NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPELLANT AND OF HIS CLAIM OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA186/2021
[2022] NZCA 188

BETWEEN	P Applicant
AND	MINISTER OF IMMIGRATION Respondent

CA187/2021

BETWEEN	P Applicant
AND	IMMIGRATION AND PROTECTION TRIBUNAL First Respondent
	MINISTER OF IMMIGRATION Second Respondent

Court:	Collins and Dobson JJ
Counsel:	Applicant in person A B Goosen and E J Cameron for Respondent in CA186/2021 and Second Respondent in CA187/2021 No appearance for First Respondent in CA187/2021
Judgment: (On the papers)	16 May 2022 at 10.30 am

JUDGMENT OF THE COURT

A The applications for leave to appeal and to bring proceedings for judicial review are declined.

B There is no order for costs.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Having failed in the High Court to obtain leave to appeal and/or commence proceedings to judicially review a decision of the Immigration and Protection Tribunal (the Tribunal),[1] P now applies to this Court for leave to appeal and/or review the Tribunal's decision. In its decision the Tribunal held P was liable to be deported to Samoa.[2]

[2] P had the benefit of name suppression in the Tribunal and in the High Court. We shall continue to anonymise his name and suppress any matters that could lead to his identification.

Background

[3] P was born in Samoa in 1995. He arrived in New Zealand in 2015 to live with his father. In 2016, P was granted a resident visa on the basis that he was a dependent child.

[4] In March 2018, P was sentenced to a term of four years and two months' imprisonment after he pleaded guilty to:

(a) wounding with intent to cause grievous bodily harm;

(b) assaulting a female;

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1 *BP (Samoa) v Minister of Immigration* [2021] NZHC 376 [High Court judgment].
2 *BP (Samoa) v Minister of Immigration* [2020] NZIPT 600642 [Tribunal decision].

(c) speaking threateningly; and

(d) wilfully causing damage.

[5] The convictions rendered P liable for deportation.[3] He was served with a deportation liability notice in September 2019.

[6] P appealed to the Tribunal against his deportation liability. The appeal relied on s 207(1) of the Immigration Act 2009 (the Act), which 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.
>
> …

[7] In *Ye v Minister of Immigration*,[4] the Supreme Court noted that to be "exceptional" under s 207(1)(a) of the Act, the "circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule".[5]

[8] Exceptional circumstances of a humanitarian nature usually engage an appellant's welfare, safety, or happiness,[6] and must be the consequences or effect of the deportation.[7] It is well established that:[8]

> Circumstances which may cause difficulty, hardship and emotional upset to persons the subject of removal orders, or those associated with them, will not suffice to meet the statutory requirement unless the circumstances themselves or their consequences can legitimately be characterised as exceptional.

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3 Pursuant to s 161(1)(b) of the Immigration Act 2009.
4 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.
5 At [34].
6 *Minister of Immigration v Q* [2020] NZCA 288 at [31].
7 At [31], citing an example of a case that has recognised the existence of this implicit requirement: *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [9].
8 *Nikoo v Removal Review Authority* [1994] NZAR 509 (HC) at 514, quoting a passage from the decision challenged unsuccessfully on appeal.

[9] If an appellant establishes exceptional circumstances of a humanitarian nature, then the Tribunal needs to also determine if the circumstances would make it unjust or unduly harsh for the appellant to be deported from New Zealand. Undue harshness means that the consequences of deportation go "beyond the level of harshness that must be regarded as acceptable in order to preserve the integrity of New Zealand's immigration system".[9] That assessment is to be made "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".[10] Where an appellant's deportation arises because of his or her offending, the Tribunal must "assess the gravity of the particular offending and its effects, not merely the kind of offence involved".[11] It is necessary for the Tribunal to "assess the degree of an appellant's culpability in all the circumstances".[12]

[10] P was represented before the Tribunal by his father. An application was made three days before the hearing for an adjournment to enable P to obtain legal advice. The Tribunal declined to adjourn the hearing.

[11] In its substantive decision, the Tribunal concluded that P had failed to demonstrate exceptional circumstances of a humanitarian nature.[13] That finding rendered it unnecessary for the Tribunal to consider the remaining criterion in s 207(1)(a) of the Act. For completeness, however, the Tribunal recorded that the "dangerously violent" nature of P's offending meant that his deportation would be neither unjust nor unduly harsh.[14]

[12] P sought leave from the High Court to:

(a) appeal the Tribunal's decision pursuant to s 245 of the Act, which limits grounds of appeal to questions of law; and

(b) judicially review the Tribunal's decision pursuant to s 249 of the Act.

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9 *Ye v Minister of Immigration*, above n 4, at [35].
10 *Guo v Minister of Immigration*, above n 7, at [9].
11 *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [162].
12 At [162].
13 Tribunal decision, above n 2, at [66].
14 At [71].

[13] Two primary grounds of appeal and/or review were advanced in the High Court on behalf of P, namely:

(a) The Tribunal had breached P's right to natural justice, affirmed in s 27(1) of the New Zealand Bill of Rights Act 1990 (the NZBORA), when it refused the request by P's father to adjourn the hearing so as to enable P to obtain legal representation.

(b) The Tribunal erred in its assessment of the facts by failing to have proper regard to the degree of shame and stigma that P and his family would suffer if he were deported to Samoa.

[14] Both applications were dismissed by Nation J, who held:

(a) "[T]he Tribunal conducted the hearing in a manner that ensured [P] would not be disadvantaged through not being legally represented",[15] and that P could not identify any basis upon which he had been disadvantaged through not having the services of a lawyer.[16]

(b) The circumstances relied upon by P were not exceptional and that P had failed to establish an arguable case the Tribunal had made factual errors in its decision.[17]

[15] P now seeks leave from this Court to appeal and/or review the Tribunal's decision. He relies on ss 245(1) and 249(3) of the Act, which provide that if the High Court refuses leave to appeal and/or review, then the unsuccessful applicant can seek the leave of this Court to appeal and/or review the Tribunal's decision in the High Court.

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15 High Court judgment, above n 1, at [65].
16 At [66]–[76].
17 At [119]–[120].

[16] The criteria for leave under s 245 are well established. Those criteria are:

(a) The proposed appeal must concern a seriously arguable question of law.[18]

(b) The proposed appeal must be "one that by reason of its general or public importance or for any other reason ought to be submitted to the High Court for its decision".[19]

[17] The criteria for leave to commence judicial review proceedings are equally stringent:

(a) The proposed application must concern a reviewable error that is able to be seriously argued.

(b) The proposed ground of review must be one that could not have been "adequately dealt with in an appeal" from the Tribunal's decision.[20]

(c) The proposed ground of review must raise issues that "by reason of their general or public importance or for any other reason … ought to be submitted to the High Court for review".[21]

[18] The "any other reason" criterion in ss 245(3) and 249(6)(b) of the Act will only be met "in an exceptional case involving individual injustice to such an extent that the Court simply could not countenance the Tribunal's decision standing".[22]

[19] P was represented by a lawyer in the High Court. He no longer has legal representation. No submissions have been filed by P in this Court. He relies instead on the submissions filed on his behalf in the High Court.

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18 *Machida v Chief Executive of Immigration New Zealand* [2016] NZCA 162, [2016] 3 NZLR 721 at [8].
19 Immigration Act 2009, s 245(3).
20 Section 249(6)(a).
21 Section 249(6)(b).
22 *Machida v Chief Executive of Immigration New Zealand*, above n 18, at [8].

Grounds of appeal and/or review

[20] The proposed grounds of appeal and/or review are the same as those advanced in the High Court, namely:

(a) that the Tribunal erred in proceeding with the hearing notwithstanding P did not have a lawyer; and

(b) that the Tribunal erred by not placing proper weight on the shame and stigma P and his family would face upon his return to Samoa.

Breach of natural justice

[21] As we have noted, three days before the hearing P's father requested an adjournment for six weeks, to enable P to obtain legal representation. P had been represented by his father up until that time. P's father realised after reading the submissions filed on behalf of the Minister of Immigration that he was not able to properly deal with the legal issues involved in P's appeal to the Tribunal.

[22] The Tribunal refused to grant an adjournment. It explained that P's father had conducted his son's case with "care and intelligence to date" and that any potential injustice due to lack of legal representation would be avoided in P's case by the Tribunal taking "extra care to ensure that the hearing was conducted in a manner that was understandable to [P] and his father".[23] The Tribunal also noted it had been "careful to accord [P] opportunities to support his case".[24]

[23] P repeats the submissions made in the High Court that natural justice required he be afforded legal representation before the Tribunal. The factors that underpinned that submission are:

(a) He is a young man with a basic education.

(b) His English skills are limited.

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23 Tribunal decision, above n 2, at [41].
24 At [42].

(c) P is highly reliant on his family and was not able to advocate on his own behalf, which is why his father represented him throughout his appeal.

(d) The legal issues before the Tribunal were beyond the understanding of P's father, who has had a limited education and is employed as a driver.

(e) Neither P nor his father understood the complexities of the test for determining a humanitarian appeal and the absence of legal representation meant P was not able to provide formal submissions in support of his case. Instead, P relied on letters of support provided by a selection of individuals.

Analysis

[24] The right to natural justice and to a fair hearing before the Tribunal does not necessitate legal representation before the Tribunal in every case.[25] There is a high hurdle in place for those who apply for leave to appeal and/or review a decision of the Tribunal on the basis that the Tribunal declined an application for an adjournment in order to allow an applicant to obtain legal representation. The refusal to adjourn must have led to the applicant's fair trial rights being "irretrievably compromised".[26]

[25] After consideration of the Tribunal's decision, and the reasons for declining the application for an adjournment, we agree with the High Court's assessment that this proposed ground of appeal is not seriously arguable.

[26] There are five reasons for this conclusion:

(a) The Tribunal explained to P what was required of him at a case management conference one month before the hearing. The Tribunal also ensured P had a proper opportunity to present his case, took steps to reduce any confusion and offered the opportunity for P to make further submissions after the hearing.

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25 *Kumar v Minister of Immigration* [2013] NZHC 546, [2013] NZAR 529 at [27]–[28].
26 At [21].

(b) The case before the Tribunal was primarily factual and did not raise difficult or complex procedural or legal issues.

(c) P has not identified how his case would have been advanced differently, to his benefit, if he had received legal representation.

(d) Legal representation would not have changed the essential facts of the case, which fell significantly short of constituting exceptional circumstances of a humanitarian nature.

(e) Legal representation could have been arranged earlier as P's father had been made fully aware of the elements of s 207 of the Act at least a month before the hearing.

Assessment of evidence

[27] In the High Court, it was submitted on behalf of P that the Tribunal failed to place proper weight on the evidence concerning the strong stigma in Samoan culture around deportation and the potential consequences of deportation for P's wellbeing as a result of him experiencing social stigma and humiliation within his Samoan community. It was submitted that these errors of fact impacted on the outcome of the case.

Analysis

[28] Our reading of the Tribunal's decision, however, reveals that the Tribunal did take into account the stigma that P and his family would suffer if he were deported.[27] The challenges to the factual findings of the Tribunal are not seriously arguable.

[29] Even if the Tribunal made errors of fact, they were not so serious as to constitute an error of law. This is because P's circumstances fell well short of meeting the statutory threshold of exceptional circumstances of a humanitarian nature.

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[27] See Tribunal decision, above n 2, at [30]–[31], [34]–[36], [59]–[61] and [64]–[65].

Result

[30] The applications for leave to appeal and to bring proceedings for judicial review are declined.

[31] The Minister of Immigration does not seek costs. We therefore decline to make any order as to costs.

Solicitors:
Crown Law Office, Wellington for Respondent in CA186/2021 and Second Respondent in CA187/2021