IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA428/2022
[2023] NZCA 97

BETWEEN	NGOC HONG TRUONG Appellant
AND	THE KING Respondent

Hearing:	21 February 2023
Court:	Gilbert, Ellis and Davison JJ
Counsel:	J C Harder and N J Wright for Appellant M R L Davie for Respondent
Judgment:	5 April 2023 at 3 pm

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The application to file fresh evidence on appeal is granted.

C The appeal is dismissed.

REASONS OF THE COURT

(Given by Davison J)

[1] Ngoc Truong (the appellant) applies out of time for leave to appeal her convictions and sentence. She seeks to have her convictions quashed, and to be discharged without conviction pursuant to s 106 of the Sentencing Act 2002.

[2] On 14 February 2019 the appellant pleaded guilty to one charge of cultivating cannabis[1] and one charge of theft of electricity.[2] Convictions were entered on both charges. The appellant was sentenced on 11 April 2019 in the District Court at Manukau to five months' community detention, eight months' supervision, and ordered to pay reparation of $2532.55.[3]

[3] On 27 June 2022 the appellant received a deportation liability notice from Immigration New Zealand (INZ). She says that when sentenced in April 2019 she did not appreciate that the entering of convictions would trigger liability for deportation pursuant to s 161 of the Immigration Act 2009, and that she was not advised by her counsel that she could apply to be discharged without conviction.

[4] This appeal is brought over three years out of time. The Crown accepts that the appellant has explained the reasons for her delay in bringing her appeal which relate to her ill health, and it does not oppose the granting of an extension of time to appeal. We are satisfied by the appellant's explanation for the delay, and that it is appropriate to grant an extension of time for the filing of her appeal. The Crown also does not oppose admission of the affidavits filed by the appellant in support of her appeal and seeks to admit fresh evidence on the appeal itself. We also grant leave to admit the affidavits filed by the appellant and respondent as fresh evidence for the appeal.

Background

The offending

[5] The appellant's offending was committed over a period of 11 months between February and December 2017. She and her husband, Mr Hoang, were jointly charged. Mr Hoang pleaded guilty and was sentenced to nine months' home detention on 18 January 2019.[4] Sentencing the appellant on 11 April 2019 Judge Bergseng said: [5]

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1 Misuse of Drugs Act 1975, s 9(1).
2 Crimes Act 1961, ss 219(1)(a) and 223(b).
3 *R v Truong* [2019] NZDC 26677 [Sentencing decision]. At [15] the sentencing notes refer to a reparation order for $5232.55, but the Court Trial Record sheet signed by Judge Bergseng records the reparation as $2532.55.
4 *R v Tran* [2019] NZDC 806 at [17].
5 Sentencing decision, above n 3.

> [2] The background to this offending is that in 2017 an investigation was undertaken by the police into the cultivation and supply of cannabis by a Vietnamese syndicate. That investigation found you to be part of the syndicate. Cannabis was being cultivated by a number of players in the syndicate, and there were several addresses throughout Auckland that were involved. You were not one of the main players.
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> [3] The main players were the defendants Stone and Mu. They were supplying to you and your husband equipment for cultivation of cannabis.
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> [4] When a search warrant was executed at your address there were 50 juvenile plants located. They were between 500 millimetres and 800 millimetres in height. There were also 23 seedlings. The value of the potential crop from those plants as seedlings was put to be somewhere between $21,900 and $65,700. Police also found that the power meter at your address had been tampered with, so that the power was not passing through the meter. Power used was not being recorded. The value of the power lost over that period has been calculated at $5075 excluding GST.

[6] The Judge noted that the starting point adopted for Mr Hoang's sentencing on the same charges was two and a half years' imprisonment. He accepted however, that the appellant had played a lesser role. He found that the appellant's offending fell within category 2 of *R v Terewi* and a starting point range of between two and four years' imprisonment would be appropriate.[6] Having regard to the appellant's lesser role the Judge adopted a starting point of two years' imprisonment in respect of both charges.[7]

[7] The Judge then allowed a discount of four months to take account of the appellant's lack of previous convictions and health issues. He also allowed a further four months discount to take account of the appellant's guilty pleas, to reach an adjusted starting point of 16 months' imprisonment. He then considered a community-based sentence. Having regard to the appellant's lesser role in the cannabis cultivation enterprise, her mental health issues, and the fact that she had her young child to look after, the Judge concluded that a sentence of community detention was the least restrictive sentencing outcome that was appropriate in the circumstances.

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6 *R v Terewi* [1999] 3 NZLR 62 (CA) at [4].
7 Sentencing decision, above n 3, at [9].

The appellant's background and immigration status

[8] The appellant was born in Vietnam and is a Vietnamese citizen. She has permanent residence visa status in New Zealand.[8] She came to New Zealand in August 2010 as an overseas student when she was 16 years old and was granted a student visa. She resided with a sponsoring family and attended Papatoetoe High School. Shortly after leaving school at age 18 she married a Vietnamese national who had New Zealand citizenship. After two years this first marriage ended in separation. On 24 May 2013 the appellant was granted a residence class visa.

[9] The appellant married Mr Hoang in June 2016. Mr Hoang is a Vietnamese national who was then living in New Zealand unlawfully.

[10] The appellant and Mr Hoang commenced their commercial cannabis cultivation operation in February 2017 and continued until they were both arrested and charged on 14 December 2017.

[11] As Mr Hoang was illegally in New Zealand, on completion of his home detention sentence in September 2019 he was deported to Vietnam. The appellant also left New Zealand and travelled to Vietnam in late 2019 to be with her husband. Their son born in July 2018 accompanied her. However, after around five months, on 5 March 2020 the appellant returned to New Zealand leaving their son in the care of his father and her parents. In June 2020 the appellant's daughter was born in New Zealand.

[12] In April 2021 the appellant and Mr Hoang agreed to separate, and in July 2022 the appellant's son returned to live in New Zealand. Both of the appellant's children having been born in New Zealand are New Zealand citizens. They are now approaching five and three years old respectively.

[13] Upon her convictions being entered on 14 February 2019 in respect of offending committed between February and December 2017, the appellant became liable to deportation. Section 161(1)(b) of the Immigration Act provides that a

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[8] The appellant was granted a permanent residence visa in 2015.

residence class visa holder will be liable to deportation if convicted of an offence for which the court has the power to impose imprisonment for a term of two years or more if the offence was committed not later than five years after the person first held a residence class visa. As the appellant was first granted a residence visa on 24 May 2013, she comes within the terms of s 161(1)(b).

[14] Although INZ had noted the appellant's s 161(1)(b) deportation liability in October 2019, no action was taken immediately as it learned that the appellant had engaged with mental health services. Having regard to the possible effect that the prospect of deportation may have on the appellant, INZ considered that it was inappropriate to pursue the matter at that time. Enquiries conducted by INZ in April 2022 ascertained that the appellant had been discharged from mental health services in November 2020. Immigration New Zealand then took steps to locate the appellant, and in June 2022 she contacted INZ and provided her residential address.

[15] By letter dated 27 June 2022 INZ wrote to the appellant and notified her that because she had been convicted and sentenced on 11 April 2019 on one charge of cultivating cannabis and one charge of theft (over $1000) she was liable to deportation under s 161(1)(b) of the Immigration Act.[9] The letter also stated:

> A Delegated Decision Maker (DDM) will now decide whether your deportation should proceed. You are invited to make submissions on this matter, which will be considered by a DDM before a decision is made. You may wish to comment on the grounds for your deportation liability, your personal circumstances, or the circumstances of your family.
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> A deportation questionnaire is enclosed for you to complete should you wish to do so. You and your family are also welcome to provide additional submissions and documents in support of your case. Please provide copies of documents only; originals may not be returned. All information provided must be in English or include an English translation.
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> …
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> If a DDM decides that you should be deported, he or she will sign a deportation liability notice which will be served on you. Your right to appeal against your liability for deportation, if applicable will be outlined in the deportation liability notice. If a delegated decision maker decides that

[9] The INZ letter was sent to a licensed immigration adviser engaged by the appellant.

> your deportation should not proceed, your deportation liability will be suspended or cancelled.
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> …

[16] Since being advised of this appeal INZ has suspended taking any further steps to progress the matter pending determination of the appeal.

Evidence

The appellant

[17] In her affidavit in support of her appeal the appellant says that she pleaded guilty to the charges on the basis that she was a party to the offending by Mr Hoang. She says that at the time she was not aware that a conviction could have any consequences for her immigration status, or that she would be liable for deportation. She says that her counsel, Mr John Corby, did not ask her about her immigration status and she did not raise the matter with him. She says that Mr Corby did not tell her that she could apply for a discharge without conviction.

[18] The appellant says that she understood that once she had been sentenced and had completed her sentence of community detention, apart from paying off the reparation ordered by the Court, the whole matter would be behind her. She says that she heard nothing more about the matter until early June 2022, when an INZ officer left a business card at her address asking her to contact them. She says that when she telephoned INZ she was told over the phone that she was liable for deportation as a result of her convictions. She says that she subsequently received the 27 June 2022 letter from INZ advising that because of her 2019 convictions she was liable for deportation. She says that had she been aware that the conviction for the charges she was facing would have immigration consequences, she would have asked her lawyer what steps could be taken to avoid that happening. Further, if she had known that she could apply for a discharge without conviction on the grounds of her risk of deportation, she would have done so.

[19] The appellant says that the stress of the criminal proceedings which followed her arrest and being charged in December 2017, combined with Mr Hoang's imminent deportation, and her pregnancy with their first child, caused her to suffer a significant

decline in her mental health. She says however that the prospect of her husband's deportation was by far the main stressor. She says that she was placed in the care of the Maternal Mental Health team at Counties Manukau District Health Board. The mental health team clinical notes produced by the appellant which cover the period between March 2018 and November 2020 confirm the appellant's account of her serious mental health deterioration and the treatment she received during that period. The clinical notes show that in November 2020 the appellant was discharged from the care of the mental health team and transferred to the care of her general medical practitioner.

[20] The appellant says that after Mr Hoang was deported, she returned to Vietnam to be with him. However, after five months she decided that she did not want to stay in Vietnam and she returned to New Zealand in March 2021. Within several months the appellant and Mr Hoang agreed to separate.

[21] The appellant says that based on the legal advice she has received, she understands that there is a real risk that she will be deported as a result of her 2019 convictions. In her affidavits the appellant details what she anticipates will be the adverse consequences for her and her children if she is deported. She says that the prospect of deportation since receiving the INZ letter in June 2022 has been very unsettling and as a result she has again been receiving mental health counselling.

[22] The appellant says that she is now living in Auckland with her two young children. She is employed as a beauty technician, and works between three and six hours a day, six days a week, so that she can care for her children when they are not at the day-care centre they attend. She says that she wishes to remain living in New Zealand and raising her children here because of the educational and work opportunities that living in New Zealand will provide them, and because her son suffers from asthma and this has been managed much better since his return to New Zealand from Vietnam in August last year. She says that she is worried that if she is deported and her children return with her to Vietnam, they may decide to return to live and study in New Zealand when they are older. If that were to happen and she herself could not return to New Zealand she would suffer considerable hardship from being separated from them.

[23] In support of her appeal the appellant has filed an affidavit by Stewart Dalley who is a lawyer specialising in immigration law. Mr Dalley says that by reason of her convictions the appellant comes within s 161(1)(b) of the Immigration Act and is liable for deportation. He says that the first step in the process is a questionnaire to be completed by the appellant in order to provide INZ with information regarding her and her circumstances relevant to New Zealand's international human rights obligations. The application enables INZ to prepare a submission for the Minister of Immigration (the Minister), or the Minister's delegate, to determine whether a deportation liability notice (DLN) will be served on the appellant. If a DLN is served on her she has a right of appeal to the Immigration and Protection Tribunal. She cannot lodge an appeal until a DLN is issued, and this process will take as long as the INZ officials determine.

[24] Mr Dalley says that if the appellant is issued with a DLN and files an appeal she will have to overcome a high threshold test in order to be successful. He notes that pursuant to s 207(1) of the Immigration Act the appellant would need to demonstrate exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for her to be deported, and that it would not, in all the circumstances, be contrary to the public interest to allow her to remain in New Zealand. Mr Dalley says that in his view, given the appellant's circumstances, any appeal against her deportation will clearly lack exceptionality.

[25] Mr Dalley notes the appellant's circumstances, including her health issues and the welfare and best interests of the two children, are relevant considerations to be taken into account. However, he says that having regard to the appellant's background of having lived in Vietnam until she was 16 years old, the fact that her son lived in Vietnam for two and half years and her daughter for several months, and that their father is now living back in Vietnam while the appellant has no other family residing lawfully or permanently in New Zealand, he does not consider a finding of exceptional circumstances of a humanitarian nature would be made.

[26] Mr Dalley says that in his view, if the appellant's convictions remain, she will invariably be served with a DLN, and while she will have the statutory right of appeal against deportation, such an appeal will be highly likely to fail. He says that the effect of the appellant's convictions is a real risk that she will be deported from New Zealand,

while a discharge without conviction will mean that the appellant could not be made liable for deportation.

[27] The appellant gave evidence at the hearing of her appeal and was cross-examined by Mr Davie for the Crown. Under cross-examination she confirmed that she had understood the contents of the Residence Application she made in June 2012 which includes a declaration that she was aware that convictions for certain criminal offences committed up to 10 years after first being granted a residence class visa can result in deportation. However, she denied that around the time of Mr Hoang's sentencing in January 2019 she had told a medical practitioner working with the Maternal Mental-Health team that she herself was at risk of deportation as was recorded in a clinical note. She maintained that she did not know that the effect of the convictions entered in February 2019 rendered her liable for deportation.

[28] The appellant having waived solicitor-client privilege, the Crown filed an affidavit by Mr Corby regarding his advice to the appellant concerning sentence. Mr Corby says that having regard to the sophisticated and commercial nature of the cannabis cultivation operation which the appellant had admitted, the question of applying for a discharge without conviction did not occur to him. He says that he was concerned to obtain the least restrictive sentence and following discussions with the prosecutor an amendment to the summary of facts was agreed which described the appellant as having played a supporting role to Mr Hoang. Mr Corby says that while the appellant expressed concerns that Mr Hoang might face deportation, she never mentioned having any concerns about being deported herself.

Submissions

The appellant

[29] Mr Harder, for the appellant, submits that the convictions which result in the appellant being liable for deportation is a consequence out of all proportion to the gravity of her offending. He says that an assessment of the gravity of the appellant's offending is informed by the fact that her husband was the principal offender in the cannabis cultivation operation, and the appellant's role was to act on his instructions and manage the cultivation when he was absent from the property.

He notes that at the appellant's sentencing the Crown had acknowledged that she had played a lesser role than her husband.

[30] Mr Harder says that while the offending itself was moderately serious, when the appellant's lesser role is considered, her offending could be described as being in the range of low to moderately serious. He submits that an assessment of the gravity of the appellant's offending is also informed by her actions following the offending itself, including her guilty pleas which were entered shortly after the Crown acknowledged that she played a lesser role and agreed to amend the prosecution summary of facts.[10] He says that it is also relevant that the appellant was 22 years old at the time and was acting at the direction of her husband out of naivety and loyalty. Counsel notes that the appellant had no previous convictions and was otherwise a person of good character. He also notes that in the five-year period since being arrested and charged for her role in the cannabis operation, the appellant has not re-offended.

[31] Mr Harder says that the appellant has now served her sentence and has paid the reparation she was ordered to pay. He says that she has suffered the consequences of the break-up of her family unit. She has also suffered serious mental health issues which have resulted from the stress and anxiety caused by the legal proceedings, the prospect of her husband's deportation, and her circumstances of living alone in New Zealand with responsibility for caring for her two young children. When all of these factors are taken into account, the gravity of the appellant's offending is appropriately placed at the lower end of the range.

[32] Mr Harder submits that the effect of the convictions which trigger the operation of s 161(1)(b) of the Immigration Act and which give rise to a real risk of the appellant being deported are consequences out of all proportion to the gravity of her offending. He submits that the appellant's situation can be distinguished from those cases involving temporary visa holders, where the conduct involved in their offending triggers immigration consequences rather than the imposition of a conviction which itself triggers liability for deportation.[11]

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[10] Relying on *Delaney v Police* HC Wellington CRI-2005-485-22, 22 April 2005 at [29].
[11] *Sok v R* [2021] NZCA 252; and *Bong v R* [2020] NZCA 94.

[33] Mr Harder says that having made what was a "devastating decision" to leave her husband in Vietnam and return to live in New Zealand with her children, the appellant is now faced with a second round of severe consequences which flow directly from the entering of the convictions. He says that the impact of these consequences is compounded by the fact that the prospect of deportation first arose in June 2022, some three and a half years after the convictions were entered, and well after the appellant had completed her sentence and paid the reparation ordered. Mr Harder submits that in these unusual circumstances, where the appellant has already served the penalty determined by the District Court to be appropriate for her offending, the further consequences of a real risk of deportation should readily be regarded as being out of all proportion to the gravity of her offending. He says that the sentencing Judge was not informed of the immigration consequences of entering convictions, and as a result he did not consider the question of whether the appellant should be discharged without conviction. He accordingly submits that the Court should allow the appeal and discharge the appellant without conviction on the charges.

The respondent

[34] Mr Davie for the respondent, submits that the appellant has failed to show that she should be discharged without conviction. The Crown submits that the gravity of the appellant's offending itself is moderate to serious having regard to its purely commercial purpose, duration, sophistication, and the quantity of cannabis that the plants were capable of producing. The Crown says that while the appellant has identified a number of mitigating factors, they are not of such weight as would warrant an assessment of the gravity of appellant's offending as being low.

[35] Mr Davie notes that if INZ resumes its work on the appellant's case and prepares a briefing paper for the Minister (or his delegate), the appellant will have the opportunity to make submissions to be considered by the Minister when deciding whether to order that a deportation liability notice be served on the appellant. He notes that in addition to deciding whether to order the service of a deportation liability notice the Minister has the options of cancelling the appellant's liability for deportation, or suspending her liability for deportation for up to five years, on conditions such as that

she does not re-offend.[12] Mr Davie further submits that if the Minister directs that a deportation liability notice is to be served on the appellant, she will then have the right to appeal against the Minister's decision to the Immigration and Protection Tribunal pursuant to s 206(1)(c) of the Immigration Act.

[36] The Crown does not disagree with the view expressed by Mr Dalley that there is a real and appreciable risk that the appellant will be served with a deportation liability notice. However, it takes issue with Mr Dalley's opinion that an appeal by the appellant to the Immigration and Protection Tribunal pursuant to s 206(1)(b) of the Immigration Act on humanitarian grounds would be "highly likely to fail". The Crown submits that this Court should regard Mr Dalley's view and his prediction of what other decision-makers may decide on that issue as being of little assistance or relevance in the context of this appeal.

[37] As to whether the appellant has shown that the consequences of her convictions are out of all proportion to the gravity of her offence, the Crown submits that the offending is of moderate seriousness and the consequences of conviction, while potentially adverse, are nevertheless towards the lower end of the scale, and not out of all proportion to the gravity of the offence. The Crown submits that the circumstances and impact of a possible deportation of the appellant on her and her children are matters which will be given due consideration by the Minister when deciding whether to order the service of a deportation liability notice or cancel or suspend her liability for deportation.

Sentencing Act

[38] Pursuant to s 106 of the Sentencing Act, where a person who is charged with an offence is found guilty, or pleads guilty, the court may discharge the offender without conviction. Section 107 provides that the court must not discharge an offender without conviction unless it is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

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12 Immigration Act, s 172.

In *Z (CA447/2012) v R* this Court described a four-step process to be adopted by the court when considering discharging an offender without conviction under s 106:[13]

> (a) consider all aggravating and mitigating factors of the offence and the offender to assess the gravity of the offence;
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> (b) identify the direct and indirect consequences of conviction for the offender;
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> (c) consider whether those consequences are out of all proportion to the gravity of the offence; and
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> (d) if the court determines that the consequences are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge, although it will be a rare case where a court will decline to grant a discharge in such circumstances.

[39] In considering what the direct and indirect consequences of conviction are, the court must be satisfied that there is a real and appreciable risk that the consequence of a conviction identified by a defendant could occur.[14]

Jurisdiction

[40] There was no application in the District Court for the appellant to be discharged without conviction. Therefore, the appellant is not appealing against a decision of the Judge to refuse discharge under s 106 of the Sentencing Act.

[41] In *Bedford v R* this Court considered a conviction and sentence appeal on the grounds that the appellant did not appreciate the consequences of his conviction on the immigration status of his wife and children.[15] The appellant argued he should have been discharged without conviction. It was found an appellate court does have jurisdiction to consider an appeal against conviction and sentence on the grounds that

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13 *Z (CA447/2012) v R* [2012] NZCA 599, [2013] NZAR 142 at [27][28].
14 *R v Taulapapa* [2018] NZCA 414 at [22].
15 *Bedford v R* [2021] NZCA 395.

the offender should have been discharged without conviction where there is a change of circumstances or where fresh evidence becomes available when there was no application for discharge at first instance.[16]

Discussion

[42] Addressing the first of these four steps, we consider that the appellant's offending itself was moderately serious.

[43] We consider that the appellant's cannabis cultivation offending was correctly assessed by the sentencing Judge as category two offending in terms of *R v Terewi* and warranted a starting point of two years' imprisonment. The prosecution summary of facts on which the appellant's pleas of guilty were entered describes the cannabis cultivation operation as comprising 50 mature juvenile cannabis plants ranging between 400mm and 600mm in height as well as 23 cannabis seedlings of various sizes. As noted by the Judge, it was estimated that the cannabis could have produced a crop with a potential value of between $21,900 and $65,700. The summary of facts also noted that while the appellant was an active participant in the cultivation, she played a supporting role to her husband, who was a main point of contact with other offenders and who provided the appellant with instructions on how to manage the cultivation when he was not present.

[44] We also find that the sentencing Judge appropriately recognised the mitigating features of the offending including the appellant's lesser role compared to her husband, and the appellant's personal mitigating factors in the discounts he allowed which resulted in the imposition of a sentence of five months' community detention, with eight months' supervision and an order for the payment of restitution.

[45] Turning to step two and the direct and indirect consequences of conviction for the appellant, we note that the principal consequence advanced on behalf of the appellant is that the convictions render her liable to deportation under s 161(1)(b) of the Immigration Act. Once a deportation liability notice is served on her, it is submitted her prospects of a successful appeal to the Immigration and Protection

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16 At [18].

Tribunal are poor because of the difficulty she will face of satisfying the high threshold of showing the existence of exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for her to be deported. However we consider that submission overlooks the appellant's ability to make submissions to the Minister before a decision is made as to whether INZ will proceed to issue a DLN.

[46] As the holder of residence class visa issued to her on 24 May 2013 upon being convicted of offences in respect of which the court had power to impose a term of imprisonment of two years or more and committed within five years after she was granted the residence class visa, the appellant becomes liable to deportation.

[47] Section 161(1)(b) relevantly provides:

> **161 Deportation liability of residence class visa holder convicted of criminal offence**
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> (1) A residence class visa holder is liable for deportation if he or she is convicted, in New Zealand or elsewhere,—
>
> (a) ….
>
> (b) of an offence for which the court has the power to impose imprisonment for a term of 2 years or more, if the offence was committed not later than 5 years after the person first held a residence class visa; or
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> …

[48] However, the issue of a deportation liability notice is not automatic.[17] Where a person is convicted and becomes liable for deportation under s 161, the first step taken by INZ is the preparation of a briefing paper for the Minister (or his or her delegate), for the Minister to consider whether to order that a deportation liability notice be served on the convicted person. This process is described in the letter dated 27 June 2022 which was sent to the appellant. As set out above, the letter advised the appellant that because of her convictions she was liable to deportation and that a Delegated Decision Maker (DDM) "will now decide whether [the appellant's] deportation should proceed." The appellant was invited to make submissions on that matter, and the letter advises that any submissions will be considered by a DDM before a decision is made.

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[17] See *Zhu v R* [2021] NZCA 254 at [12].

[49] Section 172 of the Immigration Act contains the power for the Minister at any time, to cancel a person's liability for deportation,[18] or suspend a residence visa class holder's liability for deportation for a period not exceeding five years subject to their compliance with conditions stated in a written suspension notice.[19] The appellant will have an opportunity to make submissions which will be considered by a DDM before a decision is made. The appellant's right to make submissions is clearly explained in the 27 June 2022 letter sent to her by INZ.

[50] These provisions of the Act and the 27 June 2022 letter make it clear that before the Minister makes a decision as to whether to order the service of a deportation notice, the appellant will have an opportunity of making written submissions to the Minister regarding all of the matters she considers to be relevant to the decision as to whether a deportation notice should be served on her. The outcome of that process and the Minister's decision cannot be anticipated or predicted by the Court. In the event that the Minister determines that a deportation liability notice should be issued and served on the appellant, she will have a right of appeal to the Immigration and Protection Tribunal on humanitarian grounds pursuant to s 206(1)(c) of the Immigration Act.

[51] We agree with the Crown submission that in his review of the steps to be followed by INZ, although Mr Dalley referred to the questionnaire to be completed by the appellant as the first step, he did not refer to the process by which the appellant will have an opportunity to make written submissions to be considered by the Minister before he or she decides whether to order that a deportation liability notice be served on the appellant.

[52] In our view the process by which the appellant will have an opportunity to make submissions regarding whether her deportation should proceed, which will be considered by the Minister before a decision is made as to whether a deportation liability notice is to be served on her, is significant. The appellant will have an opportunity to put her whole history before the Minister for his or her consideration and explain her concerns regarding the impact that her deportation would have on her

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18 Immigration` Act 2009, s 172(1).
19 Section 172(2).

and her children. While the imposition of the convictions has the effect of involving the appellant in the process by which the Minister will determine whether or not to proceed with service of a deportation liability notice on her, and that process gives rise to a real and appreciable risk of her deportation, before a decision to proceed with deportation is made, the Minister is required to consider any written submissions made by the appellant, and to also consider whether to cancel or suspend the appellant's deportation liability so that deportation does not necessarily follow. The Minister can be expected to take all relevant considerations into account in making his or her decision.

[53] As this Court observed in *Sok v R*:[20]

> [47] It is usually the case that immigration processes must be commenced, and adverse decisions made by immigration authorities, before a person who has committed an offence is compelled to leave the country. A court may accept that during a given process the person will be heard on mitigating and personal circumstances and the outcome will be determined by those circumstances rather than the fact of a conviction. The offending is a fact that that has been admitted or proved and the Court's view of its gravity will be a matter of record. In such cases courts usually find the outcome a consequence of the offending behaviour rather than the conviction.
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> [48] This approach is sometimes justified for reasons of institutional competence and comity, as Katz J remarked in *Singh v Police.* Immigration authorities possess expertise and enjoy access to information — for example, concerning conditions in a prospective deportee's country of origin — that is generally not available to courts. Their processes allow them to scrutinise humanitarian circumstances that are said to justify allowing a person to remain in New Zealand. By contrast, a court's knowledge is usually based on an affidavit from the applicant and perhaps another from an immigration lawyer. Rarely is evidence of this kind tested.
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> [49] Courts usually assume, in the absence of evidence to the contrary that immigration authorities will take relevant considerations into account. But there are cases in which courts have accepted that authorities may decide the offender's status on the conviction alone, ignoring the circumstances of an offence that is a minor example of its kind. In such cases as Lang J observed in *Clarabel v Police*, courts may be willing to base the decision to convict or discharge on the probability that the offender will be deported.
>
> [50] The cases sometimes caution against "usurping" or "pre-empting" immigration powers. It is strictly inaccurate to speak of a discharge usurping the authority of officials or the Minister or the Tribunal; the Court is exercising its own jurisdiction under s 106 of the Sentencing Act, and that is so even in cases where an offender is not liable to deportation unless a conviction is entered. It is more accurate to say that legislative policy decisions and

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20 *Sok v R*, above n 11 (footnotes omitted).

> statutory powers and processes may not only establish consequences for an offender but also determine whether those consequences are the product of a conviction and influence the proportionality assessment.
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> [51] Courts may distinguish between liability to deportation and the risk that a person will ultimately be deported, holding that they do not "usurp" immigration powers by granting a discharge where the offending is not serious and exposure to deportation liability would be a disproportionate consequence in itself. In such cases the court need not make predictions about what immigration authorities will do. This Court's decision in *Rahim v R* appears to fall into this category. The cases involve offending that was not intrinsically serious, or which was not a serious example of its kind, and in which there were substantial personal mitigating features.

[54] We do not consider this case to be one of those referred to in *Sok* where the offending involved was not intrinsically serious or was not a serious example of its kind.

[55] As the appellant's convictions do not inevitably result in her being deported, there is a statutory process by which the merits of the appellant's grounds for cancellation or suspension of her deportation will be considered before a decision is made that she be deported, and she will have a right of appeal to the Tribunal against such a deportation decision if one is made, we find that those consequences of conviction are not out of all proportion to the gravity of the offences.

[56] While there is cogent evidence supporting the appellant's claim to have suffered significant mental health issues as a result of her anxiety over her husband's deportation and the prospect that she too may be deported, those matters together with other factors, such as: the welfare interests of her two children; the absence of any further offending; and the appellant's now established and settled life with her children in New Zealand, are best considered by the Minister in deciding whether or not deportation should proceed, or if deportation is to be suspended what conditions are appropriate to impose. The Minister and the Tribunal (if there is an appeal) will be better informed than the Court is to assess and determine the merits of the appellant's case and her grounds for not being deported, in light of the offending for which she was convicted.

[57] We accordingly find that the appellant has failed to show the direct and indirect consequences of conviction would be out of all proportion to the gravity of the offence.

Where the requirement in s 107 of the Sentencing Act is not satisfied, the Court must not grant a discharge under s 106.

[58] We consider that the circumstances in which the appellant's sentencing occurred and in which the appellant's counsel did not make an application for her to be discharged without conviction has not resulted in a miscarriage of justice. In our view, had the appellant made an application to the Judge to be discharged without conviction, that application would have failed, as the consequences of the convictions are not out of all proportion to the gravity of the appellant's offences.

[59] We therefore dismiss the appeal.

Result

[60] The application for an extension of time is granted.

[61] The application to file fresh evidence on appeal is granted.

[62] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent