenant on Civil and Political Rights, and that New Zealand could be argued to be the appellants own country. And I set out in paragraph 40 the relevant article and in particular paragraph 4, "No one shall be arbitrarily deprived of the right to enter his own country."

The Tribunal's finding relevant to the question of whether New Zealand is the appellant's own country is set out in paragraph 56 of its decision which I set out - and paragraph 56 is on page 50 of the case on appeal.

ELIAS CJ:

Which paragraph are you referring to in the decision?

MS SCHAAF:

Paragraph 57 and that's on page 50.

ELIAS CJ:

Yes, thank you.

MS SCHAAF:

And I set that out in my submissions and I submit that those facts make this case relevant to the provision of Article 12, paragraph 4 and that the appellant came to this country when he was only six years old, so he has spent almost all of his formative years in this country, and he will have some familiarity with common culture from growing up in a Tongan immigrant family in context 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 to 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.

And in paragraph 42 of my submissions I refer to the view of the United Nations Human Rights Committee in *Nystrom v Australia* CCPR/C/102/D/1557/2007, 18 August 2011, which I submit is relevant to this question of whether Article 12, paragraph 4 is of relevance to the appellant's case, and *Nystrom* is set out in number 6 of the bundle of authorities. And the relevant facts I have set out from paragraph 43 of *Nystrom* and as stated in my submissions, he was born in Sweden when his Swedish mother visited her home country from Australia and he spent a total of 25 days in Sweden and lived in Australia from his arrival there from the age of 27 days until he was deported and Mr Nystrom had numerous convictions for quite serious offences. After some years had passed the Australian Minister of Immigration cancelled his transitional permanent visa on the ground that he failed a character test in section 501, subsection 5 of the Australian Migration Act 1957. Mr Nystrom was deported to Australia [*sic*] and he was in his 30s when he was deported. He signed the declaration accepting deportation to avoid being in indefinite detention until the United Nations Human Rights Committee examined his case.

The relevant paragraphs from the view of the United Nations Human Rights Committee in *Nystrom* I refer to in paragraph 45 of my submissions and paragraph 7.4 of the decision of the view of the United Nations Human Rights Committee I refer to that in relation to what the Committee stated when considering Article 12(4) so that's paragraph 7.4 of the *Nystrom* decision. That's page 18 of that decision.

I refer to that paragraph. It's later on towards the end of that paragraph 7.4, that's where I'm, sixth line from the bottom of that paragraph 7.4 where the Committee stated, "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." His words "his own country", in my consideration of such matters, is longstanding residence, close, personal and family ties, and intentions to remain as well as to the absence of such ties elsewhere. I refer further on in paragraph 46 of my submissions to the last sentence of 7.5. That's looking on page 18 of the *Nystrom* view of the Committee. The Committee stated there that, "Given the particular circumstances of the case, the Committee considers that the author has established that Australia was his own country within the meaning of Article 12 paragraph 4 of the covenant. In the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country, and the lack of any other ties than nationality with Sweden."

I refer in paragraph 47 of my submissions to the Committee considering the circumstances of the case and found that Nystrom's deportation was arbitrary and that it violated Article 12(4) of the ICCPR. It stated its conclusions in relation to Article 12(4). That's in paragraph 7.6 of the Committee's view, still on page 18 of that decision.

As to the alleged arbitrariness of the author's deportation, the Committee records its general comment number 27 on freedom of movement, where is stated that even in the theories provided for by law should be in accordance with the provisions, aims, and objectives of the covenant and should be in any event reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's country could be reasonable.

A State party was not by stripping a person of nationality or expelling an individual to a third country arbitrarily prevent this person from returning to his or her own country.

In my submissions, those paragraphs, and also the particular facts of this case, of the appellant's case, which Ms Radcliffe will also be referring to in applying the facts of the case to the questions that have been approved that it can be shown in my submission that New Zealand could be stated to be the appellant's own country and that there have to be serious reasons of why he should be deported from New Zealand.

In this case, this was a case of the appellant's case on paragraph 48 of my submissions that the Tribunal had the power of the Commission of Inquiry under the Immigration Act 1987 to look into a matter not specifically argued before it. As your Honours would see from the decision in *Nystrom*, it was released a week just before the decision of the Tribunal in this case was released.

The State also has an obligation to observe its international obligations and the Tribunal has a duty to consider first whether it is raised or not. On paragraph 50 of my submissions it's not argued that the appellant has the right of citizenship so that this would conflict with New Zealand citizenship law. However, the right could be stated to be de facto citizenship where the rights of that person is more than the ordinary person. This is a person in the appellant's situation where they've spent most of their life in one country and has close connections with that country. The right advocated in the view of the United Nations is one offering more protection, as I stated, to a person who's very closely connected with his or her country of residence, but falls short of according that person rights equal to citizenship.

ELIAS CJ:

Are you saying that it's de facto, the citizenship? I'm just wondering, really, whether that is an argument you want to explain a little more or pursue, because it does seem pretty much a two-edged sword for you, Ms Schaaf. If you are saying that your argument has the consequence that people in this position are to be treated as de facto citizens, is that what you're saying?

MS SCHAAF:

I think probably that's the wrong formulation because if it implies that he's got rights equal to a New Zealand citizen. I think perhaps a better formulation of the argument

is that his rights are more than the rights of somebody who's got New Zealand residence status but it's just below, if there's a threshold of citizenship, that he's just below that. He's got more rights than other people because of his close connections to the country and there's somebody who came here at a very young age and basically this country has got close connections with that person more than their country of citizenship or nationality and I think it's not probably characterised by de facto but that's a throwaway comment and it's been referred to in other decisions overseas but I think a more accurate description would be that it's less than citizenship but nearly the same as citizenship rights.

WILLIAM YOUNG J:
It's pretty common. I mean, the *Nystrom* approach is potentially very far-reaching, very subversive of immigration rules.

MS SCHAAF:
I think there would be, in my opinion, I don't think there would be a floodgate where you have all these people who came here at a very young age will be claiming citizenship, and as your Honours can see from the decisions that have been considered overseas in *Balogun v United Kingdom* [2012] ECHR 614 (10 April 2012) and those cases, they fall to be decided on the facts of each case so the mere fact that there may be a recognition that a person's own country could be New Zealand in this circumstance would not avail every person in this situation to be able to argue. They can argue that they should stay here, but it will be decided on the facts of each case.

ARNOLD J:
Although the Court of Appeal said at paragraph 29 on page 14 of the case that the Article 12(4) argument is really limited to those cases where the combination of circumstances puts the persons being deported in an exceptional category. Now, do you accept that or not?

MS SCHAAF:
I wouldn't characterise it as exceptional circumstance. What I would say is based on each case, for example, the decision in *Maslov v Austria* [2008] ECHR [GC] 1638/03(23 June 2008), and the circumstances of each case will be looked at, and it's a matter of weighing up the factors that are identified by each Court or the Tribunal as to what the circumstances of that case, because your Honours know from

Nystrom those sets of circumstances are unique to that case. But it's the weighing up of those factors. For example, *Nystrom* entered Australia at aged 27 days but he had a whole list of very serious criminal offending. In *Maslov*, he entered Austria at aged six. So basically, rather than saying they have to be exceptional, it's a matter of weighing the circumstances of each case and the factors identified that would – because not every case would be the same so you can't say, "This case is exceptional," because it's a matter of weighing the criminality and the humanitarian circumstances of the case.

ELIAS CJ:
Are you resisting the characterisation of the appellant's case as exceptional?

MS SCHAAF:
I think I'm resisting the characterisation of *Nystrom*, the facts at *Nystrom* at page 27 that would include consideration of the factors in Mr Helu's case.

ELIAS CJ:
It is a rather extreme concept in law to dub something as exceptional because in your client's case, I suppose it could be said that there may well be many young men in that position so it's rather hard to make it out.

MS SCHAAF:
It's a matter of applying the factors as I have stated, your Honours, it's considered to each case and whether that case would apply and I think my worry about *Nystrom* being set up as the exception that that would imply that only somebody who entered at a very young age would qualify if your Honours are so minded.

ELIAS CJ:
Yes.

ARNOLD J:
Well, the problem is, as Justice Young put to you, if it isn't an exceptional category it does become very subversive of the ordinary immigration law.

MS SCHAAF:
As I have stated, each case will be assessed on its own merits and as stated, the overseas cases, there's no - *Balogun v United Kingdom* as an example that he

entered the United Kingdom at age three and had circumstances peculiar to his case, as you can see from those cases that have been cited in my submissions and also from the respondent's submission it's not a given that a person – it's not an easy test, even if you say, "This consideration should apply to the circumstances of the appellants," that in the end it would result in the subversion of immigration law. As you can see from the case that I have included in my bundle of authorities, *Levi Leiataua v Minister of Immigration* I just refer to that, your Honours, because there are not many cases like this, hardly any cases appearing before the New Zealand Tribunal, that would come into – that one could apply or one could say that Article 12(4) is relevant. So in terms of its applicability, it's not going to result in the subversion of New Zealand immigration laws in my submission.

ELIAS CJ:

Isn't your more direct answer, though, that it's not subversive of New Zealand immigration law because the interpretation you're contending for is application of New Zealand immigration law?

MS SCHAAF:

Yes. An application of New Zealand immigration law and the application of New Zealand's international obligations to the provision of the Immigration Act. In my submission, there are – I mean, it's for the Tribunal for the Courts to apply the facts if they accept that Article 12(4) applies to a situation and, I mean, the result will be for the Courts and the Tribunals to decide whether the facts of those cases fall within the provision of Article 12(4).

McGRATH J:

Ms Schaaf, isn't the position that the holder of a residence permit has the right to enter New Zealand, to come and go, generally? I mean, that is part of the rights that the residence permit conveys, is it not?

MS SCHAAF:

Yes.

McGRATH J:

Your concern is with what might be said to be an exception, where a person has held a resident permit for less than a certain time, five years, and commits a serious

offence for which they are punished by imprisonment. Now, that is a limitation, I suppose, on the Article 12(4) right, isn't it?

MS SCHAAF:

Yes, so if there's no argument, of course, that a person has got residence visa status can enter New Zealand. But the argument in this case, of course, if the deportation provision is applied and Mr Helu is deported, then that would deprive him of the right to enter his own country if your Honours are so minded to conclude that Article 12(4) applies to his situation.

WILLIAM YOUNG J:

It does if it's arbitrary. You've got the expression of opinion in the *Nystrom* case that it's almost always going to be arbitrary.

MS SCHAAF:

It has to be arbitrary and reasonable in the circumstances, so not every deportation will be arbitrary because it has to be weighed against the aims and objectives of the Act and I suppose the public interest elements in the test so basically it's a matter of whether it's reasonable in the circumstances.

McGRATH J:

So in many cases the section 91(1)(c) where a person is convicted, do you accept that that will not be arbitrary in its application in many cases?

MS SCHAAF:

In most cases it may not be arbitrary but the argument in this case it will be arbitrary and it's not reasonable in the circumstances.

McGRATH J:

But the section is – sorry, the Act, the 1987 Act in section 105 set up a regime, did it not, for deciding or enabling a Tribunal to decide independently whether or not it was arbitrary?

MS SCHAAF:

Yes, but the argument that's made on the behalf of the appellant is that if your Honours conclude that international covenants Article 12(4) and also Article 17 and 23(1) are applicable to this case then when you read section 105 of the

Immigration Act 1987 and apply as a consideration those Articles then it will, in the circumstances of this case, put on some – it will affect how the section is read in terms of the facts of this case, the circumstances of this case, and not arguing that every other case will be affected in the same way but –

ELIAS CJ:

Do you say - I'm not sure, I'm just looking up your statement of claim but was argued that – in the High Court that they'd failed to take into account a relevant consideration?

MS SCHAAF:

I did refer to – this matter was argued before the High Court that Article 12 should have been considered but there was no conclusion stated in the High Court decision about that issue. It was stated in the narrative of the High Court decision but –

WILLIAM YOUNG J:

Something I don't understand, there's only two dissents in *Nystrom* but there's a whole lot of dissents in the next case, *Warsame v Canada* CCPR/C/102D/1959/2010, 1 September 2011. It looks as though some of those who dissented on the meaning of Article 12(4) in *Warsame* went along with the *Nystrom* decision only a month or so earlier. Do you understand – I mean there must be something I've misunderstood in that. You see, if you look at number 9 in your bundle, there's a whole lot of opinions starting at page 22 of the report saying they don't agree with his own country approach and yet at the back of *Nystrom* there's only two and some of the people who filed dissenting opinions in the second case seemed to have signed up to the majority decision in the first case, for instance Sir Nicholas Rodley.

MS SCHAAF:

I think my comment on that would be that it shows the diversity of opinions in this area of the law, so basically as I don't see that the communication in *Warsame.* The case there, the situation there was quite different from *Nystrom*.

WILLIAM YOUNG J:

Well Sir Nigel Rodley at page 22 in his dissents, individual opinion says, "As to article 12, paragraph 4, the Committee gives the impression that it relies on General Comment 27 for its view that Canada is the author's own country. Certainly, the General Comment states that 'the scope of "his own country" is broader than the

concept of "country of his nationality"'. What the Committee overlooks is that all the examples given in the General Comment of the application of that broader concept are ones where the individual is deprived of any effective nationality. The instances offered by the General Comment are those relating to 'nationals of a country who have been stripped of their nationality in violation of international law'; 'individuals whose country of nationality has been incorporated in or transferred to another national entity…," et cetera. All of that would seem to be applicable to *Nystrom*. What I'm – it's just a question. I don't understand why Sir Nigel Rodley dissents in one case but seems to sign up to it in another case and the decisions are only a day or so apart. There probably will be a reason.

GLAZEBROOK J:

So that it was actually strange circumstances in *Nystrom,* wasn't it, because he was 27 days old? He'd been a State ward I think and he thought he was a citizen and they should have actually made him a citizen. So that might be the distinguishing factor.

McGRATH J:

And he had very little connection with his country of birth.

GLAZEBROOK J:

Yes, well the same in this one but he was four. But I think he wasn't a State ward. He could have applied for citizenship himself which is what I think –

ARNOLD J:

Well I think he said in *Nystrom* that he didn't apply for citizenship because he thought he was a citizen and his mother did too.

GLAZEBROOK J:

Yes, but I think that that was slightly different in this, in the other situation.

MS SCHAAF:

I think the situation in *Warsame*, he also was, in a way, stateless because he was born in Saudi Arabia and he'd never been to Somalia. So…

ELIAS CJ:

That would suggest that the dissenter was wrong, though, on the facts.

WILLIAM YOUNG J:
Well he just considered – the truth in reading what he says he doesn't seem – Sir Nigel Rodley doesn't seem to be giving Article 12(4) a very big meaning. But he did sign up for the Judge. He does seem to have signed up to the other Judge.

GLAZEBROOK J:
Well I just wonder whether it's because the boy there had every right to think he was a citizen given that he was a State ward and they should have applied for it maybe. So it might just be a fatal but it – because I thought he did say something about he could've applied for citizenship but now I can't find it.

WILLIAM YOUNG J:
Yes, it is in there, it is in there, yes.

MS SCHAAF:
I think in all the cases, it's in Mr Helu's case, they could've applied for citizenship but in terms of young people, it's their parents who makes the decisions in terms of whether they apply for citizenship so they're in the unfortunate position of finding themselves facing deportation at a young age.

I'll go on to paragraph 51 of my submissions. That's on page 11. And that tribunal did not consider the age of the appellant as part of its assessment of whether it would be – and I think that he committed the qualifying offence. It's a qualification for that, whether it would be contrary to the public interest to allow Mr Helu to remain in New Zealand. And on paragraph 52, in examination of the documents before the Tribunal shows that there are about two references to the youth of the appellant. When he was sentenced for the aggravated robbery his youth is identified as a discounting factor. His age was also referred when he was sentenced on the two assault charges and, in my submission, in assessing whether there's a breach of Article 17 and 23(1) of the ICCPR, a relevant consideration is the age when the appellant committed the qualifying offence. This is in relation to looking at whether it would be contrary to the public interest to deport – for the appellant to remain in New Zealand.

And in this instance it is submitted that the Tribunal did not consider this a relevant consideration. The Tribunal did refer to the appellant just turning 17 when he committed the qualifying offence and it's noted but did not identify his age when he

committed the offence in his assessment of his case, in particular in the assessment of whether it would be contrary to the public interest for him to remain in New Zealand.

And I refer to, in paragraph 55 of my submissions, to the case of *Balogun* where the European Court of Human Rights identified as one of the – as relevant in considering certain criteria in determining whether deporting an alien breaches Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 17 and 23, one of the ICCPR is similar in its terms to Article 8. The factors considered in that case are similar to the factors that a tribunal looks at in considering section 104 of the Immigration Act 1987 and that's the fact of *Balogun*.

ELIAS CJ:
Where are you taking us to?

MS SCHAAF:
It's number 1 in the bundle of authorities, in paragraph 46 of that decision. It talks there about the age of the persons of significant relevance when applying certain of the criteria, and for instance when I see some of the nature and seriousness of the offences committed by an applicant it has to be taken into account whether he or she committed them as a juvenile or as an adult. The age at which the person entered the host country is also of relevance, as is the question of whether they spent a large part or even all of their childhood in that country. The Court has previously found that for a settled migrant who has spent all or the major part of his or her childhood in the host country very serious reasons are required to justify expulsion.

Of course, if you look at my submissions paragraph 32 page 6, the nature of the offence or offences of which the appellant has been convicted is one of the factors that's listed there for consideration of whether it would be unjust or unduly harsh to deport the appellant from New Zealand. But I refer to this as relevant in terms of considering whether it would be contrary to the public interest and the argument that very serious reasons are required to justify expulsion and the weighing and the consideration by the Tribunal of risk of re-offending and how the international covenants will be interpreted in terms of the provision of section 105 of the Immigration Act.

Paragraph 56 of my submissions on page 12, although the *Balogun v United Kingdom* decision was made in April 2012, it refers to another decision of the Grand Chamber of the European Court of Human Rights in *Maslov v Austria* where the age of the alien at the time of the offending was relevant. Also of relevance in terms of *Maslov v Austria* as your Honours are aware, Maslov was aged six when he entered Austria, so in my submission the age of Mr Helu when he entered New Zealand is still able to – the case is still able to be considered under the right to be in your own country, because *Maslov v Austria*, in my submission, supports that a person can still be aged six and still be considered if the circumstances of that person can fit in, that he or she is closely related to the country of residence more than their country of citizenship.

In paragraph 57 of my submissions, I refer there to the facts of the case. *Balogun v United Kingdom* involved a Nigerian man who had been living in the United Kingdom since the age of three and *Maslov v Austria*, as I have indicated, involved a Bulgarian man who lived in Austria since the age of six. The weighing up of factors and decisions of the European Court of Human Rights involved similar considerations to deportation cases under the immigration law in New Zealand. Furthermore, *Balogun v United Kingdom* involves consideration of English law and cases which are similar to New Zealand law and decisions in the English Courts have value in this country.

In the present case, the qualifying and most serious offence was committed by the appellant just after he turned 17. If this factor was taken into account, it could have made a difference in how the Tribunal assessed the case and this will be further expanded below and one of the matters that Ms Radcliffe will also be looking at.

I go on to the question of 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, apply the incorrect test?

In my submissions, though there may be some amendments to my submission that the Tribunal applied the incorrect test firstly in how it treated New Zealand's international obligations under the test of whether it would be contrary to the public interest to allow the appellant to remain in New Zealand. I think what my decision is that we are concentrating in support of Mr Helu's appeal on the application of the international covenants to the second limb of the test under section 105 is contrary to the public interest. In terms of contrary to the public interest –

ELIAS CJ:

You don't raise any general point about the approach adopted by the Tribunal in relation to section 105, do you, as to whether the approach it adopted was correct except in respect of failure to apply the international covenant?

MS SCHAAF:

Yes, and how it – I think how it approached the public interest and I think one of the issues that had been covered in the respondent's submissions about whether these are – I raised it in my submission the family unity is of public interest and the definition of what would be contrary to the public interest. So my main point is the fact that the application of the international covenant to the second limb but I can cover –

ELIAS CJ:

Well, it's just that I would have thought it was quite arguable that there are not two limbs of section 105 and that is something that I want to ask Ms Jagose about, but it's not an argument that you've developed at all?

MS SCHAAF:

No, Ma'am, it's not an argument that I've developed but I can talk about that now or talk about it after in response to Ms Jagose's submissions.

ELIAS CJ:

Well, do you accept the approach that was adopted and criticise simply the failure to undertake it properly? Is that your submission?

MS SCHAAF:

My submission is that they didn't apply the test, the international covenants, properly in how they applied the test, and I did also refer to identifying family unity as a public interest in the case that I – and in my submissions it's more properly identified as the application of the international covenants to the public interest and also the matters set out in paragraph 2 of section 105 and how the Tribunal applied the test in relation to the international covenants.

GLAZEBROOK J:

Just indicating in your notice of appeal, your client's notice of appeal, there was actually, in (b), a reference to a wrong interpretation of section 105 stating that the Tribunal had been formulaic in its approach, so it was a wider notice of appeal, arguably, than we're getting argument on.

MS SCHAAF:

Yes. The way that I think the focus on the international covenants is that the way the Tribunal has applied their formula or the factors that they take into account when looking at the term "contrary to the public interest" under section 105(1) of the Immigration Act 1987 is that once a person – once the risk is, in the case such as the appellant's, which they say, there's serious violence or it's been admitted that the violence in this case is not the worst case of violence in criminal offending, that only a low risk of re-offending would satisfy, would allow a person to remain in New Zealand and in my previous submissions before the Courts, the lower Courts, I stated that although Tribunal was formulaic in that it did not look at the peculiar characteristics of this case and applied in most of the appeals before the Tribunals the appellants are adults and they've come to New Zealand as adults. But in Mr Helu's case, he came at a young age and as Your Honours will see from the example I've given in the case of *Levi Leiataua v Minister of Immigration* the approach is still the same, even if the circumstances are such that they should have looked at the cases of young people who enter the country at a young age and who also may have offended when they were still not – they were not yet of adulthood, as in Mr Helu's case. He was 17 when he committed the qualifying offence. The Tribunal did not change the way that they looked at the applied the test and still continued with what they had been doing all along in most cases involving adults and lacking the characteristics of this case.

ARNOLD J:

So just to be clear, you're saying it's formulaic because the Tribunal did not have sufficient regard to Mr Helu's youth?

MS SCHAAF:

Yes, that was my argument before that they apply the test like it's just – this is just another case, a deportation case, and what I had argued before was that there was still applied even though those cases, in my submission, those cases involved adults and this case involved a young man who came at an early age and also committed

the qualifying offence and his most serious offending was at age – just when he turned age 17.

An issue about the identifying family interest, family unit as public interest, I'm not going to argue that strongly because in my submission –

ELIAS CJ:
Where are you at in your submission?

MS SCHAAF:
In paragraph 61 on page 13.

ARNOLD J:
Now, I couldn't quite follow what you're saying here. The Tribunal identified family unit as part of the public interest and you're critical of that. Can you just describe briefly why? What is the fault that you're pointing out?

MS SCHAAF:
I was critical of that basically because when you look at factors in paragraph 2 of section 105 they considered the humanitarian circumstances of the appellant and as stated in cases where the Courts have looked at the effect of the phrase "and that it would not be contrary to the public interest to allow the appellant to remain in New Zealand", whether it seemed to me the focus would be on negative things that would disallow the fact that the person who's passed a very high threshold in paragraph 2 of section 105 would – the qualifying effect of section 105(1) is it would not be contrary to the public interest. It's looking at negative factors more than to restrain the effect of a person who passes the high threshold test in 105(2), but in saying that, I'm not arguing it strongly today because at the end of the day whether family unity, you can call it public interest or it comes under the international covenants under Article 17 and 23(1) it would still apply to the appellant's case and also I think I want to sort of amend that firm decision of saying that positive feature cannot be considered under the contract of the public interest because there may be situations where other factors can – that are positive can be included in that phrase "contrary to the public interest".

ELIAS CJ:

But I wonder whether, really, what this does is not illustrate something that troubles me about this case, and that is that everyone is treating this as a two-part process, whereas it's perfectly possible to look at the test as a compendious assessment that the Tribunal has to make, and I would have thought that it was perfectly possible that the meaning is that usually it won't be contrary to the public interest to allow someone whose deportation is unduly harsh to remain in New Zealand. There must be some other public interest which would justify, nevertheless, deporting them. But it's the persistence of the notion that there's some sort of balance that is being struck here that I think is of concern. Because in your submissions, you are criticising the Tribunal for taking into account humanitarian considerations at one stage of the process, but why is it not part of the total mix?

MS SCHAAF:

It can, as I said, I'm not arguing the point strongly. The main argument that I'm making in this case is the application of the international covenants to both section 105(2) and 105(1) and it is difficult in the way that the sections are worded, the paragraphs are worded, as to what exactly would be contrary to the public interest. Although it's quite clear that it's the focus on the offending and risk of re-offending and public harm, that's been accepted as being the qualifying or restraining part that that phrase has on the unjust and unduly harsh –

WILLIAM YOUNG J:

The trouble is that the section makes it perfectly clear that the offending and its circumstances and consequences are part of the unduly harsh leg of the exercise as well as the public interest leg.

ELIAS CJ:

If there are legs.

WILLIAM YOUNG J:

Yes, well I've tried to avoid the –

ELIAS CJ:

Well you've just used legs.

WILLIAM YOUNG J:

Sorry, I tried to avoid using a bifurcated test or…

MS SCHAAF:

Yes, and I think that that's the difficulty that you have all those factors determined under section 105(2) and yet going through all the offending and everything else and it's quite a high threshold and then you have contrary to the public interest and still we're looking at the risk of re-offending and…

WILLIAM YOUNG J:

Well what are the other public interest considerations, the importance of maintaining a young man and his family?

MS SCHAAF:

Yes that would be public interest consideration but as I said if you look at it under section 102(2) and conclude that it's unjust or unduly harsh, when you take that into account then it would be difficult in the current interpretation of contrary to the public interest to say that such positive features or humanitarian features would overrule the repugnance to a certain crime or the assessment of high risk of re-offending. So that would be a difficulty in terms of looking at positive humanitarian factors in the way that other phrase would be contrary to the public interest to allow the appellant to remain in New Zealand. That's difficult to know when positive humanitarian factors in the assessment of that second part of the test, it would be difficult to know how the positive features can overcome the negative features that the Tribunal and the Courts have applied under the term "would not be contrary to the public interest". And I think that will be a difficulty in terms of assessing positive features under contrary to the public interest.

McGRATH J:

In *Ye v Minister of Immigration* [2009] SCNZ 76, [2010] 1 NZLR 104, we saw the issue as being really whether despite the injustice or undue harshness, there would in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand. Now that was a different section. It was dealing with overstayers.

MS SCHAAF:

Yes.

McGRATH J:
And it had the words “in all the circumstances” but they have come out of the section now haven’t they?

MS SCHAAF:
Yes.

McGRATH J:
Well they’re not in this section.

MS SCHAAF:
No they’re not in this section, so that would make the argument that those other matters in section 105(2) cannot be considered in section 105(1) but the counter argument to that would be that they have – Parliament has elected to list factors under section 105(2) but have left open the contrary to the public interest to be defined. So it would still be a – can be argued that humanitarian factors can still be included because there’s no definition, no listing of factors.

McGRATH J:
No but the humanitarian factors are directly relevant, they’re mandatory considerations in examining the unjustness if you take the bifurcated test.

MS SCHAAF:
Yes.

McGRATH J:
I still wonder whether the leaving out in this provision of the words “in all the circumstances” isn’t really directing the enquiry into factors of risk, recidivism and matters of that kind.

MS SCHAAF:
My flow of thoughts are getting – repeat that please, what you’ve just said?

McGRATH J:
Repeat what my concern is?

MS SCHAAF:

Yes.

McGRATH J:

Sorry, I didn't put it very well but the – what I suppose I'm wondering is whether the omission of the words "in all the circumstances" when you come to consider section 105(1) rather indicates that the enquiry into the public interest isn't a broad enquiry. It is rather an enquiry that is working as – it's operating as it was put in the *Ye* case on the basis that it's an enquiry into whether despite the injustice or undue harshness, it would be contrary to the public interest to allow the person to remain in New Zealand. So just focusing on the negative factors of risk, the potential for further offending of the serious kind that's occurred, it's not looking at wider, the wider humanitarian factors at that stage. I'm wondering whether the section wasn't drafted in that way.

ELIAS CJ:

Well it is if you read it as a bifurcated text. That must be it but the point is it's not drafted like that because it's drafted with an "and". It's not – I mean that's the argument really as to the approach. If you see it as all your humanitarian assessment is in deciding whether it's unduly harsh, then all you're leaving for the public interest arguably is assessment of risk which means that anyone who is at risk of re-offending will be sent back. So I, personally, do not read the section like that.

McGRATH J:

Well it's an enquiry into the extent of risk. It's not any risk.

ELIAS CJ:

Yes, I fully accept that. If it's trivial they won't be deported.

WILLIAM YOUNG J:

Is there any legislative background history to this? I know it's sort of, it's probably come throughout a complex path because it also, as we know, there's similar provisions in relation to overstayers, but is there any indication as to what the legislature had in mind, what the purpose of this way of expressing the test was?

MS SCHAAF:

It's not a matter that I have looked at closely but I think, yes, to overcome difficulty in those interpretation matters, the appellant's case is premised on the application of the international covenants to the assessment of what would be – that it would not be contrary to the public interest to allow the appellant to remain in New Zealand.

And I just go through the – in the Tribunal's decision in *Nofoaiga v Minister of Immigration* [2009] NZDRT 11, 6 April 2009 and also *Pulu v Minister of Immigration* [2008] NZAR 429 (HC). That's on page 13 in paragraph 61 and 62 of my submissions. I refer to how the Tribunal deals with the part of contrary to the public interest and paragraph 61 the Tribunal identified family unity as a public interest and also, similarly, it referred to its decision in *Nofoaiga v Minister of Immigration* where I've quoted from that decision and *Nofoaiga* is on number 5 of case, the bundle of authorities for the appellant.

And in paragraphs 133 and 134, the Tribunal stated, "The public interest in family unity, quite apart from the public interest in the observance of New Zealand's international obligations, the access to public interest in protecting family unity generally, the preservation and protection of family, is a matter of significant social importance. We acknowledge that there is here public interest in the unity of the appellant's family and also in the preservation of a functional supportive role for the appellant in his son's life." Also, the Tribunal's approach in terms of what would be contrary to the public interest is illustrated in its decision of *Pulu* where there's more detailed discussion of the public interest where the Tribunal identified that important factor in assessing public interest is the risk of re-offending and the Tribunal also states in paragraph 103 of its decision the Tribunal stated, "As a matter of common sense, the higher the chance of recidivism the greater is the public interest in the deportation of the individual."

Lastly, on paragraph 113 of *Pulu v Minister of Immigration* that's the reference there to one of the other matters that the Tribunal has looked at in terms of if there's no risk of re-offending. In other words, there would still be public interest mandating the deportation of a person.

In paragraph 63 on page 14, that's what I have just summarised. There's a further factor taken into account in that even if the risk is low there's society's condemnation of such offending. It referred to the English decision *N (Kenya) v Secretary of State*

for the Home Department [2004] EWCA CIV 1094. It stated there, "The risk of re-offending is a factor in the balance, but for very serious crimes a low risk of re-offending is not the most important public interest factor. In my view, the adjudicator's decision was rather influenced in the present case by his assessment of the risk of re-offending to the exclusion or near-exclusion of the other more weighty public interest considerations characterised by the seriousness of the appellant's offences."

I go on to paragraph 64 of my submissions on page 14. It is my submission that the Tribunal's approach to the consideration of whether it would be contrary to the public interest to allow the appellant to remain in New Zealand applied the wrong legal test when considering to enter action between Articles 23(1) and 17 of the ICCPR and section 105(1) of the Immigration Act 1987. Looking at paragraph 65, I refer there to Article 17 of the ICCPR and paragraph 66 I refer to Article 23(1) and also refer in paragraph 67 to this Court's decision in *Ye & Ors v Minister of Immigration* and where this Court referred to the principle that the Act should be interpreted in a way that is consistent with New Zealand's obligation to observe the requirements of applicable international instruments.

In paragraph 68 of my submissions, it is submitted that the factors applied by the Tribunal as to what is contrary to the public interest is wrong because it treated the right to family unity under the ICCPR is of social benefit and one of the considerations of the public interest component of section 105 of the 1987 Act. I think my decision is that –

GLAZEBROOK J:
Why would that not be helpful to your client rather than detrimental? It might have been the right test but it can't be anything other than helpful, can it, because it diminishes the seriousness of the recidivism risk, doesn't it, if you're looking at a balancing of the public interest? I know the Chief Justice doesn't like the term "balancing" but …

MS SCHAAF:
My argument is that when you treat it as a social benefit then it's just weighed up with the other considerations, whereas if you look at the application, in my submission, of the international covenants then it would apply under – when it's read into section

105 of the Immigration Act then there are other considerations that are looked at, although the Tribunal –

GLAZEBROOK J:
Is the argument really that, look, the way the Tribunal has done it is effectively had a disjunctive test, one where both have to be met but effectively disjunctive so the first test and then the second test but with no reference back to the particular humanitarian factors that merely a reference to a generic right to family life, is that the concern?

MS SCHAAF:
I think the concern, which I'm not arguing strongly because it's not – it doesn't harm my client's appellant case, but I think my concern initially was that when they cited as a public interest it detracts from the importance of the family of Articles 17 and 23(1) in looking at the international covenant and New Zealand's obligation in applying it to the issue of contrary to the public interest in this instance, although it's applicable also when looking at the humanitarian factors but which the Tribunal had traversed in this case, so when you treat it as a public interest, just that by itself, and not referring back to – not treating it as a part of the international covenant solely then it sort of detracts from that argument and the importance of the application of the international covenants when you apply it through the provisions of the Immigration Act.

I think I referred in paragraph 69 to the general approach by this Court in *Ye & Ors v Minister of Immigration* is that the Tribunal has to look at international covenants under both limbs and also makes its assessment, rather than in this instance in identifying family interest as a public interest, the approach should have been that they look at international covenants and obligations and apply that to the Act, although that approach of the Tribunal's is not detrimental to the appellant's case, but in terms of looking at the international covenants it would make a difference as to, in my submission, how this Court and other Courts could look to assess the appellant's case.

I think in one of the – I've gone to page 16 of my submissions – that the Tribunal had looked at, had indeed looked at the provisions of Article 17 and 23(1) and that's in paragraph 71 on page – the end of page 15 and the beginning of 16 but I think from the appellant's case the Tribunal, when it made the decision, had not taken into

account the development in the jurisprudence of the United Nations Human Rights Committee in *Nystrom*.

I go to paragraph 75 of my submissions on page 16 and it's submitted that a proper application of the interaction between section 105(1) in the Article 17 and 23 of the ICCPR involves an assessment of the provisions of Articles 17 and 23 is against tests that it applies as to whether it would be contrary to the public interest to allow the appellant to remain in New Zealand and I set out the relevant passages from *Nystrom* in paragraph 76 of my submissions at the top of page 17 and I refer to those paragraphs in paragraph 7.7 *Nystrom* is number 6 of the appellant's bundle of cases and I refer there to paragraph 7.3, the last sentence, 7.10 and 7.11.

I just refer in paragraph 77 to the fact that *Nystrom* was followed – the view in *Nystrom* was adopted by the Committee in *Warsame v Canada* and go on to discuss the case that he was born in Saudi Arabia, entered Canada at age 4 years, but did not obtain Saudi Arabian citizenship. He moved with his family to Canada and never lived in Somalia and he was granted permanent residence status in Canada when he was eight years old. The facts of that case are on paragraph 78. Mr Warsame was convicted of robbery when he was 16 years old and was sentenced to nine months' imprisonment and was convicted of possession of a scheduled substance for purposes of trafficking and he was sentenced to two years' imprisonment. He was ordered to be deported for serious criminality on 22nd June 2006. He had family in Canada.

I just refer in paragraph 79 to the relevance of *Warsame v Canada* that it's an example, another case example of somebody who was aged 4, even though the appellant was aged six when he entered the country.

In terms of how the Tribunal assessed the risk, the contrary to the public interest element of section 105, the Tribunal adopts the view that any case that has a high risk, a risk higher than low is dismissed by the Tribunal.

ELIAS CJ:

You don't substantiate that. What's that based on? Are you talking about a survey of the decisions of the Tribunal?

MS SCHAAF:

It's based on the statements made by the Tribunals in their decisions, yes. The approach, the general approach is they have a sliding scale and –

ELIAS CJ:

Is that a reference, as is suggested by Justice Young in paragraph 65?

WILLIAM YOUNG J:

There's paragraph 65 but that's perhaps a bit ambiguous. Page 51. At one level it's a statement of the obvious. If there is a risk of re-offending then it does raise the question of public interest but alternatively it may be if once there's a moderate risk of re-offending then it's conclusive. They do go on to mention a number of other factors, suggesting that it may be the former rather than the latter meaning that they have in mind.

MS SCHAAF:

I think they also refer in the beginning to how they look at how they assess –

GLAZEBROOK J:

Paragraph 63 talks about the sliding scale but that's the more serious the crime the lower the chance of re-offending.

MS SCHAAF:

I think there's a reference by the Tribunal.

GLAZEBROOK J:

That's related to the more serious crime, the lower the – it's not actually related. It's not a sliding scale on recidivism, as such. It's a sliding scale related to the relationship between seriousness and recidivism, which is …

ELIAS CJ:

Although the Tribunal says that an important factor is the degree of risk, I see, then it goes on to look at public interest and family unity, so I'm just wondering what – it doesn't really identify what are the factors apart from risk and family unity, is that right?

MS SCHAAF:

Yes.

GLAZEBROOK J:

And paragraph 65 seems to suggest that you weigh up public interest and family unity but not the specific circumstances.

MS SCHAAF:

I think I refer to *Pulu v Minister of Immigration* as illustrating – that's number 7 of the appellant's bundle of authorities. That case illustrates the Tribunal's general approach to assessment of – I refer to, I think, in the discussion, paragraph 62 of my submissions on page 13, there's a discussion on page 443 paragraph 101 of the *Pulu v Minister of Immigration* decision. That's in the appellant's bundle on number 7 and on page 443 beginning in paragraph 101 there's a discussion of the Tribunal's approach in assessing.

GLAZEBROOK J:

What do you say the test should be if – can you articulate what you say the test should be?

MS SCHAAF:

I think the point that I was making is that in – it's the way that the test was applied by the Tribunal in this case where they have the sliding scale and the assessment of the approach is that if you have a moderate risk, say for serious offending which they termed this offending, the qualifying offending in this case to be serious, then any risk higher than low will not be acceptable and that's the common or the approach of the Tribunal in the cases.

GLAZEBROOK J:

So are you saying a sliding scale approach is wrong?

MS SCHAAF:

No. I say that the sliding scale approach was not how they treated this case. They applied their sliding scale approach, treating it like it was a typical case of adults who entered the country and commit offence when they were adults and that the, when you look at the international covenants and how it affects that sliding scale that the appellant's risk of re-offending was termed to be moderate and in terms of that

approach automatically rules him out as being successful under that limb and I think the argument for the appellant is that if the international covenants are applied then an assessment or re-assessment of how their sliding scale applies needed to be taken into account.

GLAZEBROOK J:
So the argument is that when they were applied in a sliding scale they should have taken into account the youth of the offender?

MS SCHAAF:
Yes, and also when taken together with the international covenants there would be – reading the section 105 and how it interrelates with the international covenants it would result in a different approach, particularly in a case such as the appellant's. It would apply, the test would apply normally in the majority of cases but in this instance the Tribunal did not, in my submissions, assess the circumstances of this case, having looked at the test in relation to the international covenants, and also in particular the decision of the view of the United Nations Human Rights Committee in *Nystrom* and the development and I think the reference has been made before about how it was formulaic and I think the application of the test in this case was formulaic in a way that they just applied the test and not considering the international covenants in looking at the circumstances of the case.

McGRATH J:
Is it also part of your argument that because the offending occurred when he was young and immature that it should not be seen as typical of his pattern of criminality, that at a more mature age it can be expected that he'll become more stable and therefore is a public interest in allowing him to remain in New Zealand is influenced by the fact that what happened happened when he was at a very immature age and he's now not and he seems to be – I think that you would say from some of evidence – looking to have a more stable life.

MS SCHAAF:
The condemnation is not the same as if a young person commits a crime and an adult commits a crime and when you say it's contrary to the public interest you would have more, give more leeway to somebody who's young, an offender who's young.

McGRATH J:

Is your argument also that you would have more confidence that the person won't re-offend in the future if the only offending with which you're concerned happened when he was young?

MS SCHAAF:

I think that's not my argument because if you stretch that argument you will say that a psychologist's report that he –

WILLIAM YOUNG J:

That's an actuarial report, isn't it?

ELIAS CJ:

Which we don't have in the case, do we? We don't have the underlying material. That's something I was going to ask about.

WILLIAM YOUNG J:

Won't there be an actuarial assessment which the psychologist has supplemented by reference to – I think they're called structured clinical judgement?

MS SCHAAF:

They have a test that they assess so that's the –

ELIAS CJ:

Offending in youth is actually one of the risk factors so I think it might not …

GLAZEBROOK J:

Yes, and in any event, it's not looking at whole of life offending, and there probably is a relatively moderate risk of re-offending quickly, it's just that there is also is usually a falling-off of offending from about the age of 30. You just have to wait.

ELIAS CJ:

It's time for the morning adjournment. Ms Schaaf, how much longer do you expect to be and then we've got Ms Radcliffe to go.

MS SCHAAF:

Probably an hour for the finishing of the submissions.

ELIAS CJ:
All right. We'll take the morning adjournment now. Thank you.

COURT ADJOURNS 11.36 AM

COURT RESUMES: 11.55 AM

MS SCHAAF:
Now, I've referred your Honours to page 443 of the *Pulu* decision in tab 7 of the appellants bundle of authorities where they discuss the risk of re-offending and its relationship to the nature of the offending under the public interest element of the test in section 105(1) and they refer in paragraph 103 to the higher the chance of recidivism, the greater is the public interest in the deportation of the individual. So the issue for the Tribunal is to determine the level for chance for deportee has to be below for us to be satisfied he or she meets the public interest limb of the statutory test.

And the Tribunal, as I stated, the Tribunal's approach is once there's serious offending then only the very low, the low risk of re-offending will satisfy the test that it would not be contrary to the public interest to allow the appellant to remain in New Zealand. And in this instance the Tribunal did say that what the appellant had committed was a crime of serious violence, though it's not in the worst kind of case. And in my submission, if the Tribunal had applied the decisions or the views of the United Nations Human Rights Committee in *Nystrom* and also in *Warsame*, then basically it would allow it to apply those views in terms of the statutory test and it could have made a difference to how they looked at the sliding scale in the circumstances of somebody like the appellant or somebody who's come to enter the country at a very young age and committed the crime as a youth.

And in terms of looking at – the only case I could find I have referred to before, and I'm looking at paragraph 86, page 19 of my submissions, *L v The Minister of Immigration* No 001/03, Deportation Tribunal, 17 January 2003, and that's number – tab 2 of the appellant's bundle of cases, and that's the only case that I could find of where the offending at a young age has been discussed by the Tribunal and the Tribunal, in paragraph 4.12 of that decision, it's on page 13. The Tribunal in that case stated, "Youth does not excuse his offending and did not do so here, although

the Court ensured his sentence was not oppressive. It is his conviction which has led to the issue of the deportation order and youth is not a chance to avoid consequences, including those imposed under the Immigration Act. Serious crime by young people is prevalent and disturbing and young people should not be seen to be exempt on that account alone from the policies and operations of the Act."

And although that was a decision in 2003, and the hearing took place in 2002, those are the sorts of views that – that's the only view that I could find of a case involving –

ELIAS CJ:
So this one went on appeal and the appeal was allowed on the basis that the Tribunal had applied an incorrect test, is that right?

MS SCHAAF:
The appeal was allowed. I'll just have a look at…

ELIAS CJ:
I'm just looking at paragraph 51 of Justice Durie's decision where he says that, "The conclusion must be that in this case deportation would be unjust and unduly harsh. That being so, it would be contrary to the public interest that he be deported and no other factors."

GLAZEBROOK J:
I think he had a low risk of re-offending and major mitigating factors from a quick look. So I think that was –

ELIAS CJ:
I see, that was the basis.

McGRATH J:
That is on appeal from the decision that counsel's just been referring to is it?

MS SCHAAF:
Yes.

ELIAS CJ:
Sorry?

McGRATH J:
Is that decision of Justice Durie on appeal from the –

ELIAS CJ:
Yes, yes, from this one, yes.

McGRATH J:
Thank you.

ELIAS CJ:
"The Court should be slow to resile from and intervention to ensure a just outcome for individuals."

MS SCHAAF:
So basically my reference to the Tribunal decision is just an illustration of what I submit has been the attitude. There's no taking into account of youthful offenders before the Tribunal for them to reconsider how the approach and how they apply the sliding scale test in terms of the public interest and risk of re-offending. And I refer to the circumstances of that case, paragraph 87. He was a young Samoan man who arrived in New Zealand when he was nine years old and was granted a resident's permit when he was 11 years old and he committed rape when he turned 16. In my point that I have made before in paragraph 88, I said what the Tribunal did not do was to assess the conclusion of moderate risk against the obligations under the Human Rights instruments.

Those are the submissions that I will cover and Ms Radcliffe will look at the question. Even if either or both of those questions in the affirmative, would the Tribunal nevertheless necessarily have come to the same decision, given its findings of fact?

If there is anything else that I need to cover after that, then I will do so before we close submissions for the appellant, and unless you have any other questions for me now, Ms Radcliffe will cover.

ELIAS CJ:
Yes, thank you, Ms Schaaf. Yes, thank you, Ms Radcliffe.

MS RADCLIFFE:

Good morning. The question before me is whether the Tribunal would have come to the same decision had they considered the international instruments in the way that Ms Schaaf has suggested. It is our contention that there are three things that would have changed their findings and would have certainly coloured, in our submission, would have changed the decision that they reached. Those three things are the length of Mr Helu's stay in New Zealand and the fact that New Zealand could be said to be his own country.

The second issue that I will be raising is that they would have come to a different decision had they considered age in terms of the public interest question, and that they would have reached a different decision had they looked at the international instruments regarding the right to family life in the manner that we are suggesting.

If the Tribunal had considered that New Zealand was the appellant's own country, then they would have had to find very serious reasons to justify deportation of the appellant, not merely a lower threshold test that it would be contrary to the common interest, but very serious reasons as required under the *Maslov v Austria* test.

GLAZEBROOK J:

They would still have to apply the test, wouldn't they, under section 105?

MS RADCLIFFE:

Yes, the test would still be applied, but the test as it stands has only one requirement and that is that under 105(1)(a) that they consider the point of view of the victim if it's put before the Tribunal. That suggests that there is a lower threshold that needs to be reached and it is our submission that rather than having a lower threshold in a situation where New Zealand is considered the person's own country, it is not a lower threshold that needs to be reached, but rather very serious reasons.

ELIAS CJ:

Is there any – if this man had been a New Zealand national he couldn't have been deported.

MS RADCLIFFE:

That's correct.

ELIAS CJ:

You're building on the argument that "own country" is something less than a New Zealand national.

MS RADCLIFFE:

Something less than citizenship but requiring a higher or a more serious consideration than someone who has only recently been granted residency.

ELIAS CJ:

Just picking up, then, what Justice Glazebrook said, you would still have to come within a section 105 rule so are you simply saying that the fact that New Zealand was own country enters into the public interest assessment?

MS RADCLIFFE:

Yes, Ma'am.

ELIAS CJ:

I don't think it can possibly be suggested that his strong association and identification with New Zealand wouldn't enter into that assessment. Are you suggesting that it is being – that the Court of Appeal didn't treat it as significant?

MS RADCLIFFE:

I am suggesting, Ma'am, that if you apply the international instruments in the way that we have suggested that the instruments and the case law that followed them requires something more than an acknowledgement and a cursory consideration, but rather that they have to find very serious reasons that it is not sufficient simply to say there is a moderate risk of re-offending, that you have to put that in the context of he has lived here since he was six years old and the other reasons for which he considered New Zealand his home.

ELIAS CJ:

It's not tick the box. It requires reasons. Is that what you're saying?

MS RADCLIFFE:

Yes.

As set out in paragraph 90 of the submissions, the appellant had a number of reasons to consider New Zealand his own country. He had an absence of close ties to Tonga. He had lived here for the majority of his life, and as the Tribunal found for almost all of his formative years, he had lived in New Zealand. It is our submission that given those close ties to New Zealand, given that New Zealand could be said to be his own country, the test of very serious reasons has not been met by the Tribunal. I note also that the *Nystrom* case, while he was only 26 days old at the time he entered Australia, he was convicted of a number of very serious offences. In this case, the appellant, while he was six years old rather than 27 days old, he could not be said to have committed the worst kind of offending. In addition to the *Maslov v Austria* case, who was also six when he entered Austria and was subsequently convicted of a number of very serious crimes, it is our submission that a country can be considered the person's own country if the person had entered at a very young age and has spent a significant portion of their life in New Zealand, and that had the Tribunal made that finding it would have changed their decision.

Turning then to age as a public interest ground, it is our submission that age could be relevant not only to the risk of re-offending and the assessment thereof, but also as a ground on its own under public interest.

ELIAS CJ:
I'm sorry, I'm just wondering – under the Immigration Act, which I haven't gone through, is there any statutory provision about where people deported are to be deported?

MS RADCLIFFE:
I can't tell you the exact section but I can tell you that in practice Immigration will organise deportation to any country where the person has a right of residency.

ELIAS CJ:
Perhaps I'll ask Ms Jagose later. I just wondered whether there's anything in the Immigration Act itself which points to an expectation like that. That's all right. Carry on.

MS RADCLIFFE:
In our submission, Mr Helu's youthful offending certainly shows a lack of maturity and good judgement. But as pointed out by this Court earlier today, those things do

change with age. It is an expectation that as a person ages and matures they will tend to make better decisions.

In this situation, it is our submission that the age of the appellant at the time that he committed the offence could have been seen, in and of itself, as relevant to the public interest limb and that had the Court – had the Tribunal considered that point it would have coloured their decision.

If I could direct the Court to page 16 of the Helu decision, the original Tribunal decision, page 53 in the casebook, paragraph 66, beginning on page 14 of the Tribunal's decision and continuing on page 15, at the time of his parole hearing in May 2010, the appellant was assessed as having a high risk of re-offending. A year later, on the 24th of May 2011, that high risk of re-offending had trended downward towards only a moderate risk of re-offending.

WILLIAM YOUNG J:
This is just a function of the actuarial instrument, isn't it, how it's applied to the events that have occurred over – or not occurred over the intervening period?

MS RADCLIFFE:
Well, it certainly is a function of that, Sir, but in my submission it also shows that as he became more aware of the consequences of his actions it's clear from the assessments that Mr Helu's risk of re-offending was trending downwards and as such the Tribunal should have considered age as relevant to whether or not –

WILLIAM YOUNG J:
But age is part of the assessment.

MS RADCLIFFE:
Well, age is certainly part of Mr Woodcock's assessment. It is certainly a part of what they assess in terms of the humanitarian interest.

WILLIAM YOUNG J:
But it's part of the way the actuarial assessments work.

ELIAS CJ:
It looks, though, from paragraph 67, that it wasn't simply based on an actuarial test.

WILLIAM YOUNG J:
No, it'll be a structured clinical judgement around an actuarial assessment. Isn't it?

MS RADCLIFFE:
Yes. In fact, they say exactly which tool they used to make that determination in paragraph 66. The historical clinical risk management 20 assessment tool. However, I would put it to the Court that Mr Woodcock's brief was not to consider the public interest in allowing Mr Helu to remain in New Zealand. His brief would have simply been, is there a risk of re-offending?

Even if age and the public interest concerned with age had been a part of Mr Woodcock's brief, that does not take away the Tribunal's requirement and obligation to consider all public interest limbs for themselves. So simply because it could have been or was considered under the humanitarian part of the test and under the psychological assessment conducted by Mr Woodcock the Tribunal had a separate obligation to consider age as a factor under the public interest limb of the test.

Turning, then, to the final submission, the right to family life as part of the public interest test, it is our submission that if the Tribunal had applied the very serious grounds test to the question of whether the right to family life applied to the public interest limb, they would have made a different decision.

WILLIAM YOUNG J:
But they did apply a right to family life, didn't they, to the public interest?

MS RADCLIFFE:
I believe they applied family unity.

WILLIAM YOUNG J:
Paragraph 74, social benefit and protection of family unit as a public interest. New Zealand has also undertaken the respect the right to be free of unlawful or arbitrary interference in family life, to recognise the support of the family, the right to family life is not absolute, where the rights of the appellant's family will be breached depends on whether the appellant's deportation is reasonable, that is proportionate and necessary in the circumstances. So haven't they really taken all that into account?

MS RADCLIFFE:

Well, they certainly looked at it, Sir, but it's our submission that they did not apply the correct test, that test being that very serious reasons are needed in order to justify expulsion from a person's country.

ELIAS CJ:

Well, the real crunch is the judgement they reach that his remaining in New Zealand posed an unacceptable risk to public safety and the only basis for that unacceptable risk was the risk assessment, was it?

MS RADCLIFFE:

Yes.

ELIAS CJ:

And the nature of the offending, I suppose. It's pretty conclusory. Maybe there's nothing much you can say except where it – what your outcome is but there's nothing much to justify that.

MS RADCLIFFE:

I would certainly say, Ma'am, that in a situation where if there is an acceptance that a person has a right to a high level of consideration due to their time in New Zealand and their ties to this country there is certainly an expectation and an obligation on the part of the Tribunal to consider more than simply a moderate risk of re-offending as being an unacceptable risk.

ELIAS CJ:

I'm just wondering about the way around they've put it, too. The public interest in removing the person from New Zealand is not quite the way it's put in section 105, although maybe it doesn't make much difference. It's the public risk, isn't it, the public interest in allowing him to remain.

MS RADCLIFFE:

Yes.

Unless your Honours have further questions for me, that concludes my submissions.

ELIAS CJ:

Yes, thank you, Ms Radcliffe. Yes, Ms Jagose.

MS JAGOSE:

Thank you, your Honour. In light of the exchange from this morning, I think it's useful to start at the beginning because our written submissions begin with setting out how the Crown says section 105 works and I think I can engage directly with the issues raised by your Honour the Chief Justice in relation to is this really a two-part test or is this a one test and to be clear, the Crown's submissions is that this is a one test, a unitary test in which the Tribunal needs to be satisfied of two parts. That doesn't make them utterly interdependent, the two parts. They are all one assessment of –

WILLIAM YOUNG J:

What's the ultimate question?

MS JAGOSE:

For the Tribunal?

WILLIAM YOUNG J:

Yes. Aren't there two ultimate questions?

MS JAGOSE:

Are there humanitarian circumstances which override the particular policy of deporting a person for certain criminal offences and if there are, is there something more, is there something specific about this offender and his or her particular circumstances that make a risk to the public too great to bear? So it is really a one concept although in my submission –

ELIAS CJ:

Well, you don't get into an assessment if there aren't humanitarian concerns, so the ultimate question is the public interest question, it seems to me.

MS JAGOSE:

Yes, thank you, Ma'am, and as the Court of Appeal says, rightly in my respectful submission, that there are unduly harsh or unjust circumstances arising isn't the end of the question. The question continues. Is there something more that risks harm to the public for which the person cannot be allowed to remain?

ELIAS CJ:

Well, that I would query, the something more, or whether it is that given that it would be unduly harsh to deport the appellant is it not contrary to the public interest to allow him to remain. On the unitary view, it seems to me you get a long way in establishing a public interest in allowing him to remain. On the bifurcated approach, you don't because really ultimately the only question is going to be whether, effectively as the Tribunal said, whether exporting him is going to be in the public interest, which is not the wider inquiry that it seems to me the section mandates.

MS JAGOSE:

If your Honour is concerned that the two-part approach leads to a position that says any harm to the public is enough to overcome the humanitarian circumstances, then that's not the Crown's submission, and the reason I say "something more" is your Honours probably identify me echoing this Court's judgement in *Ye & Ors v Minister of Immigration*, there must be something more than the broad public interest in the immigration system working as it should or the principle of perhaps deterrence and –

WILLIAM YOUNG J:

But this is slightly different because this involves criminals, whereas *Ye & Ors v Minister of Immigration* didn't.

MS JAGOSE:

That's right.

WILLIAM YOUNG J:

And certainly the majority was of the view that it was a two-stage test. There were two questions that had to be answered. Now, the problem, the interpretative problem is, in dealing with a public interest –

ELIAS CJ:

That was not the determination, of course. That was assumed. It's not a finding that there must be a two-stage. It was part of the reasoning process.

GLAZEBROOK J:

Well, also, the public interest wasn't engaged on the finding.

ELIAS CJ:

No.

GLAZEBROOK J:

So it wasn't an issue – that wasn't something the Court was actually dealing with because it had already said that generalised public difficulty of upholding the sanctity of the immigration was not what was being talked about.

MS JAGOSE:

Yes.

WILLIAM YOUNG J:

Yes, but here there is a public interest which may be engaged by the risk of recidivism.

MS JAGOSE:

Yes and the Tribunal thinks about that, the nature of the offending, the risk of the offending.

WILLIAM YOUNG J:

In looking at the recidivism risk the Tribunal has to assess in a context now, the context it assessed it in was the other public interest it recognised which was the right to a family life and they did it in pretty expansive terms in the paragraph I took Ms Radcliffe –

ELIAS CJ:

74.

WILLIAM YOUNG J:

Yes, but is it also necessary for the Tribunal to say well, it's actually pretty tough on this appellant and we really have to balance things that are really personal to the appellant how tough it is on him as against the risk of recidivism because that, I think, is a proposition that's floating around here.

MS JAGOSE:

In my submission, no. That doesn't – what level of public interest is engaged is not necessarily reflective of the height or seriousness or the harshness found in the first

part of the question. But I have to accept, and I do, that there needs to be something greater than re-offending only because it must be about what assessment can the Tribunal make standing in the shoes of the public or the community that the community will tolerate before that being such a risk that the public can't tolerate it? It's not any risk. It can't be any re-offending. It must take account of, as the Tribunal did in this case, the nature of the offending and within that some of the aspects that my friends criticise, I say, are actually addressed, but we'll come to that. The nature of the offending and the likelihood of re-offending in the same manner. So it is quite particular to the appellant, particular to what the appellant raises as a concern for the public interest rather than any old aspect of the public interest which is more reflective, I think, in the broad policy about why we have part 4 deporting certain residents for certain crimes.

ELIAS CJ:

Why is there no reference to recidivism in the section if it assumes the really overwhelming significance that is being suggested?

MS JAGOSE:

The only reason I have been able to think about why it isn't there is one of the factors in 105 is that it is a significant feature of the public interest. Re-offending of a similar nature, having taken account the nature of the offending, not any offending, it's not any re-offending, is the European case law –

ELIAS CJ:

Where do you even get that from, that it's the, of the same sort of offending? These all seem to be quite elaborate constructs which are being imported into the public interest in section 105.

MS JAGOSE:

Yes, I accept that and I think those constructs, and I have to say they're not my own, they come from the cases –

ELIAS CJ:

Yes.

MS JAGOSE:

– but I think they have to be built into what the public interest is. In order for that test not to be so low that there's no point in having a humanitarian exception. There is, of course, a great point in the humanitarian exception and if we don't put into what we think of as the public interest model part of the test sufficient constructs or seriousness, there is a risk that any public interest will trigger the protective nature of that part and the humanitarian circumstances will be overcome. So I don't say those things have to be clearly balanced together but I say that is why what is in the public interest is quite an advanced assessment of this appellant, this risk, particular risk of seriousness that the public shouldn't have to tolerate.

GLAZEBROOK J:

Why –

ELIAS CJ:

That bothers me a bit too but sorry, you go.

GLAZEBROOK J:

Well I just quite understand why you wouldn't, if you have relatively minor and of course in this case we don't have the exceptional circumstances test, but if you had relatively minor humanitarian concerns, why wouldn't in a proportionality sense, why wouldn't even a relatively minor risk to the public overcome that rather than a whole pile of constructs? On the other hand, maybe if you had a very very high, many many factors that are involved in the humanitarian concern, then a larger risk to the public may be able to be tolerated because there should be some proportionality between the two because otherwise it doesn't really matter what sort of humanitarian aspects. If you've had a certain type of crime you will always go, a certain type of crime with a certain recidivism risk you will always go, not matter how young you are, how – because youth wasn't taken into account in the specific sense here because it, on the Crown's argument, it can't be because once you get to the public interest you just have a generalised view of family life and a generalised view of youth that is somehow fitted through rather than looking at the particular circumstances of a particular offender.

MS JAGOSE:

So can I address several things that came out of that comment your Honour? The first is that there won't be minor or not so serious humanitarian circumstances. They must already have been assessed to have been unduly harsh. They already –

GLAZEBROOK J:

Minor rather than exceptional because we're not in the exceptional, so we're going to have a much wider range of humanitarian circumstances I would have thought.

MS JAGOSE:

For which it's unduly harsh to deport the person –

GLAZEBROOK J:

Yes.

MS JAGOSE:

– so that assessment of, against the broad policy of deporting criminal offenders is that outweighed by these particular circumstances. So we already have a threshold of seriousness of those humanitarian circumstances.

GLAZEBROOK J:

But there's going to be a wider range if it's not exceptional I would have thought.

MS JAGOSE:

Under 105 that's right, although as I –

GLAZEBROOK J:

Or it won't be under the other once you get to exceptional, yes.

MS JAGOSE:

Yes. The new legislation or you know the current legislation of course brings back that phrase.

GLAZEBROOK J:

Yes.

MS JAGOSE:

Anyway, we don't have that phrase here, so I accept that.

The next point then is to say that the Crown submission isn't that the material that has been considered in the humanitarian circumstance as part of the question can never be reconsidered. Indeed it can be when the appropriate lens is focused on the public or the community and it might be, although it wasn't here, in relation to youth, that there is some public interest element in maintaining a very young offender within his family unit if the facts of that young offender were that that family unit was part of the way to rehabilitation. That might well have been a public interest factor with facts considered on both sides of the ledger, or both parts of the one question.

ELIAS CJ:

Well how's that? If one's taking this as being the New Zealand public interest how does it matter to us if he's rehabilitated? We're going to export him.

MS JAGOSE:

Only if it's not in the public interest for him to remain.

ELIAS CJ:

Yes but if the reason why it's not in the public interest for him to remain is because he's a recidivist risk, I'm understanding for you to be trying to temper that unattractive result by saying that it might be in the public interest if it would assist in his rehabilitation to keep him in New Zealand.

MS JAGOSE:

If something can be identified that is in the public interest, for example, what's the public interest element in deporting a child – sorry, a young child, a 12 year old? One might say there would be a level of public abhorrence to deport, even a serious criminal offender at that age, out of his or her family unit because there is something more in the public interest than simply a broad concept of family unity. This particular family might also be, on the fact, a public interest factor.

ELIAS CJ:

So that's to say that the public interest does include the public sense of morality or what's fit?

MS JAGOSE:

Yes, I think it must.

ELIAS CJ:

Then it's a question of degree, the assessment, I suppose.

MS JAGOSE:

Yes I would say, of the specialist tribunal with the appellant before it, with all the evidence before it.

ELIAS CJ:

Well if the specialist tribunal had given us a little bit more to work with, it might have been easier to accept that submission.

MS JAGOSE:

The very point where –

GLAZEBROOK J:

And I'm not sure the Tribunal is terribly specialist in risk assessment. I don't think it even pretends to be.

WILLIAM YOUNG J:

But it hears evidence as to that.

GLAZEBROOK J:

Well no, absolutely but I'm not sure it can be said to be specialist in that area and acts on evidence.

ELIAS CJ:

But it's probably a better point to make that that is the body that this decision is entrusted to and we come into this by way of judicial review. So there is a, you know, a degree of discretion that we have to concede.

MS JAGOSE:

Yes, thank you, Ma'am. That is a better way to put it. Also the Tribunal, I mean it is the proxy for the public interest. They are the ones that have to make that assessment.

ELIAS CJ:

Well I just don't understand this emphasis. What you're really almost saying is that the Tribunal is fulfilling a function similar to the, I don't know, the Parole Board or some – yes. But it's almost worse than that. You're almost saying it's there to sort of gauge how the public would assess the particular case.

MS JAGOSE:

Or what, yes, what risk should the public have to tolerate. That is what it has to determine.

ELIAS CJ:

One would have thought it was all more objective than that but maybe not. Maybe that is an objective test.

MS JAGOSE:

Can I raise a point that is a new matter that I thought might be useful? Just in the last few days I've come across a new decision – sorry, a decision of the new tribunal, the Immigration and Protection Tribunal, under the new section 207 but it does show something of how on a particular set of facts the youth of an offender might well be a relevant public interest factor. With the Court's permission I'll hand up that judgment.

ELIAS CJ:

Yes.

MS JAGOSE:

It's a decision of Judge Hastings, the former Chair of the Tribunal and just while it's coming to your Honours I'll just briefly run through the facts.

The appellant was a 19 year old citizen of the United Kingdom and he appeals against his liability for deportation under a similar provision as 91, 206, following his conviction for an offence for which the Court had power to impose imprisonment for three months or more. He was holding a temporary class visa when he offended. And the offences were relating to sexual connection with a child under 12 and then with a child under 16. The appellant himself, at the relevant times, was 15 years old at the age of the relevant offending.

Now the Judge goes, or the decision goes through, of course, the facts, the evidence from family, paragraph 28 and following, the registered psychologist's view or opinion. The Court goes on to look at the exceptional circumstances of a humanitarian nature, what they're looking for. And the relevance to the point that we've just been discussing starts at paragraph 50. We're already at 49, identifying research both in New Zealand and overseas on youth offending. It's something your Honour, Justice Glazebrook, I think was referring to before the break and the role played by brain maturation and referring there to the Court of Appeal's judgment in *Churchward v R* [2011] NZCA 531, "Age related neurological differences between young people and adults, effective imprisonment, greater capacity for rehabilitation." So it observes that that research has been considered by the Courts in the context of sentencing but that's not how it was – sorry, but it wasn't being conducted for that purpose. And the Judge finding that research is capable of being used to inform any decision-making about consequences of adolescent offending.

Now if we look then at how they have dealt with that in the public interest aspect. It's at following paragraph 86 which is the heading "Family Unity" and, "I observe that under the public interest," starting on page 19, "Risk of re-offending is the first matter considered.

ELIAS CJ:
Sorry, what paragraph?

MS JAGOSE:
Sorry Ma'am, 83.

ELIAS CJ:
Yes thank you.

MS JAGOSE:
And the Tribunal there repeats its approach that the more serious the crime that the calibration approach, that it has arising from its own decision in *Pulu*, the more serious the crime the lower the chance of re-offending that can trigger the adverse public interest finding.

McGRATH J:
Sorry, what paragraph are you at now?

MS JAGOSE:

That was 83. So it considers risk. Then it comes to family unity and like this tribunal in the current case, it considers the public interest and the preservation of family unity is a general concept and notes New Zealand's international obligations in relation to family life.

And at paragraph 87 they come to this point, "While family unity is an inherently desirable public interest matter, in this case there is the added public interest in family unity is a means of assisting a young offender to control his impulsivity of instilling in him the advantages of consequential thinking." And I don't see that as all inconsistent with the submission that the Crown makes about what is it in the public interest that is engaged? And, I mean, of course public interest is a difficult thing to define with any accuracy in an abstract way, but here it has stood out to the Tribunal because the expert psychological report put a lot of emphasis on the young man's youth, the research about impulsivity and the ability to see consequences of what you are doing and that, she thought, his family unit was one of the ways in which he was able to come through that.

ELIAS CJ:

There are similar indications, of course, here and I have to say, Ms Jagose, I am not reassured about this case by reading this determination. I think I'm quite concerned about inconsistency and matters of that sort and it just seems to me quite a – well, a terribly sad case, the one we're dealing with.

MS JAGOSE:

And I don't disagree with that, your Honour. But I say the facts are quite different in that Mr Helu was 17. His psychological assessment says the difficulties for him are the fact that he hasn't attended to his drug and alcohol use, which is a key trigger to his violent offending. There is nothing before – that I have, before the Tribunal or before this Court to show that there is any evidence that, placed in his family unit. He's now 20 – at least when the Tribunal see him.

GLAZEBROOK J:

Well this man's 19.

MS JAGOSE:

Yes but –

GLAZEBROOK J:

And there's quite a lot of indication in the decision, in fact, as to the family's interest in the repairing of the relationship and the concern that they have for him, the feeling that the family's indicated that he's very immature and needs that assistance and they say, "Isolated from him without the support of his immediate family will be challenging."

ELIAS CJ:

And in this case that you've handed up to us, the psychological report is all contingent. If the appellant continued to mature, if he continued to have family support and full employment. Well we know that the prospects of employment for the appellant in this case look terrifically bleak if he's export – it's just, well, it's a – it looks very inconsistent.

MS JAGOSE:

I accept what your Honour says that it looks inconsistent and my own submission to that is that the facts, as we see them – sorry, as they come to us from the Tribunal decision are very different because we don't see those contingent expert views. We do see there is no attention to the key triggers of the offending. We also see an assessment that the offending was violent, albeit I have to accept, not the most serious level of violence, by direct contrast with this case just handed up.

GLAZEBROOK J:

Well are you suggesting this wasn't violent?

MS JAGOSE:

That's certainly the facts, Ma'am, that –

GLAZEBROOK J:

In terms of sexual offending?

MS JAGOSE:

For sexual offending with an under 12 year old, the facts were that the boy, at 15, was in contact with the girl – it's at 65. "None of the appellant's offending is violent."

He was in contact with her on some social media, understood her to be 14 or 15 like himself. There was no aspect in the facts of violent sexual assault.

That is why the Crown's submission is that in considering the public interest -

ELIAS CJ:
Sorry, are you saying that in terms of behaviour the public – I'm just wondering about the difference between violence and sexual offending. Is it violent offending the public can't be expected to accept?

MS JAGOSE:
Not necessarily. There might be other – I was going to think of an example that actually is violent, sorry, but there might well be –

GLAZEBROOK J:
Well major fraud or recidivist burglary which –

MS JAGOSE:
Yes, you know, a significant fraud is not a violent matter.

GLAZEBROOK J:
Actually I'm not sure. Burglary may not, it might have to be aggravated burglary to trigger section 91 but you'd usually have a, you might have one of those and a string of other…

MS JAGOSE:
What I'm resisting is any suggestion that inherent in the public interest is an automatic discount for youth offending because that, in my submission, has never been the approach even in the criminal Courts. It's a matter to be taken into account. It may be a mitigating factor when one thinks about culpability and other related questions but it must depend on how the matter comes to the Tribunal for it to trigger as in – I've forgotten the name of this new case, is it *Parker v Minister of Immigration* [2013] NZIPT 500628, sorry?

Yes, in the *Parker* decision there was something clearly before it which triggered an aspect of the public interest because there was a method of assisting that person, a

method by which society recognises with in a positive way the family unit was the way to assist him, and that was the public interest element observed by that tribunal.

In the instant case the public interest element beyond family unity was not outweighed by the public interest or the risk to the public of a moderate violent re-offending. Also the particular facts in the instant case, while Mr Helu was 17 when he committed the offending for which he came able to be deported that followed while he was on bail, when he was 18 years old a further incidence of violent offending. Again not the most serious levels of violence but the Tribunal was clearly influenced by that as well that as an adult he is also re-offending in a violent way.

However written submissions I think I haven't really got off the first few paragraphs but paragraph 8 sets out sort of in summary way the approach that the Crown takes to 105. Of course, and I think in exchange, it's obvious that the Court is aware that section 105 has been repealed. Section 207 is the equivalent of the 2009 Immigration Act and its wording is like the wording of section 47 that this Court addressed in *Ye*. So it has the exceptional circumstances and it also has in all of the circumstances, which 105 doesn't have.

WILLIAM YOUNG J:
Well presumably the – I mean it's slightly awkward but the exceptional circumstances in the overstayer context was perhaps referable to the view that there was a policy that people or overstayers should be removed. Therefore it's only humanitarian considerations of an exceptional kind that, as it were, get the case afloat, whereas the policy, I guess, is that it's easier, that we really look at the negatives under public interest and it's easier to get on to the first stage because there's no requirement for the considerations to be exceptional.

MS JAGOSE:
Yes, I accept that but the first part is not as high as in 47. They still have to have out –

ELIAS CJ:
Pretty high.

MS JAGOSE:
Yes that's right.

ELIAS CJ:
Unjust and unduly harsh.

WILLIAM YOUNG J:
It just has to be unjust. There's nothing out of the ordinary there.

MS JAGOSE:
Well – and I think the unduly aspect of unduly harsh does weigh those broad policy considerations. A resident who commits certain types of offences will be deported. So that's the unduly aspect, but it isn't as high as –

McGRATH J:
Can we say there's a policy in section 91 that if you have received a resident's permit, within five years you offend with the level of seriousness the subsection provides for, that you will deported or you will be considered for deportation.

MS JAGOSE:
Yes, that latter, yes.

McGRATH J:
The latter.

MS JAGOSE:
That the Minister has a discretionary power to issue you with a deportation notice.

McGRATH J:
So that is the underlying policy of the Act, if you like. This is factored into the equation.

MS JAGOSE:
Of that part, yes.

McGRATH J:
Yes, that supports the Minister's decision.

MS JAGOSE:

Yes and you can see in section 91 a staging of the categorisation of the types of crimes and the length of residents –

McGRATH J:

Yes, yes, I have noticed that.

MS JAGOSE:

– culminating and after 10 years of residence you can't be deported for criminal offending under part 4. You might still be for national security reasons in another part but once part – part 4 stops doing its work once you've had a resident's permit for 10 years. You can see, I say, the policy evident in that. The shorter period of residence the greater we disapprove of criminal offending and sanction that person with the threat of deportation.

McGRATH J:

Is sanctioned the correct concept here? It's a public interest determination. It's not a punishment is it? They don't, despite what the authorities say it's not a punishment.

MS JAGOSE:

Yes, quite so, Sir. Yes, sanction is not – it's more of the deterrent.

McGRATH J:

Yes.

MS JAGOSE:

The policy should deter a –

McGRATH J:

Well that comes through in the English cases doesn't it, Lord Justice Richards?

MS JAGOSE:

Yes.

ELIAS CJ:

But why should it? What's it deterring, because one would have thought that deterrence from criminal offending is in the sentence, so what's it deterring? Isn't it better just to look at it as a stand-alone public interest assessment?

MS JAGOSE:

The p – do you mean the policy, your Honour?

ELIAS CJ:

Yes.

MS JAGOSE:

I was thinking about the policy about why we have part 4. In my submission, it is an element of deterrence in it that I accept that the criminal justice system is also a significant deterrent in sentencing.

ELIAS CJ:

But I don't see why you have to say it as deterrence. It's simply a policy that we're not going to continue to keep people – of the people who come here don't have any entitlement to remain if they transgress in this way. I don't see that's to be seen in terms of deterrence. It's simply a policy that has been adopted which seems to me to be quite legitimate.

MS JAGOSE:

I was answering the question about why the policy.

ELIAS CJ:

Well you did say "sanction" which triggered it.

MS JAGOSE:

I did, I did, I did, yes.

McGRATH J:

Well, sanction's a concept that c – I mean I think it's discussed by Justice MacKenzie in *Pulu* for example.

MS JAGOSE:

Yes.

McGRATH J:

But it seems to be an English concept where they're looking for wider aspects of the public interest than mere avoiding risk of re-offending and they seem to move into the slightly moralistic judgment area which I have a bit of a difficulty with myself.

MS JAGOSE:

Well I had taken the reason for that to be more than the English approach was much more of a one, well especially when convention rights are engaged, of a one rounded altogether test where they look at the humanitarian factors, they look at risk, they look at the policy inherent in order to say is the end justified? They need to look at why is the policy there and that is why I think we see some of that language that we don't tend to see in the New Zealand cases about sanction and/or the strength of deterrence, probably, in my submission, because that's dealt with when we think about is it unduly harsh? Is there something – is the harshness outweighing the broad policy reasons why we have the policy?

McGRATH J:

Well perhaps – I'd be interested perhaps after lunch if you could tell me whether you accept his correct statement of the law, Justice Mackenzie's observation, paragraph 108 of *Pulu*, "Public interest is a wide concept. Social cohesion and public confidence in the immigration system required considerations of elements of deterrence (migrants understanding the consequence of serious crime is deportation) and repugnancy (society expressing revulsion at the seriousness of criminality)." Is that part of the public interest enquiry? I'd like to know what you think of that.

GLAZEBROOK J:

What paragraph, I'm sorry?

McGRATH J:

108, page 444 of *Pulu* which is behind tab 8.

GLAZEBROOK J:

Yes, no I've found it.

MS JAGOSE:

I will answer that, your Honour. I see the time. Is this an appropriate time for lunch?

ELIAS CJ:

Yes, we'll take the lunch adjournment now, thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES 2.19 PM

ELIAS CJ:

Thank you. Yes, Ms Jagose.

MS JAGOSE:

Your Honours, I want to address directly his Honour Justice McGrath's question about *Pulu* now and I just want to back up slightly before I do so. In my written submissions, probably the best place for us to be is at paragraph 24, but just to back up slightly to think about the policy of part 4, section 4 of the Immigration Act, which provides that if you're not a New Zealand citizen you can only be in New Zealand if you hold the requisite permit or permission, section 7, no permit shall be granted to any person who has at any time, whether before or after the commencement of this Act, been convicted of any offence for which that person has been sentenced to imprisonment for five years or more, or who, within the preceding 10 years, has been convicted of any offence for which they have been sentenced to imprisonment of 12 months or more. So already in those basic rules we can see the policy running, that immigration policy is to permit into this country people who have not committed qualifying criminal offences. So the mirror of that, then, is part 4 in relation to criminal offending. If I can shorthand what I've just said as being sort of a character requirement to get permission to stay, there's something there of the residence being a privilege and it's given to people who are considered or judged to be of good character, again, shorthand, not a phrase from the Act.

Public interest is engaged here in the policy, and I want to make the distinction between the section 105 reference to public interest and the broad public interest, which is inherent in the policy. Because to answer Your Honour's question directly, do I accept what the Tribunal said at paragraph 108 in *Pulu*, that paragraph that your Honour referred me to being the recitation of the Tribunal's decision with which

Justice MacKenzie agreed, my answer to that is yes. We do submit that in the broad public interest underlying the policy are those concepts as set out there in 108, social cohesion, public confidence in the immigration system, deterrence, and repugnancy, and I go further and repeat the word I said before lunch, sanction, too, is a legitimate public aim of part 4. To say there will be an immigration sanction on you, not just a criminal sanction, so, too, an immigration deterrent on you, not just a criminal deterrent, if you commit these types of offences while holding the permit at these times five years, 10 years, and a further aspect of the public interest is protection from harm.

But when we come to the 105 expression of the public interest, that is where, the Crown says, those policy objectives that reflect the broad public interest are not enough. There needs to be something that arises from this case, this appellant, and any relevant aspects of the public interest that are engaged on those facts for the Tribunal to grapple with.

Just across the page on *Pulu* at paragraph 109, the Tribunal there relies on the High Court in *Prasad v Chief Executive of Department of Labour* [2000] NZAR 10 (HC) and the quoted part there as to public interest. Now, that's the reference directly to section 105. "As to public interest, it is to be remembered that as such to operate is a deliberate control upon the humanitarian exception intended to prevent unacceptable levels of public harm." They give some traditional examples, contagious diseases, unacceptable tenancies, but the Court there went on to say don't artificially constrain that concept and give it its broad, protective mechanism as is required on the facts. So I see the public interest being engaged in two ways, but I want to be clear that the Crown's submission is that those deterrent sanctions, those policy interests or those public interests need to be specifically engaged if they are to come in under 105, and it seems to me unlikely that they would be. An example, though, where a crime is committed where there is no evident risk of re-offending but that crime is so abhorrent to the community that deportation might follow, even in the finding of unjust and harsh.

Now, does that answer your Honour Justice McGrath's question?

McGRATH J:
It's a helpful contribution, thank you, yes. I'm trying to get my mind around what this requires. Thank you.

GLAZEBROOK J:

In paragraph 108, they do talk about balancing the public interest against the compassionate circumstances of the case, which I think in the written submissions you said didn't happen but I got the impression in the oral submissions that you were saying, well, yes, but in a slightly different manner. It's just I quite like that balancing because it just means you can look at proportionality in terms of all of the circumstances, those pointing against, those pointing towards, not necessarily getting a different result but just an easier test to apply rather than looking at subtle issues of public interest is slightly different or it's different here. Whether it's in the statutory wording, of course, is another matter but it's certainly an easier test to apply.

MS JAGOSE:

Yes, well, the statutory wording I accept readily is a very challenging test to apply, and it does have these – the two aspects that the Tribunal must be satisfied of both things. Just while I make that point, on the wording of 105 where the victim's submissions, if any, are to be taken into account, the statute makes it clear that they are to be taken into account whether on the harsh aspect or on the public interest aspect, so that the statute itself seems to be, we submit, directing us at two separate but related inquiries.

But to come to your Honour Justice Glazebrook's point, I'm sorry if the written submissions are opaque to this extent, because the Crown's submission is that one doesn't have to balance what is in the public interest side of the ledger against how harsh or how bad it was on the other side. So the public interest, in itself, doesn't need to be so significant so as to outweigh the harshness, but we do say that there might be aspects that led to the harsh conclusion that also raise elements of the public interest such as family unity. I mean, that's a classic example through many Tribunal decisions where that issue is looked at from the lens of the offender in this part 4 content to say is it harsh on that person, and then it is looked at again through the lens of the community or the public interest, those same factors.

GLAZEBROOK J:

I just don't understand. It's a very subtle distinction but I'm not sure it's ever really applied or is even able to be applied, so the submission seems to be that you look at a balance of public interest with particular circumstances. It just seems to me easier if you just quoted this as a unitary test. As I say, it may not be the statutory test but

it's not a terribly easy test to apply when you've got these two aspects with the same things being taken into account but in a slightly but only subtly different way.

MS JAGOSE:

I agree with your Honour it's not an easy test to come to.

ELIAS CJ:

If it's a unitary one, why can't it really, effectively, mean that the Tribunal must be satisfied that it would be unjust or unduly harsh to deport so that it would not be contrary to the public interest to allow the appellant to remain in New Zealand. It's still a public interest assessment but it's – I mean, the cumulativeness links the two in it. I just don't see that there is anything different in the public interest from the overall assessment of whether it is appropriate to make the order.

MS JAGOSE:

Well, the submission to that, your Honour, is that that is the effect of the wording in 105(1). The "and" doesn't link it in that cumulative way. The threshold – both aspects must be met, this one and that one. In my submission, if the answer was to put them all into the same test, is it unduly harsh on the appellant so that it is not contrary to the public interest to have him remain? That discipline of thinking about what is the harm that the public stands to bear might be lost, and I think the –

ELIAS CJ:

Well, as you say, the policy of the Act is that they go if they commit an offence, so that's the legislative judgement of the public interest. There is – even the reference to unduly harsh, unjust, it must mean that those circumstances outweigh the policy in the statute to deport.

MS JAGOSE:

Yes, I completely agree with that, with respect. That is what the balancing has done in that part of the test. We have this broad policy, is it outweighed on the humanitarian exception, but that's not the end of the question.

ELIAS CJ:

Well, I really wonder whether that's right, but we probably don't need to bat it around any more. It's just it's so complicated on the way that it's being applied and if, as you say, the policy in the Act is that people go if they commit qualifying offences within

the period, then you don't need any further public interest. What you need is an assessment by the Tribunal that the harshness and injustice outweigh that, that existing policy. So it's not a question of going on a tour of what you bring into the public interest. There's already a judgement that they go.

MS JAGOSE:

At the risk of repeating myself, I say what Parliament's intention is through that putting in the "and", it could have been drafted in a different way, I accept.

ELIAS CJ:

But it doesn't say anything about recidivism or risk or anything like that. We have to grope for those things and yet, as you say, there is an overarching public policy which is clearly identified in the Act, so why is that not sufficient?

MS JAGOSE:

Because on that basis humanitarian exceptions, again, a shorthand phrase for 105, humanitarian exceptions will always outweigh.

ELIAS CJ:

No. They have to be unjust. It has to result in an unjust result.

ARNOLD J:

But isn't the problem on that interpretation that the second part or the words after "and", that it would not be contrary to public interest, don't have any meaning? Because if the policy, the public policy, is expressed in section 91 and then you just have a humanitarian exception, which is the effect of what you're saying, then it's a very odd way of expressing the second portion of the sentence.

ELIAS CJ:

No, because it's a standard. You have to have some standard against which you're assessing injustice and unduly harsh.

ARNOLD J:

The standard is in section 91, though. It's very clearly stated you're liable to be deported if you fit into one of these categories. There's the policy. Now we look at an exception.

ELIAS CJ:

I agree with that, but I'm saying – anyway, we can carry on the debate later.

MS JAGOSE:

If I move to paragraph 43 of the written submission, and I understand your Honours to understand the Crown's submission that is the submission, it's there again at 43, that the public interest, it is a deliberate, it has been added on following the word "and" in this section. It operates as a deliberate control as the High Court said in *Prasad*, intended to prevent unacceptable levels of public harm. In this context, criminal offending, unlike the unlawful overstayer cases where the same test will now apply in the new Act, those public interest factors are likely to be about risk and harm to the public because we're in this criminal offending arena.

I don't think I need to go through those paragraphs that follow because those are the expression of what I've just been orally submitting.

McGRATH J:

When you talk about overlap, that's the concepts of family unity coming back?

MS JAGOSE:

In this case, it was family unity coming back, yes. That was a clear factor in both considerations.

McGRATH J:

Is that the leading case on that? You've said it's in a lot of Tribunal decisions, but I'm just interested to see where that broad view of public interest is taken in the authorities, preferably at the Court of Appeal or High Court level.

MS JAGOSE:

Well, in the High Court it's in *Prasad* and *Garate v Chief Executive of Department of Labour* HC Auckland CIV-2004-485-102, 30 November 2004 too.

GLAZEBROOK J:

And probably *O'Brien v Immigration and Protection Tribunal* [2012] NZHC 2599, [2012] NZAR 1033, as well, I think.

MS JAGOSE:

And *Mwai v Removal Review Authority* [2000] NZAR 206 (CA) in the public interest test.

GLAZEBROOK J:

Even though there wasn't a public interest limb in that test, but it was added in, in any event, no explicit public interest, but that was on a balancing test, though.

McGRATH J:

That's sufficient, Ms Jagose. It comes back, also, you mentioned that you've got to look at the position of the appellant in his or her context and is that part of the same idea of a broad approach to public interest?

MS JAGOSE:

I think so, your Honour, if I understand your question in that the submission is that what's in the public interest in 105 has to be about the facts that this appellant raises, the particular issues or public interest matters that arise from looking at this appellant.

GLAZEBROOK J:

And is that both in the – if I can put it this way, the humanitarian public interest factors such as family life and the actual risk of recidivism or whatever it happens to be or …

MS JAGOSE:

Well, the lens is different. It is all. Those facts will be – that's why I say they are overlapping considerations because the factual matrix might be similar or the same, indeed, but in the harsh aspect we're looking particularly at the individual and those who are – particularly family – might also be affected and the public interest limb, as the Court of Appeal said, just looking at it with a different lens, the community.

GLAZEBROOK J:

I don't really understand the lens. That's the problem that I'm having. What does the lens do? I mean, I'm just trying to be a decision-maker and I'm looking at it in a different lens. Well, you can say that but what's the lens?

MS JAGOSE:

Well, in the public interest aspect.

GLAZEBROOK J:

Yes, but if you're looking at it individually, what is the public interest in this particular person's family life that I'm looking at from a different lens? In family life, I can think of as a generic concept. Family is good. I don't think that anyone would – motherhood is good as well. Nobody denies that. So you can look at it from that lens, but how do I say this family is good as against another family, if you do take into account the individual circumstances? Do you understand – that's why I'm having difficulty with this lens aspect.

MS JAGOSE:

Because in the harshness and injustice limb, we're saying what is the effect on this particular family of having the appellant deported? What's the effect on the appellant? What's the effect on his family in order to make that assessment about whether it's unduly harsh or unjust?

When we look at the public interest limb, we're not so interested in the appellant and his family, but we are saying family unity broadly has a public interest, and is there anything more that engages the public interest out of the appellant's circumstances? We saw in Judge Hastings' decision that I handed up that there was something more that they considered was of value that the public – a principle or a concept that the public would value, which was, in this particular instance, the likelihood of rehabilitation of that offender would be achieved by keeping him in his family and that, they said, had a public interest element.

ELIAS CJ:

If one looks at subsection (2) of section 105, the references to the nature of the offence and any other offences of which the appellant has been convicted, where do you say they come in? Because they're treated as being part of the unjust or unduly harsh to deport.

MS JAGOSE:

Yes.

ELIAS CJ:

But, of course, they are the – they are key to the, to the public interest that you are postulating as a separate inquiry.

MS JAGOSE:

Yes, and that's a further example of where they're – the same factors might be considered under both aspects.

ARNOLD J:

Well, isn't the answer that you're looking at them in a slightly different way? When they're mentioned in section 105(2), in terms of the unjust or unduly harsh, what they're directed at is the personal culpability of the person. So you look, as you would in sentencing, you look at the circumstances of the offence and you look at if there are any personal aggravating features in terms of a previous record. So that goes to personal culpability. The assessment of the public interest stage is different, at least in cases like this because it's looking at well what are the long term prospects for this person? Is he or she a person who's likely to re-offend and re-offend seriously and in part the prior record will be relevant to that, but you're looking at it for a different purpose?

MS JAGOSE:

I agree, your Honour, thank you. I mean that is the –

ELIAS CJ:

Well you're driven to that if you have a bifurcated understanding of section 105(1).

ARNOLD J:

It does depend on the bifurcation, yes.

GLAZEBROOK J:

Why is the personal culpability related to unduly harsh, because if there's a very bad crime, it's not – it might be, despite the personal circumstances still unduly harsh because it seems to be a doubling up of the two limbs of the test that way which is why I come down to I actually prefer the factors for and factors against and then you decide what the answer is but it just may not be able to be achieved on the way it's actually drafted but it seems to me a much easier approach to deal with?

MS JAGOSE:

But isn't – sorry, I don't mean to ask it as a question, but that is why the wording of the nature of the offending, not just what is the offence, but the nature of the offending might also allow the Tribunal on that part, looking at the harshness or the injustice, to factor in matters like culpability, understanding of consequences, because it's the nature of the offending not just broadly the offence itself. And in this particular case with aggravated robbery as the qualifying offence, it was the nature of that offence in relation to the appellant that made the Tribunal say it's not its most serious kind. Yes he held up a convenience store with a pistol and it was a toy pistol. Some of those factors do go into the assessment of the nature of the offence, rather than just it was aggravated robbery which might take on a significance that's not warranted if you didn't think of other particular facts.

GLAZEBROOK J:

That seems to me to be relevant to both limbs still, even putting that way.

MS JAGOSE:

Yes, and I don't step away from it being relevant to both limbs. But the nature of the offence, the nature of the offending and the risk of re-offending are all significant matters in section 105's public interest assessment. They must be.

GLAZEBROOK J:

But they just seem to be more relevant to the public interest assessment than the humanitarian factor because humanitarian factors, aside from section 105(2) seems to be talking about humanitarian factors rather than about the crime itself, apart from the underlying policy matter that – in any event it's just difficult wording I think which is why I think the Courts have struggled a bit and the Tribunal struggled a bit with articulating what the actual test is.

MS JAGOSE:

And the Tribunal has consistently approached that question by saying when they get to the public interest limb they need to identify what they call positive elements and adverse elements and weigh them.

GLAZEBROOK J:

Well the Courts probably haven't because the Courts have said if you look at why and various things, that the public interest limb takes account of all the individual

circumstances as well. So most of the Court decisions actually don't take the approach of the Tribunal and they don't take their different lens approach. They, in fact, mostly, if you look at them, look at a balancing approach. Taking account of the public interest just may be including these other matters and they're probably rising of the, "In all the circumstances," but even in *O'Brien v Immigration and Protection Tribunal* [2012] NZHC 2599, [2012] NZAR 1033 where there wasn't at all the circumstances they did, El Hussein actually took a balancing approach even without the public interest limb.

MS JAGOSE:
In the instant case the Court of Appeal did come at it –

GLAZEBROOK J:
Well we're on appeal from the instant case but –

MS JAGOSE:
Well yes, indeed, but that is where they came at their paragraph 43 –

GLAZEBROOK J:
Yes but all of those references did not apply the approach that you're suggesting that should be applied. *Garate v Chief Executive of Department of Labour* neither did *O'Brien v Immigration and Protection Tribunal* so all of the references given by the Court of Appeal actually didn't apply that approach.

McGRATH J:
Were you going to say something further about 43?

MS JAGOSE:
I was only going to point out that paragraph 43 in the Court of Appeal judgment does confirm, although Justice Glazebrook has just corrected me on that at paragraph (c), for example, the focus is not exactly the same because the Tribunal is looking more sharply at the community's interests.

GLAZEBROOK J:
I don't actually have a problem with paragraph (c), it's more the paragraph (b).

WILLIAM YOUNG J:
Paragraph 3(c)?

GLAZEBROOK J:
Paragraph 43(c) I don't have a problem with that. I think they certainly were saying that because, in fact, that must be the case given that you're looking at the public interest limb. No, it was more the humanitarian factors have public features and then taking from that that the only part of the features that you look at is the public interest features because that wasn't really the approach of those cases, because those cases tended to take into account all of the circumstances at both limbs of the test.

MS JAGOSE:
Because this section required that in all of the circumstances.

GLAZEBROOK J:
Well they were using that terminology, although in *O'Brien* they said well the fact that all of the circumstances isn't in there still meant that you did look at all of the circumstances.

MS JAGOSE:
Well I understood *O'Brien* to be saying all of the circumstances where a relevant aspect of the public interest is engaged.

GLAZEBROOK J:
Well that's not what the cases have done. So that might be the submission but if it's based on those cases, that isn't what the cases did. They looked at the individual circumstances.

MS JAGOSE:
Well I don't know that I can say anymore about that –

GLAZEBROOK J:
But I'm not sure that there's really that much of a difference in the sense that – well you do accept that it's the individual family life that's just looked at through a different lens – the problem I'm having is how one applies that different lens I suppose, and whether it's actually a sensible test to have if we don't know what it means and we can't put our finger on it.

WILLIAM YOUNG J:

Well can it mean eve – with everything other than the fact that it's going to be tough on the appellant. We're not looking at it through the appellant's personal eyes, we're looking at it through the eyes of the family unit of which he's a member and the general desirability of maintaining family units and the particular desirability of that in this case?

GLAZEBROOK J:

Well, I have difficulty. Why pick out family in those circumstances because most of those cases that are talking about family are usually cases where you've got children of an offender and so you're looking at dependence on the defender. The trouble with youth, it's the other way round. The youth is dependent on the family and so it's not that you've got family members who are going to be hard done by. It's the offender themselves that are going to be hard done by in the sense, and you could say I suppose, well that's just tough if it's hard on the offender but I'm not sure that any of the cases that you refer to in your submissions about youth would actually agree with that because they say, well you really do have to have – because otherwise there's no reason to have a difference between a 12 year old and a 16 year old or an 18 year old you're going deport, is there, if youth is irrelevant and dependency on the family as against the other way round is the distinguishing factor?

MS JAGOSE:

Well with respect, Ma'am, the submission is not that youth is irrelevant. It's just that it's not determinative, that it might well be relevant.

GLAZEBROOK J:

No and I perfectly accept that it's not determinative and I don't have a problem with that submission at all because that's what the cases have said. It can be proportionate. It's just that it's very, that most of those cases it actually was pretty serious offending, probably more serious here and found not to be proportionate in those cases you refer to.

MS JAGOSE:

Well in the European cases that are referred to, and now I'm looking at 86 and 87, the consideration of youth in the international jurisprudence, *Maslov*, which your Honours have already been taken to, I mean the decisive factors in *Maslov* were that

they found the offending to be of a nature that they could describe as juvenile delinquency and non-violent and for that reason they thought that the deportation of a young adult would be disproportionate to the objective, but *Maslov*, the principle that is repeated in a number of cases out of that European Human Rights Court is that serious reasons are needed to justify deportation even if committed by a minor, that might still lead to deportation. So I don't see that as inconsistent with the Crown's submission that we need to find something in the – it's not enough to say it's harsh on the person, the Act still says that it might be that you are deported anyway despite of that harsh and unjust effect on you.

GLAZEBROOK J:
But except that you seem to suggest that you have to find something more than youth for it to engage a public interest factor and if something more than youth has to be engaged to find the public interest factor, then youth is effectively irrelevant, not that a serious matter must be found to deport. But it actually is irrelevant if the offending and the risk of re-offending is serious enough and that doesn't seem to me to be in line with these cases.

I may have misunderstood your submission but your submission seemed to be that in that other Tribunal case they found something more, that is the possibility of rehabilitation with the family that allowed them to take youth into account whereas, in this case, despite there being quite a lot of family support, it wasn't something that should be taken into account. I know you have an argument that it was taken into account through the assessments of re-offending, et cetera, but let's leave that aside for the moment.

MS JAGOSE:
In the instant case, the Tribunal didn't make the same findings that the Tribunal made in Judge Hastings' case about the unity of the family. They had a generic, or they had a broad proposition that family unity is a good thing and they also observed international obligations. But, in fact, if we read through the decision there was actually a lot of evidence of while it would be hard on the family and particularly hard on the appellant's mother –

GLAZEBROOK J:
No, no, I'm not looking at it from that lens. It's just – because if you're a youth, it's not going to be – it will be hard on the family but not in the sense of them being dependent on you. It's the other way round, you're dependent on them.

If you have to find something more than that mere dependence for it to be taken into account as a public interest factor, it seems to me that you will always deport youths who have had a serious offence, even if not very serious, and have a high risk of re-offending or a moderate risk of re-offending because there will never be anything in the youth that could outweigh the public interest factors on the submission that's been made which seems to me to be contrary to these decisions that say you have to have serious reasons to get rid of somebody in those circumstances.

MS JAGOSE:
I don't know that I can take that any further than to repeat where I've been. So I find that it's not likely to be helpful to your Honours that youth is relevant and not determinative and there is no automatic discounting of risk and protection of the public from harm because the offender is a youth.

GLAZEBROOK J:
But you don't even have it as relevant here, though, because you say it was okay not to take it into account in this case, whereas in the other case it was taken into account rightly. So what's the difference?

MS JAGOSE:
Oh, actually, your Honour, this submission that is made in this case is that while the Tribunal didn't have a heading of youth, they were aware of the appellant's age, they were aware of his relationship in his family. The narration of the history of the family is not a tight-knit family on which the appellant relied and was dependent. In fact, it's through his imprisonment that the Tribunal found that the family had become closer, that some of the ability of the family to rely on him, they thought, after his period of imprisonment might be more available to them. He wasn't going to church when he was living with his family and they did, in fact, make a number of factual findings about the family unity that didn't engage as in the other Tribunal case, *O'Connor,* the same factor.

And the submission isn't that youth wasn't considered but that it's okay, rather in my submission the Tribunal was aware of his age. They thought about it in his family context. They were aware of youth being one of the matters that was assessed in his risk assessment. The Tribunal went through with the appellant's counsel that risk assessment and didn't find any reason to place less weight on, or step aside from what Mr Woodcock's assessment was. And as I said before the lunch break I think, the decisive factors for this Tribunal were about the key offending triggers not being addressed with the moderate risk of violent offending, and those are factors or touchstones that all address, or have implicit in them the appellant's age.

So the submission is that they didn't take it into account and that's okay but rather they took into account without formally coming to a heading "Youth" and applying some measure in their public interest approach. That's in the written submissions at about 100.

At 102, the respondent submits the Tribunal was not required to give further independent consideration to account for the appellant's age because they'd already taken it into account with risk, with family life, with the nature of the offending.

GLAZEBROOK J:
I suppose my problem is that I still, I now don't definitely don't understand the different lens argument if the argument is well they had to take it into account and they did.

MS JAGOSE:
Because it was part of their assessment of risk, part of their assessment of what is the harm to the public.

GLAZEBROOK J:
Oh, so it's only taken into account to the extent of whether it creates harm to the public is it?

MS JAGOSE:
In the public interest aspect.

GLAZEBROOK J:
All right.

WILLIAM YOUNG J:

But it's also taking into account, isn't it, one would assume, in the assessment of the family? It includes his role in the family.

MS JAGOSE:

In the public interest assessment?

WILLIAM YOUNG J:

Yes. So I mean it may be that it's not a particularly significant factor if the Tribunal was to exclude particular things that make it tough for the appellant to be - things personal to the appellant make it tough for him to be deported. But at a level, the fact that he's a young man and that he's got – there's a family context must have been taken into account.

ARNOLD J:

That's really what they're saying at 73, "The appellant had been living with his parent and sibling since he was six years old, closely bonded. The only source of family support in Tonga is from a maternal aunt and her family." So that's looking at his personal circumstances under this general rubric of the public interest of family unity and it recognises that he needs support.

MS JAGOSE:

Yes, and they've come to that with what they call a positive part of the public interest and they say that it's outweighed by the negative element as I think earlier the Chief Justice said, "They haven't given us much to work with and we're having to put a lot into that paragraph 73," but that is where they consider the public interest in the family unity for Mr Helu.

ELIAS CJ:

On, the last time I will mention this but I do want you to be given every opportunity to answer. On the interpretation that at present I prefer of section 105, the composite test where the public interest is simply the determination that there is a deportation. You don't end up with the unattractive conclusion that someone can be deported if it would be unjust or unduly harsh. That seems to me to point to the composite so that it would not be contrary to the public interest. It's a weighted judgment that has to be made in the context of the case and that also explains why subsection 2 identifies a

whole lot of considerations which must be taken into account and there's nothing comparable to the public interest. Public interest is to be taken as the statutory purpose. So if there's any comments you'd like to make on that, that you haven't already developed, I'd just like you to do so.

MS JAGOSE:

What is not in subparagraph 2 in any explicit way is the expression of the risk to public harm – sorry, public harm, the risk of public harm. On your Honour's approach you might say that fitted into any other matters considered relevant but –

ELIAS CJ:

No, it just comes into the assessment of whether it's unjust or unduly harsh to – so it's there but that's the overall conclusion. I find it extraordinary that such an edifice has been constructed on section 105. We've had so many submissions about humanitarian concerns. There's no indication in here that there is some sort of contra distinction between humanitarian interests and other interests. One would have thought that it was in the public interest that New Zealand observed its humanitarian obligations, for example. So I don't see that, I don't see where we've got this huge edifice from except in the case law but if you look at the terms of the sections, it seems quite unnecessary, and I don't think that's adverse to the Crown's position.

MS JAGOSE:

Ma'am, that point has been fairly put to me and I think you have the Crown's submission in it, that the statute does, on the reading and there's a separate threshold for the Tribunal to meet, what follows and it must be satisfied of both things and they don't – while there is elements of crossover, they are interdependent decisions that the Tribunal has to come to.

And I was looking at this Court's judgment in *Ye* at paragraph 36 where the majority comments on that test. 47(3), "The flavour of the subsection as a whole that it's interweaving of a concept of exceptional circumstances, injustice or undue harshness and the public interest suggest that Parliament, being mindful of humanitarian considerations, contemplated overstayers being allowed to remain in New Zealand if there were humanitarian circumstances of a sufficiently unusual kind that their remaining would not undermine the general importance of maintaining the integrity of the immigration system. The test was designed to be strict, but was seen as

representing an appropriate reconciliation of humanitarian concerns with relevant aspects of the public interest. And that, too, in my submission approaches it on not on two separate tests but on an appropriate approach to both the personal and the public.

ELIAS CJ:

But why doesn't the overall assessment of unduly harsh or unjust amount to the same thing? Anyway, I do understand your submissions on that.

MS JAGOSE:

Because there's no work to do in the rest of the paragraph.

ELIAS CJ:

I understand that submission.

MS JAGOSE:

Now, your Honours, do you want to hear from me on Article 12(4)? The written submissions are obviously before you. In my submission it does require an exceptional set of facts to really give a person who isn't a citizen the rights of a citizen, and that all of the case law on 12(4) does support that being a very high threshold where, as the commentary says, there are real impediments to the appellant or the individual having obtained the rights of citizenship.

ELIAS CJ:

I'd be interested – I forgot to bring it into Court – in any comment you had to make, this is on the own country thing, whether other aspects of the universal declaration on human rights and the ICCPR in referring to dignity and I think to matters of self-identification, whether they come into play more broadly in any event in a case like this.

MS JAGOSE:

Well, in a way they do, through the 105, some of those questions asked, the Tribunal asked themselves about the length of the period which the person has been here lawfully, their personal domestic circumstances. I mean, some of those concepts of personal life, family life, of course, we've already traversed.

ELIAS CJ:

I suppose you can just rest on that because, after all, there was a finding that it was unjust and unduly harsh to deport this young man, but that on the bifurcated approach the public interest factors outweighed that. So questions of self-identification because, in fact, this man's self-identity is going to be very seriously compromised by the deportation.

MS JAGOSE:

I think that is taken into account, although not on those terms. But that was certainly a matter, really, at the heart of Mr Nystrom's case, too, that he had no – he thought he was an Australian. He had no way of thinking of himself as being a Swedish citizen, so while they did get there with 12(4) you might well get there through another relevant …

ELIAS CJ:

Yes. I was raising the more general thing because it did seem to me that the emphasis on 12 was an argument that could be buttressed by those other indications in the international obligations, because one does rather recoil a little bit from suggestions of own country if one has a national focus, but they fit within a wider framework of concern for self-identity, it seems to me. But I think your answer would be that those have been taken into account.

MS JAGOSE:

Well, I think that particular one, the self-identity matter, has been – the Tribunal observed that the appellant has been raised in New Zealand but in a Tongan culture and language so perhaps if the facts were different they might have come to a different perspective about what it would be like for him to be deported to Tonga. Obviously they didn't think about it expressly, but I think it probably is in there.

ELIAS CJ:

Yes.

MS JAGOSE:

I'm just taking a look through my written submission because I feel that we have probably ranged right through them and I'm anxious not to take up more time but also not to miss things out that your Honours want to address. I think the next question is whether, on the factual findings, the Tribunal would come to the same view anyway.

That's in the written submissions at 114. For reasons I suspect that I've already foreshadowed, those factual findings that go to the public interest factors of harm, which come from the nature of the offending, the risk of re-offending, and it was violent criminal offending both as a 17 year old and while on bail as an 18 year old, are the factors that, in my submission, would likely lead the Tribunal to the same conclusion. They're set out at 116, the particular factual findings. So I think I have addressed all of those, violent criminal offending, further violent criminal offending, taking place while he, the appellant, was heavily intoxicated, that that alcohol and drug use, abuse, has not been sufficiently attended to and is a key driver of his offending, and there's no basis to depart from the recently-obtained expert assessment of his risk of re-offending. Those, in this context, must weigh so heavily in the public interest contrary to the public interest part of the test, in my submission the Tribunal would come to the same conclusion, even if it was to think about youth as having some separate attribute in the public interest rather than an element, as I have submitted, of different specific matters such as family.

Your honours, there's one thing that I might draw your attention to. In the *Connor* case that I handed up, your Honours may have observed, or perhaps when you have an opportunity to read it, have observed that the Tribunal there used powers that it has under the 2009 Act that weren't available under the 1987 Act to suspend the immediate effect of the deportation.

McGRATH J:
Which decision was that?

MS JAGOSE:
Sorry, your Honours, *Parker v Minister of Immigration*. This was the Judge Hastings decision. I just point that out because it is a new power that will come following the same sort of test in section 207. In that case, anyway, that 91 Tribunal orders deportation liability be suspended for a period of four years subject to the condition that he doesn't – that he's not convicted of category 2, 3, or 4 offence within those four years.

McGRATH J:
So is that a means of being able to hold the past offending which has been the subject of the decision that is being reversed to sort of hold open reference to it in the future?

MS JAGOSE:

Well, the Tribunal must allow the appeal first, so it has to find both the harshness is met and it's not contrary to the public interest, but then they just have this further power to suspend the effect of it. It just allows, I think, a more protective approach to the very uncertain science of risk assessment to say, "For all these reasons we come to the view that it's not contrary for the public interest for you to remain but we're still a bit anxious and we have a further power to suspend that effect to really further that deterrent idea to protect the public further", to say, "Once more and you're out."

GLAZEBROOK J:

But that would be the case anyway, wouldn't it, because you wouldn't be – if there was a further qualifying offence. Maybe if you were outside of the 10 years, I suppose. I understand.

MS JAGOSE:

Yes. I only draw it to your attention because it's a new power that's used here.

GLAZEBROOK J:

Because it doesn't stop you looking at those earlier offences if you were within the period, would it, the fact that you've had an appeal allowed? If you did it again, you could still go back and look at the other offences.

MS JAGOSE:

Well, on the 1987 Act you couldn't if you were outside the 10 –

GLAZEBROOK J:

No, sorry, not outside the 10 years, but within it.

MS JAGOSE:

Yes, it would be relevant.

GLAZEBROOK J:

But this helps because you can then take it outside of the 10 years or the five years or whatever.

MS JAGOSE:

Mhm.

GLAZEBROOK J:

I understand.

McGRATH J:

So the decision is not quashed. Instead, the deportation is suspended and we'll wait and see, is that the …

MS JAGOSE:

I think that's the right approach to it. The 2009 Act has the concept of liability for deportation, which affixes to a person once they are sentenced or convicted of a qualifying offence so it extends – they allow the appeal and extend that status of being subject to deportation liability for a further four years.

Your Honours, do you have any further questions for me?

ELIAS CJ:

No, thank you, Ms Jagose.

MS JAGOSE:

Those are the Crown submissions. May it please the Court.

ELIAS CJ:

Ms Schaaf, do you want to be heard in response?

MS SCHAAF:

I've just got a few matters.

ELIAS CJ:

Yes.

MS SCHAAF:

Just in terms of the case that was produced by my learned friend, *Parker*, my learned friend referred to public interest being taken because there was something more, the likelihood of rehabilitation of the offender. In this case, that public interest was not

afforded to the offender, to the appellant. In previous cases, but I haven't got the benefit – I didn't have the benefit of having this case – the approach that had been, a request to the Tribunal was made for an adjournment so to allow the person to be, to have some rehabilitation before the decision is made, because if the person, they don't have the benefit of having rehabilitation available at the early stages of the imprisonment, and I just want to draw attention to why – there was nothing more in terms of public interest in *Parker* that distinguished it from the appellant's case, and in terms of the wider framework of identity as opposed to Article 12(4) of the ICCPR, I submit that the issues that were identified in *Nystrom*, they refer to matters of identity such as language, familiarity, and close ties with the country, and I submit that since the appellant is not arguing that he has got the right of citizenship or the equivalent of citizenship, that this Court can consider his case under Article 12(4).

I think those are the only matters I wish to address, unless you have further questions.

ELIAS CJ:

No, thank you, Ms Schaaf. Thank you, counsel, for your assistance. We will reserve our decision in this matter. Thank you.

HEARING ADJOURNS 3.19 PM