

[2] Ms Bolea says the Judge was wrong to decline her application for a discharge and now appeals her conviction and sentence.

The offending

[3] Ms Bolea was in a relationship with a Mr Mataia, a nominee of the Comancheros Motorcycle Club. At some time prior to 5 August 2020, she knew that Mr Mataia and others connected to the Comancheros were participating in an organised criminal group sharing the objective of obtaining material benefits from the possession and supply of methamphetamine.

[4] On 4 August 2020 at Mr Mataia's direction she hired a rental car from Auckland airport. She and Mr Mataia then collected another co-offender, Mr Katoa, and drove to Christchurch. As Ms Bolea knew, there was methamphetamine in the car. Although she was not aware of the exact quantity, she did know it was for the purpose of supply. A covert police search of the car found two plastic containers in the boot with at least 500 grams of methamphetamine.

[5] The trio arrived in Christchurch on 5 August 2020. Ms Bolea went to Mr Mataia's family home, while he and Mr Katoa went to a gang pad with the methamphetamine.

Sentencing in the High Court

[6] The Judge noted that pursuant to s 107 of the Sentencing Act consideration of an application for discharge without conviction involves a three stage process.³

[7] Turning to the first stage — an assessment of the overall gravity of the offending — the Judge found, having regard to both the facts of the offending and Ms Bolea's personal circumstances, that it was moderate to low.⁴

³ High Court decision, above n 2, at [6].

⁴ At [7]–[19].

[8] Next, the Judge considered the direct and indirect consequences of the offending.⁵ The first of these advanced by Ms Bolea was that she would face deportation if convicted.⁶

[9] At this juncture, it is convenient to provide a brief explanation of the relevant deportation processes.

[10] Ms Bolea is an Australian national. For immigration purposes, she is considered to have had a resident visa from the time she first arrived in New Zealand in May 2019. Under s 161(1)(b) of the Immigration Act 2009, the holder of a residence class visa is liable for deportation if convicted of an offence for which a court may impose imprisonment for a term of two years or more, provided the offence was committed no later than five years after the visa was granted. The offence committed by Ms Bolea meets all those criteria.

[11] On becoming aware of a qualifying conviction entered against a resident visa holder, Immigration New Zealand prepares a detailed briefing paper for the Minister of Immigration (or more commonly the Minister's delegate) who will then decide whether to order that a deportation liability notice be served.

[12] In *Zhu v R* and *Anufe v New Zealand Police*, this Court stated that as part of the process of compiling the briefing paper, the officials give the resident visa holder an opportunity to be heard and make submissions.⁷ The submissions can include issues about the gravity of the offending, their personal circumstances and the impact deportation would have on them. The submissions from the resident visa holder are included in the briefing paper as are the summary of the facts and sentencing notes.

[13] A similar description of the process regarding the opportunity to be heard and the compilation of the briefing paper is also contained in a 2022 High Court decision *Kupriianova v New Zealand Police*.⁸

⁵ At [20]–[27].

⁶ At [21].

⁷ *Zhu v R* [2021] NZCA 254 at [12] and [24]; and *Anufe v New Zealand Police* [2021] NZCA 253 at [12] and [19].

⁸ *Kupriianova v New Zealand Police* [2022] NZHC 1306 at [25]–[26].

[14] In the absence of evidence confirming these judicial descriptions of the process, counsel on appeal for Ms Bolea, Mr Bailey, was not prepared to accept their correctness. However, we have no reason to doubt them. They accord with rules of natural justice as well as practices described in publicly available official documents.⁹

[15] If a deportation liability notice is issued, then within 28 days of being served, the resident visa holder has the right to appeal to the Immigration and Protection Tribunal on humanitarian grounds against their liability for deportation. Section 207(1) of the Immigration Act states:

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.

[16] In *Minister of Immigration v Q* this Court held that the “unjust or unduly harsh” leg of s 207(1)(a) requires the Court to balance the reasons why the appellant is liable for deportation (to which their degree of culpability is relevant) against the consequences for the appellant of deportation.¹⁰ The degree of culpability is also relevant to the second leg regarding the public interest.¹¹

[17] All of the above is subject to the residual discretion of the Minister under s 172 of the Immigration Act. Section 172 empowers the Minister in their absolute discretion at any time to cancel a person’s deportation liability or to suspend it for a period of no more than five years subject to conditions, for example a condition that the person not re-offend.

⁹ See for example Ministry of Business, Innovation & Employment “Process diagram for deportation decisions for residents” <www.mbie.govt.nz>; and Michael Heron *Independent Review of Immigration New Zealand’s Residence Deportation Liability Process* (Ministry of Business, Innovation & Employment, 25 September 2019).

¹⁰ *Minister of Immigration v Q* [2020] NZCA 288 at [33].

¹¹ At [33].

[18] In the High Court in this case, Ms Bolea provided the Judge with an affidavit from an immigration lawyer, Mr Hennessey. He opines that if Ms Bolea were convicted, she would “almost certainly” be sent a deportation liability notice. The affidavit does not address her prospects of success on appeal to the Tribunal.

[19] It does however note that if unsuccessful in appealing the notice she would be deported and that in turn would mean she and the young child she has with Mr Mataia would be permanently separated from him and never be able to have face to face contact. Mr Matai is a deportee from Australia under that country’s “501 policy” and under current Australian law unable to return there.¹² The ability of the family to meet in another country would be problematic given the parents’ convictions.

[20] The second disproportionate consequence of conviction identified by Ms Bolea was the adverse impact a conviction would have on her future employment.¹³

[21] As regards deportation, the Judge acknowledged that Ms Bolea’s liability to deportation would be a consequence of conviction but in his view deportation itself, were that to occur, was more correctly viewed as a consequence of her offending rather than her conviction.¹⁴ Deportation was not inevitable.¹⁵ The Judge noted that Ms Bolea would have an opportunity to account for herself and her family circumstances and that immigration authorities would consider those matters as well as the gravity of the offending.¹⁶

[22] In taking this approach, the Judge relied on the decision of this Court in *Zhu*.¹⁷

[23] As regards consequences for future employment, the Judge accepted that a conviction would have some consequences for Ms Bolea, but noted that her current

¹² Migration Act 1958 (Cth), s 501.

¹³ High Court decision, above n 2, at [26].

¹⁴ At [25].

¹⁵ At [24].

¹⁶ At [24].

¹⁷ At [24].

employer has, despite full knowledge of her offending, recently offered her a full-time position.¹⁸

[24] The Judge then turned to the third stage of the inquiry, whether the consequences of conviction would be out of all proportion to the gravity of the offending. He noted that “out of all proportion” was a high threshold and concluded that in this case it was not satisfied for the following reasons:¹⁹

- (a) although the conviction would have some consequences on Ms Bolea’s general career prospects, that should normally yield to an employer’s right to know all relevant information in their hiring decisions; and
- (b) while a conviction would expose her to liability to deportation, that was not out of all proportion to offending that was of moderate to low gravity. It might be that Ms Bolea was ultimately deported but that would be a consequence of her offending and it would be a decision made by the immigration decision makers after consideration of all the circumstances, including the gravity of the offending and personal and family circumstances.

[25] Having declined the application for a discharge without conviction, the Judge then went on to discuss the appropriate sentence which, as mentioned, he found was a four month period of home detention.²⁰

[26] We turn now to discuss the two grounds of appeal and our response to them.

Did the Judge err in his assessment of the gravity of the offending?

[27] Although this is not the primary ground of appeal, it is logical to address it first.

¹⁸ At [27].

¹⁹ At [29]–[30].

²⁰ At [32]–[49].

[28] Mr Bailey contended that the Judge should have assessed the gravity of the offending as low, rather than moderate to low. In support of that contention, Mr Bailey argued that the Judge wrongly undertook an assessment of the gravity of the type of offence, instead of an assessment of the gravity of the offence as committed by Ms Bolea. He argued that the Judge placed excessive weight on the fact the offending occurred in the context of a drug dealing operation involving a large quantity of methamphetamine, without taking sufficient account of the limited role played by Ms Bolea. Had the Judge not fallen into that error, the assessment including personal mitigating factors would have led to a finding of low gravity.

[29] We do not accept those submissions. As the Crown points out, the Judge was well placed to assess the overall gravity of the offending, having presided over the trial and sentencing of all the co-defendants including Mr Mataia and Mr Katoa.

[30] It is also clear from the sentencing notes that the Judge carefully considered Ms Bolea's role and her knowledge of the drug dealing, as exemplified by the approach he took in fixing the date at which she became aware of the drug dealing. Although there was some evidence to justify finding Ms Bolea had the necessary knowledge well before August 2020, the Judge limited the offending to early August.²¹ He also placed weight on her mitigating personal factors.²²

[31] We acknowledge that in assessing the gravity of the offending, the Judge took into account Ms Bolea had a degree of responsibility for the wider scale of the offending of the organised group.²³ However, as Mr Bailey acknowledged, that approach was in accordance with the decision of this Court in *Paku v R*.²⁴

[32] We are unable to identify any error in the Judge's assessment and agree with the finding of moderate to low gravity.

²¹ At [11]–[12] and [35].

²² At [37]–[43].

²³ At [17].

²⁴ *Paku v R* [2011] NZCA 269.

Immigration consequences

The argument

[33] The primary ground of appeal is that the Judge erred in law by finding that deportation, were it to occur, was a consequence of Ms Bolea's offending rather than her conviction. Mr Bailey submitted that this finding "stymied" the application for a discharge and was the result of applying the wrong statutory test.

[34] Mr Bailey acknowledged the Judge was bound by *Zhu*. However, he submitted that *Zhu* itself was wrong in law and invited us to depart from it.

[35] In support of that contention, he submitted the reasoning in *Zhu* was illogical, and contrary to previous case law.

[36] He submitted it was illogical because in Ms Bolea's case, as in *Zhu*, conviction is a necessary pre-condition to the initiation of the deportation process. Under s 161 of the Immigration Act, only a conviction can trigger a deportation liability notice and therefore it must follow, in Mr Bailey's submission, that any subsequent deportation is a direct consequence of conviction. Were Ms Bolea to be discharged without conviction, there could not be a deportation.

[37] It followed too, in his submission, that in so far as the Judge had concerns that a discharge without conviction would usurp or encroach on the jurisdiction of the immigration authorities, those concerns were unfounded. The authorities only had jurisdiction if there was a conviction. The Court was required to exercise its own judgment and decide whether a conviction was warranted. It could not in effect abdicate its responsibility to another decision maker, especially when the focus of that decision maker and the statutory framework under which it was operating were different.

[38] According to Mr Bailey, the reasoning in *Zhu* is also inconsistent with the well-established principle that for the purposes of a discharge, the Court is not required to be satisfied that the consequence relied on is certain to happen or inevitable. It is sufficient if there is a real and appreciable risk.

Our view

[39] *Zhu* was one of three decisions issued by this Court in 2021 regarding immigration issues in the context of s 106 of the Sentencing Act. The other two were *Sok v R* and *Anufe*.²⁵

[40] We do not accept that correctly analysed the reasoning in any of the three decisions represents a departure, let alone a radical one, from previous authority. In our view the decisions are simply a useful exposition of the existing case law and the legal reasoning underpinning different outcomes in different cases. We are not persuaded there is any reason to revisit the decisions.

[41] The key points to emerge from the three decisions for present purposes are as follows:

- (a) *Zhu* does not assert the absolute proposition that liability to deportation or the risk of actual deportation can never be an operative consequence justifying a discharge without conviction. The decision in fact expressly acknowledges that it can be an operative consequence on the basis of “but for” causation reasoning.²⁶ At the same time the decision also notes that in other cases it will not justify discharge.²⁷
- (b) The latter category is identified as including cases where the Court is satisfied that immigration decision makers will consider the circumstances that are said to justify a discharge, including the gravity of the offending (in relation to which the decision maker has the benefit of the sentencing court’s assessment) and the offender’s personal circumstances.²⁸ In those sorts of cases, the courts “usually” reason that the outcome is a consequence of the offending, rather than the conviction.²⁹

²⁵ *Sok v R* [2021] NZCA 252; and *Anufe v R*, above n 7.

²⁶ *Zhu v R*, above n 7, at [25].

²⁷ At [25].

²⁸ At [25].

²⁹ *Zhu v R*, above n 7, at [25]; and *Sok v R*, above n 25, at [47]–[48].

- (c) Although this approach is sometimes justified in the case law on the basis of institutional competence and comity, strictly speaking it is inaccurate to speak of a discharge without conviction usurping the authority of officials or the Minister or the Tribunal.³⁰ 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. We interpolate to note that the point made by Mr Bailey on the issue of institutional comity is thus expressly recognised.
- (d) Rather than invoke institutional comity, it is more accurate to say that legislative policy decisions and 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.³¹
- (e) There are cases where the courts have held that the mere exposure to the risk of deportation and the associated processes is in itself a wholly disproportionate response without needing to draw a distinction between liability to deportation and the risk that a person will ultimately be deported. Such cases involve offending that was not intrinsically serious or which was not a serious example of its kind and in which there were substantial mitigating factors. *Rahim v R* – one of the decisions cited to us by Mr Bailey – is identified as in that category.³²
- (f) There is another category of case where discharges have been granted on the basis that deportation is a consequence of conviction because it is considered the immigration authorities will not look beyond the fact of the conviction and so fail to consider the circumstances of the offending.³³

³⁰ *Sok v R*, above n 25, at [48]–[50].

³¹ At [50].

³² *Rahim v R* [2018] NZCA 182.

³³ *Anufe v R*, above n 7, at [20]; and *Sok v R*, above n 25, at [49].

[42] There can be little doubt that in the present case conviction will expose Ms Bolea to the risk of deportation and the associated process. However, we are not persuaded that this is one of those cases where the mere existence of that risk is in itself a sufficiently disproportionate consequence given the gravity of the offending. It was not minor offending.

[43] Nor is this a case where there is any reason to believe the authorities would not look beyond the fact of the conviction and ignore the circumstances of the offending including mitigating features of that offending and Ms Bolea's personal circumstances and the interests of her daughter.

[44] Rather, this is in our view a case where the risk of deportation must be balanced against the existence of pathways whereby deportation can be avoided and which will without doubt allow the immigration decision maker to consider the gravity of Ms Bolea's actual offending and all her personal circumstances, including her lack of criminal history and family situation.

[45] That distinguishes this sort of case from cases involving potential employment or overseas travel consequences. While they too involve an outcome determined by another person (a prospective employer or a visa authority), they do not involve a comparable rights based process, the existence of which, on any view, must significantly weaken the causative link between conviction and deportation.

[46] In our view, in a very real sense deportation arising as a result of such a process can validly be regarded as a consequence of the offending and not the conviction.

[47] It follows we consider the Judge was correct to decline Ms Bolea's application for a discharge without conviction.

[48] The appeal is accordingly dismissed.

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