IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2020] NZIPT 504941**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**BX (Afghanistan)**
Before:	M B Martin (Member)
Counsel for the Appellant:	S Shamia
Date of Decision:	1 September 2020

DEPORTATION (NON-RESIDENT) DECISION

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[1] This is a humanitarian appeal by the appellant, a 27-year-old citizen of Afghanistan, against his liability for deportation which arose when he became unlawfully in New Zealand.

[2] The appellant is married to a 26-year-old New Zealand citizen (originally from Afghanistan) and they have two New Zealand-citizen daughters (the elder child is aged two and the younger child is aged 11 months). The appellant made a residence application, supported by his wife, which was declined on character grounds in February 2020. He appealed that decision to the Tribunal in its residence appeal jurisdiction. The Tribunal has determined, in a decision released contemporaneously with this decision, that Immigration New Zealand did not conduct a correct character waiver assessment. The application is returned to Immigration New Zealand for a correct assessment.

THE ISSUE

[3] The principal issue in this appeal is whether the appellant has exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for him to be deported before Immigration New Zealand has commenced and progressed its new assessment of his residence application. Factors relevant to this assessment include the interests of his wife, who is currently

suffering from depression and anxiety, and the best interests of their two children (which for reasons explained below, are served by remaining with both parents in New Zealand at this time).

[4] The Tribunal finds that the appellant's circumstances meet the statutory test and orders that he be granted a work visa, valid for 12 months from the date of this decision.

BACKGROUND

[5] In August 2010, the appellant's now wife was granted residence under the Family (Sibling and Adult Child) category, along with her parents and six siblings. She and her family arrived in New Zealand in October 2010 and have been living here since then.

[6] In November 2013, the appellant made an application for a partnership-based visitor visa because he wanted to travel to New Zealand to marry his now wife pursuant to a culturally arranged marriage. There was a familial connection between their two families and they had been engaged since January 2013. Immigration New Zealand assessed the application under the visitor instructions relevant to culturally arranged marriages. In May 2014, it declined the application because it had not been demonstrated that the intended marriage would be pursuant to "any tradition of arranged marriage".

[7] In September 2014, the appellant made another visitor visa application, under the instructions relating to culturally arranged marriages. Immigration New Zealand considered that this time sufficient evidence had been produced and issued the appellant with a three-month visitor visa.

[8] The appellant arrived in New Zealand on 21 December 2015 and, in January 2016, he and his wife married. Their daughters were subsequently born.

[9] In February 2016, the appellant applied for a partnership-based work visa, but it was declined in March 2016 because there was insufficient evidence in support of the couple's partnership.

[10] The appellant had been granted an interim visa during the assessment of the partnership-based work visa application. On its expiry, he lodged an application under section 61 of the Immigration Act 2009 ("the Act"), a provision which allows the Minister of Immigration to grant a special visa in circumstances where an

applicant has become unlawfully in New Zealand. In May 2016, the appellant was issued with a six-month work visa under section 61.

[11] In November 2016, the appellant applied for a partnership-based work visa and, during the assessment of this application, he was issued with an interim visa. Immigration New Zealand accepted that he and his wife were living together in a genuine and stable partnership and approved his work visa application in March 2017. A further partnership-based work visa application, made in April 2018, was approved in June 2018.

[12] In October 2018, the appellant made the abovementioned residence application under the Family (Partnership) category. On 1 February 2019, Immigration New Zealand emailed the appellant's then counsel and requested that the appellant produce a police certificate from Pakistan because he had indicated that he had lived there, along with his parents and siblings, from 2000 to 2014. It provided a hyperlink to that part of its website which set out how the appellant could obtain a police certificate, such as through an application being made to his nearest High Commission for Pakistan (there being one in New Zealand).

[13] A clear police certificate (19 February 2019) was duly produced. However, when Immigration New Zealand checked that document with the police station in Pakistan said to have issued it, the station advised that the certificate was a forgery.

[14] The appellant's position, as advanced during the assessment of his residence application, was that, while Immigration New Zealand had provided him with a hyperlink to information contained on its website about applying for a police certificate through his local High Commission for Pakistan, in its email of 1 February 2019, he had not appreciated that fact at the time. He had not carefully read the email, English was his second language, and his then counsel had not brought the hyperlink to his attention. In these circumstances, ignorant of the application process available for obtaining Pakistani police certificates as provided by the New Zealand High Commission for Pakistan, he had simply assumed that he would need to get a police certificate directly from a police station in Pakistan. With no family or friends there, he did not know what he could do to get that certificate. He discussed his predicament with a friend in New Zealand. The friend said that he had a brother in Pakistan who could get him his certificate. The appellant had no idea why the certificate subsequently produced to him had been forged, and only became aware of that fact when it was raised by Immigration New Zealand. He had tried to get an explanation from his friend in New Zealand, but the friend was no longer answering his calls. Given his friend's behaviour, he had resigned himself to

the fact that the certificate must have been forged. However, he had no reason to provide a forged document himself because that would only serve to put his application at risk in circumstances where it was close to being approved. He had not acted with any intent to deceive.

[15] The appellant also noted that he had been able to obtain an earlier Pakistani police certificate before he came to New Zealand, provided to Immigration New Zealand in support of a temporary visa application. He had gone into his local police station with his father and simply requested one. He submitted that this certificate was genuine.

[16] Immigration New Zealand did not consider it to be credible that the appellant had used a friend to get a police certificate in Pakistan when it had previously provided him with, in its email of 1 February 2019, a clear pathway for obtaining a certificate through his local High Commission for Pakistan. The hyperlink to information contained on its website explaining this possible pathway was contained in the same paragraph as the request for the police certificate. It was difficult to accept that only that part of the paragraph requesting the police certificate had been read and understood. Further, the appellant had not been self-representing during the assessment — he had the benefit of assistance from his (then) counsel.

[17] In addition, Immigration New Zealand said that it appeared that the appellant needed to provide a copy of his passport with a Pakistani visa in order to apply for a police certificate through the New Zealand High Commission for Pakistan (according to the Commission's website). There was no evidence to demonstrate that the appellant had held a visa while living in Pakistan or had otherwise been there lawfully. The concern was that, knowing the problems that an unlawful status in Pakistan presented him in getting a legitimate police certificate, he had made the decision to use his friend to get him a forged certificate. Questions remained as to how he had been able to get his earlier-produced police certificate in circumstances where he had not been lawfully in Pakistan at any point while living there.

[18] Immigration New Zealand concluded that the appellant had intentionally produced a forged police certificate and so did not meet the good character requirement of instructions. It then considered whether to grant him a character waiver, in circumstances where evidence and submissions had been provided on this matter. In the end, it determined that the "significance of the false information provided in this case outweigh[s] the positives" and refused to grant him a waiver.

[19] Immigration New Zealand noted, near the end of its overall assessment, that, while the appellant had been asked to produce a new and genuine Pakistani police certificate from the High Commission for Pakistan, once the above forgery had been discovered, and he had produced evidence of his having ordered this certificate, it had yet to be received.

[20] On 25 February 2020, Immigration New Zealand declined the appellant's residence application because he did not meet the good character requirement of instructions and had been refused a character waiver.

[21] On 15 March 2019, as the appellant's residence application was being assessed, he made an application for a further partnership-based work visa. However, within days of the decline of his residence application, this application was also declined because he had provided a forged police certificate in support of his residence application. He was not granted a character waiver.

[22] While the work visa application was being assessed, Immigration New Zealand granted the appellant a number of temporary visas to hold his position, including an interim visa and then a work visa issued under section 61 of the Act. That work visa expired on 4 March 2020 and the appellant then became unlawfully in New Zealand.

[23] As indicated above, on 10 March 2020, the appellant appealed Immigration New Zealand's decision in respect of his residence application to the Tribunal, under its residence appeal jurisdiction. The Tribunal, in a decision released contemporaneously with this decision (*FZ (Partnership)* [2020] NZIPT 205723), has found that Immigration New Zealand's decision to decline the application was not correct. While it correctly determined that the appellant had intentionally produced a forged police certificate, the character waiver assessment was flawed. The application is returned to Immigration New Zealand for a correct assessment.

[24] On 24 March 2020, the appellant lodged this appeal with the Tribunal on humanitarian grounds against his liability for deportation.

STATUTORY GROUNDS

[25] The grounds for determining a humanitarian appeal are set out in section 207 of the Act:

> (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.

[26] The Supreme Court stated that three ingredients had to be established in the first limb of section 47(3) of the former Immigration Act 1987, the almost identical predecessor to section 207(1): (i) exceptional circumstances; (ii) of a humanitarian nature; (iii) that would make it unjust or unduly harsh for the person to be removed from New Zealand. The circumstances "must be well outside the normal run of circumstances" and while they do not need to be unique or very rare, they do have to be "truly an exception rather than the rule", *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34].

[27] Because there are family interests at issue in this appeal, regard must be had to the entitlement of the family to protection as the fundamental group unit of society, exemplified by the right not to be subjected to arbitrary or unlawful interference with one's family – see Articles 17 and 23(1) of the 1966 *International Covenant on Civil and Political Rights*. Whether such rights would be breached depends on whether deportation is reasonable (proportionate and necessary in the circumstances) – see the United Nations' Human Rights Committee's General Comment 16 (8 April 1988) and the discussions in *Toonen v Australia* (Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1994) and *Madafferi v Australia* (Communication No 1011/2001, UN Doc CCPR/C/81/D/1011/2001, 26 August 2004) at [9.8].

THE APPELLANT'S CASE

[28] The appellant has new counsel on appeal. His case is set out in counsel's submissions (22 May 2020). Counsel submits that 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. The supporting reasons include:

(a) The appellant relocated from Afghanistan to Pakistan in 2000, at seven years of age, and lived there as a refugee until December 2015, at which point he came to New Zealand. If deported, he would be returned to Afghanistan, a country he has not known since he was a child.

(b) The appellant has a strong familial nexus to New Zealand through his New Zealand-citizen wife, with whom he is living in a genuine and stable relationship, and their two young New Zealand-citizen children. He also has a nexus here through his wife's extended family members who are resident in the country.

(c) The appellant's wife is suffering from depression and anxiety and, if the appellant is deported, her psychological state will be further compromised. Her interests require that the appellant remain in New Zealand so that he can continue to help her raise their children.

(d) The best interests of the couple's children, which are a primary consideration pursuant to the 1989 *Convention on the Rights of the Child*, can only be served by their remaining in New Zealand under the care of both parents. As New Zealand citizens, the children have the right to reside here and to have access to publicly-funded healthcare, education and welfare support. They would not grow up in a safe or healthy environment if they relocated to Afghanistan with the appellant because girls have limited access to education there and face ongoing discrimination. Further, there are recurring terrorist attacks in Afghanistan and returnees can face an increased risk of harm because of their association with Western countries.

(e) The appellant acknowledges that he should have applied for his Pakistani police certificate through the appropriate channels, but he did not appreciate that the police certificate he produced had been forged. Further, the character waiver assessment carried out in respect of his residence application was flawed.

(f) In support of the above submissions, counsel has referred to previous decisions made by the Tribunal in its residence jurisdiction. While counsel acknowledges that this is a deportation (non-resident)/humanitarian appeal, she submits that these decisions are still of some assistance.

[29] Counsel also submits that it would not be contrary to the public interest for the appellant to remain in New Zealand. Relevant factors include the public interest in protecting family unity and the fact that there is a low risk of the appellant producing forged police evidence in the future.

[30] Finally, counsel submits that the appellant should be granted a resident visa or, in the alternative, a 12-month work visa.

[31] Counsel provides evidence in support of her submissions, including:

(a) Copies of pages from the appellant's and his wife's passports, along with birth certificates for their two New Zealand-citizen daughters.

(b) Copies of correspondence between the appellant, his wife and former counsel on the one hand, and Immigration New Zealand on the other.

(c) Two of the police certificates that the appellant previously provided to Immigration New Zealand, including the 2019 certificate that has been definitively found to be a forgery. In addition, information from the website of the New Zealand High Commission for Pakistan relating to matters including applications for police certificates; a statutory declaration (3 December 2019) provided to Immigration New Zealand by the appellant in support of his claim not to have any convictions; an email (5 March 2020) from the New Zealand High Commission for Pakistan advising that the appellant had lodged an application for a Pakistani police certificate; and a further email (10 July 2020) from the High Commission advising that it could not provide a timeframe for the production of the certificate and noting that the "details of Afghan refugees living in Pakistan or [who] have left Pakistan after spending some years there are very hard to verify".

(d) Following the production of the evidence summarised above at [31(c)], a copy of a new Pakistani police certificate for the appellant dated 18 June 2020 but stamped 25 August 2020. This certificate, said to have been issued by the "Office of the Capital City Police" based in the city where the appellant used to live in Pakistan, records that he has no criminal record.

(e) A copy of a document entitled "Afghan Citizen — Proof of Registration" which appears to have been issued to the appellant by Pakistani authorities, but which contains errors in respect of the spelling of his name and date of birth.

(f) Letters to the Tribunal, including from: the appellant and his wife; members of the wife's extended family who are living in New Zealand;

the secretary of a New Zealand-based Afghan organisation; and the director of a childcare business.

(g) The couple's New Zealand marriage certificate and a joint Westpac bank account statement.

(h) A letter (6 April 2020) from the practice nurse at the wife's local clinic setting out recent medical notes. These notes confirm that the wife has depression and anxiety, and that she had surgery earlier this year for gallstone pancreatitis.

(i) Academic records relating to the appellant's studies while in Pakistan, including: certificates from an English language and computer course provider; a letter from his former college principal; and secondary school and technical education examination marks.

(j) Printed online information in respect of Afghanistan (Council on Foreign Relations *Global Conflict Tracker — War in Afghanistan* (2020) at www.cfr.org and Ministry of Foreign Affairs and Trade *Safe Travel — Afghanistan* (2020) at www.safetravel.govt.nz).

ASSESSMENT

[32] The Tribunal has considered the above submissions. It has also considered the appellant's Immigration New Zealand files in relation to his residence and temporary visa applications, and the evidence produced in support of this appeal and the appellant's residence appeal.

Whether there are Exceptional Circumstances of a Humanitarian Nature

[33] The appellant is a 27-year-old citizen of Afghanistan who was relocated from Afghanistan to Pakistan in 2000, as a seven year old. He went with his parents and, it appears, his two siblings. The appellant advises that they moved countries because "the situation in Afghanistan was not so good at that time". Counsel submits that they were recognised as refugees in Pakistan.

[34] While in Pakistan, the evidence shows that the appellant was able to receive an education, including completing English language and business studies. He was also able to undertake some employment, which included assisting at a local vehicle repair business and teaching English.

[35] There is some uncertainty as to whether the appellant returned to live in Afghanistan for a period of time before coming to New Zealand in December 2015. In one document provided to Immigration New Zealand during the assessment of the residence application (an Additional Information Form, dated 6 February 2019), the appellant recorded that he returned to live in Afghanistan in 2014, where he remained until he relocated to New Zealand in December 2015. His then counsel advised that he returned to Afghanistan because of the "deteriorating relationship" between Pakistan and Afghanistan. However, in this appeal, the appellant's counsel submits that the appellant lived in Pakistan right up until December 2015. The reason for this inconsistency is not clear. In these circumstances, the Tribunal prefers the direct evidence of the appellant, which was that he did return to Afghanistan in 2014.

[36] The appellant indicated to Immigration New Zealand that his parents and siblings also returned to Afghanistan, although on a later occasion he indicated that one sibling was residing in Pakistan. It may be that this sibling returned to Pakistan recently, but this is not something that needs any further consideration here.

[37] The appellant and his wife, who had moved to New Zealand in October 2010, had become engaged in January 2013. They were married in January 2016, shortly after he had arrived in New Zealand. Evidence previously provided to Immigration New Zealand, including from the wife's parents, suggests that this was a culturally arranged marriage where the families had a familial connection and had known each other for "a long time".

[38] Immigration New Zealand accepted that the couple was living together in a genuine and stable partnership when determining both the appellant's residence application and his most recent partnership-based work visa application. The Tribunal endorses those findings on appeal and notes that the genuineness of their partnership is reinforced by the fact that they have two children together. The elder daughter is aged two and the younger daughter is aged 11 months. They, like their mother, are New Zealand citizens.

The decline of the appellant's recent residence and work visa applications

[39] The appellant's residence application made in October 2018 was declined on the basis that he had intentionally produced a forged Pakistani police certificate and had been refused a character waiver. As noted above, his subsequent appeal of that decision to the Tribunal has been successful, with the Tribunal finding that the waiver assessment was flawed.

[40] The appellant's most recent application for a partnership-based work visa was also declined on the above character ground and in circumstances where a waiver was refused. The Tribunal has reviewed all of the files provided to it by Immigration New Zealand and the only character waiver assessment it can find is the one relied on by Immigration New Zealand in declining the appellant's residence application. It therefore appears that this same assessment may have been relied on in declining the work visa application.

[41] If the same character waiver assessment was relied on for the work visa application, then the concerns that have been raised in respect of the residence appeal would also be of relevance here. However, that being said, the Tribunal is unable to consider the merits of Immigration New Zealand's decision to decline a temporary visa application (*L v Removal Review Authority* (HC Wellington, CIV-2005-485-1601, 3 March 2006) at [11] and [13]) and so the matter cannot be taken further here.

Country information — Afghanistan

[42] A theme running through the evidence and submissions on appeal is that the appellant and his family cannot reasonably be expected to relocate together to Afghanistan on his deportation because Afghanistan remains a dangerous place to live. The Tribunal now addresses the country information that has been provided for its consideration.

[43] In one report (Council on Foreign Relations *Global Conflict Tracker — War in Afghanistan* (2020) at www.cfr.org), Afghanistan's recent political history is outlined. It is noted that the United States of America invaded Afghanistan in 2001 after the Taliban government refused to hand over Osama bin Laden. The Taliban leadership lost control of the country and then began to wage an insurgency against the Western-backed government and security forces. Since 2010, there have been more than 100,000 civilian casualties. In February 2020, the United States and the Taliban signed a peace agreement that set a timeline for the withdrawal of United States troops in exchange for various pledges made by the Taliban. The agreement was signed following a seven-day reduction in violence, being a period which required the Taliban to adhere to a "significant and nationwide" reduction in violence and the United States and Afghan forces to cease targeting Taliban-controlled areas. Despite this agreement, there is still no official cease-fire in place and, after the reduction in violence period ended, the Taliban "quickly resumed attacks on Afghan security forces and civilians".

[44] The New Zealand Ministry of Foreign Affairs and Trade advises, on its Safe Travel website, that there is an "ongoing and extreme risk of terrorism throughout Afghanistan", and that "[s]uicide bomb attacks, roadside bombs, car bombs, rocket attacks and small arms attacks" are a frequent occurrence (Ministry of Foreign Affairs and Trade *Safe Travel — Afghanistan* (10 April 2020) at www.safetravel.govt.nz). The Ministry also notes that unexploded landmines and munitions are a hazard, as are violent crimes, including carjacking, armed robbery and banditry, particularly in rural areas.

[45] The Tribunal notes that Afghanistan remains one of the poorest countries in the world (Aryana Aid *Poverty in Afghanistan* at www.aryanaaid.org.uk). Afghans "struggle to get access to healthcare due to pervasive violence, widespread poverty, and a weak public health system" (Doctors Without Borders *Reality Check — Afghanistan's Neglected Healthcare Crisis* (March 2020) at p1). At p6 of that report, it is noted that women and children are "disproportionately affected by the conflict in Afghanistan — not only in terms of casualties, but also when it comes to displacement, financial difficulties, and lack of access to essential services such as healthcare".

[46] Further, the United Nations High Commissioner for Refugees (UNHCR) has found that Afghanistan has a poor history in respect of recognising and protecting women's rights, and that "improvements in the situation of women and girls have reportedly remained marginal" (UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* (30 August 2018) at p68, available at www.refworld.org). In that report, reference is made to information from the Asia Foundation suggesting that "[l]imited access to education and health care, restrictions on freedom of movement, unjust punishment for 'crimes of morality', unequal participation in government, forced marriage, and violence remain major challenges for women and girls in Afghanistan" (The Asia Foundation *A Survey of the Afghan People — Afghanistan in 2017* (November 2017) at p30).

[47] Finally, the Tribunal notes that counsel refers to information in previous decisions of the Tribunal, including the deportation (resident) decision of *AQ (Afghanistan) v Minister of Immigration* [2016] NZIPT 600144, where it was accepted, at [77], that the Taliban, in particular, are suspicious of returnees from western countries.

The appellant's circumstances

[48] The appellant has lived in New Zealand for more than four-and-a-half years and he has a nexus to the country through, in particular, his wife and children.

However, he came to New Zealand in circumstances where he held no visa allowing him to reside here on a permanent basis. Consequently, that he may need to return to Afghanistan has always been a real possibility.

[49] The Tribunal accepts, having considered the state of affairs in Afghanistan at this time, that the prospect of returning there would be alarming for the appellant, as it would be for many citizens of Afghanistan who are residing temporarily outside of that country.

[50] The evidence suggests that the appellant lived in Pakistan from around the age of 7 years until he was approximately 21 years of age. He returned to live in Afghanistan during 2014 and remained there until he came to New Zealand in December 2015. Because of this return to Afghanistan, the appellant can be taken to have refamiliarized himself with his country of birth. The Tribunal also notes that he has family in Afghanistan, including his parents and at least one sibling, and it has not been demonstrated that they would be unable to support him on his return.

[51] If it were simply a case of the appellant having to return to live in Afghanistan, the impact of his deportation could not be considered exceptional. However, the appellant is part of a family unit and his departure from New Zealand will have a significant impact on them. The Tribunal now turns to consider the interests of his New Zealand-citizen wife and children.

The circumstances of the appellant's wife

[52] The appellant's wife, who is originally from Afghanistan, has lived in New Zealand for approaching 10 years and is a New Zealand citizen. Her parents and six siblings reside here.

[53] The wife has a history of depression and, more recently, anxiety. Medical evidence before the Tribunal, which includes a letter (31 May 2019) from the wife's general practitioner and a letter (6 April 2020) from this doctor's practice nurse, which contains the wife's recent records held by the clinic, sets out her history of depression. Her recent medical records dated 16 March 2020 record a previous diagnosis of postnatal depression, accompanied by anxiety, and confirm that she is currently receiving antidepressant medication. Her doctor says that the lowering of the wife's mood has "been affecting her social relationships and interactions".

[54] In letters from a number of the wife's siblings in New Zealand, concern is expressed about the wife's emotional state, with one sister saying that the wife's

depression seems to be getting worse “day by day”. The wife has noted in her own evidence that a factor currently impacting on her mood state is seeing how stressed the appellant is about his immigration problems, and this sends her into a “deep depression”.

[55] The Tribunal has before it a “Work and Income Work Capacity Medical Certificate” (9 January 2018) showing that the wife, as early as 2018, was found to be suffering from depression. She was not considered to be in a position to work in employment because of her health status, and her capacity to work in the future would “fluctuate significantly”.

[56] Evidence before the Tribunal shows that the wife has been in receipt of a government benefit and is living in public housing with her family.

[57] If the appellant were deported, the wife says she “will not manage” in New Zealand. She has two children and does not know what she would do. She refers to the high level of support that the appellant provides her, noting, for example, the care he provided her during recent hospital admissions for surgery due to gallstone pancreatitis, and follow-up surgery due to complications. She says that, in the evenings, he visited her at the hospital to provide her with emotional support and, during the days, he cared for their two children himself. She says he is a “genuine, kind and caring husband”.

[58] In terms of the wife’s ability to relocate to Afghanistan in order to remain with the appellant, she notes the obstacle is their children. They would have no future in Afghanistan. In New Zealand, she states, the children can live in a safe environment and have access to functioning health and education systems.

[59] The Tribunal accepts that, as a New Zealand citizen, the wife has the right to reside in New Zealand on a permanent basis, and to benefit from all of the publicly-funded services made available to New Zealand citizens and residents, including welfare support services. The welfare support that she is currently receiving in New Zealand would not likely be replicated in Afghanistan. It is also questionable, having regard to the country information noted above, whether she would be able to access the type of medical care that she can in New Zealand, which is helping to ensure that she is receiving treatment for her depression and anxiety.

[60] The Tribunal accepts that the security situation in Afghanistan is volatile and that the country still has a long way to go to ensure that women’s rights are protected.

[61] The Tribunal finds that the wife's interests, as a New Zealand citizen, are served by remaining in New Zealand where she feels settled and safe, especially in circumstances where she is currently receiving treatment due to a compromised psychological state. Her interests are also served by being with her husband who, from the tone of her evidence, is her key source of emotional and practical support.

The best interests of the appellant's children

[62] A salient matter in this appeal is the fact that the appellant has two very young children. Relevant to these children is the *Convention on the Rights of the Child* which provides, at Article 3(1), that, in all actions concerning children, the best interests of the child shall be a primary consideration: see also *Puli'uvea v Removal Review Authority* (1996) 14 FRNZ 322 (CA).

[63] As noted above, the appellant's elder daughter is aged two and the younger daughter is aged 11 months. The evidence suggests that the appellant is a devoted and responsible father to his daughters and a good husband to their mother.

[64] The children are New Zealand citizens and so, like their mother, they have the right to reside here on a lawful and permanent basis, and to have access to publicly-funded services, including the public health, education and welfare systems. If they relocated to Afghanistan with the appellant, in the event of his deportation, they would be moving to a country where it is well-documented that females face discrimination and they would not have the same access to health, education and welfare services enjoyed by children in New Zealand. They would also be moving to a country that remains in a state of conflict and where there are recurring terrorist attacks. Their living circumstances there are likely to be unsettled and uncertain.

[65] If the appellant relocated to Afghanistan without his wife and children, then the children would be left in New Zealand to be raised by a single parent. The Tribunal has concerns about the mother's ability to manage their care at this time, given her compromised emotional state. There is evidence to suggest that the appellant provides her with practical and emotional support, which no doubt enhances her ability to care for the children.

[66] It is not clear whether the appellant's wife may be assisted in her care of the children by a referral to a psychologist or other therapist, to help her manage the stress that she is experiencing, and to help her to make future plans. It also does not appear that the couple has looked into what additional family supports could be

put in place to assist the wife with the children, in the event of the appellant's deportation. The evidence suggests that she has parental and sibling support here. In any event, the Tribunal accepts that the wife's family members cannot replace the important role of the children's father in their lives at this stage of their development and where their mother suffers from ongoing issues with depression and anxiety.

[67] Based on the evidence that has been produced, the Tribunal finds that the children's best interests are served by remaining in New Zealand under the care of both parents, at this present time.

Residence decisions referred to on appeal

[68] For the sake of completeness, the Tribunal observes that, as noted above, counsel has referred to a number of the Tribunal's previous residence decisions. The Tribunal has drawn limited assistance from these decisions because it is operating under its deportation appeal jurisdiction.

Conclusion on exceptional humanitarian circumstances

[69] The Tribunal finds that the appellant's wife's interests and their children's best interests would be served by remaining in New Zealand with the appellant at this time. The wife is currently in an emotionally vulnerable state due to her depression and anxiety, and her ability to care for the children is enhanced by the appellant's practical and emotional support. Having regard to these factors, the Tribunal finds that the prospect of deportation of the appellant, before he has had an opportunity to have a character waiver assessment properly conducted by Immigration New Zealand in respect of his residence application, means that he currently has exceptional circumstances of a humanitarian nature. The Tribunal also considers that there is much for the appellant and his wife to do so as to properly plan for their family's future, in circumstances where the outcome of the residence application remains uncertain. The grant of a 12-month temporary visa to the appellant would afford them a reasonable amount of time to commence and progress their planning.

Whether it would be Unjust or Unduly Harsh for the Appellant to be Deported

[70] Where, as in this case, exceptional humanitarian circumstances are found to exist, the Tribunal must go on to assess whether those circumstances would make it unjust or unduly harsh for the appellant to be deported. According to the Supreme Court in *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR

248 at [9], this 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".

[71] The appellant is liable for deportation because he became unlawfully in New Zealand in March 2020. However, it is relevant to consider the wider background that led to his unlawful status, namely Immigration New Zealand's finding that he intentionally produced a forged Pakistani police certificate, a finding which has been upheld by the Tribunal in its decision concerning the appellant's residence appeal (refer in particular to [58]–[65] of that decision). The appellant's claim that he had simply received a police certificate that he did not know was forged does not, without more and as a standalone claim, strike the Tribunal as plausible. One potential motivation in arranging for a forgery may have been to avoid the excessive delays involved in applying for a genuine certificate, but this is speculative and is not taken further here.

[72] The production of a forged document is a serious matter because Immigration New Zealand depends on applicants to provide reliable and accurate evidence.

[73] However, against the above reasons for the appellant's liability for deportation must be weighed the exceptional humanitarian circumstances that have been found to exist in this case. Having particular regard to the interests of the appellant's wife and the best interests of his children, the Tribunal finds that it would be unjust or unduly harsh for the appellant to be deported from New Zealand at the point at which Immigration New Zealand is about to reassess his residence application (which will include conducting a new and correct character waiver assessment). His departure from New Zealand at this juncture, with a potential return in the event of his residence application being approved, would be counterproductive, unnecessarily disruptive, and harmful for the family unit. That being said, the Tribunal makes it clear that it cannot comment on the application's prospects of success.

[74] If the appellant's residence application is not successful, then the grant of a temporary visa will allow him and his wife time to discuss plans for their family's future and to take preparatory steps. This could include helping to ensure that good supports are put in place to assist the wife, who is currently in an emotionally vulnerable state. The appellant will also have new rights of appeal to the Tribunal.

Public Interest

[75] Having found that the appellant has exceptional humanitarian circumstances which would make it unjust or unduly harsh to deport him at this time, the Tribunal must also be satisfied that his stay here will not, in all the circumstances, be contrary to the public interest.

[76] Immigration New Zealand did not have any concerns about the appellant's standard of health when determining his most recent partnership-based work visa application, in February 2020.

[77] The Tribunal recognises that there is a public interest in the upholding of New Zealand's international obligations with regard to family unity and the best interests of children pursuant to Article 23(1) of the *International Covenant on Civil and Political Rights* and Article 3(1) of the *Convention on the Rights of the Child*. It is accepted that there is a public interest in the protection of the family unit that is comprised of the appellant, his wife and their two daughters.

[78] A New Zealand police certificate for the appellant (dated 12 August 2020) shows that he has no convictions in New Zealand and he previously provided Immigration New Zealand with a clear police certificate from Afghanistan which it accepted was genuine. However, as noted above, there is a character issue relating to the appellant's production of a forged Pakistani police certificate to Immigration New Zealand.

[79] The Tribunal accepts that there is a public interest in maintaining the integrity of the immigration system, which relies on applicants providing reliable information. The appellant has undermined the immigration system by producing a forged Pakistani police certificate.

[80] As to whether the appellant has a clear criminal record in Pakistan, the Tribunal acknowledges that he has produced a Pakistani police certificate on appeal which is clear of convictions. However, there is the question of how much weight can be placed on this document when a previously produced police certificate was forged. The Tribunal does accept that it is unlikely the appellant would risk being involved in the creation of another forged document. He now understands the serious consequences of producing a false certificate and he will appreciate that in all likelihood the new certificate will be subject to a verification process (which Immigration New Zealand will be able to do when it conducts its new assessment of the appellant's residence application). Further, while there is no evidence before

the Tribunal confirming that the New Zealand High Commission for Pakistan passed on this certificate to the appellant, supporting the fact that it came through the proper channels, it is clear that he made an application to the Commission for a certificate which was due at any time. The Tribunal also notes that Immigration New Zealand made enquiries with his former local police station in Pakistan and was not advised of any conviction history. All of these factors, combined with the fact that the Tribunal is considering a time-limited visa in this case as opposed to permanent residence, help to alleviate the Tribunal's concerns.

[81] Weighing the competing public interest considerations, the Tribunal finds that, in all the circumstances, it would not be contrary to the public interest for the appellant to remain in New Zealand for the 12-month period of the temporary visa the Tribunal intends to grant (being a work visa). This will allow the appellant to remain here for the time being while his residence application is reassessed and to seek work to support his family and also to plan, along with his wife, for their family's future.

DETERMINATION

[82] For the reasons given, the Tribunal finds that the appellant has exceptional circumstances of a humanitarian nature which would make it unjust or unduly harsh for him to be deported from New Zealand at this present time. The Tribunal also finds that it would not in all the circumstances be contrary to the public interest for him to remain in New Zealand on a temporary basis.

[83] The Tribunal orders that the appellant be granted a work visa pursuant to section 210(1)(b) of the Act for a period of 12 months commencing on the date of this decision. The appellant should be aware that, in the event that the new Pakistani police certificate produced on appeal is found to be a forgery by Immigration New Zealand, following a process of verification that forms part of its assessment of his residence application, this will create an additional character issue (alongside the previously produced forged certificate) which could lead to a new basis for his deportation.

[84] The appeal is allowed on those terms.

Order as to Depersonalised Research Copy

[85] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal

orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to the identification of the appellant, his wife, or their two children.

"M B Martin"

M B Martin
Member

Certified to be the Research Copy released for publication.

M B Martin
Member