IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2019] NZIPT 205493**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**DG (Partnership)**
Before:	J Donald (Member)
Counsel for the Appellant:	J Turner and S Shamia
Date of Decision:	11 December 2019

RESIDENCE DECISION

[1] The appellant is a 58-year-old citizen of China whose application for residence under the Family (Partnership) category was declined by Immigration New Zealand.

THE ISSUE

[2] Immigration New Zealand declined the application because she was eligible to be included in her husband's expression of interest under the Family (Parent) category but had not been included and that expression of interest led to an invitation to apply for residence. For the reasons set out below, the Tribunal finds that Immigration New Zealand's decision was correct.

[3] The principal issue for the Tribunal is whether the appellant has special circumstances, arising from her family nexus to New Zealand, the best interests of her grandchildren and the reasons the appellant finds herself ineligible for residence, such as to warrant a recommendation that the Minister of Immigration consider an exception to residence instructions.

[4] The Tribunal finds that the appellant has special circumstances which warrant consideration by the Minister of Immigration. She has a strong family nexus to New Zealand and no other pathway to residence. She and her family require a final resolution of her immigration status so that the family can plan for the future,

particularly given her close relationship with her New Zealand-citizen grandchildren and their best interests.

BACKGROUND

[5] The appellant's daughter holds a New Zealand permanent resident visa. The appellant's husband lodged an expression of interest under Tier 1 of the Family (Parent) category in June 2014, which included the appellant as a secondary applicant. He was invited to make a residence application and did so. That application was declined on 10 September 2015 because the appellant was not of an acceptable standard of health and she was not granted a medical waiver. The husband was unhappy with that outcome because, among other things, he felt he had not had an opportunity to remove the appellant from the application after learning that a medical waiver would not be granted. The medical waiver was declined on 10 September 2015 and the letter declining the application was sent the following day.

[6] According to Immigration New Zealand's electronic records, the husband lodged a second expression of interest on 17 September 2015. The appellant was not included. He was invited to make an application for residence, did so, and it was granted on 3 May 2018.

The Appellant's Application for Residence

[7] The appellant made her application for residence under the Family (Partnership) category on 5 December 2018. Her New Zealand-resident husband was her supporting partner.

[8] By letter dated 13 May 2018, Immigration New Zealand advised the appellant that it appeared she was not eligible to be granted residence under the Family (Partnership) category. She was eligible to be included in her husband's expression of interest under the Family (Parent) category, made on 17 September 2015, but was not included. That expression of interest led to an invitation to apply for residence. Therefore, instruction F2.40.5 meant she could not subsequently be granted residence under the Family (Partnership) category.

[9] The appellant responded the following day explaining the background to her non-inclusion in her husband's second expression of interest. In her view, she was not eligible to be included because Immigration New Zealand had, immediately prior

to it, found that she was not of an acceptable standard of health and had declined to grant her a medical waiver. According to the appellant, when her husband's first residence application was declined on this ground, the case officer had advised that her husband needed to make a new application for him alone.

Immigration New Zealand's Decision

[10] By letter dated 28 May 2019, Immigration New Zealand declined the appellant's application on the ground that, because she had been eligible for inclusion in an expression of interest under the Family (Parent) category, but was not included, and that expression of interest led to an invitation to apply for residence, she was not eligible for residence under the Family (Partnership) category.

STATUTORY GROUNDS

[11] The appellant's right of appeal arises from section 187(1) of the Immigration Act 2009 (the Act). Section 187(4) of the Act provides:

> (4) The grounds for an appeal under this section are that—
>
> (a) the relevant decision was not correct in terms of the residence instructions applicable at the time the relevant application for the visa was made; or
>
> (b) the special circumstances of the appellant are such that consideration of an exception to those residence instructions should be recommended.

[12] The residence instructions referred to in section 187(4) are the Government residence instructions contained in Immigration New Zealand's Operational Manual (see www.immigration.govt.nz).

THE APPELLANT'S CASE

[13] On 21 June 2019, the appellant lodged this appeal on the ground that her circumstances are special such that an exception to the residence instructions should be considered.

[14] On appeal, the appellant has instructed counsel. Counsel makes submissions in support of the appeal (20 September 2019) and produces new evidence set out below at [23]–[24].

ASSESSMENT

[15] The Tribunal has considered the submissions and documents provided on appeal and the file in relation to the appellant's residence application under the Family (Partnership) category and her husband's two residence applications under the Family (Parent) category, which have been provided by Immigration New Zealand.

[16] While the appellant appeals only on the ground of her special circumstances, the Tribunal's jurisdiction requires that it first determine whether Immigration New Zealand's decision was correct. That assessment is set out below. It is followed by an assessment of whether the appellant has special circumstances which warrant consideration of an exception by the Minister of Immigration.

Whether the Decision is Correct

[17] The appellant concedes that Immigration New Zealand's decision was correct. The application was made on 5 December 2018 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because it was caught by F2.40.5 of residence instructions which states:

> **F2.40.5 Applications under Partnership Category of persons eligible for inclusion in earlier registrations or expressions of interest**
>
> If the principal applicant in an application under Partnership Category was eligible for inclusion in a successful registration under the Family Quota, the Refugee Family Support Category, Samoan Quota Scheme or the Pacific Access Category, or in an expression of interest under the Parent Category or Community Organisation Refugee Sponsorship category from which an invitation to apply was subsequently issued, but was not included, they must not subsequently be granted residence under Partnership Category.
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> *Effective 15/12/2017*

[18] Eligibility for inclusion in an expression of interest and eligibility for the grant of residence are not the same thing. The appellant was eligible for inclusion in her husband's expression of interest despite not meeting the health requirements of residence instructions. That expression of interest led to an invitation to apply. The appellant was therefore caught by F2.40.5 and could not subsequently be granted residence under the Family (Partnership) category.

[19] Immigration New Zealand was correct to decline the appellant's application; it had no discretion to do otherwise.

Whether there are Special Circumstances

[20] The Tribunal has power pursuant to section 188(1)(f) of the Act to find, where it agrees with the decision of Immigration New Zealand, that there are special circumstances of an appellant that warrant consideration by the Minister of Immigration of an exception to the residence instructions.

[21] Whether an appellant has special circumstances will depend on the particular facts of each case. The Tribunal balances all relevant factors in each case to determine whether the appellant's circumstances, when considered cumulatively, are special.

[22] Special circumstances are "circumstances that are uncommon, not commonplace, out of the ordinary, abnormal"; *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) at [24] per Glazebrook J.

Submissions and new evidence on appeal

[23] Counsel submits that:

(a) The appellant's lack of knowledge of residence instructions and misunderstanding of the law led to her inability to obtain residence under the Family (Partnership) category.

(b) The appellant is in a genuine and stable partnership with her New Zealand-resident husband.

(c) The appellant is the parent of a New Zealand-resident child and grandchildren who need her support and care to maintain family bond and help raise the grandchildren.

(d) The appellant's family's contribution and nexus to New Zealand is significant, through property, a well-established business and the grandchildren's best interests.

(e) Living together in China is not a viable option for the family.

[24] In addition to material already held on the Immigration New Zealand file, counsel produces the following new evidence on appeal:

(a) a letter of support from the appellant's daughter;

(b) updated evidence that the appellant and her husband are living together in China;

(c) two letters of support from friends of the appellant's daughter;

(d) updated medical evidence for the appellant;

(e) evidence that the appellant raised her granddaughter in China;

(f) evidence of communication between the appellant and her daughter and photos of the family together on various occasions in New Zealand and in China;

(g) financial records for the daughter and her husband's business in New Zealand; and

(h) copies of the grandchildren's birth certificates.

Personal and family circumstances

[25] The appellant is a 58-year-old citizen of China. She is currently living in China with her husband, a 59-year-old New Zealand resident. The couple have one child, a daughter aged 35 years. She is a New Zealand permanent resident. She is married to a New Zealand resident and they have two New Zealand-citizen children, aged 14 and six years.

[26] Immigration New Zealand did not determine whether the appellant and her husband were living together in a genuine and stable partnership because the application was being declined for reasons unrelated to their partnership. Given the evidence produced to Immigration New Zealand and on appeal, the Tribunal has no reason to doubt that the couple are living together in a genuine and stable partnership and proceeds on that basis.

Immigration history

[27] The daughter has lived in New Zealand for approximately 17 years and her husband for 16 years.

[28] The appellant lived in New Zealand with her daughter from June 2005 until March 2006 (during this time her granddaughter was a baby) and from April 2013 until October 2015 (during this time her grandson was a baby and toddler), and most recently visited from August 2018 until September 2018. The appellant's husband

lived in New Zealand from April 2013 until October 2015 apart from a short visit to China, and most recently visited from August 2018 until September 2018. The couple are presently living in China. The appellant had the care of her granddaughter in China between May 2006 and April 2013. The granddaughter visited China between November 2017 and March 2018.

[29] It is clear that the appellant and her husband's intention in 2013 was for them both to migrate to New Zealand to join their daughter and grandchildren here. However, for a number of reasons, the appellant's husband only obtained New Zealand residence in May 2018.

[30] F2.40.5, the instruction which meant the appellant could not be granted residence, has been in place since July 2013. Had she been withdrawn from her husband's application first, she would not have been caught by it (as he would not have needed to lodge a second expression of interest). There was no obstacle to her removal from the application, had Immigration New Zealand provided sufficient time for that step. However, had she been removed from her husband's application, she would have faced a different obstacle when she applied for residence under the Family (Partnership) category. She would have had to provide a General Medical Certificate (rather than a Limited Medical Certificate), and had she been determined to not be of an acceptable standard of health, she would not have been eligible for a medical waiver (R5.96, effective 30 July 2012 and A4.20, effective 15 December 2017).

[31] Counsel submits that, Immigration New Zealand advised the couple, in relation to her husband's first residence application, that should she be withdrawn from the application she would need to provide a General Medical Certificate in any future application and, if found to be not of an acceptable standard of health, would not be eligible to be granted a medical waiver. However, it made no mention of F2.40.5 or the consequences of not including the appellant in a future expression of interest. This led the appellant to believe that the only obstacle to her eligibility for residence was her health.

[32] Counsel further submits that the appellant has no other pathway to residence under the present instructions. That appears to be correct. The Tribunal notes that nothing on the face of the financial accounts of the business owned by the appellant's daughter and her husband suggests that they would meet the recently announced income requirements for sponsoring a parent under the Family (Parent) category.

Health

[33] At the time the appellant's husband's first residence application was declined (September 2015) the appellant was found to be not of an acceptable standard of health because she had Hepatitis B-surface antigen positive, elevated ALT and HBVDNA, and moderate fibrosis. The medical assessor concluded that she would be eligible for anti-viral treatment.

[34] In the Immigration New Zealand decision under appeal, it found that the appellant was of an acceptable standard of health. In support of her residence application, the appellant provided a Limited Medical Certificate rather than a General Medical Certificate. Partners of New Zealand residents are only required to provide Limited Medical Certificates, with a small number of exceptions. The exceptions at A4.60.b, effective 15 December 2017, and R5.96, effective 30 July 2012, did not apply to the appellant. She had not been withdrawn from her husband's first application and she was not eligible for inclusion in his second application as she had not been included in his expression of interest. Of course, from the perspective of the instructions, the matter was moot because F2.40.5 prevented the grant of residence in any event.

[35] The short point is that, because the appellant only provided a Limited Medical Certificate and the question of her health was not referred to a medical assessor, it is difficult to know what weight to give to Immigration New Zealand's finding that she was of an acceptable standard of health. That finding was based on limited medical information, with no apparent reference to her Hepatitis B, and in a context where, as the partner of a New Zealand resident, she was presumed to be eligible for a medical waiver.

[36] The appellant and counsel have indicated that, when the appellant returned to China in 2015 she did so with the intention of seeking treatment for her Hepatitis B in order to become eligible for residence, and indeed, it was treated. On appeal, updated medical information is provided from a physician in China, together with blood test results. The physician states (6 September 2019) that "[t]he patient's current follow-up shows that the liver function is basically normal". A receipt for medication appears to indicate that the appellant is presently taking antiviral medication (Entecavir). The Tribunal is not able to interpret the blood test results.

[37] Should the Minister of Immigration wish more clarity regarding the appellant's present health or any associated potential health costs, he may require her to provide an updated General Medical Certificate and refer the question of her health

to a medical assessor. Whether or not to do so is a matter entirely for the Minister of Immigration.

Character

[38] Immigration New Zealand found that the appellant met the character requirements of residence instructions, recording clear Chinese police certificates dated 8 October 2018 and 26 September 2018, and a clear New Zealand police certificate dated 28 January 2019. The Tribunal has not sought an updated New Zealand police certificate because the appellant has not lived in New Zealand since September 2018. Whether or not to request that the appellant provide an updated Chinese police certificate is a matter for the Minister of Immigration.

Education and employment

[39] In China, the appellant has worked as a hairdresser for many years. It is not known whether she is presently employed there.

Family nexus and potential contribution

[40] Counsel advises that the appellant's daughter and her husband run a busy and profitable hair salon in New Zealand, which requires their full-time attention. They need the appellant's ongoing support as, when she is in New Zealand, she takes care of the grandchildren. The grandchildren are emotionally attached to the appellant and used to share a bedroom with her when she was living in New Zealand. Further, the appellant and her husband raised the granddaughter in China for a period of eight years (between 2006 and 2013), until her daughter and her daughter's husband had settled in New Zealand. The appellant is part of close family unit and is, understandably, particularly close to her granddaughter.

[41] Counsel submits that the daughter and her husband require the appellant's help to care for the grandchildren. The couple's contribution to New Zealand would cease were they to decide to sell their business and their property and return to China to live as a family. New Zealand would lose a successful business and two taxpayers who are making a financial contribution.

[42] In her letter of support produced on appeal, the appellant's daughter explains that her mother first came to New Zealand in 2005 to help her care for her newborn daughter. She was young and inexperienced as a first-time mother and need her mother's support. When her parents returned to China she followed a few months

later and left her daughter in their care while she and her husband worked to establish themselves in New Zealand. They established a hairdressing salon and both worked full-time, seven days per week and long hours. They worked hard because they wanted their daughter and the appellant's parents to be able to join them in New Zealand. The daughter stresses just what a close family they are and the important emotional relationships the grandchildren have with their grandparents. She also highlights that her parents cannot contemplate living apart from each other and have not done so. The appellant's grandchildren are New Zealand citizens and have their friendships and schooling now firmly established in New Zealand; they are kiwis.

[43] The two letters of support from friends of the daughter and her husband stress that how hard they have worked to establish and grow their business, how much they need the support of the appellant and her husband and how close the appellant and her husband are to their grandchildren.

The best interests of the grandchildren

[44] The Tribunal is required, pursuant to Article 3(1) of the United Nations 1989 *Convention on the Rights of the Child*, to have regard to the best interests of the grandchildren as a primary consideration. However, their best interests are not the paramount consideration (as per *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Tipping J).

[45] The granddaughter and grandson have clearly benefited from the care of their grandparents in New Zealand and, in the granddaughter's case, for a significant period in China. Separation from them is no doubt a wrench, but relocation to China is difficult to contemplate as both grandchildren are very well-settled here. The Tribunal is satisfied that the grant of residence to the appellant would be in the best interests of the grandchildren.

Discussion of special circumstances

[46] The appellant has a very strong family nexus to New Zealand through her husband, her daughter and her grandchildren. She has an especially close relationship with her granddaughter whom she and her husband raised for eight years. Her daughter benefits greatly from her parents support when they are in New Zealand and fears what will happen when they age and require her care.

[47] The dilemma for the family is that the daughter, her husband and two children are very well-settled in New Zealand. The couple have worked hard to establish their business. The grandson, aged six, has only ever lived in New Zealand and the granddaughter, aged 14, has lived here for the past six years. The appellant's husband has residence, but she and her husband do not wish to live apart. Therefore, the family face, either now or at some time in the future, a difficult decision whether the daughter and husband leave the lives they have established in New Zealand and disrupt their children's lives to return to China to benefit from family support or face continued separations. This dilemma is not uncommon where a child migrates, but it is felt most keenly by the appellant and her family because of their close relationships and because of the period of six years over which they have struggled to resolve it.

[48] The question of the appellant's health and any associated costs remains unclear as only a Limited Medical Certificate was produced and there was no referral to the medical assessor. Should the Minister of Immigration wish to do so, a General Medical Certificate could be requested and referred to the medical assessor.

[49] The Tribunal is satisfied that the appellant's circumstances are special. Because instructions prevent the appellant qualifying for residence on the basis of her partnership, she has no apparent pathway to residence and therefore the appellant's husband, her daughter and grandchildren face ongoing uncertainty about where their future lies. The appellant and her family require a final resolution of her immigration status so that the family can plan for the future, particularly given the daughter's and the grandchildren's strong connection to this country and the grandchildren's engagement in the school system here. That can only be secured through consideration by the Minister of Immigration of an exception to instructions.

DETERMINATION

[50] This appeal is determined pursuant to section 188(1)(f) of the Immigration Act 2009. The Tribunal confirms the decision of Immigration New Zealand as correct in terms of the applicable residence instructions but considers there are special circumstances of this appellant that warrant consideration by the Minister of Immigration as an exception to those instructions.

[51] Pursuant to section 190(5) of the Immigration Act 2009, the Minister of Immigration is requested to make one of the two decisions set out below. Pursuant to section 190(6) of the Immigration Act 2009, the Minister of Immigration is not

obliged to give reasons in relation to any decision made as a result of a consideration of the Tribunal's recommendation.

Order as to Depersonalised Research Copy

[52] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to the identification of the appellant.

"J Donald"
J Donald
Member

Certified to be the Research Copy released for publication.

J Donald
Member