IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1691
[2018] NZHC 2616

UNDER	Section 245 of the Immigration Act 2009
IN THE MATTER	of a decision of the Immigration and Protection Tribunal, being [2017] NZIPT 600365 dated 26 June 2017
BETWEEN	KRUTI PATEL Appellant
AND	MINISTER OF IMMIGRATION Respondent

…/cont

Hearing:	18 September 2018
Appearances:	A Schaaf and M Tuilotolava for the Appellant/Applicant I Clark and M Madden for the Second Respondent
Judgment:	8 October 2018

JUDGMENT OF GORDON J

This judgment was delivered by me
on 8 October 2018 at 3.30 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:	M Tuilotolava, Manukau Crown Law, Wellington
Counsel:	A Schaaf, Onehunga, Auckland

CIV-2017-404-1700

UNDER	Section 247 of the Immigration Act 2009, and under the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules
IN THE MATTER	A decision of the Immigration and Protection Tribunal, being [2017] NZIPT 600365 dated 26 June 2017
BETWEEN	KRUTI PATEL Applicant
AND	IMMIGRATION AND PROTECTION TRIBUNAL First Respondent
	MINISTER OF IMMIGRATION Second Respondent

Introduction

[1] Kruti Patel is a citizen of India. She holds a New Zealand permanent resident visa which was granted on the basis of her relationship with her then husband, Vishal Patel.

[2] However, it transpired that Ms Patel had failed to tell Immigration New Zealand (INZ) that she had instigated divorce proceedings against another man, Hardik Jingar, in India.

[3] On 25 August 2016, INZ issued a deportation liability notice (DLN) to Ms Patel under s 158(1)(b)(ii) of the Immigration Act 2009 (the Act).

[4] On 26 June 2017, the Immigration and Protection Tribunal (the Tribunal) dismissed Ms Patel's appeal against deportation liability on the basis she had failed to prove that no relevant information had been concealed.[1] It also found there were no exceptional circumstances of a humanitarian nature.

[5] Ms Patel appeals the Tribunal's decision under s 245 of the Act. She also applies for judicial review of the decision under s 249 of the Act.

[6] On 29 March 2018, this Court granted Ms Patel leave to appeal on two questions of law, as well as granting leave for judicial review on one further question.[2]

[7] This is the judgment on those questions. There is also an application by Ms Patel to adduce further evidence on appeal and in the judicial review.

Factual background

[8] Ms Patel was born in Ahmedabad, Gujarat, India on 24 September 1989. She arrived in New Zealand lawfully in 2008 on a student permit.

---

1 *Patel v Minister of Immigration* [2017] NZIPT 600365.
2 *Patel v Minister of Immigration* [2018] NZHC 577.

[9] In November 2008, Mr Jingar, who was living in India, contacted INZ and asserted that he had married Ms Patel in India on 24 September 2007. He claimed he had a marriage certificate. INZ did not act on these allegations at that time.

[10] Ms Patel met Mr Patel in 2008. Mr Patel is also an Indian citizen living in New Zealand. Ms Patel started a relationship with him in 2009 and the two were married on 3 June 2011.

[11] Shortly after the marriage, Mr Patel applied for a permanent residency visa and included Ms Patel in the application.

[12] On 5 August 2011, INZ interviewed Ms Patel in relation to her work visa application based on her marriage to Mr Patel, to determine whether her relationship with Mr Patel was genuine and stable. They asked her about Mr Jingar and his allegations. She told the interviewer that the alleged marriage to Mr Jingar was not genuine, and that the marriage certificate had been forged. She said she had never married Mr Jingar, and that he had tried to blackmail her and her family.

[13] INZ interviewed Ms Patel again in August 2012 in relation to the residence application submitted by Mr Patel in which she was included as a secondary applicant. She maintained the above stance.

[14] INZ accepted Ms Patel's account and made no further inquiries. It granted residency visas to Mr and Ms Patel on 23 August 2012. Their daughter was born on 25 March 2014.

[15] Ms Patel travelled to India on a number of occasions before and after her daughter was born. Ms Patel's daughter is currently being cared for by Ms Patel's parents in India.

[16] INZ eventually granted Mr and Ms Patel permanent residency visas on 11 September 2014. One month later, they separated. Their marriage was dissolved on 20 October 2016.

[17] Mr Jingar contacted INZ again in June 2015. He provided INZ with a copy of a marriage certificate and with photographs of Mr Jingar, Ms Patel and her daughter taken during Ms Patel's visit to India in 2014.

[18] Mr Jingar repeated the same allegations. This time, however, he added that Ms Patel had returned to India in 2009 to commence divorce proceedings against him. He said that the Family Court in Gujarat had dismissed the proceedings in 2011 for lack of prosecution.

[19] INZ then instructed its office in New Delhi to investigate Mr Jingar's claims. The conclusion was that the marriage certificate between Ms Patel and Mr Jingar appeared valid, that the marriage was registered and that Ms Patel had lodged an application for divorce which had been dismissed by the Family Court in Gujarat.

[20] On 4 December 2015, INZ wrote to Ms Patel informing her that they were investigating whether she was liable for deportation. The letter contained reasons for the investigation, including that she had not advised INZ of her marriage to Mr Jingar prior to being granted residency, and that had INZ been aware of the marriage, she may not have been eligible to be included in Mr Patel's residence application. It also stated that Ms Patel had not informed INZ that she had instigated divorce proceedings against Mr Jingar which were disposed of by the Family Court in Gujarat for lack of prosecution.

[21] In response, Ms Patel repeated that the marriage was not genuine. She said that the marriage certificate had been fraudulently obtained. As to the divorce proceedings, she said she had received legal advice in India to commence those proceedings after she had found out that the marriage was registered. She said she was told by a lawyer, Nilima Vyas, that it would be easier to file for divorce on the basis of abuse during the marriage, rather than declare the marriage null and void.

[22] On 25 August 2016, INZ issued a DLN. Ms Patel appealed to the Tribunal on the facts and on humanitarian grounds. It dismissed her appeals.

The Tribunal's decision

[23] After summarising the evidence of Ms Patel and Greg Woodcock, a registered clinical psychologist called on Ms Patel's behalf, and the evidence called by the respondent, the Tribunal discussed the appeal on the facts.[3]

[24] Although Ms Patel was adamant that she did not marry Mr Jingar, the Tribunal stated that the evidence "tends to point the other way",[4] and referred to the following:

(a) Mr Tripathi, an officer in the New Delhi branch of INZ, conducted an investigation. Those inquiries indicated that the marriage certificate appeared to be genuine.[5] The registration of the marriage document was verified by the relevant registry to be genuine. The marriage was registered and regarded as legally valid.

(b) Ms Patel also gave evidence that in 2009 she had received legal advice through her mother that the marriage certificate was valid on its face.[6]

(c) There was evidence that her father had commissioned an investigation which indicated that the marriage had been registered and the certificate appeared to be genuine.[7]

(d) Ms Patel did not seek to have the marriage declared null and void. She instead lodged an application in the Family Court seeking to have the marriage dissolved on the grounds of cruelty. The Tribunal found her explanation was "implausible", as it was "unlikely that a lawyer would suggest that a client risk being seen to endorse as genuine a document which the client asserts is false".[8] It similarly did not find it likely that a lawyer "would recommend to a client that he/she commit perjury".[9]

---

3 *Patel v Minister of Immigration*, above n 1, at [57].
4 At [59].
5 At [60].
6 At [61].
7 At [19].
8 At [61].
9 At [61].

It stated that it was significant that there was no evidence called from the lawyer to corroborate the claim.[10]

(e) It was notable that Ms Patel did not call evidence from any of her family members.[11]

[25] Ultimately, the Tribunal recorded its conclusion that Ms Patel's appeal on the facts did not succeed because she had not established, on the balance of probabilities, that she did not conceal relevant information from INZ, namely the divorce proceedings, during her interviews with INZ in 2011 and 2012.[12] This information was of direct relevance to whether Ms Patel was in a genuine and stable relationship with Mr Patel.[13] In failing to disclose the information, Ms Patel had deprived INZ of a relevant line of inquiry.[14]

[26] The Tribunal also concluded that the humanitarian appeal did not succeed because Ms Patel had not established that her humanitarian circumstances met the threshold of exceptionality that is required by the Act.[15] The Tribunal accepted that Ms Patel would have to "forego her current employment and her educational aspirations" if she returned to India.[16] But it noted that Ms Patel's daughter's best interests are currently being met by living with her grandparents in India.[17]

[27] The Tribunal also noted that her parents and brother (a medical professional), who live in India, "will provide significant emotional and practical support while she seeks to re-establish herself".[18] It did not consider there to be any evidence that established that Ms Patel would be unable to support herself in India.[19]

10 At [61].
11 At [62].
12 At [3], [66] and [69]-[70].
13 At [69].
14 At [69].
15 At [3] and [102].
16 At [79].
17 At [84].
18 At [95].
19 At [96].

[28] The Tribunal also found that although Ms Patel has a depressive condition which may be connected with a sexual assault by Mr Jingar, the evidence does not establish a risk of further sexual assault by him.[20]

[29] Both the appeal on the facts and the humanitarian appeal were dismissed.

Appeal questions

[30] Ms Patel applied for leave to appeal the Tribunal's decision pursuant to s 245 of the Act.

[31] On 29 March 2018, Edwards J granted Ms Patel leave to appeal on two questions of law:[21]

> (a) Did the Tribunal err by concluding Ms Patel had "concealed" relevant information within the meaning of s 202(ca) of the Act?
>
> (b) Did the Tribunal err by failing to take into account whether Ms Patel intentionally concealed relevant information when assessing whether there were exceptional circumstances of a humanitarian nature under s 207 of the Act?

[32] The Judge also granted leave to review the Tribunal's decision on the following question:[22]

> (a) Did Ms Patel's previous counsel err by failing to adduce evidence relevant to the validity of the marriage for the purposes of the Tribunal hearing? If so, did such error cause procedural unfairness?

The statutory framework

[33] As noted, INZ issued a DLN to Ms Patel under s 158(1)(b)(ii) of the Act. That section provides:

---

20 At [100].
21 *Patel v Minister of Immigration*, above n 2, at [86].
22 At [87].

> **158 Deportation liability of residence class visa holder due to fraud, forgery, etc**
>
> (1) A residence class visa holder is liable for deportation if—
>
> …
>
> (b) the Minister determines that—
>
> (i) any of the information provided in relation to the person's application, or purported application, for a residence class visa or entry permission was fraudulent, forged, false, or misleading, or any relevant information was concealed; or
>
> (ii) any of the information provided in relation to the person's, or any other person's, application, or purported application, for a visa on the basis of which the residence class visa was granted was fraudulent, forged, false, or misleading, or any relevant information was concealed.

[34] Ms Patel was entitled to appeal to the Tribunal on the facts against her liability for deportation.[23] Section 202 of the Act governed the appeal. That section relevantly provides:

> **202 Grounds for determining appeal on facts**
>
> The Tribunal must allow an appeal against liability for deportation on the facts where,—
>
> …
>
> (ca) in the case of an appellant liable for deportation under section 158(1)(b)(ii), the Tribunal is satisfied, on the balance of probabilities, that none of the information provided in relation to the person's, or any other person's, application, or purported application, for a visa on the basis of which the residence class visa was granted was fraudulent, forged, false, or misleading, and *no relevant information was concealed* …
>
> (Emphasis added)

[35] Ms Patel was also entitled to appeal to the Tribunal on humanitarian grounds.[24] Section 207 governed the appeal. That section relevantly provides:

---

23 Immigration Act 2009, s 201(1)(b).

24 Section 206(1)(c).

> **207 Grounds for determining humanitarian appeal**
>
> (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—
>
> (a) there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
>
> (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.
>
> …

[36] Section 226(1) provides that it was the responsibility of Ms Patel to establish her case, and she had the obligation to ensure that all information, evidence, and submissions that she wished to have considered in support of the appeal were provided to the Tribunal before it made its decision on the appeal. Section 228(1) allows the Tribunal to seek information from any source. But it is not obliged to do so.[25]

Approach on appeal

[37] Subject to leave being granted, Ms Patel was entitled to appeal to this Court on a question of law.[26]

[38] Section 245(4) of the Act provides this Court with jurisdiction to determine the question of law. It may then:

> (4) On the appeal, the High Court must determine the question or questions of law arising in the proceedings, and may then—
>
> (a) confirm the decision in respect of which the appeal has been brought; or
>
> (b) remit the matter to the Tribunal with the opinion of the High Court, together with any directions as to how the matter should be dealt with; or
>
> (c) make such other orders in relation to the matter as it thinks fit.

[39] However, as Toogood J stated in *Song v Minister of Immigration*:[27]

---

25 Section 228(2).
26 Section 245(1).
27 *Song v Minister of Immigration* [2016] NZHC 1828.

> [33] The Court's powers on an appeal relating to a question of law are tightly circumscribed. The Court must not give any consideration to the factual merits of [the applicant]'s case, or give any weight to any agreement or disagreement with the Tribunal's result or the quality of its reasoning process.
>
> (Citations omitted)

Concealed relevant information?

[40] The first question of law concerns the Tribunal's finding that Ms Patel had concealed relevant information, namely the divorce proceedings. It is (now)[28] not in dispute that Ms Patel did not disclose the divorce proceedings to INZ.

[41] As Edwards J identified, this ground of appeal raises questions about the meaning of "relevant information" and "concealed".[29]

[42] Section 58(3) of the Act requires an applicant for a visa to inform INZ of any relevant fact, including any material change in circumstances that occurs after the application is made, if that fact or change in circumstances may affect the decision on the application or a decision to grant entry permission in reliance on the visa for which the application is made.

[43] I agree with Edwards J's statement as to the meaning of "relevant information" in the circumstances of this case:

> [47] The fact of the divorce proceedings was relevant to the validity of Ms Patel's marriage to Mr Jingar. That marriage was relevant to whether the relationship between Mr and Mrs Patel was genuine and stable. Whether the marriage was obtained by fraud or not, the divorce proceedings was a fact which may have affected the decision on the residence application. Accordingly, it is not seriously arguable that the Tribunal erred in determining the divorce proceedings to be relevant information.

[44] Whether Ms Patel had instituted divorce proceedings against Mr Jingar was relevant to whether her relationship with Mr Patel was genuine and stable. It was a factor capable of influencing INZ's decision to grant her a permanent residency visa.

---

[28] Ms Patel disputed this before the Tribunal.

[29] *Patel v Minister of Immigration*, above n 2, at [45].

[45] The real issue under this question is whether Ms Patel in fact concealed the relevant information, namely the divorce proceedings. This issue requires consideration of the term "concealed" within ss 158(1)(b)(ii) and 202(ca) of the Act.

[46] Ms Clarke, for the Minister of Immigration, submits that concealment occurs when:

(a) the applicant knows the information exists;

(b) the information is objectively relevant; and

(c) the applicant fails to disclose the information.

[47] Ms Clarke's submission is that s 158(1)(b)(ii), therefore, does not require inquiry into the appellant's state of mind. She submits that the case law, the Act and its legislative history supports such an objective approach.

[48] Accordingly, Ms Clarke submits the Tribunal was correct to conclude that Ms Patel failed to establish she did not conceal the divorce proceedings.

[49] Ms Schaaf, for Ms Patel, acknowledges that concealment does not require a subjective element. However, she submits instead that INZ has a duty to let people know what specific information they want, not just any information that they might consider. She submits there is an onus on INZ to formulate questions on forms so people are very clear what information is required. Otherwise, it is unfair on applicants to be put in a position where they have to "second guess" what INZ wants to know.

[50] As Edwards J stated, no case has specifically considered the meaning of the term "concealed" within ss 158(1)(b)(ii) and 202(ca) of the Act.[30] However, there are cases which have considered other terms in those sections.

---

[30] At [49].

Case law

[51] In *Pal v Minister of Immigration*, INZ ordered the appellants' deportation under s 158(1)(b)(ii) of the Act on the basis that they procured their resident class visas through fraud, forgery, false or misleading information or concealment of relevant information.[31] Specifically, it was found that the application forms for the appellants' residence visas contained a fraudulent misstatement of fact. The appellants had not correctly declared how many children they had.

[52] The submission on behalf of the appellants was that there was "no mens rea". The appellants asserted that they relied upon an agent who had completed the application forms for them.

[53] In determining the application for leave to appeal, Asher J first held that, looking at the matters afresh, the Tribunal was correct when it concluded that the appellants knowingly committed the fraud by providing incorrect information about their children.[32] In other words:

> [41] … On any objective analysis of the evidence before the Tribunal, deliberate concealment of four of the six children was established on the balance of probabilities.

[54] The Judge accepted, however:

> [32] If there is a misleading statement, and an appellant wishes to show that they were not knowingly misleading, then it is clear from s 226(1) that it is up to the appellant to call evidence or provide material to show that the inference that can logically be drawn (that is that the misstatement was deliberate) could not be drawn. The only evidence provided by the applicants was their own testimony. It was contradictory and lacking in detail. It was uncorroborated save between themselves and their son Ashok.

[55] In any event, Asher J held that the "false or misleading representations do not need to be knowing. They can be entirely innocent".[33] The Judge reached that conclusion based on a line of authority which stands for the proposition that there is no subjective element required to establish actual fraud.[34] He concluded:

---

[31] *Pal v Minister of Immigration* [2013] NZHC 2070.
[32] At [33].
[33] At [44].
[34] At [45]-[52].

> [50] This line of authority is, with respect, clearly correct. It is generally the case that the exact circumstances of the completion of an application for a residence visa are known only to the applicant. Such applications would often occur within the context of a family situation where a senior member of the family would take over the running of a fraudulent application, and the others will follow. For this reason, no doubt, the legislature has chosen the wording in s 158(1)(b) which precludes the mental element of knowing misrepresentation. It would be most surprising for Parliament to leave the section in a near identical form in the Immigration Act 2009 if it considered the interpretation given in 1993 was wrong.
>
> [51] Included in the matters to be determined are whether there was a "false or misleading representation". On these plain words there is no requirement for knowledge of the misrepresentation. There is a long line of authority relating to the phrase "misleading and deceptive conduct" in the Fair Trading Act context which makes it clear that there is no requirement on the part of the representor of knowledge of the fraud.
>
> [52] Thus, the plain words and the policy considerations set out in the authorities cited are quite clear on this point.
>
> (Citations omitted)

[56] I also note the comments of Tompkins J in *Rajan v Minister of Immigration*, in the context of fraud under s 158(1)(b):[35]

> … there is nothing in the New Zealand section to indicate that guilty knowledge is required to be established before the Minister can exercise his power to revoke the permit. There is no subjective element involved.

[57] Recently, in *Panchal v Immigration and Protection Tribunal*, the Court of Appeal was asked to consider the extent to which the Tribunal ought to have considered an applicant's alleged lack of culpability in the provision of fraudulent information by a third party.[36] In that case, fraudulent information had been provided by the applicant's employment supervisor in relation to his application for a residence visa.

[58] Citing *Pal* and *Rajan*, the Court of Appeal commented:

> [20] … Among other things these cases establish that the relevant fraud or concealment need not be that of the proposed deportee. As long as the deportee benefits from the fraud or concealment, his or her state of mind is irrelevant …

---

[35] *Rajan v Minister of Immigration* HC Auckland M1151/94, 31 July 1995 at 11.
[36] *Panchal v Immigration and Protection Tribunal* [2018] NZCA 83.

[59] The Court did not comment any further on this point. It supported the Tribunal's finding in that case that there was good evidence the applicant was aware of the fraud.[37] It then stated:

> [26] In those circumstances, even if the first question of law was answered in [the applicant]'s favour, and innocence of the deportee was considered relevant, it could not have affected the result in this case.

Discussion

[60] In my view, the test is simply, as Ms Clarke set out, whether the applicant knows about objectively relevant information and fails to disclose it. It is unnecessary to prove that an applicant intentionally concealed relevant information. It is similarly irrelevant that an applicant might have unintentionally concealed relevant information, as long as they had knowledge of the information. There is no mens rea or subjective element to the test for concealment.

[61] The policy behind the Act, as mentioned by Asher J, supports this approach. The Act places the duty of disclosure of relevant information firmly on the applicant. When an applicant is applying for a visa, s 58(1) of the Act states that it is that applicant's responsibility to ensure that all information, evidence, and submissions that the applicant wishes to have considered in support of the application are provided. This section has been described as placing a "duty of candour" on the applicant.[38] The duty is ongoing,[39] and it remains on the applicant before the Tribunal.[40]

[62] Section 58(6) of the Act provides that the Minister may decline to grant a visa to a person if satisfied that the person withheld relevant information that was "potentially prejudicial to the grant of the visa". This indicates Parliament's intent that applicants should err on the side of disclosure to comply with this duty of candour.

[63] Asher J in *Pal* encapsulated the policy objectives behind placing the duty of disclosure on the applicant:

---

37 At [25].

38 *Song v Minister of Immigration*, above n 27, at [44]. See also *Sidhu v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZHC 2841 at [51].

39 Section 58(3).

40 Section 226(1).

> [62] … The integrity of the application process turns on the scrupulously honest and careful completion of forms. Applicants must realise that the consequence of failing to be honest and open in the application process is severe. Only then will the immigration system continue to work. If sympathy for the individual became the dominating concern it can be foreseen that the present application system would break down entirely.

[64] Therefore, the applicant must provide full and accurate information as it is they who have control over that information. It follows that there is no obligation on INZ to let applicants know what specific information it wants. That submission is unrealistic. INZ will not always be aware of all the information held by the applicant. It cannot be expected to know something it was not told. As INZ relies upon the information provided by the applicant, it is crucial to the integrity of the immigration system that the information is full and accurate.

[65] This interpretation is also supported by other sections in the Act. Edwards J referred to the 2015 amendments to s 158 of the Act, noting:

> [52] The 2015 amendments to s 158 placed even further emphasis on full and accurate disclosure regardless of fault or intention. Those amendments broadened the grounds on which a residence class visa holder can be held liable for deportation. In particular, s 158(1)(b), which previously triggered deportation liability where a person's residence class visa or entry permission was "procured" through the concealment of relevant information, was altered so as to trigger liability simply where any relevant information was concealed.

[66] Similarly, the introduction of s 158(1A) shows that the applicant's individual mental state is not relevant to the inquiry. It provides that s 158(1)(b)(ii) applies whether the person holding the residence class visa is the person who concealed the relevant information. This supports the policy considerations outlined above.

[67] Further, s 342 contains a range of offences which relate to providing false or misleading information in an application where the applicant knows that the information is false or misleading. Similarly, s 17(2) of the Citizenship Act 1977 allows the Minister to deprive a New Zealand citizen of his or her citizenship "if he is satisfied that the registration … was procured by … wilful concealment of relevant information".[41] There is no such stated requirement of knowledge or intention in ss

---

[41] See *Joseph v Minister of Internal Affairs* [2012] NZHC 49 at [41]. Lang J there stated, "[w]ilful concealment of relevant information will occur where there is a deliberate omission of information that is likely to be relevant to the decision that the Minister is required to make."

158(1) or 202(ca). The logical conclusion is that where the Act requires an applicant to have a certain state of mind, it says so.

[68] Although it did not explicitly set out a test, the Tribunal effectively correctly applied the test for whether relevant information was concealed. Ms Patel was aware that INZ was investigating whether she was in a genuine and stable relationship with Mr Patel. She had a duty to disclose anything that might affect that decision.

[69] As Moore J stated in *Sidhu v Chief Executive of the Ministry of Business, Innovation and Employment*:[42]

> [69] … the correct emphasis is not on whether [the information] would have, in fact, made a difference but rather on the deprivation of the opportunity to undertake a further fuller analysis of risk.

[70] Ms Patel knew about the divorce proceedings. She acknowledged that she brought the proceedings and stated that she received legal advice in India to commence them. There is no doubt that the existence of the divorce proceedings was relevant information,[43] and that Ms Patel failed to disclose it. As the Tribunal noted in its decision, "[i]n failing to disclose this information, the appellant deprived Immigration New Zealand of a relevant line of inquiry".[44]

[71] In the circumstances of this case, therefore, I am satisfied that the Tribunal made no error of law in concluding that Ms Patel concealed relevant information, namely the divorce proceedings.

Exceptional circumstances of a humanitarian nature?

[72] The second question of law concerns whether the Tribunal erred by failing to take into account whether Ms Patel intentionally concealed relevant information when assessing whether there were exceptional circumstances of a humanitarian nature under s 207 of the Act.

---

42 *Sidhu v Chief Executive of the Ministry of Business, Innovation and Employment*, above n 38.
43 Refer [43] above.
44 *Patel v Minister of Immigration*, above n 1, at [69].

[73] In *Ye v Minister of Immigration*, the majority of the Supreme Court held that the predecessor to s 207(1)(a) of the Act, which was materially identical to s 207(1)(a), required the Tribunal to consider three discrete elements.[45] As the Court of Appeal recently reiterated, those elements are:[46]

> (a) whether there are exceptional circumstances;
>
> (b) whether those circumstances are "humanitarian"; and
>
> (c) whether they are such as to make it unjust or unduly harsh to require removal or deportation.

[74] Only if there are "exceptional circumstances" of a "humanitarian" nature must the Tribunal move to consider the third element.[47] If all those elements are satisfied, then consideration must be given to the final public interest filter in s 207(1)(b).[48]

[75] This ground of appeal concerns the first element under s 207(1)(a) of the Act. In respect of this issue, Edwards J commented:

> [56] … I consider that it is seriously arguable that Ms Patel's knowledge and intent are factors relevant to the assessment of the exceptional circumstances of a humanitarian nature, and that the failure to take them into account is an error of law.

[76] Ms Clarke, however, submits that the level of intent or culpability is not relevant to establishing whether there are "exceptional circumstances" of a "humanitarian" nature. She submits culpability could only ever be relevant (if at all) when considering the third element, namely whether it would be unjust or unduly harsh to deport.

[77] Accordingly, as the Tribunal determined there were no exceptional circumstances of a humanitarian nature, Ms Clarke submits it was unnecessary for it to go on and consider the subsequent stages of the test.

---

45 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34]. The Supreme Court in *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [8]-[9] supported continuity in application between the old and new regimes.

46 *Panchal v Immigration and Protection Tribunal*, above n 36, at [27].

47 *Ye v Minister of Immigration*, above n 45, at [34]; *Wu v Minister of Immigration* [2016] NZCA 511 at [10]; *Panchal v Immigration and Protection Tribunal*, above n 36, at [28]; *Chan v Minister of Immigration* [2015] NZHC 2036 at [10].

48 *Panchal v Immigration and Protection Tribunal*, above n 36, at [28].

[78] Ms Schaaf, on the other hand, submits there are differing opinions expressed by the Courts about whether an applicant's mental state can be considered under the phrase "exceptional circumstances of a humanitarian nature". She submits that it is appropriate for the Court to take into account Ms Patel's absence of fault or absence of intentional concealment as a humanitarian circumstance. Arguments to the contrary, Ms Schaaf submits, unduly limit the open-ended wording of s 207 as to what could constitute "exceptional circumstances of a humanitarian nature".

Discussion

[79] The majority of the Supreme Court in *Ye* explained the meaning of the term "exceptional circumstances":

> [34] … The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in overstayer cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule …
>
> (Citations omitted)

[80] The Supreme Court did not define the term "humanitarian", commenting instead:

> [34] … It is unnecessary and undesirable to attempt to define the compass of the word "humanitarian". It is unlikely to be difficult to decide whether the circumstances of a particular case fulfil that description …

[81] In *Guo v Minister of Immigration*, the Supreme Court commented generally on liability for deportation:[49]

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

[82] Ms Schaaf identifies the above comment to support her submission as to the alleged conflict of authorities.

---

[49] *Guo v Minister of Immigration*, above n 45.

[83] I do not accept Ms Schaaf's submission that the authorities are inconsistent about the place of culpability in a humanitarian appeal. To the extent culpability is relevant, it is not part of the first stage of the inquiry.

[84] The types of circumstances that will be relevant in the first stage of the inquiry are signalled through the use of the word "humanitarian". Although, as noted, the Supreme Court in *Ye* did not attempt to define humanitarian circumstances, other cases have done so.[50] Such circumstances will generally relate to, for example, an applicant's welfare, safety or happiness.

[85] Ultimately, it is the consequences or effects of deportation on the person that is at the heart of the first stage of the inquiry under s 207.[51] The reason a person is made liable for deportation (or their level of culpability) is not a consequence or effect of deportation.

[86] In another case, *Minister of Immigration v Q*, the Minister has been granted leave to appeal the Tribunal's decision in relation to whether fault can be considered at the first stage of the s 207 inquiry (arising from the Tribunal's application of the Supreme Court decision in *Guo v Minister of Immigration* at the first stage).[52]

[87] I do not consider that *Guo* is authority for the proposition that an absence of fault is relevant to determining whether there are exceptional circumstances of a humanitarian nature (i.e. the first stage). That decision was focussed on the second stage of the s 207 inquiry, namely "unjust or unduly harsh". Although the Supreme Court makes reference to the children's innocence being "exceptional",[53] this was not ultimately the way the Supreme Court approached the matter:

---

50 See *Sale v Removal Review Authority* HC Auckland M1471/93, 26 October 1993 at 9-10; *Zanzoul v Removal Review Authority* HC Wellington CIV-2007-485-1333, CIV-2008-485-854, CIV-2008-485-855, 9 June 2009 at [177]-[178].

51 See *O'Brien v Immigration and Protection Tribunal* [2012] NZHC 2599 at [43]; *Guo v Minister of Immigration*, above n 45, at [9]; *Tuitupou v Minister of Immigration* [2016] NZHC 2002 at [43] and [47]; *Davies v Chief Executive of the Ministry of Business, Innovation and Employment* [2017] NZHC 503 at [25] and [30]; and *Li v Chief Executive of the Ministry of Business, Innovation and Employment* [2017] NZHC 2977 at [16]-[17].

52 *Minister of Immigration v Q* [2018] NZHC 1071 at [41].

53 *Guo v Minister of Immigration*, above n 45, at [10].

> [9] … Whether deportation would be "unjust or unduly harsh" is to be assessed in light of the reasons why the appellant is liable for deportation and involves a balancing of those considerations *against the consequences for the appellant of deportation* …
>
> (Emphasis added)

[88] Decisions of this Court applying s 207 since *Guo* have indicated that consideration of culpability applies in the second stage, namely the unjust or unduly harsh balancing exercise.[54]

[89] Since culpability only becomes relevant after exceptional circumstances of a humanitarian nature are found to be present, and having found no such circumstances, the Tribunal did not need to consider Ms Patel's culpability.

[90] But in any event, I must focus on the question in respect of which leave was granted.

[91] The answer to the question is that the Tribunal did not err by failing to take into account whether Ms Patel intentionally concealed relevant information when assessing whether there were exceptional circumstances of a humanitarian nature under s 207 of the Act.

Further evidence

[92] It is appropriate to deal with Ms Patel's application to adduce further evidence at this point. The further evidence consists of affidavits from Ms Patel, Michael Maran, a handwriting expert, and Divya Vala, Ms Patel's mother.

[93] The Minister of Immigration opposes the application to admit the evidence on the two appeal questions.

[94] Ms Patel must obtain leave to adduce this further evidence.[55] Leave may be granted only if "special reasons" exist.[56] As Downs J commented, "[c]ourts have

---

54 *Kaur v Minister of Immigration* [2016] NZHC 3110 at [42]-[46]; *Tuitupou v Minister of Immigration*, above n 51, at [45] and [51].
55 High Court Rules, r 20.16(2).
56 Rule 20.16(3).

frequently held it inappropriate to admit fresh evidence on appeals on points of law and judicial review".[57] An appeal is not an opportunity for an appellant to bolster his or her case with new evidence.[58]

[95] Generally, further evidence will need to be cogent, credible and fresh.[59] But the overriding criterion is the interests of justice.[60]

[96] Ms Schaaf submits that the further evidence should be admitted as it provides cogent evidence that would likely have changed the decision of the Tribunal. Ms Clarke, on the other hand, submits that the evidence will not assist the Court to determine the questions of law before it.

[97] There is an affidavit dated 16 May 2018 from Ms Patel in which she details the process she undertook after the Tribunal's decision to acquire the evidence from Mr Maran. She also describes the circumstances around her seeking advice from Ms Vyas in India. Ms Vyas was the lawyer who, Ms Patel says, advised her to institute divorce proceedings against Mr Jingar. Ms Patel also produces evidence to discredit Mr Jingar's claims that he is the father of her daughter, by showing that she was not in India during the time that her daughter was conceived.

[98] In his affidavit dated 7 May 2018, Mr Maran deposes that, in his opinion, the signatures attributed to Ms Patel in the marriage certificates from India are non-genuine when compared to her known signatures.

[99] Lastly, by way of affidavit dated 1 May 2018, Ms Vala deposes as to her efforts to track down Ms Vyas. She says she went to the Family Court and found Ms Vyas. But, Ms Vyas refused to cooperate and told Ms Vala not to contact her again.

[100] As to the first question, Ms Schaaf submits that the further evidence may establish that Ms Patel's marriage to Mr Jingar was fraudulently registered. That

---

57 *Li v Chief Executive of Ministry of Business Innovation and Employment* [2018] NZHC 1309 at [20].
58 At [20]; citing *Guo v Immigration and Protection Tribunal* [2014] NZHC 804 at [43] and [47].
59 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120]; *R v Bain* [2004] 1 NZLR 638 (CA) at [22].
60 *Lundy v R*, above n 59, at [120]; *R v Bain*, above n 59, at [22].

conclusion, she submits, means that Ms Patel did not conceal relevant information from INZ.

[101] Even if the further evidence, taken at its highest, establishes that the marriage was fraudulently registered, the fact that Ms Patel took steps to institute legal divorce proceedings is something that had to be disclosed as relevant information.

[102] I am satisfied, therefore, that the evidence should not be admitted in relation to this question as it is not cogent in relation to the issue in question one. There is no factual conflict about what the Tribunal decided. No new evidence is required to determine this question of law.

[103] I am similarly satisfied that the further evidence should not be admitted in relation to the second question. The second question requires the Court to consider the relevance of Ms Patel's intention at the first stage of the s 207 humanitarian appeal. There is similarly no factual conflict about what the Tribunal decided. No new evidence is required to resolve this question of law.

[104] The Minister of Immigration consents to the further evidence being considered in the judicial review proceedings.

[105] For that reason, I will consider the further evidence in relation to the judicial review question, to which I now turn.

Judicial review - procedural unfairness?

[106] Ms Patel's position is that counsel representing her in the Tribunal, in error, failed to present the following evidence to the Tribunal:

(a) Forensic analysis of the marriage documents;

(b) Mr Jingar's emails regarding the parentage of Ms Patel's daughter; and

(c) Evidence to corroborate Ms Patel's assertion that a lawyer in India advised her to file for divorce rather than to have her marriage to Mr Jingar declared null and void.

[107] As Wild J has noted, "[i]n cases involving immigration status, natural justice requires high standards of fairness because of the profound implications on the lives of those affected".[61]

[108] Edwards J acknowledged that this Court has recognised in the past that counsel error can cause procedural unfairness:[62]

> [81] This Court has acknowledged that it is possible for counsel error in failing to call important evidence causing procedural unfairness to be a ground for review. However, such cases are regarded as exceptional and they have generally involved cases of claimed refugee status …
>
> [82] In those cases where counsel error as a ground of review has been considered, the cogency and materiality of the evidence which was not adduced has been a critical factor in deciding whether to grant review …

[109] But the Judge also added:

> [85] Finally, counsel has not produced any evidence from which it could be inferred that the failure to adduce this evidence was a result of counsel error. However, counsel for the Minister did not oppose the application on this ground. Accordingly, for the purposes of determining the leave application I have accepted counsel for Ms Patel's submission that the omission was a result of counsel error. However, evidence relevant to that alleged error will need to be produced at the review hearing if Ms Patel is going to establish that such an error resulted in procedural unfairness.

[110] In *Lal v Removal Review Authority*, McGechan J referred to there being a "clear possibility of unfairness" if there is a "vital omission".[63] In that case, the appeal document was so plainly incomplete and so obviously failed to address the necessary criterion that the Judge considered the Authority should have informed the appellant accordingly.

---

61 *Noa v Minister of Immigration* HC Wellington CIV-2010-485-659, 30 September 2010 at [8].

62 *Patel v Minister of Immigration*, above n 2. See also *JS v Immigration and Protection Tribunal* [2015] NZHC 2832 at [43]; citing *AL v Immigration and Protection Tribunal* [2014] NZAR 1079 (HC) at [36].

63 *Lal v Removal Review Authority* HC Wellington AP95/92, 10 March 1994 at 24.

[111] In *Isak v Refugee Status Appeals Authority*, Asher J allowed the appeal on the grounds of procedural unfairness due to counsel error.[64] Counsel had failed to present relevant and available evidence in the form of a letter in support of the appellant's asylum application.[65] The Judge noted the significance of the evidence, commenting:

> [79] … If the factual issue had been less fundamental, or the evidence less cogent, the result might have been different. However, this was very important evidence relating to the fundamental plank of Mr Isak's case. The consequences of the wrong decision may be dire. I consider there is a real risk that not leading this evidence could lead to a very grave injustice being done to him. The cost and delay of a rehearing is a small price to pay, if such an outcome is avoided. A generous approach to intervention is warranted. A little additional fairness is called for.

[112] Ms Tuilotolava, for Ms Patel, submits that had the further evidence been presented at the hearing before the Tribunal, there could have been a different result. She submits that Mr Mukusha, Ms Patel's former counsel, erred by failing to adduce this evidence relevant to the validity of Ms Patel's marriage to Mr Jingar.

[113] Ms Patel has not produced evidence, as referred to by Edwards J, from which it could be inferred that the failure to produce the evidence in [106] above was the result of counsel error. Ms Tuilotovala submits that Ms Patel would have told Mr Mukusha that the marriage certificate was a forgery, but that he did nothing about it. Although the application for judicial review was served on Mr Mukusha, he has refused to comment or give evidence.

[114] Ms Patel does not identify any significant omission or failing by her former counsel in the presentation of the case before the Tribunal. There is no evidence from Mr Mukusha acknowledging that he made a mistake. Instead, Ms Tuilotovala asks the Court to draw inferences from Ms Patel's affidavit.

[115] In her affidavit, Ms Patel deposes that there was no attempt made by Mr Mukusha to have her claim that she did not sign the marriage certificates verified by a handwriting expert. She also says that emails and information about her travel to

---

64 *Isak v Refugee Status Appeals Authority* [2010] NZAR 535 (HC).
65 At [37].

India was not provided to the Tribunal by Mr Mukusha. She says this information would show she was not in India during the time that her daughter was conceived.

[116] Ultimately, this ground of appeal fails on the basis that any failure to call this further evidence has not caused procedural unfairness. Even if, taken at its highest, the further evidence proves that Ms Patel was a victim of fraud, it cannot be said that the evidence was important evidence that would have changed the Tribunal's decision.

[117] Ms Patel became liable for deportation because she concealed relevant information, namely the divorce proceedings. There was an obligation on Ms Patel to provide all relevant information to the Tribunal. She failed to discharge that obligation. The further evidence does nothing to change that position. The genuineness of the marriage certificate was unrelated to whether Ms Patel concealed the relevant information. The same can be said of the emails relating to Mr Jingar and Ms Patel's daughter, as well as Ms Patel's reason for instituting divorce proceedings. Simply, the evidence is not relevant to the question that was before the Tribunal in the facts appeal. It cannot be said, therefore, that Ms Patel was prejudiced by it not being placed before the Tribunal.

[118] In respect of the humanitarian appeal, none of the additional information relates to the consequences of Ms Patel's deportation. Similarly, therefore, it cannot be said that Ms Patel was prejudiced by it not being placed before the Tribunal.

[119] From the information before the Court, I am not persuaded that there is an error which has reached the high threshold necessary in order to cause procedural unfairness.

Result

[120] The appeal and the judicial review are dismissed.

Costs

[121] As Ms Patel is legally aided, Ms Clarke notes that costs are not sought.

[122] I make an order that costs are to lie where they fall.

Gordon J