RESIDENCE REVIEW BOARD
NEW ZEALAND

AT WELLINGTON	**RESIDENCE APPEAL NO: 15992**
Before:	V J Vervoort (Member)
Representative for the Appellant:	Simon Laurent
Date of Decision:	23 December 2008
Category:	Family (Parent)
Decision Outcome:	Section 18D(1)(e)

DECISION

INTRODUCTION

[1] The appellant is a married woman, aged 72. Her husband is included in the application and he is aged 71. They are both British citizens.

[2] This is an appeal against the decision of Immigration New Zealand (INZ) declining the application because the appellant was found not to be of an acceptable standard of health and was not granted a medical waiver. The principal issue for the Board is whether the medical waiver assessment was correct as to factual matters concerning the cost of medication and procedurally fair as to matters of process.

BACKGROUND

[3] The appellant made her application in the United Kingdom on 20 April 2007. The application is sponsored by the appellant's only child, a daughter, who obtained New Zealand permanent residence in September 2001 and is now a New Zealand citizen.

[4] When the appellant tendered her application she was unrepresented.

Health

[5] The appellant's medical certificate completed in February 2007 disclosed she had had bilateral knee and hip replacements, a hysterectomy, had an early cataract problem, suffered from hypertension and the skin disease vitiligo. Accompanying her medical certificate was a letter dated 13 November 2006 from a Consultant Rheumatologist ("the Rheumatologist") who stated the appellant was in the care of the Rheumatology Department of a London hospital for the treatment of rheumatoid arthritis.

INZ Processing of the Application

First Referral to the Medical Assessor

[6] INZ referred the appellant's medical and x-ray certificates to the Medical Assessor in May 2007. The Medical Assessor responded on 12 May 2007 and stated that further information was required to assess her medical conditions. Specialist reports were required and the Medical Assessor stated *(verbatim):*

> "SHE HAS ARTHRITIS & IS ON IMMUNOSUPPRESSIVE TREATMENT SO IS APPX 10. WOULD NEED A VERY GOOD REPORT FROM RHEUMATOLOGIST WHICH WOULD CONFIRM NO NEED FOR FURTHER JOINT SURGERY & GOOD OUTLOOK
> - ? OK OFF TREATMENT.
>
> REPORT ALSO RE CATARACTS
> ? NEED FOR SURGERY
>
> BP NOT CONTROLLED SO NEEDS FURTHER CONSULTANT ASSESSMENT -
> CURRENT STATE
> RISK FACTORS
> END ORGAN DAMAGE
> PROGNOSIS"

[7] INZ wrote to the appellant on 23 May 2007, advising her of the Medical Assessor's opinion. She was asked to respond with the required information.

[8] The appellant responded in a letter dated 30 August 2007 with a report from the Rheumatologist which stated *(verbatim):*

> "With your condition, Rheumatoid Arthritis, it is likely that you will need immuno-suppressing treatment for the foreseeable future. The dose and the type of treatment may change, but without this treatment the disease is not controllable.
>
> In terms of joint surgery, that is not something that I can currently predict, but I would hope that on your treatment there would not be a need for surgery in the future. This is not something, however, that I can guarantee."

[9] The appellant also provided evidence of an appointment at an out-patients' clinic as a post-operative follow-up after a right cataract operation in May 2007. The appellant advised she was on a waiting list for left cataract surgery.

[10] In addition she provided details from her general practitioner as to the medication she was prescribed for her hypertension and her blood pressure readings in June, July and August 2007.

Second Referral to the Medical Assessor

[11] On 3 September 2007, INZ referred the further information from the appellant to the Medical Assessor. The Medical Assessor responded on 12 September 2007 and stated that he or she had an adverse opinion regarding the appellant's medical conditions. Section 5.2 of the medical referral form for residence was completed and it stated:

> "● There is a **relatively high probability** that the applicant's acute medical condition(s) will require health services in New Zealand costing more than $25,000 within the next 4 year period or the applicant's chronic recurring condition(s) will require health services in New Zealand costing more than $25,000 over the predicted course of the condition.
>
> ● There is a **relatively high probability** that the applicant's medical condition(s) will require health service(s) in New Zealand for which the current demand in New Zealand in *(sic)* not being met."

[12] In addition, the Medical Assessor stated "RA ON IMMUNOSUPPRESSIVE THERAPY APPX 10".

First INZ Letter

[13] By letter dated 18 September 2007, INZ stated the Medical Assessor had advised the appellant did not meet the acceptable standard of health for entry to New Zealand. It referred to the matters outlined above and stated that the Medical Assessor had noted: "The applicant is on immunosuppressive therapy (Appendix 10)". She was advised it was unlikely that the application would be approved.

[14] The appellant was advised she could comment if she wished or send additional information to further support her application. She was told the Medical Assessor would consider any additional medical information such as another medical opinion or an opinion from a suitably qualified professional. If there was no dispute as to the Medical Assessor's opinion then INZ would consider her for a waiver of the requirement to have an acceptable standard of health.

[15] INZ set out the factors it would take into account for a medical waiver and provided the appellant with relevant extracts from the INZ Operational Manual.

[16] The appellant was asked to respond with information by 18 October 2007.

Response from the Appellant's Daughter

[17] In an email dated 3 October 2007 the appellant's daughter raised a number of issues for clarification with INZ.

[18] First, she asked INZ whether the principal basis for their assertion that it was unlikely that her parents' application would be approved was that her mother's cost of treatment for autoimmune disease was likely to impose significant costs on New Zealand's health services. She stated that her mother's medication which included Infliximab infusion treatment was not subsidised by the New Zealand health service and the appellant would have to pay for it herself, as would any other New Zealand resident. Therefore, she would place no extra burden on health services because of the cost of the medication, despite the primary responsibility of her health care notionally falling on New Zealand's health services if she were a New Zealand permanent resident. The daughter referred to past decisions of the Residence Review Board regarding the cost of Infliximab and in particular referred to *Residence Appeal No 14728* dated 30 September 2005. She cited paragraph [27] of that decision which addressed the fact that at that time Infliximab was not subsidised in New Zealand.

[19] Second, the daughter asked, in light of that decision on what other basis INZ thought other costs were likely to arise within the next four years in respect of her mother's health care. In particular, as the appellant had recently had both knees and hips replaced, had had one cataract removed and was on a waiting list to have another one done, she was unlikely to be a great burden to the healthcare services here in the next four years, if indeed she lived that long. The daughter stated that most if not all of the serious deleterious effects of the appellant's rheumatoid arthritis had already occurred and had been addressed in the United Kingdom. Further, as the appellant would be living with her, it was unlikely that there would be a significant drain on community health services or specific disability support services in New Zealand.

[20] Moreover the appellant and her husband would be bringing capital of some NZD800,000 to NZD1 million together with having a combined pension income of $4,000 per month.

Exchange of Emails between INZ and the Daughter

[21] INZ responded by email on 4 October 2007. The daughter was invited to submit further information as to the cost of her mother's treatment if she believed the statements made by the Medical Assessor did not reflect her mother's circumstances. She was advised that if further medical information was provided it would be sent to the Medical Assessor, but the Medical Assessor could not consider humanitarian issues.

[22] The daughter responded by email dated 6 October 2007. She said that before she could fairly comment on the Medical Assessor's assertions, there was a lot of underlying detail that she would need to know about the process by which the Medical Assessor came to the conclusions reached.

[23] INZ was asked to provide her with all the factors taken into consideration by the Medical Assessor and the relative weighting attached to each before reaching the conclusion made that all the relevant costs were likely to exceed the $25,000 limit.

[24] INZ responded by email on 12 October 2007. The relevant INZ officer advised she had spoken to her manager regarding the daughter's queries and said she could not provide an explanation of the Medical Assessor's opinion on her mother's standard of health in the context of the mathematical probabilities raised by the daughter.

[25] It was explained that the referral to the Medical Assessor was a process, which had to be followed, and it was an applicant's responsibility to provide as much information as possible so the Medical Assessor could make as accurate a "conclusion as possible". She explained that once the Medical Assessor reached a definitive recommendation based on the medical information provided, INZ in turn communicated that to the applicant and it was up to the applicant to respond appropriately. It was reiterated that the appellant was welcome to provide further medical professional opinion and that information would be forwarded to the Medical Assessor for consideration.

[26] The daughter was referred to the policy at A4.10.c which stated that conditions listed in Appendix 10 of policy were considered to impose significant costs and/or demands on New Zealand health services. The Medical Assessor's recommendation on the appellant's standard of health was based on the fact that the appellant had a condition listed in Appendix 10 and therefore it was not only

the professional opinion of the Medical Assessor, but also a matter that was addressed directly in policy.

[27] The daughter responded by email dated 12 October 2007. She stated the main problem seemed to be that severe autoimmune conditions in general had been "deemed" to impose significant costs, at least according to policy. Therefore, the appellant's individual situation and specific circumstances seemed not to have been considered even though she would not, after all, impose significant costs on New Zealand's health service because her drug regime was not subsidised in New Zealand. And, she would apparently not need further expensive hospitalisation and costly surgery as much of the surgery had been done in the United Kingdom. Despite all of that, the daughter stated that it appeared the appellant was likely to:

> "... fall foul of a generalised assumption that anyone with any severe autoimmune disease (whatever it is) would probably impose significant costs (even if the likely costly effects of the disease have already been fixed!) and that the policy effectively pre-judges her likely medical costs without having regard to her actual specific circumstances."

[28] INZ responded by email on 15 October 2007, acknowledged the daughter's efforts but stated any other arguments could be addressed to the Medical Assessor as part of the response to the adverse opinion given. The daughter was asked to provide evidence of the costs of her mother's treatment and to put a case together to prove her points, rather than sending emails to INZ.

Further Medical Information

[29] The appellant provided INZ with a letter from the Rheumatologist, dated 22 October 2007. The Rheumatologist stated the best treatment for the appellant to keep her arthritis under control was Infliximab and Methotrexate which the appellant took at a dose of 15 mgs per week by mouth. It was stated the appellant came to the hospital to have her Infliximab infusions at roughly two-monthly intervals. Over the years this had proved to be the best treatment for the appellant as it did not interact with any of her other medications.

Further Information from the Appellant's Daughter

[30] In an email dated 7 November 2007, the daughter referred to specialist medical reports being provided to INZ in respect of both her parents. In relation to her mother, she referred to the Rheumatologist's report of 22 October 2007. She drew attention to the Rheumatologist's recommendation that her mother remain on unsubsidised medication as that was the best and most easily tolerated treatment

for her. Even though that medication was expensive, no cost would currently fall on the New Zealand health service, as the appellant would have to bear the cost herself. It was unlikely she would be able to find a suitable subsidised alternative when in New Zealand. The daughter also noted the Rheumatologist's advice that with the appellant's current medication regime it was unlikely she would require further surgery.

[31] Accordingly, the daughter stated, it seemed that the Medical Assessor's opinion was at odds with the evidence from the Rheumatologist and the conclusion that the appellant was likely to be an unacceptable burden on New Zealand's health service did not seem to be supported by the available facts.

Third Referral to the Medical Assessor

[32] INZ referred the appellant's medical certificate and the second report from the Rheumatologist to the Medical Assessor on 13 November 2007. The Medical Assessor responded on 15 November 2007 and stated that he or she had an adverse opinion regarding the appellant's medical conditions. The Medical Assessor stated *(verbatim):*

> "AS BEFORE APPX 10"

Second INZ Letter

[33] In a letter dated 27 November 2007 the appellant was advised by INZ that the Medical Assessor had determined she was not of an acceptable standard of health for entry to New Zealand on the basis that she was likely to impose significant costs or demands on New Zealand's health services. Extracts of all the policy previously cited were cited again. The appellant was again advised that she could make comments or send additional information to further support her application. This included further medical information and/or information to support her case for a medical waiver.

Response from the Appellant's Daughter

[34] The daughter responded by email dated 1 January 2008; she requested that her mother be considered for a medical waiver. She set out a response to each of the factors set out in policy at A4.70 and in particular in response to A4.70.c.ii – the degree to which the appellant would impose significant costs and/or demands on New Zealand's health or education services.

[35] A detailed analysis of the costs of the appellant's drug treatment was set out. In particular, it addressed the cost of Infliximab drug treatment on an annual basis. The daughter reiterated that as the treatment was not subsidised in New Zealand, that meant that the appellant would be paying the significant cost of approximately NZD12,050 per annum. The appellant would be well able to meet the cost from the financial resources she would bring to New Zealand. Accordingly, the daughter stated there was very little likelihood of the cost of the appellant's drug regime falling on the New Zealand health service. Therefore, there seemed in turn to be very little justification for the view that the appellant would actually be likely to impose significant costs on New Zealand health services.

Referral to a Second Medical Assessor

[36] INZ acknowledged receipt of the information provided by the daughter as to medical waiver and advised that it would now refer the appellant's medical certificate to a second Medical Assessor for a second opinion, as required by policy. INZ advised that a medical waiver assessment would be undertaken after the response from the second Medical Assessor had been received.

Request for Information as to Progress

[37] On 6 February 2008 INZ received an email from the appellant's daughter requesting an update as to the decision reached by the second Medical Assessor and whether a medical waiver had been granted to her mother. INZ responded by email also on 6 February 2008 and advised that the second Medical Assessor had confirmed that the appellant was not of an acceptable standard of health and that she would require a medical waiver. The appellant would be given a further formal opportunity to submit any information to be considered in respect of a medical waiver.

[38] In February 2008 the appellant's daughter was advised that there had been another change in INZ officer and pending further information in relation to the appellant's husband, INZ would be in touch in due course as to matters in respect of the appellant's request for a medical waiver. By email dated 5 May 2008 the appellant's daughter sought an update from INZ as to the current status of her parents' application. She had been advised earlier of the allocation of a new case officer to her parents' application.

[39] By email dated 15 May 2008, the appellant's daughter was advised that INZ now considered her father was of an acceptable standard of health. In respect of the appellant, INZ advised it was continuing with the medical waiver process and the appellant would be sent a formal letter dated 16 May 2008, in which she would be provided with a further and final opportunity to provide information to support a medical waiver "for my manager's assessment".

Third INZ Letter

[40] By letter dated 16 May 2008 the appellant was advised that the second Medical Assessor had provided a second opinion and had confirmed the original Medical Assessor's opinion that she was likely to impose significant costs or demands on New Zealand's health services. The second Medical Assessor had noted *(verbatim):*

> "Appendix 10 condition – severe autoimmune disease (rheumatoid arthritis) requiring immunosuppressive therapy".

[41] The appellant was advised INZ would now look at a request to waive the medical requirements of policy. The medical waiver policy at A4.60 and A4.70 was set out.

Further Information for the Medical Waiver

[42] The appellant's daughter contacted INZ by email on 2 June 2008. She referred to the previously submitted information.

[43] In summary, the daughter's case was that INZ was required to fully consider where the supposed likely cost of her mother's treatment would actually fall and given that the medication used by the appellant was not subsidised in New Zealand, then that cost would fall on her. Further, as the appellant had already undergone numerous joint replacements there seemed to be little left in the way of major surgery or hospitalisation which would fall on the New Zealand health service.

[44] The relevant INZ case officer advised on 4 June 2008 that a medical waiver had been drawn up and it had been handed to a manager for assessment.

INZ Requests Information about the Cost of Drug Treatment in New Zealand

[45] The INZ Manager ("the Manager") considering the issue of a medical waiver for the appellant requested information from a Health Analyst at the Department of

Labour in New Zealand on 6 June 2008 as to whether Infliximab treatment would be available in New Zealand through the public health system.

[46] The Health Analyst responded also by email on 6 June 2008 and advised that Infliximab was listed on the Pharmac Hospital Pharmaceutical Schedule but that the Analyst could not exactly discern what this meant. The Analyst had sought further advice from Pharmac and would advise in due course.

[47] On the INZ file is a letter dated 18 June 2008 from the Chief Executive of Pharmac which advised that Infliximab was listed in the Hospitals Section of the Pharmaceutical Schedule, which meant that it could be used to treat rheumatoid arthritis if the local District Health Board paid for it. The Chief Executive understood that some District Health Boards did fund the treatment but that needed to be discussed with the relevant District Health Board. The drug was not listed in Section B as it was an infusion that had to be administered in a hospital setting. A further drug, with the brand name Humira, was a similar treatment which was subsidised under certain conditions to treat rheumatoid arthritis. It was stated that "the lady in question" may be eligible for that medicine but it required a Special Authority.

Medical Waiver Decision – 14 July 2008

[48] The Manager who determined the medical waiver set out the consideration of the appellant's circumstances. In dealing with the degree to which the appellant would impose significant costs on New Zealand's health services (A4.70.c.ii) INZ reviewed the information and evidence put forward by the appellant's daughter. It was stated that the "big question" was whether the medication needed by the appellant would be publicly funded or not as it was clear she would need medication for the foreseeable future. The Pharmac response of 18 June 2008 was quoted. Then it was stated that *(verbatim):*

> "Through no fault of [the appellant's daughter], as updated information is very hard to find on the internet, it would seem that she is working on out of date information. In fact, the drugs her mother would need would be subsidised and therefore a substantial cost to the New Zealand public health system. Furthermore, the infliximab would need to be administered in a hospital, thus increasing the potential cost".

[49] In reaching the decision on the medical waiver INZ said regardless of the appellant's undertaking that she would meet her own medical costs the potential burden on the New Zealand public health care system remained should the appellant be granted residence. It was stated that there was no dispute of "the

very high likelihood" of the cost the appellant would pose on the New Zealand health care system. The appellant had a high cost condition for which she required ongoing care and extensive medication, even if she did not need any future joint surgery. Even though the appellant's daughter believed the drugs were not subsidised, the most recent information from Pharmac showed that they were. The ongoing cost of the medication and the hospital services required to administer it was very high and would exceed the cost threshold.

The Appellant's Daughter Requests an Update as to Progress

[50] In an email dated 30 July the daughter requested an update as to the progress being made with INZ's attempt to obtain up-to-date information regarding the availability of Infliximab and other drugs in New Zealand.

[51] The Manager responded immediately and stated that the onshore medical analysts had provided her with useful information. She had gone through all the information provided by the daughter but also had to take into consideration that the appellant had a "wide range of health issues" and was dependent on ongoing medication and aggressive monitoring to keep her health stable. As a New Zealand resident, the appellant would be eligible not just for the subsidised drug Infliximab, but also the full range of subsidies available for other medications and as such she would be placing a strain on health resources.

[52] The Manager stated that she was sorry that a medical waiver could not be approved, but when all the factors were considered she had found that the high cost of the appellant's conditions and ongoing treatment outweighed all the other factors in the application. The application was to be declined and the appellant would be advised of that in the coming week.

[53] The appellant's daughter responded in a detailed email dated 1 August 2008. First, she questioned INZ's analysis that her mother suffered from a "wide range of health issues". She pointed out that this was a matter that had not been alluded to previously and nor had the appellant been given an opportunity to comment on them.

[54] As to the INZ statement that the appellant needed ongoing medication and aggressive monitoring to keep her health stable, the daughter asked for quantification of what was being suggested and what constituted "aggressive monitoring". The daughter asked for an explanation of the statement that the appellant would be eligible "not just for subsidised Infliximab" but a full range of

other subsidised medications. She stated that she had checked with the local District Health Board, which is where the appellant would be treated, and it had confirmed that Infliximab remained unsubsidised throughout New Zealand. Therefore, the daughter questioned whether the INZ statement that Infliximab was subsidised in New Zealand was correct.

[55] Then the daughter asked on what basis was it likely that the appellant would qualify for alternative drugs to Infliximab.

[56] On the issue of the claimed strain the appellant would place on health resources – inpatient and outpatient treatment – the daughter asked what specific local resources were affected and what was the current supply of those local resources, such as rheumatology funding or the availability of a nurse to administer the occasional dose of Infliximab.

[57] The Manager responded by email also dated 1 August 2008. She acknowledged the daughter's disappointment but stated she did not intend to relitigate the decision which had been made after a great deal of thought and consultation with colleagues in New Zealand. INZ stated that it would not answer the issues raised by the daughter on a point-by-point basis. In summary, INZ said the appellant did have a range of health issues but it was only her rheumatoid arthritis and the treatment needs arising from it that were considered as part of the waiver decision. As far as medical services and the resources in New Zealand were concerned, the supply of all medical services was finite, that some diseases were more high maintenance to control than others. Rheumatoid arthritis was such a disease.

[58] The daughter was advised that once the relevant INZ case officer had completed the assessment of her parents' application and sent out the decline letter she would have the opportunity with her parents to appeal the decision. The Manager stated that she was not prepared to debate the matter any further and she asked that her decision and the opinions of the Medical Assessors be respected.

INZ Decision

[59] INZ declined the application in a letter dated 6 August 2008. The application was declined because the appellant did not meet the acceptable standard of health for residence in New Zealand. INZ gave as its further reasons that rheumatoid arthritis was considered to be an Appendix 10 condition when

treated with "antisuppressants other than prednisone", the appellant's medication would be available via the local District Health Board and so her treatment would be eligible for subsidy and incur a substantial cost to the New Zealand health care system. Finally, her circumstances and family ties to New Zealand had been taken into account, but on balance it was decided that a medical waiver could not be granted.

GROUNDS OF APPEAL

[60] Section 18C(1) of the Immigration Act 1987 ("the Act") provides:

> "Where a visa officer or immigration officer has refused to grant any application for a residence visa or a residence permit, being an application lodged on or after the date of commencement of the Immigration Amendment Act 1991, the applicant may appeal against that refusal to the Residence Review Board on the grounds that –
>
> (a) The refusal was not correct in terms of the Government residence policy applicable at the time the application for the visa or permit was made; or
>
> (b) The special circumstances of the appellant are such that an exception to that Government residence policy should be considered."

[61] The appellant appeals on both the available grounds, that is, that the refusal was not correct in terms of the Government residence policy that was applicable at the time her application for a visa was made and that her special circumstances are such that an exception to Government residence policy should be considered.

[62] The appellant is represented by counsel on appeal and counsel makes submissions dated 25 and 26 September 2008.

[63] In addition, produced to the Board were copies of emails exchanged between the appellant's daughter and INZ, as already found on the INZ file. The following were also produced:

(a) A Ministry of Health application for subsidy by special authority (form SA0812 (October 2008));

(b) A letter dated 11 September 2008 from the Marketing Manager at Schering-Plough to the daughter's partner concerning the availability of Infliximab in New Zealand. It was stated that the drug was listed on Section H of the Pharmaceutical Schedule. However, unlike Section B of that Schedule, that did not confer any form of centralised funding or reimbursement for the drug. It noted that a decision to commence a patient on Infliximab

treatment was entirely at the discretion of the local District Health Board and all costs associated with the treatment were borne from that District Health Board's budget. It was understood that only a:

> "… small number of adults with rheumatoid arthritis currently access Infliximab via this route in New Zealand".

[64] The submissions and documents on appeal are considered below.

ASSESSMENT

[65] The Board has been provided with the INZ file in relation to the appellant and has also considered the submissions and documents provided on appeal. An assessment as to whether the INZ decision to decline the appellant's application was correct in terms of the applicable Government residence policy is set out below.

[66] The application was made on 20 April 2007 and the relevant policy criteria are those in Government residence policy as at that time.

Acceptable Standard of Health

[67] Of relevance to the appellant's application is the requirement that all applicants for residence be of an acceptable standard of health. The policy at A4.10 (Acceptable standard of health (applicants for residence)) with effect 28 November 2005, provides as follows:

> "**A4.10 Acceptable standard of health (applicants for residence)**
>
> a. Applicants for residence visas and permits must have an acceptable standard of health unless they have been granted a medical waiver. An application for residence must be declined if any person included in that application is assessed as not having an acceptable standard of health and a medical waiver is not granted (see A4.60).
>
> b. Applicants for residence are considered to have an acceptable standard of health if they are:
>
> i unlikely to be a danger to public health; and
>
> ii unlikely to impose significant costs or demands on New Zealand's health services or special education services; and
>
> iii (unless the applicant is sponsored for residence by a person who holds refugee status in New Zealand) able to undertake the work on the basis of which they are applying for a visa or permit, or which is a requirement for the issue or grant of the visa or permit.

c. The conditions listed in Appendix 10 are considered to impose significant costs and/or demands on New Zealand's health and/or special education services. Where a visa or immigration officer is satisfied (as a result of advice from an Immigration New Zealand medical assessor) that an applicant has one of the listed conditions, that applicant will be assessed as not having an acceptable standard of health.

d. If a visa or immigration officer is not initially satisfied that an applicant for residence has an acceptable standard of health, they must refer the matter for assessment to an Immigration New Zealand medical assessor (or the Ministry of Education as appropriate).

Effective 28/11/2005"

[68] In assessing whether an applicant for residence is unlikely to impose significant costs on New Zealand's health services A4.10.1 (with effect 28 November 2005) provides as follows:

"**A4.10.1 Assessment of whether an applicant for residence is unlikely to impose significant costs on New Zealand's health services**

a. The requirement that an applicant for residence must be unlikely to impose significant costs on New Zealand's health services is not met if, in the opinion of an Immigration New Zealand medical assessor, there is a relatively high probability that the applicant's medical condition or group of conditions will require health services costing in excess of $25,000.

Note: Assessment will be in terms of current costs with no inflation adjustment.

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b. In the case of acute medical conditions, the medical assessor will provide an opinion on whether there is a relatively high probability that the condition or group of conditions will require health services costing in excess of NZ$25,000 within a period of four years from the date the assessment against health requirements policy is made.

c. In the case of chronic recurring medical conditions, the medical assessor will provide an opinion on whether, over the predicted course of the condition or group of conditions, there is a relatively high probability that the condition or group of conditions will require health services costing in excess of NZ$25,000.

Effective 28/11/2005"

[69] If INZ determines that an applicant is not of an acceptable standard of health then unless the applicant is excluded by the policy at A4.60 (Medical waivers (applicants for residence)) with effect 28 November 2005, an applicant will be considered for a medical waiver in terms of the policy set out below:

"**A4.70 Determination of whether a medical waiver should be granted (residence and temporary entry)**

a. Any decision to grant a medical waiver must be made by an officer with schedule 1 delegations (see A15.5.1).

b. When determining whether a medical waiver should be granted, visa and immigration officers must consider the circumstances of the applicant to decide whether they are compelling enough to justify allowing entry to, and/or a stay in New Zealand.

c. Factors that officers may take into account in making their decision include, but are not limited to, the following:

i the objectives of Health requirements policy (see A4.1) and the objectives of the policy or category under which the application has been made;

ii the degree to which the applicant would impose significant costs and/or demands on New Zealand's health or education services;

iii whether the applicant has immediate family lawfully and permanently* (see F4.5.1) resident in New Zealand and the circumstances and duration of that residence (unless the limitations on the grant of medical waivers set out at A4.60(c) apply);

iv whether the applicant's potential contribution to New Zealand will be significant;

v the length of intended stay (including whether a person proposes to enter New Zealand permanently or temporarily).

d. An applicant who is the partner* or dependent child* of a New Zealand citizen or resident, may generally be granted a medical waiver unless there are specific reasons for not granting such a waiver or the limitations on the grant of medical waivers to such persons set out at A4.60 (c) apply.

e. Officers should consider any advice provided by an Immigration New Zealand medical assessor on medical matters pertaining to the grant of a waiver, such as the prognosis of the applicant.

f. Officers must record decisions to approve or decline a medical waiver, and the full reasons for such a decision.

Effective 28/11/2005"

Submissions on Appeal

[70] Counsel submits that INZ's decision to decline the application was not correct in terms of the applicable Government residence policy. He cites four errors relating to the application of the policy and/or matters of process.

[71] These were:

(a) a failure to determine whether the appellant suffered from a severe autoimmune disease;

(b) an incorrect application of the policy as to the degree to which the appellant would impose significant costs and/or demands on New Zealand's health services (A4.70.c.ii);

(c) a denial of the right of reply to potentially prejudicial information – the fact that INZ had received advice from Pharmac prior to the medical waiver decision as to changes in the subsidisation of the drug Infliximab;

(d) prejudgement in the medical waiver consideration.

[72] The Board deals with each matter in turn below as they address matters central to the correctness of the INZ decision.

Severe Autoimmune Disease – Appendix 10

[73] The relevant part of Appendix 10 (as at 28 November 2005) provides as follows:

> "**Appendix 10 - Medical conditions deemed to impose significant costs and/or demands on New Zealand's health and/or education services**
>
> …
>
> ● Severe autoimmune disease, currently being treated with immuno-suppressants other than prednisone"

[74] Counsel submits the appellant was found to have "severe autoimmune disease" because she was being treated with immuno-suppressants, other than Prednisone. However, he says there was no actual determination as to whether the appellant's rheumatoid arthritis was a "severe autoimmune disease" an essential fact in determining whether Appendix 10 applied to the appellant.

[75] The Board agrees that the first Medical Assessor's conclusion that the appellant had an Appendix 10 condition was inadequate, as nothing was said about the severity of the appellant's condition.

[76] The failure to clearly determine the applicability of Appendix 10 to the appellant's condition was not redeemed by the second Medical Assessor's opinion (acting as Medical Referee), even though that opinion stated the appellant had an Appendix 10 condition "severe autoimmune disease (rheumatoid arthritis) requiring immuno-suppressive therapy". Again, there was nothing to demonstrate how that conclusion had been reached, whether as to the level of severity or otherwise. Moreover, it had been made clear to the appellant that the second Medical Assessor's opinion was final.

[77] The Medical Assessors should have stated precisely what condition the appellant had and provided full reasons for finding that her rheumatoid arthritis condition was severe. If a reasoned conclusion that the appellant had an

Appendix 10 condition had been reached, then all discussion about whether the appellant's condition imposed costs on the health services would have been unnecessary.

[78] If the appellant had an Appendix 10 condition, then as a matter of policy she would be deemed to impose significant costs on the health services and had to be assessed as not being of an acceptable standard of health.

[79] The degree to which the appellant's condition would impose significant costs and/or demands on the health services would then have an issue only in respect of the medical waiver assessment. That issue is discussed below in paragraphs [84] to [91].

[80] There was no dispute that the appellant suffered from rheumatoid arthritis or that she had had extensive joint replacement surgery in the past and that the condition could now only be controlled with an immunosuppressant other than Prednisone. However, it was evident that the daughter sought to understand precisely the basis on which the appellant was considered to cost or place demands on the health service.

[81] She had put forward evidence that her mother's medication costs for Infliximab would not be subsidised in New Zealand. Moreover, as it was not likely the appellant would require further joint replacement surgery, it was difficult for her to see how the appellant would in fact impose significant costs and demands on health services in New Zealand.

[82] INZ's responses were diplomatic, but inadequate and reflected the inadequate reasons and lack of precision in the opinions given by the Medical Assessors. INZ was required to be clear about the nature of the appellant's condition and why it was considered to impose significant costs and/or demands on the health service.

[83] In short, the basis on which it was determined the appellant was not of an acceptable standard of health was flawed.

Medical Waiver Assessment - A4.70.c.ii

[84] The daughter provided submissions in relation to the factors that INZ might take into account in its decision on whether the appellant should be granted a medical waiver.

[85] In particular, she addressed the factor at A4.70.c.ii – the degree to which the applicant would impose significant costs and/or demands on New Zealand's health services. She provided a detailed quantification of the costs of her mother's treatment on the drug Infliximab, having established that it was not subsidised in New Zealand, which in turn meant the significant cost attached to that treatment would fall directly on the appellant. This was a critical matter.

[86] INZ also sought to address the question of "significant costs" by establishing whether Infliximab remained unsubsidised in New Zealand.

[87] It received information from Pharmac that Infliximab had been placed on the Pharmaceutical Schedule for hospitals in New Zealand. This meant the drug could be used to treat rheumatoid arthritis, but only if the local District Health Board met the cost. Further, there was a similar treatment, an alternative drug with the brand name Humira, which was also subsidised under certain conditions.

[88] The Board agrees with counsel that Pharmac's statements about potential subsidisation of Infliximab were "transformed" in the mind of the Manager completing the waiver. She stated Humira was fully subsidised and that Infliximab was subsidised under certain circumstances. From this she concluded that the drugs required by the appellant were subsidised in New Zealand and therefore she would be a substantial cost to the New Zealand health system.

[89] Those conclusions were not factually correct. All that may be certainly said regarding the appellant's access to Infliximab in New Zealand is that the drug may be subsidised by a local District Health Board, if it chooses to do so. The fact that Humira may also be subsidised under certain conditions, does not mean that the appellant would be appropriately treated with Humira and even if she were, whether she would be eligible for subsidisation of that drug, was a different issue.

[90] Further, the wording of the policy at A4.70.c.ii means that INZ is obliged to set out the degree to which an applicant would impose significant costs and/or demands on New Zealand's health services. The use of the words "degree" and "would impose" in the policy means an analysis of the costs and demands involved such as drugs, other health services, and hospitalisation (if required) was necessary. It was not sufficient for INZ to make generalised statements such as the cost of medication was "high" and would "well exceed" the cost threshold.

[91] The Board acknowledges that cases such as the appellant's are challenging for INZ to assess. The medical information is complex as is the information about

medication options and the associated costs. However, as the degree to which the appellant would impose significant costs and demands on the health services was a critical element in the medical waiver assessment, and ultimately was the matter on which the waiver turned, INZ was obliged to draw correct conclusions on the information to hand.

Procedural Fairness and Prejudgement

[92] Counsel described INZ as having the duty to disclose that it had updated information from Pharmac about the possible subsidisation of Infliximab. In failing to disclose this information counsel submits INZ breached the fairness and natural justice policy and this was indicative of its prejudgement of the appellant's case for a medical waiver. However, there is no evidence to suggest the failure to disclose or reconsider arose from bias or prejudgement – more simply, it appeared that INZ was keen to bring its decision-making in the application to a close.

[93] That said, the Board agrees that INZ ought to have disclosed this information to the appellant. That information was essential to the submissions as to the degree to which the appellant's medication regime would impose significant costs on New Zealand's health services.

[94] Counsel also submits that, there is no basis in law or in policy, for INZ to treat a medical waiver decision as final, before an application has been declined. He submits the Manager considering the medical waiver was obliged to remain open to further information and submissions up to the date of the final decision on the application.

[95] He contends that the Manager's refusal to consider any further information or requests for information about the basis on which the medical waiver decision had been made was effectively a fetter on discretion and amounted to bias against the appellant.

[96] The Board does not consider that the Manager's refusal was as the result of bias. However, it was incorrect for INZ to refuse to consider any further information or to term the daughter's requests for information as a "relitigation". Her requests came directly as the result of the new information about the subsidisation of Infliximab, which had not been disclosed before the medical waiver decision had been made.

[97] To be clear, INZ had no obligation to provide the appellant with a copy of the medical waiver decision before its decision to decline the application. However, having provided a copy of that decision before declining the application, INZ was obliged to consider any new information or comment which the appellant sought to provide that was directly relevant to the factors taken into account in the decision (see policy at R5.20.1.a (Further information, with effect 15 December 2003)). The information that the applicable District Health Board did not subsidise Infliximab treatment was relevant and worthy of further exploration.

Conclusion on Correctness

[98] There can be no doubt that the appellant's overall state of health is such that she was not of an acceptable standard of health. However, whether that was because she had an Appendix 10 condition or because she came within the policy at A4.10.1, was not correctly determined. Thereafter, the medical waiver assessment was also flawed as to matters of fact concerning the access of the appellant to subsidised medication (Infliximab) in New Zealand and as a consequence the degree to which she would impose significant costs and/or demands on health services.

[99] The combination of factual and procedural errors identified mean that the decision to decline the application on the basis that the appellant was not of an acceptable standard of health and was not granted a medical waiver must be set aside.

STATUTORY DETERMINATION

[100] For the reasons given above, the Board finds that INZ has followed a flawed process in its assessment as to the reasons why the appellant was found not to be of an acceptable standard of health and whether the appellant was entitled to a medical waiver. The INZ decision is therefore incorrect.

[101] This appeal is determined pursuant to section 18D(1)(e) of the Immigration Act 1987. The Board considers the decision to refuse the visa was made on the basis of an incorrect assessment in terms of the applicable Government residence policy. The Board is not satisfied the appellant would, but for that incorrect assessment, have been entitled in terms of that policy to the immediate issue of a visa.

[102] The Board therefore cancels the decision of INZ. The appellant's application is referred back to the Secretary of Labour for a correct assessment in terms of the applicable Government residence policy, in accordance with the directions set out below.

[103] Counsel submits that the application should not be returned to the London Branch for reassessment because of the errors made by branch members in the assessment and in the medical waiver decision. He suggests the reassessment be done by INZ at Manakau, the branch closest to the appellant's daughter, the sponsor. Where the application is to be reassessed is a matter for INZ, but as the sponsor and counsel are in New Zealand it may expedite matters, if the reassessment is done at an on-shore branch.

Directions

[104] It should be noted that while these directions must be followed by INZ, they are not intended to be exhaustive.

1. A correct assessment shall be made by a case officer who has not been previously associated with the appellant's case, on the basis of the Government residence policy effective when the appellant made her application, and with no requirement of an additional filing fee.

2. INZ will give the appellant a reasonable period to provide updated medical evidence as to her rheumatoid arthritis condition, giving details of the treatment she receives and supervision and monitoring of her condition, including by any specialists. Any medical practitioners and/or specialists such as the appellant's Rheumatologist, who provide evidence for her in this respect, should also comment on whether she suffers from a severe autoimmune disease as is listed in Appendix 10.

3. When that evidence has been received, INZ shall provide it to the Medical Assessor who, in turn, is to provide a properly reasoned opinion on the appellant's condition. That opinion should include a specific finding as to whether she suffers from a condition listed in Appendix 10, giving reasons for that, in the event that the appellant's medical advisors maintain that she does not.

   In the alternative, the Medical Assessor will give full reasons for any finding made that there is a relatively high probability that the appellant's condition

will require health services in New Zealand costing more than $25,000 over the predicted course of the condition or within the next four-year period. If central to that finding is the issue of the cost of the appellant's drug treatment, then any findings so made must be based clearly on whether such drug treatment is subsidised in New Zealand and whether the appellant could reasonably be expected to be eligible for such subsidisation.

4. The appellant will be given the opportunity to respond to any prejudicial opinion from the Medical Assessor, and the appellant's submissions and further evidence are to be considered by INZ.

5. If the appellant does not dispute the Medical Assessor's opinion or otherwise provide conflicting medical evidence, INZ shall then make a decision about the appellant's standard of health. If Apppendix 10 is applicable, she will be deemed by policy not to be of an acceptable standard of health. If the policy at A4.10.1 is applicable INZ shall make a reasoned decision, taking into account all the available medical evidence including the opinion of the Medical Assessor, and it shall record its final decision on that matter.

6. If INZ concludes that the appellant is not of an acceptable standard of health, then the appellant shall be given a specific opportunity to provide information and evidence that she wishes to be considered by INZ in its determination of whether or not to grant a medical waiver.

[105] The appeal is successful in the above terms. The appellant is to understand that the reassessment of the application on the issue of her health is no guarantee as to its outcome. That is a decision for INZ after a correct assessment.

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V J Vervoort

Member
Residence Review Board