IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-1829

UNDER	Section 117 of the Immigration Act 1987
BETWEEN	M ZAFIROV Appellant
AND	THE MINISTER OF IMMIGRATION Respondent

Hearing: 11 December 2008
Further evidence and submissions filed on 26 January 2009, 9 March 2009 and 13 March 2009

Counsel: Mr M Bott for Appellant
Mr H L Dempster for Respondent

Judgment: 7 April 2009 at 4.30 pm

JUDGMENT OF MALLON J

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Introduction

[1] Mr Zafirov (the appellant) appeals against a decision of the Deportation Review Tribunal declining to quash the Minister of Immigration's (the respondent) order that he be deported. Mr Zafirov is 51 years old and is a New Zealand resident. In 1992 Mr Zafirov, with his wife and two children, fled Macedonia, initially for Germany, in advance of the civil war. They arrived in New Zealand in 1998. Mr Zafirov is a qualified draftsman and mechanical engineer and the family obtained New Zealand residence on the basis of his skills. After arriving in New Zealand Mr Zafirov found work in a factory but in May 1999 he suffered a back injury which has prevented him from working. He undertook a number of courses and was looking for work in a position that did not require lifting.

[2] In May 2002, while Mr Zafirov was at his home alone, a woman working as a market researcher came to the door. Mr Zafirov invited her in. Mr Zafirov disputes what then occurred. According to the Judge's sentencing notes that relate to the events, he carried the woman into the master bedroom and forced her onto the bed, he then sexually assaulted her, and he also violated her by forcing his fingertips inside her vagina through her clothing. The woman fled at the first opportunity. Mr Zafirov was convicted of abduction and sexual violation. He was sentenced to a period of imprisonment of three years and nine months. He was in prison from April 2004 until his release in December 2005.

[3] Mr Zafirov's deportation was ordered by the Minister because of Mr Zafirov's convictions for abduction and sexual violation. Each of these were offences carrying maximum penalties of imprisonment of 12 months or more and were committed within five years of the grant of Mr Zafirov's residence permit (s 91(1)(b) of the Immigration Act 1987). Mr Zafirov appealed the Minister's deportation order to the Deportation Review Tribunal. The Tribunal hearing took place on 14 and 15 March 2007. Its decision was given on 25 July 2007. For the deportation order to be quashed it was necessary for Mr Zafirov to establish both that a deportation would be unjust or unduly harsh and that it would not be contrary to the public interest to allow him to remain in New Zealand (s 105 of the Act). The Tribunal found that, although it would be unjust or unduly harsh to deport

Mr Zafirov, it would be contrary to the public interest to allow him to remain in New Zealand. The Tribunal therefore declined to quash the deportation order.

[4] A decision of the Deportation Review Tribunal can be appealed on a "question of law" to the High Court (s 117 of the Act). Mr Zafirov appeals against the Tribunal's finding that it would be contrary to the public interest to allow him to remain in New Zealand. This finding was based on the Tribunal's view that Mr Zafirov's risk of reoffending was above "low". There are a number of issues raised about this finding but there are two main issues. The first of these is that the Tribunal's assessment is said to be in error because it has not explained what it means by "low" or "above low" making comparisons with other cases relied upon by the Tribunal unhelpful. The second issue arises because the assessment of Mr Zafirov's risk was based on evidence before the Parole Board which dealt with Mr Zafirov. This evidence was at least partly arrived at by the use of a risk assessment tool known as the Static-99. Mr Zafirov says that the assessment was in error because for New Zealand offenders the Static-99 test has been replaced by the Automated Sexual Recidivism Scale (ASRS) test. Under the ASRS it is said that Mr Zafirov's risk of reoffending is "low".

[5] The Minister says that no error of law occurred in respect of the Tribunal's finding because Mr Zafirov had the opportunity at the Tribunal hearing to challenge the evidence that was before the Parole Board, the ASRS cannot be said to be a mandatory relevant consideration and it was not unreasonable for the Tribunal to rely on the only assessment results before it.

[6] The Minister cross-appeals against the Tribunal's finding that it would be unjust or unduly harsh to deport Mr Zafirov. The Tribunal considered that Mr Zafirov's deportation would be unduly harsh on his wife, having regard to the closeness of the family, as she would be forced to choose between going with her husband and staying with her daughter. The Minister says this was irrational, and therefore an error of law, because the Tribunal had concluded that it would not be unduly harsh on either Mr Zafirov or the daughter if Mr Zafirov were deported. Mr Zafirov says in response that the Tribunal reached a view that was open to it on the facts.

[7] For the reasons which follow I consider that there was an error of law in respect of the Tribunal's finding that it would be contrary to the public interest for Mr Zafirov to remain in New Zealand. I consider there was no error of law in respect of the Tribunal's finding that it would be unduly harsh to deport Mr Zafirov.

Preliminary matters

[8] Mr Zafirov sought leave to file further evidence from a psychologist (Dr Vess) concerning the assessment of Mr Zafirov's risk of reoffending (see [37] to [41] below) and also further evidence from Mr Zafirov and doctors concerning the health condition of Mr Zafirov's daughter (see [17] below).

[9] Leave was opposed by the Minister on a number of grounds. The main ground of opposition in respect of the psychologist evidence was that this evidence sought to contest findings of fact which it was said could not be relevant on an appeal on a question of law. The main ground of opposition in respect of the evidence concerning the health condition of Mr Zafirov's daughter was that the issue has arisen after the Tribunal's decision and so could not form the basis of challenge to that decision on a question of law.

[10] Having indicated to counsel that I was likely to grant leave for the evidence to be adduced, the Minister was granted leave to file any response it wished to make to that evidence and Mr Zafirov was granted leave to adduce any further evidence in reply to the Minister's response. In accordance with this an affidavit from Dr Wilson (a psychologist) was filed on behalf of the Minister (see [42] to [44] below) and a further affidavit was filed by Dr Vess (see [45] to [46] below). Both parties were also given an opportunity to make further submissions in respect of that evidence, which they did.

[11] Leave to adduce further evidence can be granted where there are special reasons for hearing the evidence (r 20.16, formerly r 716, of the High Court Rules). I consider that there are special reasons to grant leave for the new evidence in this case. The psychologist's evidence is relevant to the issue of whether an error of law occurred because it is argued by Mr Zafirov that it was an error of law for the

Tribunal to proceed on a misapprehension as to the evidence of Mr Zafirov's risk assessment. The evidence from Dr Vess is material to that issue.

[12] The Court of Appeal's decision in *R v Peta* [2007] 2 NZLR 627 – where there was extensive discussion on the tools to assess the risk of sexual offending recidivism including that the ASRS was now being used in New Zealand – was delivered shortly before the Tribunal's hearing. It was therefore potentially available to Mr Zafirov. However I am prepared to accept that its significance for the Tribunal hearing may not have been immediately apparent to Mr Zafirov's then counsel. It does not appear to be a situation of a party deliberately holding back in a "dummy run" before the Tribunal which can be a concern when parties seek to adduce further evidence on an appeal.

[13] The evidence about the health of Mr Zafirov's daughter is updating evidence. It is evidence that was not available at the Tribunal hearing. I consider that leave should be granted for this evidence to be adduced, not because it is directly relevant to whether the Tribunal erred on a question of law but because it is potentially relevant to what should occur if I were to find that the cross-appeal succeeded.

Unduly harsh

[14] There are two limbs to the test in s 105 of the Act which must be satisfied if a deportation is to be quashed. One of those limbs is that the Tribunal must be satisfied that it would be "unjust or unduly harsh" to deport Mr Zafirov. There are a number of factors which the Tribunal must have regard to in making this assessment (s 105(2)). Most of the list relate to the appellant and his or her offending but the factors also include "[t]he interests of the appellant's family" (s 105(2)(g)) and "[s]uch other matters as the Tribunal considers relevant" (s 105(2)(h)).

The Tribunal's decision

[15] In respect of Mr Zafirov the Tribunal considered that, although deportation would lead to emotional and financial hardship for him, in view of the gravity of his

offending deportation would not be unjust or unduly harsh on him. The son and daughter (aged 20 and 17 respectively at the time of the Tribunal hearing) do not speak, read or write Macedonian fluently, have established themselves in New Zealand and would not return to Macedonia if their father is deported. The Tribunal considered that it would not be unduly harsh on them if the father was deported. The Tribunal also said that the daughter was a mature young woman and would cope if her mother returned with her husband.

[16] The Tribunal's decision on this limb was based on the effect of deportation on Mr Zafirov's wife. The wife said that if her husband was sent back to Macedonia it would destroy their close family. She said her heart would be broken as she would be torn between going with her husband and staying with her children. She said that her husband, who still suffered from his back injury, relied on her for physical and emotional support. She also felt that her children, who do not have other family here, needed parental support. The Tribunal considered that Mr Zafirov's deportation would be unduly harsh on Mrs Zafirov "having regard to the closeness of the family, the age of the daughter and the health of [Mr Zafirov]".

[17] Since the Tribunal's decision the daughter has been diagnosed with Hodgkin's Lymphoma. Mr Zafirov has sworn an affidavit dated 10 December 2008 which attaches letters from doctors concerning the diagnosis, symptoms and treatment for this cancer. Mr Zafirov describes his daughter as "in a state of trauma" and as needing all the help the family can give her. He says that their daughter is the focus of their concern at this difficult time. He says that his wife is not coping and they are all in shock. One of the reports from the doctors says that the continued support from a strong family group will be important for the daughter's psychological well-being and that the deportation of her father could not come at a worse time.

Submissions

[18] Counsel for the Minister says there was no probative evidence that the wife provided Mr Zafirov with physical assistance such that it would be unduly harsh to deport him. Counsel for the Minister submits that if Mr Zafirov's health did not

mean it was unduly harsh on him if he were deported then his health could not have made his deportation unduly harsh on the wife. Similarly counsel submits that it is illogical for the daughter's age to be a reason why deportation was unduly harsh on the mother when the Tribunal had found that the daughter would manage the separation from her father and mother. He submits that it was illogical to find that the closeness of the family made deportation unduly harsh on the wife when the Tribunal had found that deportation would not be unduly harsh on the other family members. He submits that it was wrong to focus on the "choice" the wife would be faced with. Rather the question was whether it would be unduly harsh on her once her choice was made and, in considering this, the Tribunal failed to factor in that the wife would be returning to her home country.

[19] Counsel for the Minister further submits that having found it would be unduly harsh on the wife the Tribunal did not then balance this with other humanitarian factors and so elevated one of the criteria in s 105(2) to a "trump card". Overall the Minister submits that there was no evidence or no reasonable evidence for the Tribunal's decision, it was irrational and that the Tribunal has wrongly lowered this part of the s 105 test to such an extent that every appellant will pass it.

[20] Counsel for Mr Zafirov submits that the Tribunal's decision was correct. He submits that the family is important even where the children are adults. *Beoku-Betts (FC) v Secretary of State for the Home Department* [2008] UKHL 39 is referred to, although the particular passages relied on in that case come from other cases. One of those is *Huang v Secretary of State for the Home Department* [2007] UKHL 11; 2 AC 167 at [18] which makes the point that the family is the group on which many people "most heavily depend, socially, emotionally and often financially", that prolonged separation from the family group can seriously inhibit a person's ability to live a fulfilling life and relevant to this are such things as the closeness and previous history of the family and their prevailing cultural tradition.

My view

[21] On the second part of this appeal (see [72] below) the Minister submits that the "*Wednesbury*" test of unreasonableness is appropriate in appeals of this kind. I

approach the cross-appeal on the same basis. The question is not therefore whether I agree with the Tribunal's conclusion that it would be unduly harsh to deport Mr Zafirov but whether it was a conclusion reasonably open to the Tribunal on the evidence correctly applying the law to that evidence.

[22] There was evidence that Mr Zafirov and his wife had been married for over 20 years. There was evidence that Mr Zafirov still suffered from his back injury. There was also evidence from Mrs Zafirov that she was her husband's caregiver and to deport him away from her "would deprive him of all support, medical and emotional, in a most cruel and inhumane way". There was evidence that the family was close. There was evidence that Mr Zafirov thought his family would go with him to Macedonia if he were deported but his two children were of the view that they would not. There was evidence that Mrs Zafirov considered her children still needed parental support and that they had no other family in New Zealand.

[23] There was therefore evidence on which it was open to the Tribunal to find that the mother was faced with a difficult choice. That both her husband and daughter might or would cope was not the point. Mrs Zafirov would have to choose between her husband (whom she had been with for more than 20 years and who had a back injury and to whom she provided care) and her daughter (who was still in her teenage years and who her mother believed needed the kind of parental support which would not be possible from Macedonia). It was open to the Tribunal to find that in the context of a close family it was harsh on the mother to have to choose between returning to Macedonia (where she could be with and could look after her husband but where she would not be available to her daughter should she need her) and staying with her daughter (with the result that she would not be with her husband and would not be able to look after him). That Mr Zafirov came from Macedonia was beside the point in respect of the choice facing the mother. I consider that the Tribunal's finding was not irrational.

[24] Further, it was open to the Tribunal, who saw the witnesses and heard the evidence, to say that this harshness was at a level where it was "undue". The Tribunal's assessment of the wife's position was contrasted with their assessment of Mr Zafirov's position. It said that his deportation would lead to emotional and

financial hardship for him but, given the gravity of his offending, it was not unjust or unduly harsh on him. The Tribunal considered that, in respect of the wife, Mr Zafirov's deportation "is not just harsh, but tips the balance and amounts to undue harshness for her". The Tribunal therefore turned its mind to and addressed the requirement for the harshness to be undue.

[25] In finding this limb satisfied based on harshness to the wife the Tribunal was not elevating this factor above all the others. The other factors related to Mr Zafirov and the nature of his offending. The harshness on the wife, in the circumstances of the case, was the material factor.

[26] Nor does the Tribunal's finding lower the bar such that every appellant will be able to meet it. Relevant here were the closeness of the family, Mr and Mrs Zafirov's lengthy marriage, Mr Zafirov's back injury, the assistance Mrs Zafirov provided to Mr Zafirov with that, and that, although the daughter was mature and would cope, she was still only 17, Mrs Zafirov's view that her daughter still needed her and the absence of other family to provide support for the son and the daughter. Mrs Zafirov was therefore faced with a difficult choice in these particular circumstances.

[27] I therefore consider that there was no question of law on which the Tribunal erred on this limb of the s 105 test. It is therefore unnecessary for me to consider whether the matter should be referred back to the Tribunal for rehearing on this aspect. Had it been necessary to consider that question the new evidence would be relevant. It is the kind of thing that sadly can arise and where parental support is important. It reinforces the Tribunal's conclusion that it would be unduly harsh on the wife if she were forced to choose between her husband and her daughter. (Conceivably it might also alter the assessment in respect of Mr Zafirov tipping the balance from harshness to "undue" harshness for him, as well as in relation to the daughter herself.)

Contrary to public interest

[28] The other limb to the s 105 test is that it must not be "contrary to the public interest to allow [Mr Zafirov] to remain in New Zealand". Relevant to the public interest is the risk of reoffending.

Material before the Parole Board

[29] The risk of reoffending was part of the Parole Board's inquiry when considering whether Mr Zafirov should be released from prison. The material before the Parole Board in making that assessment was available to and considered by the Tribunal.

[30] Part of that material was Mr Zafirov's pre-sentence report prepared by a probation officer. At that time Mr Zafirov's risk of reoffending was assessed to be "moderate". Important in this assessment was that he denied the offending. The Parole Board also had two reports on his behaviour in prison. He was described as being a good inmate with good behaviour and attitude. He was having counselling with a social worker. A report from a probation officer referred to the difficulty of placing Mr Zafirov in rehabilitative interventions because he continued to deny the offending. His motivation to comply with home detention conditions was assessed to be at the higher end of the scale.

[31] There was also a report from Dr Dath and Mr Lipanovic, two psychologists instructed on behalf of Mr Zafirov. They had interviewed Mr Zafirov for three and a half hours. They concluded that Mr Zafirov had a "low" risk of offending for violent sexual behaviour. This does not appear to have been based on one of the actuarial assessment tools (such as the Static-99 or the ASRS) but rather was a conclusion reached because Mr Zafirov did not have a psychopathic personality structure, had no past offence pattern and no other deviant behavioural pattern, and also because he displayed a considerable level of empathy. The psychiatrists had carried out an MMSE test (to assess cognitive function) and an Aggressional Questionnaire which

indicated that he was able to regulate his anger in a constructive way and his profile was within the normal limit.

[32] A report was also prepared by Ms Bradley, a psychologist from the Corrections Department. Based on the "RoC*Rol" test she said that Mr Zafirov was a "low high" risk of reoffending in a similar nature within five years. Based on the Static-99 test she said that Mr Zafirov was a "moderate to low" risk of reoffending. These two tests did not take into account "dynamic factors". Dynamic factors included Mr Zafirov's denial of his offending. When both static and dynamic factors were considered, Ms Bradley said Mr Zafirov's risk of reoffending was "moderate". She said that this would likely reduce to "low" if Mr Zafirov expressed a willingness to participate in psychological treatment.

[33] A further report responding to Ms Bradley's report was prepared by Dr Dath and Mr Lipanovic. It was critical of Ms Bradley's report. Dr Dath and Mr Lipanovic pointed out that the "low high" risk referred to in respect of the ROC*Rol did not make sense. They said that Ms Bradley had commented on dynamic factors without using one of the more recent actuarial tests available, such as the SONAR test. In their view Mr Zafirov's denial of the offending should not be considered as going to a risk of reoffending but should be treated separately. They referred to research showing that juries can get it wrong. By this stage Dr Dath and Mr Lipanovic had carried out a Static-99 assessment, and in their view Mr Zafirov had a "low" risk of offending based on that test, and had a "low" score on the SONAR test also. Their overall view was that Mr Zafirov was in the "low" category for risk of similar offending.

[34] At the hearing before the Parole Board Mr Lipanovic and a Corrections Department psychologist, Ms Jocelyn, were in attendance. The Parole Board decision states that "[a]fter brief questioning what was ascertained from both psychologists was that they would view Mr Zafirov as being moderate to low in their assessment of him". On this basis the Board considered that his risk rating meant he was not of undue risk to the safety of the community. He was released on parole subject to special conditions.

Tribunal's decision

[35] In assessing the public interest the Tribunal considered the risk of reoffending to be the most important factor. It reviewed all of the material before the Parole Board as well as a report from Mr Zafirov's parole officer which said that Mr Zafirov had maintained good compliance with his parole terms. It referred to the Parole Board's conclusion that Mr Zafirov was not an "undue risk" of reoffending but also noted that the Parole Board and the Tribunal apply different statutory tests in different contexts. It referred to the confidence expressed by others that Mr Zafirov would not reoffend, and the unwavering support he had from his family and friends. It referred to Child, Youth and Family Services (the government agency responsible for children) being satisfied that Mr Zafirov's daughter would be safe with her father in the home. It referred to the absence of other similar offending and the "spontaneity" of the May 2002 offending.

[36] Having referred to these matters the Tribunal said that it concurred with the agreed expert evidence that Mr Zafirov's risk of reoffending was "moderate to low". It concluded:

> A risk of similar re-offending, given the seriousness of the crimes in this case, above "low" is too high for our statutory test. It reflects the appellant's refusal to admit the crime and hence a lack of insight into his offending. This means he has not had the benefit of rehabilitative programmes targeted at sex offenders. We appreciate that no convicted offender can establish a zero risk of re-offending and we do not require that. But given the serious nature of the offending here, we do require a low or minimal risk to public safety. In our view, a moderate to low risk of re-offending of this nature is a risk the New Zealand public should not bear.

The new affidavit evidence

[37] Dr Vess is a clinical psychologist with considerable experience and is qualified to give the evidence which he does. He did not interview Mr Zafirov but prepared his affidavit in support of Mr Zafirov's appeal to this Court on the basis of his examination of the assessments of Mr Zafirov that were before the Parole Board.

[38] Dr Vess describes the limitations of the Static-99 test in the New Zealand context. He refers to the ASRS as having been developed by the psychological service for the Department of Corrections in response to those limitations. He says that the ASRS is routinely used by the Department of Corrections to assess risk with sexual offenders.

[39] Dr Vess discusses Mr Zafirov's scores and what they mean. Mr Zafirov received a score of "2" on the Static-99 rating. This places him at the bottom of the scoring range for the "medium-low" category. The sexual reoffence rates for those in this category are 10% at five years after release into the community, 13% at 10 years and 17% at 15 years. On the ASRS test Mr Zafirov had a "0" score. This places him in the category of "low" risk. The reoffence rate for adult sexual offenders in this category is 6.2% over 15 years. For someone over 50 years the sexual reoffending rate is 2% over an average time period of 10 years.

[40] Dr Vess goes on to say that current best practice calls for these actuarial instruments to be considered alongside dynamic factors. He says that STABLE and ACUTE are the most commonly used standardised measures of dynamic factors. He says that Ms Bradley did not specifically address the STABLE and ACUTE factors. He says that while those factors had not been formally assessed "available documentation does not suggest the presence of these factors to a significant degree". Dr Vess refers to psychopathy being associated with higher rates of reoffending and that, while an assessment using a well-validated measure has not been conducted, "the available file documentation suggests few signs of the interpersonal, emotional, and behavioural characteristics that typify the psychopath".

[41] Dr Vess refers to a study which found, amongst other things, that denial of sexual offending is not empirically related to sexual recidivism. Denial of offending can preclude treatment aimed at preventing reoffending because the treatment typically requires an offender to acknowledge his offences. Dr Vess says that based on Mr Zafirov's apparent "low" level of risk, treatment to reduce this risk may be unwarranted and potentially counter productive.

[42] The Minister was granted leave to reply to this affidavit. A reply was prepared by Dr Wilson, a clinical psychologist who is currently the National Advisor for Psychological Research, Community Probation and Psychological Services at the Department of Corrections. He also has considerable experience and is qualified to give the evidence which he does. Dr Wilson says that when Ms Bradley used the Static-99 test it was internationally validated. He says the validation of the ASRS was underway but not complete. He says that the first peer-review article on the validation of the ASRS was not published until November 2006. Accordingly he says that Ms Bradley was not wrong to apply the Static-99 at the time. He agrees with Dr Vess that the ASRS has become the preferred static risk measure in New Zealand.

[43] Dr Wilson agrees with Dr Vess that consideration of the Static-99 or the ASRS alone are not sufficient to assess Mr Zafirov's risk of reoffending and that dynamic factors should also be considered. Dr Wilson does not know whether Ms Bradley used one of the structured assessments of dynamic risk variables in her assessment. Dr Wilson agrees that denial of reoffending does not in and of itself indicate a higher risk of reoffending. It needs to be assessed as part of the dynamic risk assessment.

[44] Dr Wilson comments that one of the reasons why it was necessary to develop the ASRS for New Zealand was that the New Zealand criminal history database does not routinely capture three of the 10 items in the Static-99 test. These three items are "stranger victim", "unrelated victim" and "never lived with a lover for two years". Of these "stranger victim" and "unrelated victim" are relevant to Mr Zafirov. Because these items are not captured by the ASRS Dr Wilson says that Mr Zafirov's risk of reoffending will have shown a lower risk. He also says that without a timely and comprehensive assessment at this time any conclusion on Mr Zafirov's dynamic risk as "low" is speculative and based on assumptions.

[45] Dr Vess was granted leave to respond. He stands by his evidence. He accepts that the ASRS omits three variables but says that the ASRS has the two important advantages over the Static-99 which he discussed in his first affidavit. He sets out these advantages in more detail in this second affidavit. He says that the

assertion that the ASRS may be flawed when applied to certain offenders obscures the point that any actuarial assessment may be flawed when applied to individual offenders. He says that to assert that the Static-99 is superior in predictive accuracy for those offenders who demonstrate the factors not included in the ASRS is at this point purely speculative because the empirical research to support this assertion has not been carried out.

[46] Dr Vess says that his intention was to bring to the Court's attention the relative strengths and limitations of the risk assessment methods and to bring greater clarity to what conclusions can properly be placed on the findings of such assessments. He says that Mr Zafirov belongs to a group that has empirically demonstrated a relatively low rate of sexual reoffending. He says that a "thorough understanding of his particular sexual offending behaviour, including the personal and environmental contingencies that contributing [sic] to his offending, are necessary to make an informed judgment regarding the likelihood of recurrence of this type [of] offending".

Relevance of Mr Zafirov's denial of guilt

[47] A number of submissions are made concerning the Tribunal's approach to Mr Zafirov's denial of his guilt. Counsel for Mr Zafirov refers to the Tribunal's statement that a "significant impediment to [Mr Zafirov] establishing a minimal risk of reoffending is his refusal to acknowledge his offending". He submits that Mr Zafirov was penalised for maintaining his innocence in the face of his conviction and this is contrary to his right to freedom of expression. He submits that it was wrong for the Tribunal to place such weight on Mr Zafirov's denial of his guilt. He says that this may have led the Tribunal to place less weight on the "low" assessment of Dr Dath and Mr Lipanovic. He refers to cases and literature, and Dr Vess' evidence, as to why a person will maintain their innocence and that parole cannot be declined merely because a prisoner denies guilt. He says that even if Mr Zafirov admitted guilt he might not actually qualify for any targeted intervention. In support of this submission reference is made to *R v Secretary of State for the Home Department, exp Hepworth* [1996] COD 330; 1996 WL 1092050 (QBD) (citing *R v*

Secretary of State for the Home Department, exp Zulfikar [1996] COD 256; Times, July 26, 1995) where it is said that in the majority of cases denial of guilt is unlikely to be more than one of many factors to which undue weight should not be given. He further submits that the Tribunal used subjective criteria to override the risk ratings of the psychologists.

[48] Counsel for the Minister submits that Mr Zafirov was given the opportunity to be heard on the issue of reoffending and his denial of guilt. Counsel for the Minister submits that there was evidence before the Tribunal about the relevance to the reoffending risk when an offender admits guilt and limited evidence as to the contrary position. He submits that the literature Dr Vess refers to on sexual recidivism was not before the Tribunal and "it is simply impossible for the [Tribunal] to make an error of law by not relying on something that was not before it". He says that denial of guilt is a relevant factor, but it was not the only factor the Tribunal took into account. He refers to the Judge's view when sentencing Mr Zafirov, that Mr Zafirov had fabricated a document for the trial, as making it shaky to accept Dr Dath and Mr Lipanovic's view about Mr Zafirov's integrity.

[49] The submission that Mr Zafirov's right to freedom of expression is engaged is not accepted. There was no infringement of that right – Mr Zafirov remained free to say what he liked. The right is not infringed merely because the Tribunal makes an assessment of his risk of reoffending in light of what he has chosen to say.

[50] Nor did the Tribunal err in its approach to the relevance of Mr Zafirov's denial. The Tribunal referred to Mr Zafirov's denial as demonstrating a lack of insight and that view does not acknowledge any possibility that the jury got it wrong. But the Tribunal did not rely on the lack of insight in and of itself. Rather it tied this lack of insight into the point that his denial meant that he had not had the benefit of rehabilitative programmes. This was relevant because of the possibility (or probability) that the jury was correct. If the jury was correct then Mr Zafirov had committed serious offending and his risk of any further offending had not been addressed by a rehabilitative programme. That Mr Zafirov had not had the benefit of a targeted rehabilitative programme is a factor relevant to the risk of reoffending.

[51] That existing programmes are focussed on high risk offenders and so it can be counter productive for lower risk offenders to be exposed to the deviant interests and behaviour of high risk offenders does not detract from this point. The point raised by Dr Vess that treatment may be unwarranted for a low risk offender was not raised before the Tribunal but, in any event, is predicated on Mr Zafirov being a low risk offender. Whether he is properly in that category depends on the evidence, including dynamic factors, that is accepted.

[52] The Tribunal did query whether the questioning of guilt affected Dr Dath and Mr Lipanovic's assessment but in the end the material factor in the Tribunal's assessment was that in their evidence before the Parole Board the psychologists agreed that Mr Zafirov was a "moderate to low" risk. I therefore disagree that the Tribunal overrode the risk ratings given by the psychologists.

Natural justice

[53] Counsel for Mr Zafirov submits that the Tribunal did not engage with Mr Zafirov about the "medium to low" assessment yet the point was pivotal to the Tribunal's decision. He submits that in this respect there was a breach of natural justice. He further submits that in reaching its decision that any risk greater than low was unacceptable the Tribunal applied a rigid policy rather than a merits based assessment of Mr Zafirov and had predetermined the matter.

[54] Counsel for the Minister disagrees that Mr Zafirov did not have an opportunity to respond to these matters. He submits that there was no policy or predetermination. Rather, what was crucial to the Tribunal's assessment was that both experts agreed that Mr Zafirov had a moderate to low risk of reoffending.

[55] I consider that there was no breach of natural justice. Cases in this area make it clear that the risk of reoffending is relevant to the assessment of whether it is contrary to the public interest for an appellant to remain in New Zealand. The passages Mr Zafirov's counsel referred to in his written submissions show that the Tribunal specifically told Mr Zafirov, when questioning him, that the risk of

reoffending was an important factor and that the Tribunal considered Mr Zafirov's denial to be relevant to their assessment of his reoffending risk.

[56] I also consider there was no application of a rigid policy or pre-determination. The Tribunal considered the evidence in relation to Mr Zafirov's risk of reoffending and found it to be too high in light of the seriousness of the offending for which he was convicted. It was an assessment of the public interest that was specific to Mr Zafirov's circumstances.

Reason for assessment

[57] Counsel for Mr Zafirov submits that the Tribunal does not give reasons why a low risk is acceptable and a moderate to low risk is not. Counsel for the Minister refers to *Pulu v Minister of Immigration* [2008] NZAR 429 as an example where the High Court upheld a finding that a moderate to low risk of reoffending was contrary to the public interest.

[58] I do not accept Mr Zafirov's submission. Reasons were given for the assessment which is made. Those reasons were that it was the agreed evidence of the psychologists before the Parole Board that Mr Zafirov's risk was above low, and Mr Zafirov had refused to admit the offending and hence lacked insight and therefore had not had the benefit of targeted rehabilitative programmes. Reasons were also given as to why a moderate to low risk was too high a risk. Those reasons were that, in view of the serious nature of the offending, there needed to be a low or minimal risk to public safety because anything above this level was a risk the New Zealand public should not bear.

Meaning of "moderate to low" and "low"

[59] Counsel for Mr Zafirov submits that the Tribunal did not explain what a "low" risk of reoffending meant, nor what a "moderate to low" risk meant except that it was greater than low. He submits that this amounts to an "error of law and material fact". The error of law is said to be its irrationality. In support of this

submission counsel refers to the comment in *R v Peta* (at [53]) that "[t]he results of a properly conducted risk assessment must be effectively communicated to the Court" and further that labels such as high, moderate or low risk should be qualified by probability statements and the numbers of people that fall within each category.

[60] A related submission is that this error meant that the Tribunal referred to cases which are not necessarily similar – they involve different offending, the tests used to arrive at the assessments in those cases are not known and the meaning of the categories referred to are also not known. For example the Tribunal referred to *Zoraja v Minister of Immigration Deportation Review Tribunal* 13/200 18 December 2000 where the appellant had been convicted of multiple rapes and was sentenced to 10 years imprisonment. The Tribunal commented that "it is significant that the accepted evidence showed a low risk of re-offending, a risk lower than that established by the evidence concerning Mr Zafirov".

[61] Counsel for Mr Zafirov says that the rates of reoffending for those in the medium-low risk category ought to have been provided to the Tribunal. Counsel refers to Dr Vess' evidence about the rates of reoffending that apply to the categories. There is also the issue which Dr Vess discusses about the degree of inference that can be drawn about an individual based on findings about a group (ie. the point that "men in this category have a [say] 50% likelihood, but which half is he in?").

[62] Counsel for the Minister submits that this category of risk was agreed by the experts and Mr Zafirov brought no evidence to challenge it. He also refers to *Pulu* (see above at [57]).

[63] In *R v Peta* the Court of Appeal referred to the development of the ASRS for New Zealand and that this was now the measure commonly used in New Zealand for measuring static risk. The Court of Appeal also referred to the need for clear reporting of the scores and victim and individual matters. It said "[t]he factors, other than those contained in the actuarial measures, used to formulate a clinical assessment of risk and the effect they are said to have must be identified explicitly" (at [51]), "[r]isk assessments and the related judicial decision making for risk

management are best informed through an individualised formulation of risk" (at [52]) and (at [53]):

> The results of a properly conducted risk assessment must be effectively communicated to the Court … When reporting the findings of a risk assessment, comparative categorical labels such as high, moderate or low risk should be qualified by probability statements that give corresponding reoffence rates for groups of similar offenders and the numbers of offenders in each category should be specified.

[64] I accept the point made for Mr Zafirov that it is not clear what the Tribunal meant by "moderate to low" and "low". The Tribunal appears to have relied on the labels applied by the psychologists at the Parole Board. But in order to make the decision that any risk above low was too great a risk to the public, the Tribunal ought to have set out what they understood "moderate to low" risk, as described by the Parole Board, to mean and why that did not meet their view as to the level of risk which would not be contrary to the public interest. It is possible that Mr Zafirov's "medium to low" rating as assessed by the psychologists before the Parole Board was within the Tribunal's view as to what qualified as "low". Dr Vess says, for example, that Mr Zafirov was at the lower end of the moderate category in the Static-99.

[65] There are other concerns arising from the absence of clarity about the labels. It is not clear whether the Parole Board's description of the agreement of the experts to the "moderate to low" risk was because Ms Bradley viewed the risk as "moderate" and Mr Lipanovic viewed it as "low" so that together their assessment was "moderate to low". From the Parole Board's perspective "moderate to low" was sufficient to meet its test of "undue risk" and so it was apparently not necessary to decide as between the "moderate" and "low" assessments. Nor was it apparent whether the "moderate to low" category already took into account Mr Zafirov's denial of offending or any other dynamic factors which the Tribunal might have viewed as relevant – such as the support Mr Zafirov had from his family and friends. It is also not clear that the comparisons the Tribunal made with other cases were comparing "apples with apples" (as Mr Bott put it).

[66] For these reasons I consider that the Tribunal may have misapplied the test of what was contrary to the public interest to the established facts and its reasons do not show that no such error occurred. I consider that the Tribunal erred in this respect.

Reliance on Static-99

[67] Counsel for Mr Zafirov submits that the Tribunal erred in accepting the evidence before the Parole Board which was based on the Static-99 test. He says that this test is no longer used as the standard test by the Department of Corrections and it is incontrovertible that on the test now used by the Department of Corrections Mr Zafirov is a "low" risk of reoffending. In support of his submission counsel for Mr Zafirov refers to the comment in *R v Peta* at [22] that actuarial measures should be validated on the population to which they are applied (which the ASRS test is but the Static-99 is not). He also refers to other cases in Australia and New Zealand discussing the limitations of the Static-99 test. He refers to Dr Vess' evidence as to the superiority of the ASRS over the Static-99.

[68] Counsel for Mr Zafirov submits that it is not surprising that counsel and the Tribunal were not aware of the ASRS test and *R v Peta*. He refers to Dr Vess' evidence that the ASRS test replaced the Static-99 as the preferred test for the Department of Corrections during 2005 and that according to Dr Vess this information was not made "generally available to attorneys, the judiciary, or others who might be involved with sex offender cases". He says that the Department of Corrections did not communicate this to counsel for the Minister, counsel for Mr Zafirov or the Tribunal. He says that Dr Vess' evidence gives reason to doubt the risk level which the Tribunal relied on. He submits that a formal assessment of dynamic factors should be carried out.

[69] Counsel for Mr Zafirov submits that the Tribunal's decision was unreasonable because its assessment was based on a test "neither normed or validated for New Zealand conditions". He further says that this resulted in unfairness on which the Court can intervene as an "error of law". He refers to Kirby J's judgment in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 that perverse findings on primary facts amount to an error of law. (However I

note that the majority in that case had a different view.) He refers to other cases, but the one of most relevance is *E v Home Secretary* [2004] EWCA Civ 49.

[70] For the Minister it is submitted that there was no error of law by the Tribunal relying on the results of the Static-99 test as assessed by Ms Bradley. Counsel for the Minister says that Ms Bradley's report was produced in evidence before the Tribunal and no other report was produced in evidence. (By this I understand counsel to be referring to the Static-99 test being the only test result produced, rather than whether any other psychologist report was produced because the Tribunal decision refers to all the reports before the Parole Board having been produced.)

[71] Counsel for the Minister says that at the time of Ms Bradley's report the ASRS was not in existence and so she cannot be criticised for not using it. He points to the opportunity Mr Zafirov's counsel had to present evidence about the ASRS at the Tribunal hearing and also before the Tribunal decision was delivered (the first peer review article about the ASRS was published four months before the hearing and the Court of Appeal's decision in *R v Peta* was released two weeks before the hearing) He submits that the Tribunal had no notice of anything to indicate a reoffending risk assessment tool superior to the Static-99.

[72] Counsel for the Minister submits that "unreasonableness" is the only possible error of law in issue here but that it was reasonable for the Tribunal to rely on the evidence presented to it. He submits that this is not a case involving fundamental human rights such as the right to be free from persecution, and that other cases of the kind in the present case have applied the usual "*Wednesbury*" test to what constitutes unreasonableness in this context. He says that the ASRS cannot be considered a mandatory relevant consideration and the Tribunal was not required to obtain more information.

[73] Counsel for the Minister submits that even if the ASRS were to be considered the Tribunal made no error. The ASRS omits relevant variables which means the test result shows a lower risk of reoffending when applied to persons who have those risk factors that are omitted from the test. He submits that because Static-99 captures those relevant factors it was reasonable for the Tribunal to rely on it. The

Tribunal's conclusion on Mr Zafirov's risk of reoffending was therefore not one without any supporting evidence or one on evidence that could not reasonably support it.

[74] Counsel for the Minister also refers to the limitations of the ASRS test, that Dr Vess did not examine Mr Zafirov and that he did not carry out any formal dynamic assessment. It is said that it is therefore not inevitable that Mr Zafirov has, as a matter of fact, a low risk of reoffending. He submits there is now a conflict of evidence (though not on the evidence that was before the Tribunal) but that this conflict does not show that the Tribunal acted irrationally.

[75] On the evidence before me the ASRS has replaced the Static-99 test as the preferred test for the Department of Corrections. That had occurred by the time of the Tribunal hearing. If Mr Zafirov had been assessed for parole, by a psychologist appointed by the Department of Corrections, shortly before the Tribunal hearing then the ASRS test would have been used and Mr Zafirov would have been assessed as having a "low" risk under that test. The Tribunal was not informed as to any of these matters. It instead proceeded on agreed evidence before the Parole Board that Mr Zafirov's risk was "moderate to low" based on the replaced test.

[76] The critical issue on this aspect of the case is whether evidence of fact that was not before the decision maker can be relevant to an appeal confined to questions of law. This was also the issue that was before the Court in *E v Home Secretary*. That case concerned two foreign nationals who arrived in the United Kingdom and applied for asylum. Their claims were refused and that decision was upheld by adjudicators and then by the Immigration Appeal Tribunal. After these decisions new evidence became available but their appeal rights from the Immigration Appeal Tribunal were limited to a point of law.

[77] The Court asked (at [44]) "[c]an a decision reached on an incorrect basis of fact be challenged on an appeal limited to points of law?" It said that this "apparently paradoxical question has a long history in academic discussion, but has never received a decisive answer from the courts" (at [44]). The Court considered (at [38] and [44] to [57]) the judicial review cases where errors of fact have been a

ground of review as well as academic commentary on the topic. It discussed the debate about whether mistake of fact was a separate ground of review or was merely an aspect of the traditional grounds. It doubted that the traditional grounds provided an adequate explanation in all cases. It discussed (at [40] to [43]) whether the grounds on which a Court can intervene differ depending on whether the case comes before it as an application for judicial review or an appeal on a point of law. It concluded that it did not. It said that the main dividing line was between appeals on both fact and law, and those confined to law. It said (at [42]) that the latter "are treated as encompassing the traditional judicial review grounds of excess of power, irrationality, and procedural irregularity".

[78] Returning to the question of whether an incorrect basis of fact could be challenged on an appeal or point of law it said (at [66]):

> In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the Criminal Injuries Compensation Board case. First, there must have been a mistake as to an existing fact <u>including a mistake as to the availability of evidence on a particular matter</u>. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning. (emphasis added)

[79] In New Zealand the circumstances in which an error of fact can constitute an "error of law" are discussed in: *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 although not as to whether uncontentious and material facts which ought to have been before a decision maker but which were not could constitute an error of law. In a number of cases considering appeals on questions of law the Courts have referred to at least some of the traditional judicial review grounds (see, for example, *Davidson v Palmerston North City Council* HC PMN CIV-2006-085-1462 30 May 2008; *Civil Aviation Authority v Heli Logging Ltd & Ors* HC NWP CRI-2005-043-002361 19 September 2006; *Fowlie v Accident Rehabilitation and Compensation Insurance Corporation* HC WN AP50/100 4 October 2000; *Rodney District Council v Gould* [2006] NZRMA 21; and *New Zealand Suncern Construction Ltd v Auckland*

City Council [1997] NZRMA 419). There have also been cases discussing the availability of review where it is not suggested that the decision making body erred but where something else occurred to give rise to a miscarriage of justice (see, for example, *Surinder v Minister of Immigration* HC AK M 1095/96 4 September 1996, and *Amosa v The Secretary of Justice & Ors* HC WN CP 317/94 22 December 1997). I have not been referred to any New Zealand case discussing whether uncontentious and material facts which were not before the decision making body could constitute an error of law nor, more generally, whether an appeal on a question of law covers all the grounds that would be available on a judicial review.

[80] I consider that the approach taken in *E v Secretary of State* is available in this context. A mistake as to the facts (including the availability of evidence) may give rise to a miscarriage of justice. A reviewing Court must be alert to a miscarriage of justice in an area where a person's right to continue to live in the place they have made their home is to be removed. This is not to intrude upon the Tribunal's function, as entrusted to it by Parliament, to decide the facts. On an appeal on a question of law the Court cannot substitute its view of the facts for the Tribunal's view merely because it disagrees with the Tribunal's view. The four criteria referred to in the passage quoted above (at [78]) provide a useful guide to determining whether something has gone wrong in the decision making approach to the facts as distinct from a challenge to the particular findings on disputed or contentious facts the Tribunal has made.

[81] Considered on this basis the failure to consider the ASRS score meets the four criteria in *E v Secretary of State* and gave rise to unfairness before the Tribunal. There was a mistake as to the availability of evidence (the Tribunal and the parties were not aware of Mr Zafirov's ASRS score and that this was now the preferred assessment tool in New Zealand); this evidence is uncontentious and objectively verifiable (there is no issue about Mr Zafirov's scoring on that test nor that it had become the Department's preferred tool); Mr Zafirov was not responsible for the mistake (here I accept that by the time of the Tribunal hearing it was not widely known that the ASRS test had replaced the Static-99 test); and the mistake played a material part in the Tribunal's reasoning (the Tribunal relied on the agreed evidence before the Parole Board that Mr Zafirov was a "moderate to low" risk and because

that put him above "low" it found that it would be contrary to the public interest if Mr Zafirov were to remain in New Zealand).

[82] The issue can also be considered on more traditional judicial review grounds which counsel for the Minister accepts can give rise to a question of law. In this case the Tribunal had to determine whether it would be contrary to the public interest if Mr Zafirov were to remain in New Zealand. The Tribunal correctly identified the risk of reoffending as of particular importance to that test. On traditional judicial review terms the risk of reoffending was a mandatory relevant consideration (being, in terms of *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 at [184], something which is "so significant that by law it had to be taken into account"). In considering this question the Tribunal based its assessment of that issue on the evidence of risk before the Parole Board which in turn was based on the Static-99. However if the Static-99 assessment was to be considered it was materially relevant (ie. so relevant that it must be taken into account) that the Tribunal know that after the Parole Board's consideration, the Department of Corrections had replaced that test with the ASRS test (as being a better test in New Zealand) and that on this test Mr Zafirov was in the "low" risk category. In this way it can be said that there was a failure to consider a mandatory relevant consideration (the risk of re-offending as determined by the ASRS score). It can also be said to be an "unreasonable" decision because it was based on a mistaken view of the facts (ie. that the Static-99 was the best available tool to assess risk in New Zealand when in fact the Department of Corrections had replaced this with the ASRS test and under this test Mr Zafirov was a "low" risk).

[83] On the basis of Dr Vess' evidence Mr Zafirov falls into the low risk category under the ASRS test. Taking into account his age, this meant that he was in a group which had a 2% risk of re-offending. This may have been altered upwards if dynamic factors were formally assessed, but it is also conceivable on the available material, as Dr Vess says, that it would not have. If these facts had been before the Tribunal it is not clear that it would have viewed Mr Zafirov's risk as at a level as to be contrary to the public interest if Mr Zafirov were allowed to remain in New Zealand.

Overall

[84] I consider that the Tribunal erred on a question of law because it is not apparent that the evidence before the Parole Board, which it accepted, was evidence of a risk at a level that would be contrary to the public interest. I consider that the Tribunal also erred on a question of law because it proceeded on a mistaken view of the facts. This gave rise to unfairness in the hearing before the Tribunal and/or it meant that the Tribunal failed to take into account a mandatory relevant consideration or its decision was unreasonable.

Result

[85] The appeal is allowed. The matter is referred back to the Tribunal for a rehearing on the question of whether it would be contrary to the public interest for Mr Zafirov to remain in New Zealand.

Mallon J

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