IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-1610

UNDER	the Immigration Act 1987
IN THE MATTER OF	An appeal against a determination of the Deportation Review Tribunal
BETWEEN	HEMANTKUMAR MISTRY AND SHEETAL MISTRY Appellants
AND	THE MINISTER OF IMMIGRATION Respondent

Hearing: 3 November 2009

Appearances: A Schaaf for Appellants
C A Griffin for Respondent

Judgment: 17 November 2009

RESERVED JUDGMENT OF RANDERSON J

This judgment was delivered by me on 17 November 2009
at 10.30 am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

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Introduction

[1] The appellants Mr and Mrs Mistry were born in India but subsequently emigrated to New Zealand where they each gained residence visas. Some years later it was discovered they had manufactured documents and lied to New Zealand immigration officials in connection with their applications for residence. The respondent, the Minister of Immigration, revoked residence permits issued to Mr and Mrs Mistry under s 20 Immigration Act 1987. An appeal on humanitarian grounds was subsequently dismissed by the Deportation Review Tribunal under s 22 of the Act. Mr and Mrs Mistry now appeal against the Tribunal's decision on points of law pursuant to s 117.

[2] Although a number of grounds of appeal were advanced, the principal ground was that the Tribunal erred in its approach to the assessment of the issues it was obliged to consider under s 22(4) to (6), particularly with regard to the difficulties Mr and Mrs Mistry would face in obtaining employment should they be obliged to return to India.

Factual Background

[3] Mr Mistry is now aged 42 and his wife 36. They were married in India on 1 May 1993 and have one child, a daughter born in 1994. She is now 15 years of age. She has remained in India at all material times and is currently being looked after by relatives.

[4] On 14 October 1997, Mr Mistry applied for residence in New Zealand under the Family (Adult Child or Sibling) category of residence policy. He was sponsored by his brother who had permanent residence in New Zealand. In order to qualify for residence, Mr Mistry had to be single with no dependent children. He provided false information in his application, declaring he had never been married and had no dependent children. He was granted a residence visa on 26 July 2000 and arrived in New Zealand on 19 August 2000.

[5] In February 2001, he returned to India and arranged for an elaborate false Hindu wedding ceremony to be held in which he and Mrs Mistry purported to marry. Photographs and a false marriage certificate claiming the marriage was solemnised on 10 April 2001 were procured and supplied to Immigration New Zealand in support of an application for residence for Mrs Mistry under the Family (Marriage) category.

[6] Her application was lodged on 8 August 2001 and Mrs Mistry was issued with a residence visa from 29 October 2001. She arrived in New Zealand with Mr Mistry on 5 February 2002.

[7] It was not until 2005 that the fraud was discovered. In March that year, Mr Mistry applied for citizenship claiming his trip to India in February 2001 was for the purpose of marriage. When interviewed by immigration officials on 13 July 2005, Mrs Mistry maintained that she and her husband had married in April 2001. However, when confronted with documentation of their marriage in 1993, Mr and Mrs Mistry both admitted the truth. They were subsequently convicted on 7 December 2005 after pleading guilty to two charges laid under s 229A(b) Crimes Act 1961 for fraudulently using a document to obtain a benefit. Each was sentenced to 275 hours community service.

[8] As a result of the fraud, the Minister revoked Mr and Mrs Mistry's residence permits on 11 September 2006. Mr and Mrs Mistry appealed to the Deportation Review Tribunal which had the effect of staying the revocation. They travelled to India in August 2007 returning to New Zealand in March 2008. On their return, they were issued with new residence permits to which they were entitled by virtue of s 18 of the Act on the basis of their original permits and returning residence visas. The new permits were revoked by the Minister on 7 April 2008. The appeal by Mr and Mrs Mistry was dismissed by the Tribunal on 27 July 2009.

Statutory Background

[9] The Minister may revoke a residence permit under s 20(1)(c) on the basis that it was "procured by fraud, forgery, false or misleading representation, or

concealment of relevant information...". The consequence of doing so is that the holder of the permit becomes a person who is unlawfully present in New Zealand and is obliged to leave the country: s 4(2).

[10] A right of appeal to this court exists under s 21 if the decision is considered to be "erroneous" but Mr and Mrs Mistry do not challenge the decision to revoke their permits under that section.

[11] In terms of s 22, any person whose residence permit is revoked under s 20 may appeal to the Tribunal against the revocation. An appeal under s 22 is described in the heading to the section as an appeal on "humanitarian grounds". The relevant parts of s 22 for present purposes are:

> **22 Appeal on humanitarian grounds to Tribunal against revocation of residence permit**
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> ...
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> (4) Subject to subsection (5) of this section, on any appeal under this section the Tribunal may confirm or quash the revocation of the residence permit, as it thinks fit.
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> (5) The Tribunal shall not confirm the revocation of a residence permit under this section if it is satisfied that it would be unjust or unduly harsh for the appellant to lose the right to be in New Zealand indefinitely.
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> (6) In determining any appeal under this section, the Tribunal shall have regard to the following matters:
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> (a) The appellant's age:
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> (b) The length of time during which the appellant has been in New Zealand lawfully:
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> (c) The appellant's personal and domestic circumstances:
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> (d) The appellant's work record:
>
> (e) The grounds on which the permit was revoked:
>
> (f) The interests of the appellant's family:
>
> (g) Such other matters as the Tribunal considers relevant.

[12] A decision of the Tribunal under s 22 is final and conclusive subject only to an appeal on points of law under s 117.

The approach to an appeal under s 22

[13] There is some awkwardness in the application of s 22(4) to (6). The leading authority is the decision of the Court of Appeal in *Minister of Immigration v Al-Hosan* [2009] NZAR 259. An appeal under s 22 is essentially a matter of balancing the need to preserve the integrity of New Zealand's immigration laws against the humanitarian considerations affecting the appellant. In *Al-Hosan* the focus of the humanitarian factors related to the respondent's children. In that context, the Court of Appeal described the balancing process at [73]:

> The position that a s 22 appellant starts from is that he or she has done or omitted to do something that calls into question the integrity of New Zealand's immigration laws. The gravity of the breach will vary from case to case. In that context the interests of the children will be a matter of importance, but those interests may be outweighed by the need to control the border and provide a disincentive for dishonest actions on the part of immigration applicants.

[14] An issue arose on appeal in *Al-Hosan* as to the order in which the Tribunal should approach subsections (4) and (5). The Tribunal's approach had been to deal with s 22(5) first and, if that did not resolve the issue, it would deal with s 22(4) as a "residual" matter. The Court of Appeal found at [33] that the order in which the Tribunal approached its tasks under those provisions was not a matter of great consequence so long as the Tribunal addressed each task properly. At [34] and [35], the Court of Appeal expressed a preference for the following formulation articulated by the Tribunal in *Vake v Minister of Immigration* (1989) 7 NZAR 500, 502:

> Under s 22(4), however, the Tribunal has a very broad discretion. There are no jurisdictional prerequisites. The only fetter on the Tribunal's discretion is that contained in s 22(5) which prohibits the Tribunal from confirming a revocation if it is satisfied that it would be unjust or unduly harsh for the appellant to lose an indefinite right of abode in New Zealand.

[15] The Court of Appeal noted that the formula adopted by the Tribunal in the later decision of *Aiolupotea v Minister of Immigration* [1994] NZAR 452 carried the risk of downplaying the broad discretion under s 22(4) by describing it as a "residual" discretion.

[16] The Court of Appeal in *Al-Hosan* concluded at [36]:

> We conclude on issues (a) and (b) that there is no mandatory order for consideration of the discretions under s 22(4) and (5), and that the DRT [the Deportation Review Tribunal] is free to deal with them in any order it considers to be appropriate. But they are two different tasks and each must be addressed properly, unless the decision on the first one which is considered renders consideration of the other unnecessary. In both cases the criteria set out in s 22(6) must be evaluated, and while that does not necessitate the repetition of the DRT's views on each one at length, it does require proper evaluation of those factors in relation to each decision.

Grounds of appeal

[17] The grounds for appeal may be summarised as follows:

a) The Tribunal erred in concluding that a lower standard of living for the appellants in India was insufficient to meet the statutory test under s 22(5) and by excluding consideration of economic factors in relation to the exercise of jurisdiction under s 22(4).

b) The Tribunal erred in concluding that the discretion under s 22(4) was the same as the standard required for the prohibition under s 22(5).

c) The Tribunal failed to take into account a relevant consideration namely the circumstances of the family.

d) The Tribunal erred by concluding that current residence policy was irrelevant.

e) The Tribunal failed properly to consider the effect of the deportation on Mr Mistry's brother.

f) The Tribunal erred in reaching certain factual conclusions unsupported by evidence or alternatively made mistakes of fact in relation to those issues or was unreasonable.

The Tribunal's decision

[18] The thorough and carefully reasoned decision of the Tribunal commences with a description of the statutory provisions and the following statement of its broad approach:

> [5] The apparently unfettered discretion in section 22(4) must be deployed to promote the policy and objects of the Act; *Minister of Immigration v Vilceanu* (High Court, Wellington, CIV-2007-485-377, 11 December 2007, Miller J) [49]. The Court of Appeal has described the required evaluation as broad and not necessarily limited to the factors set out in section 22(6); *Minister of Immigration v Al-Hosan* [2008] NZCA 462 [37].
>
> [6] The starting point for the Tribunal's consideration is the fraud or other grounds on which the permit was procured and the degree of culpability involved; *Ansell v Minister of Immigration* [2001] NZAR 999 [29], [42]-[43], *Minister of Immigration v Al-Hosan supra* [73](b). There follows a balancing exercise, which requires weighing the seriousness of the fraud or other grounds giving rise to the revocation, with the humanitarian factors favouring remaining in New Zealand; *Ansell supra* [30], *Rahman v Minister of Immigration* (High Court, Wellington, AP56/99 & CP 49/99, McGechan J, 26 September 2000) [25]-[27], [49]-[50], *Minister of Immigration v Al-Hosan supra* [64]-[66].

[19] The Tribunal noted that the appellants did not wish to return to India as it would be difficult for Mr Mistry to earn enough money to provide for the family including their daughter. They also wished to bring their daughter to New Zealand to have a better future and to unite their family in this country. The Tribunal described the essential issue as being whether, given Mr Mistry's anticipated difficulties in finding employment, the Tribunal should exercise its discretion to allow Mr and Mrs Mistry to remain in New Zealand.

[20] The Tribunal then embarked on an extensive discussion of the family circumstances describing separately those of Mr and Mrs Mistry, Mr Mistry's brother and his mother. Reference was made to five trips which Mr Mistry had made to India for extended periods since his arrival in New Zealand and to their extended family in Mumbai. The Tribunal also analysed and discussed the financial resources of the couple and their employment prospects in New Zealand or alternatively in India should the revocation of the permits be confirmed.

[21] Having analysed the factual background, the Tribunal then went on to assess each of the statutory factors identified in s 22(6). On the key issue of the relative economic conditions in India by comparison with New Zealand, the Tribunal stated:

> [53] They would like to remain in New Zealand, as they can both work here and be fairly self-sufficient. They expect that if they were to return to India, the husband, being the only one who they say would work, would not earn enough money for them. Nevertheless, they would return to India with more assets than they had when they arrived and could realise those assets for enough money to sustain them for two years. They would live rent-free in the flat owned by the husband's brother. He has also offered to assist in whatever way he can, including financially, though expects that would be difficult at the moment due to the current recession. Both Mr and Mrs Mistry also have numerous other family in India, with whom they maintain good relations.
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> [54] The country information produced by the appellants establishes what is well known about India, in that there is poverty there, the wages are low and the country's economy has been affected by the current global recession, which has led to rising unemployment. We accept the appellants will have a standard of living lower than the one they enjoy here, but not low in the context of India and they will not be homeless or destitute. The lower standard of living which they are likely to have in India would not, of itself, be sufficient to meet our statutory test; *Moe v Minister of Immigration* (High Court, Wellington, CIV 2004-485-20, 13 May 2004, France J) [43]-[44].
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> **The Appellant's Work Record**
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> [55] Mr Mistry was employed as a touring car driver in India and has worked in New Zealand in a dairy, a fast food outlet and as a car groomer. Mrs Mistry worked in a clothing shop in India before she was married and has worked here in a fast food outlet and as a car groomer. The store manager at *Burger King* speaks highly of both of them in his testimonial. They have a strong work ethic. Both are healthy. We accept that Mr Mistry would find it difficult to obtain fulltime work, at least initially, but given his motivation to work and experience in customer service and driving, he is likely to find employment in due course. While the custom may be for married women with limited education not to work, that remains an option for Mrs Mistry. She is still relatively young. She has only one child (aged 14) and there are other extended family members who would be able to help with childcare, to the extent necessary, while she worked.

[22] The Tribunal then discussed the grounds on which the permits were revoked noting that the fraud was carefully planned and maintained by Mr and Mrs Mistry over a period of almost seven years, was deliberate, and resulted in the grant of residence permits which would not otherwise have been granted.

[23] The Tribunal carefully considered the interests of the appellants' family concluding that the reunification of the family in India would be of particular

advantage to the daughter. The Tribunal also considered the circumstances of Mr Mistry's mother noting that she was not a permanent resident of New Zealand and was unlawfully in this country. If the revocation of the permits were upheld, she informed the Tribunal she would choose to return to India to live with the appellant rather than remain in New Zealand where her youngest son lived. The circumstances of Mr Mistry's brother were again assessed at [68].

[24] An issue was raised before the Tribunal about current residence policy, it being submitted that Mr Mistry would now be eligible for a residence permit even though he was married with a daughter. In that respect the Tribunal said at [69]:

> We have not assessed his eligibility, as we do not regard this as a material consideration, but we observe that their convictions and the fraud by which they obtained residence here mean neither of them would now satisfy the character requirements of residence policy and would need a discretionary character waiver. The fact remains that, whatever policy is now in place, the appellants did not meet the criteria applicable whey they applied, so they chose to submit fraudulent applications.

[25] In assessing the relevant threshold for consideration of humanitarian circumstances, the Tribunal stated:

> [74] Prior to assessing whether the appellants satisfy the statutory test for setting aside the revocation of their permits, the Tribunal must address an issue raised by their counsel concerning the threshold they must meet under section 22(4) of the Act. It will be recalled that section 22(4) allows the Tribunal to confirm or quash the permit revocations "as it thinks fit". We may not, however, confirm the revocations if it would be "unjust or unduly harsh" for the appellants to lose their right to remain in New Zealand (s22(5)).
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> [75] It is submitted, based on the decision of the Court of Appeal in *Minister of Immigration v Al Hosan supra* [32], that a lower standard can be considered under section 22(4), where economic hardship would not normally reach the "higher" threshold of being unjust or unduly harsh (under s 22(5)).
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> [76] This is a misreading of the Court's decision. It was making no observation on the threshold that is to be met under subsections (4) or (5) of section 22 and certainly not that one is lower than the other. The point being made by the Court is that the Tribunal's decision in *Al Hosan* had not properly addressed the broad discretion in subsection (4), once it had made its decision under section 22(5), since the outcome under section 22(4) had "followed almost inexorably" the outcome under section 22(5). The Tribunal was directed to fully address each of subsections 22(4) & (5), having regard to the factors listed in section 22(6) (which were not exhaustive). This, we will shortly proceed to do.

> [77] The factors to be considered under each head of our discretion (subsections (4) & (5)) are the same in this case, if not in every case. The Tribunal is unable to identify any factor in this case that would be relevant to one, but not the other. The threshold under each is the same. The statutory test though is formulated differently. In particular, the broad discretion under section 22(4) is not fettered by any "unjust or unduly harsh" criterion, except to the extent that if the latter criterion is met, that appellant must prevail, so the broad section 22(4) discretion becomes otiose. It is conceivable therefore that the circumstances of an appellant may not be unjust or unduly harsh, but the Tribunal could see fit to set aside the revocation under its general discretion in subsection (4). As will be seen, that is not the case here.

[26] In the final part of its assessment, the Tribunal balanced what it clearly saw as a serious fraud by which Mr and Mrs Mistry had obtained their residence permits with their humanitarian circumstances and those of their family members. While recognising that Mr and Mrs Mistry were reasonably well-settled in this country, owning a house and both being employed, the Tribunal noted that they could sell their assets here and would be returning to a country with which they were familiar and where their daughter and other family lived. On the issue of their prospective financial situation in Mumbai, the Tribunal concluded at [82]:

> We accept it would not be easy for him to find fulltime employment, but he is likely to do so in due course. Mrs Mistry is also young and healthy and could work. They estimate that cashing up their assets in New Zealand will give them about two year's income there. That would provide a 'cushion' for them. The husband's brother is a generous man and would assist them if called upon to do so, as he has done in the past, though we accept his contribution would be limited by his financial commitments in both New Zealand and India, including his own family to provide for here. He has offered his apartment in Mumbai rent-free, which would be a great help to the appellants. It seems to the Tribunal they would be no worse off, indeed probably better off, than most in India.

[27] The Tribunal's final conclusions were recorded at [85] and [86]:

> Having regard to all the factors considered in more detail above, when we balance the false and concealed information with the consequences for the appellants, their daughter, the husband's mother and his brother (and his family), the Tribunal does not think fit to quash the Minister's revocation of the permits of Mr or Mrs Mistry. Those consequences are considerably outweighed by the need to maintain the integrity of our immigration system and thereby protect New Zealand's border, given the calculated and prolonged deceit here.
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> Turning then to our jurisdiction under section 22(5), having regard to all the same factors, the Tribunal is not satisfied that it would be unjust or unduly harsh for Mr or Mrs Mistry to lose their right of residence. Again, the

> undermining of the integrity of the immigration system by this deliberate fraud weighs heavily against them.

First ground of appeal - The Tribunal erred in concluding that a lower standard of living for the appellants in India was insufficient to meet the statutory test under s 22(5) and by excluding economic factors under s 22(4)

[28] Ms Schaaf for Mr and Mrs Mistry submitted that, in the passage from [54] of the Tribunal's decision (cited at [21] above) the Tribunal had wrongly fettered its discretion under s 22(4) by concluding that economic factors could not be weighed in exercising the Tribunal's under s 22(4). It was submitted that the Tribunal was required to assess all relevant factors as an evaluative exercise. The s 22(4) threshold was not linked to the "unduly harsh" standard in s 22(5).

[29] The Tribunal cited paragraphs [43] and [44] from the decision of Ellen France J in *Moe v Minister of Immigration* CIV 2004-485-20 13 May 2004. The Judge concluded in that case, when considering a challenge to a deportation order in terms of s 105 of the Act, that the fact that an applicant may be economically worse off in the home country does not necessarily make it unjust or unduly harsh for an applicant to be deported, citing the decision of McGechan J in *Rahman v Minister of Immigration* HC WGN 26 September 2000 AP56/99 at [44].

[30] I am not persuaded there is any error of law in this respect. I agree with the views expressed by Ellen France J and McGechan J that the mere fact that a lower standard of living or poorer economic circumstances may prevail in the home country does not necessarily make it unjust or unduly harsh for an applicant to be deported. It is, as McGechan J observed in *Rahman,* a matter of degree. Economic considerations are to be considered along with all other relevant factors as part of an overall evaluative exercise.

[31] The approach which the Tribunal took to its assessment in the present case demonstrates that the Tribunal well understood its task in that respect. It may be that in the challenged passage at [54] of the Tribunal's decision the words "not necessarily" might better have been substituted for the expression "not of itself" used by the Tribunal. However I am satisfied this slight infelicity of expression did not

lead the Tribunal into error in its overall assessment. It is apparent that the Tribunal meant no more than that the difference in economic conditions did not make it unjust or unduly harsh to deport the appellants in the circumstances of their case.

[32] As to the suggestion that economic factors were excluded from consideration under s 22(4), there is simply no basis to support that proposition when the Tribunal's careful assessment is read as a whole.

Second Ground of Appeal – the Tribunal erred in concluding that the discretion under s 22(4) was not lower than the standard required for the prohibition under s 22(5)

[33] Ms Schaaf's submission on this point arises from paragraphs [74] to [77] of the Tribunal's decision, cited at [25] above. Ms Schaaf's submission was that, despite the reference by the Tribunal to the Court of Appeal's decision in *Al-Hosan*, the Tribunal's approach reflected what she described as "the old mind set" when there was a single test under s 22(5) with reference to the unjust or unduly harsh test. Ms Schaaf referred to the Court of Appeal's observation at [51] of its decision which referred to the approach under s 22(4) as being a "much more open-textured discretion".

[34] Ms Griffin accepted that the Tribunal's use of the term "threshold" was possibly unfortunate but it may have arisen in consequence of the submission made to the Tribunal on behalf of Mr and Mrs Mistry which is recorded at [75] of the Tribunal's decision. Ms Griffin pointed out that while the Tribunal stated in [77] that the "threshold" under both subsections (4) and (5) is the same, the Tribunal had made it clear that "the statutory test though is formulated differently". Ms Griffin submitted that the Tribunal had gone on to correctly refer to the broad discretion under s 22(4) and to the fact that the discretion under that subsection was not fettered by the "unjust or unduly harsh" criterion. Ms Griffin also submitted that the Tribunal had correctly recognised the possibility that, even if the Tribunal did not consider that the circumstances of an appellant were such as to make it unjust or unduly harsh for the appellant to lose the right to be in New Zealand indefinitely under subsection (5), the Tribunal might nevertheless decide to quash the revocation

under subsection (4). It was implicit in this view that the assessment under subsection (4) was pitched at a lower level than the prohibition under subsection (5).

[35] It would have been better for the Tribunal to have avoided use of the expression "threshold" in relation to subsections (4) and (5). In truth, there is no threshold as such under subsection (4). As the Tribunal correctly recognised, there is a broad discretion under that subsection which is not subject to the fetter or ceiling prescribed by subsection (5) unless the Tribunal decides to confirm the revocation. Under subsection (4), the Tribunal's task is to embark upon an evaluative exercise. It must consider all the matters in subsection (6) and balance those factors against the public interest in the preservation of the integrity of New Zealand's immigration laws, policy and administration. It may confirm or quash the revocation of the residence permit subject only to the prohibition in subsection (5) against confirming the revocation of a residence permit if the Tribunal is satisfied it would be unjust or unduly harsh for the appellant to lose the right to be in New Zealand indefinitely.

[36] I accept Ms Griffin's submission that in the challenged parts of the Tribunal's decision, the Tribunal was endeavouring to explain that the essence of the Court of Appeal's decision in *Al-Hosan* was that the discretion under subsection (4) had not been properly considered since the outcome under that subsection had "followed almost inexorably" from the outcome under subsection (5). The Tribunal reiterated at [76] that its task was to fully address all of the factors in subsection (6) when considering each of subsections (4) and (5).

[37] I am also satisfied that the Tribunal's references to the threshold being the same under each of the two subsections has not led the Tribunal into error in its approach to the evaluation of the case. That is evident from the Tribunal's discussion at [85] and [86] (cited at [27] above). The Tribunal first considered the broad discretion under subsection (4) before turning to consideration of subsection (5). This approach avoids colouring the subsection (4) analysis with the "unjust or unduly harsh" prohibition under subsection (5). Unless the Tribunal immediately forms the impression under subsection (5) that it would be unjust or unduly harsh to confirm the revocation of a residence permit, there is something to be said for the Tribunal commencing its analysis under subsection (4) before considering subsection

(5). However, as the Court of Appeal has made it clear, there is no mandatory requirement to consider one subsection before the other.

Third Ground of Appeal – the Tribunal failed to take into account a relevant consideration namely the circumstances of the family

[38] Ms Schaaf submitted under this ground that the Tribunal had failed to consider the circumstances of the return of Mr Mistry's parents to India and the separation of Mr and Mrs Mistry from their daughter. Mr Mistry's parents had been the holders of residence permits in New Zealand but lost that privilege when they returned to India to be with their granddaughter. Ms Schaaf also mentioned the circumstances in which Mr Mistry's father had died in India in August 2007 without his children being present.

[39] I am not persuaded there is any substance in this ground of appeal. The Tribunal's decision shows that it fully considered the circumstances of the wider family. It referred in particular to Mr Mistry's mother at [41] to [43] and again at [67]. The fact that the Tribunal did not specifically mention the circumstances of the death of Mr Mistry's father or acknowledge a submission by Ms Schaaf in that respect does not mean it was excluded from consideration. Even if it was, it was not a matter which was of such significance to the decision as to call the decision into serious question.

Fourth Ground of Appeal – the Tribunal erred by concluding that current residence policy was irrelevant

[40] The passage in the Tribunal's decision which is criticised is cited at [24] above.

[41] Ms Schaaf submitted it may be a relevant factor in exercising the discretion under s 22 to take into account that, under current residence policy, Mr Mistry would be eligible for a residence permit even though he was married with a daughter. She submitted that this could be relevant in assessing the overall impact and seriousness

of the fraud perpetrated in that respect under the then current policy according to which Mr Mistry would not have been eligible for a residence permit.

[42] Ms Griffin accepted that changes in current policy might in some cases have some bearing on the overall assessment but that the Tribunal had correctly observed that Mr and Mrs Mistry would not satisfy the character requirements of residence policy and would need a discretionary character waiver. It was only on that basis that the Tribunal considered current residence policy to have been irrelevant.

[43] There is much to be said for Ms Griffin's submission in this respect but, in any event, the key issue for the Tribunal under s 22 in relation to an appellant whose permit has been revoked on grounds such as those relied upon in the present case is the seriousness of that misconduct and its effect on the outcome of the residence application under the policy relevant at the time. Any subsequent change of policy may, in some cases, have some bearing on the overall evaluative exercise but it would not ordinarily be a determinative factor of such weight as to call into question the Tribunal's decision. I am satisfied there is no material error shown in relation to this ground.

Fifth Ground of Appeal – the Tribunal failed properly to consider the effect of the deportation on Mr Mistry's brother

[44] This ground of appeal must also fail. It was not suggested that the Tribunal did not consider the effect of the deportation on Mr Mistry's brother. Rather, the submission was that the Tribunal did not "properly" consider that effect. The primary basis for this submission was a challenge to the Tribunal's evaluation at [82] (cited at [26] above). This ground of appeal does not raise a question of law. Rather, it is a challenge to an aspect of the evaluative exercise conducted by the Tribunal. It cannot succeed on an appeal under s 117.

Sixth Ground of Appeal – the Tribunal erred in reaching certain factual conclusions unsupported by evidence or alternatively made mistakes of fact in relation to those issues or was unreasonable

[45] Ms Schaaf accepted that an error of fact would not amount to a question of law unless it could be brought within the rubric recently stated by the Supreme Court in *Bryson v Three Foot Six Ltd* [2005] 1 ERNZ 372 at 384, 385:

> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".

[46] Under this heading Ms Schaaf focused her attention on the Tribunal's findings about the ability of Mr and Mrs Mistry to obtain employment in Mumbai; the extent of the assets available to them (which the Tribunal concluded would provide a "cushion" of two years to support them if they were obliged to return to India); and an alleged factual error made by the Tribunal in relation to employment obtained by Mr Mistry on one of his visits to India. It was also submitted that the Tribunal had made an error of fact in relation to the length of time over which Mr and Mrs Mistry had sustained the fraud they committed.

[47] I have reviewed the evidence to which I was referred. It is possible that the Tribunal made an error of fact in relation to the extent of net funds likely to be available to Mr and Mrs Mistry upon realisation of their New Zealand assets. However, the overall conclusions reached by the Tribunal are supported by evidence and I am satisfied that none of the factual issues mentioned raises an arguable question of law.

[48] It was open for the Tribunal to reach the conclusions it did which, together, made a compelling case to refuse the appeal against the revocation of the residence permits. In essence, these factors were the serious fraud committed by both Mr and Mrs Mistry; the existence of their extended family in Mumbai; the availability of a rent free apartment upon their return; the fact that they would be reunited with their

daughter; and the Tribunal's conclusion (which it was entitled to reach) that there were reasonable prospects for Mr and Mrs Mistry to obtain employment in Mumbai in due course.

[49] On that basis there is no prospect that the decision of the Tribunal could be found to be unreasonable as Ms Schaaf submitted as a final ground of appeal.

[50] This court has repeatedly stated that issues of fact and degree should not be dressed up as questions of law. An appeal on questions of law has much more closely defined limits than a general appeal on law and fact. This is yet another case where a substantial part of the argument was addressed to questions of fact which had no or little prospect of ever being treated as questions of law. Failure to recognise this distinction may, in future, give rise to the prospect of indemnity costs or even the possibility of an award of costs being made against counsel personally.

Conclusion

[51] None of the grounds of appeal has succeeded. The appeal is dismissed. The respondent is entitled to costs against the appellants. Ordinarily, costs would be fixed on a 2B basis. Counsel for the respondent submits that an award of costs for preparation should exceed one day (twice the hearing time, which occupied half a day). If the respondent seeks costs greater than those allowed on the 2B scale, a memorandum is to be filed and served within 14 days of the date of this decision and a responding memorandum may be filed and served on behalf of the appellants within 14 days thereafter.

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A P Randerson J
Chief High Court Judge