**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA591/2023**
**[2024] NZCA 183**

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| BETWEEN | HOOI KEAT CHAI<br>Applicant |
| AND | THE MINISTER OF IMMIGRATION<br>Respondent |

Court: Courtney and Mallon JJ

Counsel: D J Ryken for Applicant
E G R Dowse, N N A El-Sanjak for Respondent

Judgment: (On the papers) 28 May 2024 at 9.30 am

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is declined.**

**B The respondent is entitled to one set of costs on a band A basis for a standard application with reasonable disbursements.**

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**REASONS OF THE COURT**

(Given by Courtney J)

## Introduction

[1] Hooi Keat Chai is a Malaysian citizen who has been resident in New Zealand since 2012. In October 2018, Mr Chai was convicted on charges of providing false and misleading information in an application for a work visa made in 2009, and the

use of a fraudulently obtained work visa on entry to New Zealand in 2009 and 2010.[1] These convictions resulted in him being served with a deportation liability notice in June 2022.

[2] Mr Chai appealed, unsuccessfully, to the Immigration and Protection Tribunal.[2] Under s 245(1) of the Immigration Act 2009, a person who is dissatisfied with any determination of the Tribunal as being erroneous on a point of law may only appeal to the High Court with the leave of the High Court or, if the High Court refuses leave, with the leave of the Court of Appeal. Mr Chai's application to the High Court for leave to appeal to that Court was refused.[3] He now applies to this Court for leave to appeal to the High Court.

[3] Under s 245(3), in determining whether to grant leave to appeal, the court must have regard to whether the question of law involved in the appeal is 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.

[4] The first limb of s 245(3) requires an applicant to identify a seriously arguable question of law which has importance extending beyond the particular case.[4] As to the second limb, that there is some other reason that the appeal ought to be submitted to the High Court, this Court has held that there must be "an exceptional case involving individual injustice to such an extent that the Court simply could not countenance the decision standing".[5] However, Mr Ryken, for Mr Chai challenges this as the appropriate test. We address that question later when we come to consider the second limb of s 245(3).

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1 Mr Chai was initially convicted on six charges but two of these were subsequently quashed; see *Chai v R* [2019] NZCA 628.

2 *Chai v Minister of Immigration* [2023] NZIPT 600727 [Tribunal decision].

3 *Chai v Minister of Immigration* [2023] NZHC 2536 [High Court judgment].

4 *Singh (Shivdev) v Chief Executive of the Ministry of Business, Innovation and Employment* [2018] NZHC 972, [2018] NZAR 1120 at [24].

5 *Machida v Chief Executive of Immigration New Zealand* [2016] NZCA 162, [2016] 3 NZLR 721 at [8].

## The Immigration and Protection Tribunal's decision

[5] Mr Chai's appeal to the Tribunal was brought under s 207 of the Immigration Act which provides that:

> **207 Grounds for determining humanitarian appeal**
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> (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—
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> (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
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> (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.
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> (2) In determining whether it would be unjust or unduly harsh to deport from New Zealand an appellant who became liable for deportation under section 161, and whether it would be contrary to the public interest to allow the appellant to remain in New Zealand, the Tribunal must have regard to any submissions of a victim made in accordance with section 208.

[6] The Tribunal found that there were exceptional circumstances of a humanitarian nature but was not satisfied that they were such as to make deportation unjust or unduly harsh.[6] As a result, it did not go on to consider the public interest limb in s 207(1)(b).[7]

*Exceptional circumstances of a humanitarian nature*

[7] Mr Chai's wife, Ms Toe, is also a Malaysian citizen. The family has a home and another property here and Ms Toe has businesses here. These include a restaurant, which requires her to work nights and weekends.[8] Ms Toe's businesses are the family's primary source of income.

[8] Mr Chai and Ms Toe have two school age children, both born in New Zealand. They are New Zealand citizens and English is their first language. They would not be eligible for Malaysian citizenship unless they renounced their New Zealand

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6 Tribunal decision, above n 2, at [80], [93], and [95].
7 At [94].
8 Mr Chai also had a construction business which failed, apparently due at least in part to the damage to Mr Chai's reputation following his convictions.

citizenship. The older child is well settled in school but the younger child, G, has a number of medical conditions. As a result, his behaviour is very challenging and he has an ongoing need for speech therapy. Mr Chai provides much of the childcare, which enables Ms Toe to attend to the businesses.

[9] The Tribunal found that Ms Toe would likely suffer a heavy burden in the event Mr Chai were deported because she would lose the support and care he provides while she is working in her business and in dealing with the challenging behaviour of their son.[9] Further, the children's best interests would be served by remaining in New Zealand with Mr Chai because of their uncertain immigration status if they were to return to Malaysia and the possibly significant, negative, effects on their education.[10]

[10] Although there would be significant readjustments required if Mr Chai were deported, both he and Ms Toe had reasonable prospects in Malaysia. Mr Chai had transferable work skills. The family owned a house there and Mr Chai still had family in Malaysia. Ms Toe had transferable work skills from running businesses here. The family could sell or rent out their properties in New Zealand to provide income. However, the prospects for the children in terms of obtaining residency or citizenship in Malaysia were uncertain. Ms Toe had said that if Mr Chai were deported, she would stay with the children in New Zealand. There would be a significant reduction in lifestyle because of the need to pay for childcare. The Tribunal concluded that there were exceptional circumstances of a humanitarian nature.[11]

*Deportation would not be unjust or unduly harsh*

[11] Before considering whether the circumstances were such as to make deportation exceptional and harsh, the Tribunal reminded itself of the statement by the Supreme Court in *Guo v Minister of Immigration* that the assessment was 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 of deportation".[12] It

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9 Tribunal decision, above n 2, at [70].
10 At [66–[69].
11 At [80].
12 At [81] citing *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [9].

considered the circumstances in which Mr Chai had come to New Zealand and the offending that had led to him becoming liable for deportation.[13]

[12] Mr Chai first came to New Zealand in 2003 on a visitor visa under the name Kok Tong Chai. He subsequently obtained a further visitor's visa which expired in April 2004 but stayed unlawfully in New Zealand until June 2005.

[13] In October 2005, in Malaysia, Mr Chai changed his name to Hooi Keat Chai and the following month re-entered New Zealand under his new name. In February 2009 Mr Chai applied for a work visa. In doing so, he stated that he had worked for an employer in Malaysia between October 2003 and June 2005. In fact, during that period he had been living in New Zealand under the name Kok Tong Chai. In August 2009, January 2010 and May 2010 Mr Chai presented the work visa that he had obtained fraudulently.

[14] These circumstances led to Mr Chai's conviction on one charge of, without reasonable excuse, supplying a document to an immigration officer knowing it was false or misleading in a material respect,[14] and five charges of producing a work visa knowing it to have been obtained fraudulently.[15] Mr Chai was sentenced to six months' home detention.[16]

[15] Before the Tribunal, Mr Chai asserted that he was innocent of the charges for which he had been convicted and that he had not knowingly or fraudulently deceived Immigration New Zealand but, rather, was the victim of a dishonest immigration adviser. He said that he had believed that, when asked in the application form for a work visa about any other names he was known by, he had thought he was being asked about names he was known by outside New Zealand.

[16] The Tribunal did not accept these explanations. It pointed out that Mr Chai had lived in New Zealand under his previous name for more than a year. Further, the

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13 Tribunal decision, above n 2, at [19]–[30] and [39]–[43].
14 Immigration Act 1987, s 142(1)(c).
15 Section 142(1)(d)(ii); and Immigration Act 2009, s 345(1)(b).
16 *Chai v R*, above n 1, at [71]. The original sentence of seven months' home detention was substituted on appeal with one of six months' home detention.

work visa application had been supported by a fraudulent letter from an employer in Malaysia regarding the time he claimed to have been employed in Malaysia when in fact he had been living in New Zealand. The Tribunal referred to the sentencing Judge's remarks that there had been "planning and preparation" when Mr Chai prepared the application and when he presented the visa on entry to New Zealand.

[17] When Mr Chai appealed his convictions and sentence, this Court described Mr Chai's offending as serious, noting that the offences for which Mr Chai was convicted (and for which convictions were upheld) involved deliberate deception of immigration authorities and were inherently serious, as reflected by the maximum penalty on each charge of seven years' imprisonment.[17]

[18] In coming to its conclusion that deportation would not be unjust or unduly harsh, the Tribunal referred again to the adverse impact Mr Chai's deportation would have for him and his family but said:[18]

> [92] However, the Tribunal is satisfied that allowing [Mr Chai's] appeal would seriously undermine the integrity of the immigration system. Immigration New Zealand depends on applicants to provide reliable and accurate information in applications for visas. It was a serious matter that [Mr Chai] was granted a temporary work visa based on his concealment of his previous identity. This fraud led to him obtaining a resident visa, to Ms Toe obtaining a resident visa based on her partnership with him and the children acquiring New Zealand citizenship on their births here.
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> [92] Weighing the offending (immigration offences involving dishonesty) against the exceptional humanitarian circumstances (primarily, the effect of deportation on Ms Toe and the children), the Tribunal is satisfied that it is not unjust or unduly harsh for [Mr Chai] to be deported from New Zealand.

**The High Court judgment**

[19] In the High Court, Johnstone J recorded Mr Chai's proposed ground of appeal as being that the Tribunal's reasoning suggested that it was applying a "rule of thumb" that deportation is not normally unjust or unduly harsh where immigration offending has given rise to liability to deportation, because the integrity of the immigration system typically overcomes exceptional circumstances of a humanitarian nature.[19]

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17 At [57].
18 Tribunal decision, above n 2.
19 High Court judgment, above n 3, at [14].

The Judge accepted that if such a "rule of thumb" approach had been adopted, it would be an error of law, but he did not accept that the Tribunal had taken that approach:[20]

> [24] … the reference to the serious undermining of the integrity of the immigration system was made for the purpose of summarising or characterising the significance of the "particular reasons why deportation liability has arisen". The Tribunal's view was simply that Mr Chai's offending outweighed the exceptional humanitarian circumstances of his case.

[20] The Judge considered, further, that the Tribunal's assessment was not plainly wrong so as to give rise to an individual injustice that the Court could not countenance.[21] Therefore, Mr Chai had not identified any seriously arguable question of law.[22]

## Application for leave

*The proposed grounds of appeal*

[21] Mr Ryken identifies three errors of law.[23] All relate to the Tribunal's treatment of integrity of the immigration system as a relevant factor in the enquiry under s 207(1).

[22] Mr Ryken submits that the integrity of the immigration system is only relevant to the "public interest" limb in s 207(1)(b). The first asserted error is that, in considering the "unjust and unduly harsh" limb in s 207(1)(a), the Tribunal wrongly took the effect on the immigration system into account. Mr Ryken wishes to argue that the Tribunal's reasoning indicated an approach that effectively meant the integrity of the immigration system trumped consideration of whether the nature of the offending made deportation unduly harsh or unjust, thereby failing to properly interpret and apply *Guo*. If the Tribunal's consideration was no more than a general concern about the integrity of the immigration system, the Tribunal would have failed

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20 At [18] and [24]–[26].
21 At [25].
22 At [26].
23 The proposed grounds of appeal are described differently in the notice of application for leave to appeal and the submissions filed in support of the application. We have addressed the issues as they are described in the submissions filed in support of the application, which reflect the draft submissions on the substantive appeal which were filed to provide additional support for the application.

to follow and apply *Ye v Minister of Immigration*,[24] and *Helu v Immigration and Protection Tribunal*.[25]

[23] Secondly, even if the integrity of the immigration was a matter the Tribunal could consider under s 207(1)(a), it failed to properly assess it in the context of the particular case and against the backdrop of the severity of the humanitarian circumstances it had found to exist, including by failing to articulate why the offending in this case outweighed the humanitarian considerations.

[24] The third asserted error is that, as a result of the first error, which led to the integrity of the immigration system being considered at the s 207(1)(a) stage, the Tribunal failed to consider the "public interest" limb under s 207(1)(b). Mr Ryken wishes to argue that if the Tribunal had considered the public interest limb separately it would have concluded that, given the nature of the offences, it is not in all the circumstances contrary to the public interest to allow Mr Chai to remain in New Zealand.

[25] Mr Ryken emphasised that the proposed grounds of appeal are directed towards the process followed by the Tribunal, not to the weight given by the Tribunal to the integrity of the immigration system or the nature of the offending. Mr Ryken does not suggest that the law in this area is not settled by the decisions of the Supreme Court in *Ye v Minister of Immigration* and *Helu v Immigration and Protection Tribunal*.[26] Instead, he says that the proposed appeal is concerned with whether the Tribunal correctly applied those decisions. For that reason, he did not accept that the recent decisions of the High Court relied on by the respondent to show the settled state of the law were relevant.[27]

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24 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.

25 *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298.

26 *Ye v Minister of Immigration*, above n 24, at [33]–[36]. See also *Helu v Minister of Immigration*, above n 25, at [153] and [176].

27 *Nacis v Minister of Immigration* [2016] NZHC 2627; *Davies v Immigration New Zealand* [2017] NZHC 1238; and *Huang v Minister of Immigration* [2020] NZHC 956.

*A seriously arguable question of law?*

[26] We do not accept that the first proposed ground of appeal raises a seriously arguable question of law. We agree with the submission for the respondent that *Ye v Minister of Immigration* makes it clear that the integrity of the immigration system is a matter that can be considered under s 207(1)(a). It is relevant to the Tribunal's consideration of the nature and gravity of the offending that led to the applicant being liable for deportation. The fact that the issue may also arise in the context of the s 207(1)(b) enquiry does not detract from this approach. We note, too, that this approach has been consistently applied in the High Court.[28] While we accept that the facts of some of those cases differ from the present, we do not see that as detracting from the basis on which they were decided.

[27] Nor do we accept it is arguable that the Tribunal failed to correctly apply the settled approach. This aspect of the proposed appeal rests on the complaint that the Tribunal failed to properly assess the gravity of Mr Chai's offending by not considering Mr Chai's claim of absence of fault and reduced culpability. However, the Tribunal expressly identified and considered these matters.[29] This aspect of the proposed appeal essentially challenges the Tribunal's assessment of Mr Chai's assertions. It does not raise a question of law.

[28] Since we do not accept that either of the first two proposed grounds of appeal are seriously arguable, the third proposed ground must fall away.

[29] We conclude that there is no seriously arguable question of law that has any general or public importance that would justify leave being granted to appeal to the High Court.

*Any other reason?*

[30] In *Machida v Chief Executive of Immigration New Zealand*, this Court held that establishing some other reason that leave should be granted to appeal to the High

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[28] *Nacis v Minister of Immigration*, above n 27; *Davies v Immigration New Zealand*, above n 27; and *Huang v Minister of Immigration*, above n 27.

[29] Tribunal decision, above n 2, at [82].

Court would require the applicant to demonstrate "an exceptional case involving individual injustice to such an extent that the Court simply could not countenance the decision standing".[30] Mr Ryken relies on two High Court decisions to invite a different, more flexible approach to the test.[31] We note that this Court has acknowledged these different views but has not yet seen the need to determine the issue.[32]

[31] The first of the cases relied on, *RM v Immigration and Protection Tribunal*, pre-dated *Machida*, and is therefore not helpful. The second, *Hu v Immigration and Protection Tribunal*, was decided in the context of a judicial review application and the Judge expressly identified that different context as warranting a different approach.[33] As a result, we do not consider it either necessary or appropriate to consider departing from *Machida*.

[32] To justify leave being given on the "any other reason" ground, Mr Chai would need to satisfy the Court that the case is an exceptional one involving individual injustice to such an extent that the Court simply could not countenance the Tribunal's decision standing. We are not satisfied that this is the case. We accept that the Tribunal's decision will have distressing consequences for Mr Chai and his family, but for the reasons discussed by the Tribunal, it cannot be said that there will be individual injustice to an extent that the Court simply could not allow the decision to stand.

**Result**

[33] The application for leave to appeal is declined.

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30 *Machida v Chief Executive of Immigration New Zealand*, above n 5, at [8].
31 *RM v Immigration and Protection Tribunal* [2016] NZHC 735; and *Hu v Immigration and Protection Tribunal* [2016] NZHC 1661.
32 *Hai v Minister of Immigration* [2019] NZCA 55, [2019] NZAR 1867 at [38]–[39].
33 *Hu v Immigration and Protection Tribunal*, above n 31, at [17].

[34] The respondent is entitled to one set of costs on a band A basis for a standard application with reasonable disbursements.

Solicitors:
Ryken & Associates, Auckland for Applicant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent