

Introduction

[1] Following a jury trial in the District Court the appellant, Sung Chang Bong, was found guilty of one charge of male assaults female. At sentencing, Judge Sainsbury declined Mr Bong's application to be discharged without conviction and sentenced him to 12 months' supervision.¹

[2] Mr Bong now appeals his conviction and sentence.

[3] Mr Bong says that because of his immigration status his conviction — contrary to Judge Sainsbury's conclusion — will have direct and indirect consequences out of all proportion to the gravity of his offence. In particular, he asserts the almost inevitable consequence of his conviction is that he will be deported from New Zealand back to Korea. That will cause the breakup of the successful life he, his wife and their three children have established in New Zealand. Accordingly, the Judge had the discretion under s 106(1) of the Sentencing Act 2002 to discharge Mr Bong without conviction. He was wrong not to do so.

[4] Mr Bong's notice of appeal was received in this Court one day out of time. As the delay is very minor and no prejudice appears to arise, we grant the necessary extension.

Context

[5] Mr Bong is a Korean national. He has lived in New Zealand since 2012, with his wife and three children, on a series of successive work visas. Mr Bong works as a religious broadcaster. In early 2018 he was in a relationship with another woman. Following a physical altercation between Mr Bong and that woman, observed by the woman's neighbours, Mr Bong faced charges of sexual violation by rape, sexual violation by unlawful sexual connection, kidnapping, threatening to kill, assault with intent to injure and two charges of male assaults female.

[6] Mr Bong's jury trial took place in September 2018. He was found not guilty by the jury on all charges that he faced, save one of male assaults female. A conviction

¹ *R v Bong* [2019] NZDC 17142.

was not entered against Mr Bong at the end of his trial, in anticipation of his application to be discharged without conviction.

[7] Mr Bong was sentenced some nine months later. By that time his work visa had expired. Mr Bong's application for a discharge without conviction was premised on the proposition that there was a real and appreciable risk that, if convicted, he would not get a further work visa. He would therefore have to return to Korea. In view of the opportunities available here, his wife and children proposed that in those circumstances they would remain in New Zealand. To quote the Judge:²

The argument is that breaking up the family in this way would be a consequence out of all proportion to the gravity of the offending.

[8] In sentencing Mr Bong the Judge first assessed the gravity of his offending.³ Given the jury's verdicts, the Judge needed to carefully identify the factual basis of the single guilty verdict returned. Having done so, the Judge categorised the level of violence involved as being at the lower end of the scale. Whilst the event was a traumatic experience for the complainant, there were relatively moderate physical consequences, such as bruising.

[9] The Judge also noted that Mr Bong had subsequently undertaken counselling, and that a significant number of letters of support had been provided to the Court which referred to Mr Bong's strong Christian principles and his general non-violent character. Whilst noting the violence inherent in the events in question, the Judge also accepted that Mr Bong was generally not a violent person, and that it appeared surprising he had acted the way he did.⁴

[10] As regards Mr Bong's s 106 application the Judge noted that, other than Mr Bong's expression of concern as to the likelihood of him getting a further work visa if a conviction was entered, no expert evidence had been placed before the Court. The Judge considered that distinguished the case before him from that of *Rahim v R*.⁵ Mr Rahim, who was in similar circumstances to Mr Bong when it came to sentencing,

² At [15].

³ At [4].

⁴ At [11]–[14].

⁵ *Rahim v R* [2018] NZCA 182.

provided the District Court with expert evidence as to the impact of his conviction in terms of the application of the Immigration Act 2009 (the Act). That evidence was that if a conviction was entered there was a real and appreciable risk that Mr Rahim would be deported, thereby splitting up the family.

[11] Disagreeing with the District Court, this Court found that would be a consequence out of all proportion to the gravity of the offending, and on appeal, granted Mr Rahim the discharge without conviction the District Court had declined to make.⁶

[12] Judge Sainsbury recorded that he was not prepared to adjourn Mr Bong's sentencing to enable such evidence to be provided, given the matter had already been substantially delayed.⁷ He contrasted *Rahim* with other cases, where the more typical approach has been to leave the consequences of the entry of a conviction to the immigration authorities. He then concluded that the risk of Mr Bong not obtaining a work visa had not been proven to be a real and appreciable risk that outweighed the gravity of his offending.⁸

[13] The Judge then convicted Mr Bong and sentenced him to 12 months' supervision, with a special condition to complete counselling.

Appeal

Fresh evidence — leave

[14] Following his conviction, Mr Bong filed his appeal and, in support, obtained expert evidence as to the consequences for his future immigration status of the entry of his conviction and of the result, successful or not, of this appeal. He also filed affidavits prepared by him and his wife describing the consequences of the conviction and any possible future deportation of Mr Bong. He requires leave for that evidence to be admitted. The general principle is that further evidence will only be admissible in a criminal appeal where it is fresh, that is in general terms it is evidence which could

⁶ At [33].

⁷ *R v Bong*, above n 1, at [17].

⁸ At [18]–[19].

not have been obtained at the time of the original decision, and it is cogent, that it is compelling. It is recognised, however, that the more compelling the evidence, the less weight will be given to the need for freshness.

[15] As the Judge noted, it would have been possible for Mr Bong, as Mr Rahim had done, to provide the Judge at sentencing with expert evidence. By the same token, by the time we heard Mr Bong's appeal things had moved on considerably as regards his immigration status. It transpired that the assumption Mr Bong and his counsel had made at the time of his sentencing, namely that Mr Bong was lawfully in New Zealand on a temporary visa, had proved to be incorrect. The expert evidence Mr Bong obtained, by way of two affidavits from Mr Simon Laurent of Auckland, a solicitor and a recognised expert in the field of immigration law, therefore provided very helpful updating evidence for the Court.⁹ Moreover, we did not understand the Crown to oppose the introduction of that evidence which, in the circumstances, was a responsible approach. Leave is granted for that additional evidence accordingly.

[16] Likewise, we consider that the affidavits of Mr Bong and his wife are cogent, and fresh in that they canvas developments since Mr Bong's sentencing. Considering, moreover, the background of a misunderstanding of Mr Bong's then immigration status in the Court below, we are satisfied that leave should also be granted to admit these affidavits and do so accordingly.

What the fresh evidence tells us

[17] Mr Laurent in fact swore two affidavits. The first proceeded on the basis that, as the Judge had recorded in his sentencing notes, Mr Bong's work visa had expired on 1 March 2019. That is after he had been found guilty on the charge of male assaults female, but before he had been sentenced. That affidavit went on to comment that Mr Bong had applied for a visitor visa before that date and had been issued an interim visa by Immigration New Zealand (INZ) to maintain his lawful status in New Zealand while his substantive application was being considered. However, neither Mr Laurent nor Mr Bong's counsel was then aware that INZ had in fact declined to follow its normal course and had instead refused to issue an interim visa to Mr Bong. He had

⁹ It was Mr Laurent who provided expert evidence in Mr Rahim's case.

consequently been in New Zealand unlawfully since 1 March 2019 and liable for deportation accordingly, irrespective of whether he was convicted for his offending or not.¹⁰ Mr Laurent reconsidered Mr Bong's circumstances in his second affidavit on that basis.

[18] In that affidavit Mr Laurent first commented that Mr Bong's true status under the Act significantly altered the immigration consequences that might flow from his conviction being upheld on appeal. Mr Laurent explained why, in his view, INZ had caused that status by not granting an interim visa:

This is probably because the existence of the charges against him had raised a character alert against Mr Bong's customer profile which prevented the automatic grant of the interim visa, and the manual assessment resulted in a decline.

[19] Notwithstanding Mr Bong's liability for deportation, INZ determined his substantive application for a visitor visa, which was declined on 12 August 2019. Mr Laurent noted the basis for that decision, as recorded in a letter from INZ which he had sighted, was the fact of Mr Bong's conviction and sentence on 20 June.

[20] Against that background, Mr Laurent assessed the significance of Mr Bong's conviction on the ability he had, first, to avoid deportation or if deported, to apply successfully to return to New Zealand.

Liability for deportation

[21] Mr Bong had had 42 days from the expiry of his last visa on 1 March 2019 to file an appeal against deportation under s 154 of the Act. As he had not done so, he had lost that appeal right. He could therefore be served with a deportation order at any time under s 175 of the Act. Once served, such an order would authorise his removal from New Zealand. Given Mr Bong's criminal offending and his unlawful status, Mr Laurent considered that service of a deportation order was "likely" in the future, most probably after our decision in this appeal.

¹⁰ Immigration Act 2009, s 154.

[22] Mr Laurent identified two ways in which Mr Bong could avoid deportation:

- (a) first, by successfully applying to the Minister to exercise his absolute discretion to grant a visa under s 61 of the Act, before a deportation order was served; or
- (b) second, by persuading an immigration officer to exercise her absolute discretion, conveyed by s 177 of the Act, to cancel that order.

[23] Given the description of both decisions as being in the “absolute discretion” of the decision-maker Mr Laurent was careful about his assessment of the consequences of Mr Bong’s conviction.

[24] In the case of a ministerial s 61 decision, Mr Laurent noted that Mr Bong had already applied unsuccessfully to the Minister under s 61 when his substantive application for a visitor visa was declined.¹¹

[25] Were Mr Bong’s appeal to be successful, and his conviction quashed, the absence of a conviction might have a positive influence on the mind of a person called to consider a s 61 application.¹² At the same time, the presence of the charge and the guilty finding already made would probably work against Mr Bong’s chances of securing a visa.

[26] The s 177 discretion responds to the possibility that the person liable for deportation might invoke New Zealand’s international obligations. In that context, Mr Laurent was of the view the factor most likely to influence INZ would be the situation of Mr Bong’s wife and children, who had lived here with him since 2012. If a case could be made that the children would benefit from remaining in New Zealand, Mr Bong’s deportation could result in them being deprived of his

¹¹ Mr Bong lodged a request to have the refusal to grant him a visitor visa reviewed. However, because he was unlawfully in New Zealand, Mr Laurent explained this was apparently treated by INZ as a request for a visa under s 61.

¹² Mr Laurent explained that s 61 requests were normally assessed by suitably graded visa officers exercising delegated ministerial authority.

presence to care for and support them, a factor of possible relevance to, for instance, New Zealand's obligations under the Convention on the Rights of the Child.¹³

[27] Mr Laurent was also of the view that the decision of this Court on Mr Bong's appeal could be influential. If the conviction stood, it was unlikely the needs of his family would outweigh the existence of that criminal record. On the other hand, a discharge without conviction could highlight the causal connection between the original conviction and the decision to decline Mr Bong's substantive visitor visa application which had, in turn, led to his unlawful status in New Zealand. That change in circumstances might justify cancellation, although the highly discretionary nature of the power under s 177 made that "far from certain".

[28] Mr Laurent then commented on the effect of a conviction on the possibility of Mr Bong being able to return to New Zealand if he was deported or left voluntarily.

[29] Mr Bong could choose to depart New Zealand before a deportation order was served on him. In those circumstances he would not be prevented from applying for a visa to return to New Zealand in the future.¹⁴ Were his conviction to stand, however, he would fail to meet INZ's character requirements, as set out in their immigration instructions, for a temporary entry class visa. He would therefore require INZ to grant him a character waiver. Mr Laurent described Mr Bong's chances of obtaining such a waiver as "quite finely balanced" as he considered that INZ generally viewed violence convictions with considerable suspicion. He also noted INZ had declined a character waiver for Mr Bong once already, when his application for a visitor visa was declined on 12 August 2019 (see above at [19]). On the other hand, were Mr Bong's appeal to be allowed and his conviction quashed, he would no longer fail INZ's character requirements and his chances of obtaining a visitor or work visa would substantially increase. As Mr Laurent concluded, "[t]he outcome of the present appeal could therefore have a significant impact on [Mr Bong's] chances of success in obtaining a visa."

¹³ United Nations Convention on the Rights of the Child (1989) 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990)

¹⁴ Although Mr Bong would still be considered "deported" in terms of s 10 of the Immigration Act, the usual prohibition on re-entry would not apply: s 179(2).

Analysis

[30] We start by noting our assessment, with which the Crown agreed, that the behaviour upon which the jury's guilty verdict was based is very low-level offending. When separated from the Crown narrative of the other alleged offending, in respect of which Mr Bong was found not guilty, the assault involved some form of tussle between Mr Bong and his victim as a result of which they both fell to the floor. There is an indication, moreover, that outcome may have been influenced in part by the fact that Mr Bong suffers from weakness in his legs. The assessment of the consequences of his conviction is to be made against that recognition. We also note this against the background of mitigating factors personal to Mr Bong, including his previous six years' successful residence in New Zealand and his considerable contributions to the community (as amply demonstrated in material provided to the Court), as a result of his involvement in good works as part of his commitment to his church.

[31] We note the conviction has already had significant adverse consequences on Mr Bong. Those include the inevitable stresses and strains the immigration processes have caused Mr Bong, his wife, their three children and their wider families. In addition, Mr Bong has suffered considerable ill health in the intervening period. Because of his unlawful immigration status, he was not entitled to receive free medical care and has faced significant costs as a result of his offending, given its very low gravity.

[32] In that context we see the severity of a conviction for Mr Bong's future immigration status as significant. We accept Mr Laurent's evidence that the presence of a conviction will make it very difficult for Mr Bong to persuade an immigration officer to exercise her discretion to cancel a deportation order under s 177. We also accept that if Mr Bong leaves New Zealand, the need for him to obtain a character waiver will represent a significant barrier to him gaining a visa in future. We note that, absent a conviction, INZ will remain on notice as to the fact of the charges Mr Bong faced and the jury's verdict, but any future application will be assessed without the significant headwind of the character waiver requirement. On balance, we are satisfied on the basis of the updated information we now have that in terms of s 106 of the Sentencing Act and in these unusual circumstances, the consequences of Mr Bong's

conviction are likely to be out of all proportion to the seriousness of his offending. We therefore allow the appeal, quash Mr Bong's conviction and discharge him without conviction.

Result

[33] The application for an extension of time is granted.

[34] The application to adduce fresh evidence is granted.

[35] The appeal is allowed.

[36] The conviction for male assaults female is quashed. The appellant is discharged without conviction.

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