RESIDENCE REVIEW BOARD
NEW ZEALAND

AT WELLINGTON	**RESIDENCE APPEAL NO: 16366**
Before:	J Donald (Member)
Representative for the Appellant:	S Laurent
Date of Decision:	25 February 2010
Category:	Family (Partnership)
Decision Outcome:	Section 18D(1)(f)

DECISION

INTRODUCTION

[1] The appellant is a citizen of Somalia, aged 23 years. The application for residence includes her son, aged 1 year and 4 months. The appellant and her son currently reside in Ethiopia and have never travelled to New Zealand.

[2] This is an appeal against the decision of Immigration New Zealand (INZ) declining the application because the appellant had not been declared in the residence application made by her spouse ("the sponsor") and is therefore caught by the provisions of policy at paragraph F2.5.e. The principal issue for the Board is whether the appellant has special circumstances such that warrant a recommendation to the Minister of Immigration for consideration of an exception to policy.

BACKGROUND

[3] The appellant tendered her application for residence for consideration under the Family (Partnership) category on 6 March 2006. Her application was sponsored by the spouse, a New Zealand citizen.

The Sponsor's Immigration History

[4] The sponsor was first granted residence in New Zealand on 20 July 2004 under the Refugee Quota programme. He was included as a dependent child in his mother's application.

[5] The sponsor's mother was interviewed in Addis Ababa on 21 August 2003 by a Refugee Status Branch officer. The report of that interview dated 12 September 2003 records that none of her children are married. The sponsor's mother was subsequently interviewed by an INZ officer on 24 October 2003. No questions regarding the marital status of her children are found in the record of that interview.

[6] The sponsor married the appellant in Somalia on 23 January 2004. As a result of his marriage, the appellant was no longer eligible to be included in his mother's residence application as a dependent child because policy provided that dependent children must be single.

[7] The sponsor was granted a residence visa to travel to New Zealand on 29 April 2004. He arrived in New Zealand on 20 July 2004.

[8] There is no record on the INZ file of an interview with the sponsor. However, in his affidavit in support of this appeal, the sponsor advises that he was asked at an interview in Addis Ababa whether he was married and answered that he was not, because at that time he was not yet married.

INZ Processing of the Appellant's Residence Application

[9] On 29 August 2007, INZ wrote to the appellant stating that it had completed a first assessment of her application and required further information, specifically evidence of how she and the sponsor maintained their relationship while they were separated, such as letters, telephone accounts, funds transfers or emails, and a police clearance certificate from Ethiopia. INZ requested that this information be provided by 29 September 2007. This deadline was subsequently extended to 29 October 2007.

[10] INZ records indicate that on 29 October 2007, it received a receipt showing 12 money transfers to the appellant from March 2006 to September 2007, six untranslated emails purportedly between the appellant and the sponsor, an original marriage certificate, five receipts showing money transfers received by the

appellant, five photographs of the couple together, one untranslated letter with envelope from the appellant to the sponsor, and an Ethiopian police certificate.

[11] INZ wrote to the appellant on 29 October 2007 drawing to her attention the fact that the sponsor did not declare that he had married her during the course of his residence application. INZ requested an explanation as to why the sponsor did not declare his marriage. The appellant was given until 29 November 2007 to comment.

[12] On 30 November 2007, INZ received a facsimile from the sponsor stating that he did not declare his marriage at the time because he was not aware that he was required to advise INZ of any change in his circumstances.

[13] The sponsor travelled to Ethiopia to visit the appellant on 5 October 2007 and returned to New Zealand on 25 December 2007.

[14] On 25 January 2008, INZ wrote to the appellant indicating that it wished to interview her and her sponsor. The letter indicated that INZ would be conducting interviews in Ethiopia in March 2008 and asked the appellant whether she would be willing to be interviewed.

[15] On 22 February 2008, the sponsor replied indicating that he and his wife were happy to be interviewed in March 2008. He also, by telephone, said that he had visited his wife in Ethiopia from 5 October 2007 to 25 December 2007. After his return to New Zealand, his wife had advised him on the telephone that they were expecting a baby.

[16] INZ records indicate that the planned interviews were postponed by INZ, subsequently placed on hold, and never eventuated.

[17] The appellant's son was born on 15 September 2008, in Addis Ababa, Ethiopia.

[18] On 4 November 2008 the sponsor provided a completed dependent child form and a medical certificate along with passport photographs to enable his son to be included in the appellant's residence application. The sponsor also provided additional evidence of communication with the appellant including emails, calling cards and airline tickets. He advised INZ that he was going to visit his wife and child. INZ records indicate that the sponsor departed New Zealand on 12 November 2008 and returned on 9 February 2009. Included in the information

he provided to INZ were bookings for travel from Auckland to Addis Ababa, Ethiopia.

[19] On 11 November 2008, INZ wrote to the appellant seeking a detailed explanation of how she met the sponsor, when and where they decided to get married and how they communicated both before and after the marriage. INZ sought current evidence that the appellant had maintained communication with the sponsor during the period they resided in separate countries. INZ also noted that the appellant had previously supplied some emails but these did not identify the sender or receiver and were not translated.

[20] INZ records indicate that, on the same day, the sponsor advised INZ that he was leaving New Zealand the following day and would be away for three months. On 21 November 2008, the sponsor emailed INZ to advise that he was in Ethiopia with his wife and child and would be back in New Zealand on 8 February 2009. He asked that INZ contact him by email should they require further information.

[21] On 16 February 2009, INZ wrote to the appellant, again drawing her attention to the fact that the sponsor did not declare his marriage to her during the course of his residence application, and highlighting the explanation he gave for failing to do so. INZ sought her comment by 16 March 2009.

[22] The sponsor responded by facsimile on 17 March 2009 explaining that when he was first interviewed in October/November 2003, he was single and it was not explained to him that he was obliged to inform INZ of any changes to his circumstances. After arriving in New Zealand, while at the Mangere Refugee Resettlement Centre, he was not interviewed and did not have a chance to inform the authorities of his change of circumstances. While at the Mangere Refugee Resettlement Centre, he was granted a residence permit.

[23] INZ assessed the appellant's residence application on 28 April 2009. It found that the appellant and the sponsor were married and in a genuine and stable relationship. The assessment also determined that the requirements of health and character policy were met.

INZ Decision

[24] By letter dated 5 August 2009, INZ declined the appellant's application because she did not meet the policy at F2.5.e as she had not been declared in her sponsor’s residence application.

GROUNDS OF APPEAL

[25] 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."

[26] The appellant appeals on the ground that her special circumstances are such that an exception to that policy should be considered.

[27] The representative provides submissions, dated 21 September 2009. In addition to material held on the INZ file, an affidavit made by the appellant's sponsor is produced.

ASSESSMENT

[28] 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. Although the appellant appeals only on the ground of her special circumstances, the Board's jurisdiction in that regard can only be exercised following a finding that the INZ decision to decline was correct. Accordingly, 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. This is followed by consideration as to whether the appellant's special circumstances warrant consideration of an exception to policy.

[29] The application was made on 6 March 2006 and the relevant policy criteria are those in Government residence policy as at that time.

Family (Partnership) Policy

> "**F2.5 How do partners of New Zealand citizens and residents qualify for residence?**
>
> …

> e. Applications for residence under Partnership policy will also be declined if the principal applicant* was a partner to the sponsor but not declared on the sponsor's application for residence.
>
> *Effective 28/11/2005"*

[30] INZ declined this application on the ground that the appellant was caught by the provisions of policy at F2.5.e because the sponsor had not declared the appellant in his own application for residence. It is not in dispute that the appellant and the sponsor were married on 23 January 2004, or that the sponsor was granted residence in New Zealand on 20 July 2004.

[31] The policy at F2.5.e is clear that in being caught by the prohibition set out in that paragraph, the appellant's application had to be declined. INZ had no discretion to do otherwise.

[32] Accordingly, the Board finds that the INZ decision to decline the appellant's application was correct in terms of the applicable policy.

Special Circumstances

[33] The Board has power pursuant to section 18D(1)(f) of the Act to find, where it agrees with the decision of INZ, that there are special circumstances of an appellant that warrant consideration by the Minister of Immigration of an exception to policy.

[34] Whether an appellant has special circumstances will depend on the particular facts of each case. The Board balances all relevant factors in each case to determine whether the appellant's circumstances, when considered cumulatively, are special. Special circumstances are "circumstances that are uncommon, not common place, out of the ordinary, abnormal"; *He v Chief Executive of the Department of Labour* (High Court, Wellington CIV 2008-485-1300, 13 November 2008, Ronald Young J) at [42].

Personal circumstances

[35] The appellant is a 23-year-old Somali citizen. Included in her application is her 1-year-old son. She is sponsored by her husband, a New Zealand citizen, originally from Somalia. The appellant currently resides in Addis Ababa, Ethiopia.

[36] The appellant's application was declined because, during the course of his residence application under the Refugee Quota programme, the sponsor failed to declare the appellant as his wife.

The sponsor's failure to declare the marriage

[37] During the course of the appellant's residence application, and in an affidavit in support of the appellant's appeal, the sponsor set out in some detail the background to his failure to declare his marriage. The sponsor's mother was the principal applicant in his residence application. He was included in the application as a dependent child. The appellant's uncle in New Zealand was the primary point of contact with INZ with the exception of interviews conducted with the appellant's mother in Addis Ababa in August and October 2003.

[38] At the time of the application, the sponsor was 19 years old. He and his family had moved to Addis Ababa to escape the security situation in Somalia. In December 2003, the sponsor returned to Somalia for approximately three months and during that time he married the appellant.

[39] The sponsor in his affidavit advises that his mother knew of his marriage, but his uncle in New Zealand did not. He asked his mother about bringing his wife to New Zealand and she said he could bring her over later.

[40] The family travelled to New Zealand in July 2004. It does not appear that there was any further interview process in New Zealand prior to the grant of residence permits. There are no documents on the file indicating that the sponsor has completed or signed any immigration forms. Nor is there any clear indication that the sponsor knew or was advised that he was obliged to advise INZ of the change in his circumstances.

[41] The record of the interviews that took place with the sponsor's mother in Addis Ababa does not clearly indicate that she was advised of her obligation to notify INZ of any changes in the family circumstances. The sponsor also points out that, at the time the residence application was processed, his mother knew no English.

[42] As a result of his marriage, the sponsor was no longer eligible to be included in his mother's residence application as a dependent child because policy provided that dependent children must be single. Conversely, because he was treated as a dependent child, the sponsor's status as a United Nations High Commissioner for Refugees mandate refugee, and his eligibility/suitability for inclusion in New Zealand's Refugee Quota programme (other than as his mother's dependent child), were never determined.

Evidence of the relationship

[43] The appellant and the sponsor were married on 23 January 2004. He remained living with her until approximately the end of March 2004. He has returned to reside with her for approximately two-and-a-half months in 2007 and approximately three months in 2008-2009. The couple have a 1-year-old son, born approximately nine months after the sponsor's 2007 visit. The INZ file includes photographs of the couple together, evidence of remittances and correspondence, and evidence of the sponsor's travel. The couple are from the same village in Somalia.

[44] In its assessment of the appellant's residence application, INZ concluded that the relationship was genuine.

The appellant's son

[45] The appellant's son is now 1 year and 4 months of age. He was born after the sponsor obtained residence in New Zealand and consequently would meet the requirement of F5.1.b.ii were he to make an application for residence under the Family (Dependent Child) category of policy. Unless the appellant is granted residence in New Zealand, or the sponsor, now a New Zealand citizen, is willing to relocate to Ethiopia or Somalia, the appellant's son will not be able to live with both of his parents.

Appellant's current living circumstances

[46] At the time of her residence application, the appellant was living in Addis Ababa while her siblings and parents remained in Somalia. She began living in Addis Ababa at the end of September 2005. The record of remittances to the appellant since then indicates that she has also spent some time in Somalia. The sponsor's visits to the appellant appear to have taken place in Addis Ababa. In May 2008, the sponsor asked that the appellant's application be resolved as soon as possible because she did not have anyone to support her in Addis Ababa.

[47] There is no suggestion that the appellant has the right to reside in Ethiopia permanently. Country information obtained by the Board states that there are a large number of Somalis living in and around Addis Ababa and their living situation is often tenuous.

Health and Character

[48] INZ was satisfied that the appellant and her son were of an acceptable standard of health and that the appellant was of good character. She has a clear Ethiopian police certificate dated 2 February 2010.

Discussion of special circumstances

[49] The appellant's residence application was declined because the sponsor failed to declare his marriage during the course of his residence application. In *Prasad v Deportation Review Tribunal* (High Court, Auckland CIV 2007-404-8059, 19 February 2008), Lang J at [56] stressed the need for applicants to be scrupulously honest in disclosing their personal circumstances and that the integrity of the application process depended on compliance with these obligations of disclosure. The Board has given careful consideration to the circumstances of the appellant's failure to disclose his marriage.

[50] At the time of his residence application, the sponsor was 19 years old and did not speak English. He was a secondary applicant in his mother's application and apart from a very brief interview prior to his marriage, he had no real involvement in the application process. The Board is satisfied that there is no evidence that the sponsor was made aware of his obligations to advise INZ of his marriage or intended to mislead INZ by failing to do so. Moreover, it is clear that the appellant herself played no role whatsoever in the failure to declare the marriage.

[51] Like INZ, the Board has concluded that the appellant's marriage to the sponsor is genuine. In particular, the birth of their son and the sponsor's visits to the appellant have demonstrated their commitment and strongly suggest that the marriage is stable. The couple have now been married for six years.

[52] The challenges they have faced in maintaining their relationship at such a distance and over such a period of time have been unusual. The sponsor has travelled from New Zealand to Ethiopia on two occasions, staying each time for a period of approximately three months. These visits were undoubtedly undertaken at considerable expense. The couple has also produced evidence to the Board of the sponsor's financial support of the appellant and their ongoing communication. They have maintained their relationship and their commitment to it despite the challenges they have faced in doing so.

[53] The appellant and her son face difficult living circumstances in Addis Ababa. They currently have a choice between returning to the dire security situation in Somalia, or remaining in Ethiopia where they have no right to reside permanently. Unless the appellant is able to reside in New Zealand with the sponsor, the family unit has limited options. The sponsor, a New Zealand citizen, can relocate to be with his wife and child, leaving behind in New Zealand his mother and a number of siblings. Alternatively, the couple may choose to apply for residence for the child alone, thus potentially separating him from his mother. The interests of the appellant's infant son clearly lie in being with both of his parents.

[54] When considered cumulatively, the background to the sponsor's failure to declare his marriage, the challenges they have met in maintaining their relationship, the appellant's current living situation and the interests of the appellant's infant son, constitute special circumstances.

[55] The Board finds that the appellant's circumstances are special and warrant the Board recommending that the Minister consider making an exception to policy in this case.

STATUTORY DETERMINATION

[56] This appeal is determined pursuant to section 18D(1)(f) of the Immigration Act 1987. The Board confirms the decision of INZ as correct in terms of the applicable Government residence policy but considers there are special circumstances of this appellant that warrant consideration by the Minister as an exception to that policy.

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J Donald

Member
Residence Review Board

[Pursuant to section 18E(5), on 24 April 2010, the Minister issued a residence visa to the appellant and her son.]