

**RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA**

Appellant: **NX (Skilled Migrant)**

Before: Judge P Spiller (Chair)

Counsel for the Appellant: J Turner

Date of Decision: 8 December 2020

RESIDENCE DECISION

[1] The appellant is a 49-year-old citizen of the Philippines. Her application for residence under the Skilled Migrant category of residence instructions was declined by Immigration New Zealand. The application includes the appellant's husband, aged 51, and their son, aged 8, who are also citizens of the Philippines.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it found that she did not meet the character requirements of immigration instructions.

[3] The principal issue for the Tribunal is whether Immigration New Zealand correctly declined the appellant's residence application.

[4] For the reasons which follow, the Tribunal finds that Immigration New Zealand's decision was not correct, and the appellant's application is referred back to Immigration New Zealand for a correct assessment.

BACKGROUND

[5] The appellant was born in the Philippines in 1971. In 2007, she married her husband, who is also a citizen of the Philippines.

[6] From August 2009 to July 2015, the appellant lived and worked in the United Arab Emirates (UAE), and her husband joined her there from September 2010 to July 2015. The couple's son was born in the UAE in 2012. Also in that year, the appellant took out a bank loan. She was later made redundant and, as a consequence, she defaulted on her loan payments. Subsequently, the financial institutions concerned filed complaints against her and, in fear of being arrested, she and her family left Dubai and returned to the Philippines.

[7] In November 2015, the appellant arrived in New Zealand and was granted a student visa, valid to December 2016. From January 2017, she held a series of work visas, and she was employed as a telecommunications network engineer. Her husband and her son joined the appellant in December 2015, and they were granted a partnership work visa and a student visa respectively.

[8] On 11 September 2018, the appellant made her application for residence under the Skilled Migrant category, including her husband and son as secondary applicants. In her application form, she declared the time that she and her husband spent in the UAE. The couple was therefore required to provide police certificates from the UAE.

Immigration New Zealand's Concerns

[9] On 13 January 2020, Immigration New Zealand advised the appellant in writing that it was a mandatory requirement for first-time applicants for resident visas aged 17 and over to obtain a police or similar certificate from each country in which the applicant had lived for 12 months or more in the last 10 years (instruction A5.5.a and b). No such certificate had been provided by the appellant.

Appellant's Response

[10] On 28 January 2020, the appellant's counsel responded to Immigration New Zealand's concerns. Counsel explained the circumstances of the appellant in relation to her default on loan payments in the UAE. Counsel noted that the appellant was making an effort to settle her outstanding debts, she did not have

any other character issues, and her good character was evidenced by character references provided. Counsel requested a character waiver.

Immigration New Zealand's Decision

[11] By letter dated 6 August 2020, Immigration New Zealand declined the appellant's application, on the basis that she did not meet the character requirements of immigration instructions (A5.1).

[12] Immigration New Zealand noted that an immigration officer may proceed to assess a residence application without a police certificate if this involves a country that does not issue police certificates and for which no instructions for how to obtain a police certificate are available. However, it advised that police certificates from the UAE were available. A police certificate could be waived if there was evidence of undue difficulty in obtaining police certificates, as where the relevant country's governmental structure was not functioning or there were circumstances beyond the control of the applicants which prevented them from obtaining the requisite certificates. The appellant's circumstances did not fall within these exceptions. Without a police certificate, a character assessment could not be completed, and as a consequence, Immigration New Zealand could not proceed to consider a character waiver.

STATUTORY GROUNDS

[13] 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.

[14] 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

[15] On 10 September 2020, the appellant lodged this appeal on both grounds in section 187(4) of the Act.

[16] In support of the appellant's appeal, her counsel provides submissions (30 September 2020). He submits that Immigration New Zealand incorrectly assessed that the appellant's application should be declined because of the non-production of police certificates. Counsel also submits that the appellant and her family have special circumstances, warranting consideration by the Minister of Immigration as an exception to residence instructions.

ASSESSMENT

[17] The Tribunal has considered the submissions provided on appeal and the file in relation to the appellant's residence application which has been provided by Immigration New Zealand.

[18] An assessment as to whether the Immigration New Zealand decision to decline the appellant's application was correct in terms of the applicable residence instructions is set out below.

Whether the Decision is Correct

[19] The application was made on 11 September 2018 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the residence application because the appellant did not meet the character requirements of immigration instructions. Applicants for residence under the Skilled Migrant category must meet, amongst other things, health and character requirements: see SM3.5.1.a.i, effective 28 August 2017. The relevant instructions in this case are:

A5.1 Requirement of good character

Applicants for all visas must:

- a. be of good character; and
- b. not pose a potential security risk.

If any person included in the application fails to meet the necessary character requirements and the character requirements are not waived, the application may be declined.

Effective 29/11/2010

A5.5 Character checks

- a. Character checks must be carried out for the following categories of applicant:
 - i. those aged 17 and over applying for residence class visas; ...
- b. It is a mandatory requirement (see R2.40) for first time applicants for a residence class visa aged 17 and over to obtain a police or similar certificate from:
 - i. the applicant's country of citizenship; and
 - ii. each country in which the applicant has lived for 12 months or more (whether on one visit or intermittently) in the last 10 years (but see A5.10.1).

...

Effective 28/08/2017

A5.10.1 If police certificates are unavailable

- a. Provision of police or similar certificates is a mandatory requirement for the grant of residence class visas in most cases (except for applicants under 17 or who are applying for a further residence class visa under RV2 or RV4). ... The only exception is where an immigration officer who holds the position of immigration manager or has Schedule 3 delegations or above is satisfied that such certificates are not available or would be unduly difficult to obtain (for example where the authorities of any such country will not generally provide such certificates).
- b. Evidence of undue difficulty in obtaining police or similar certificates may include, but is not limited, to:
 - i. information indicating conditions in the relevant country are such that the country's governmental infrastructure is no longer functioning; or
 - ii. confirmation that there are circumstances beyond the control of the applicants which prevent them obtaining the required certificates.

Note: Such circumstances do not include difficulty in paying for the certificates or delays in obtaining them.
- c. If an immigration officer who holds the position of immigration manager or has Schedule 3 delegations or above is satisfied that a police certificate is not available or unduly difficult to obtain from a particular country, then that immigration officer may require the applicant to make and provide a separate statutory declaration in both English and the applicant's own language.
- d. The statutory declaration must:
 - i. detail the applicant's attempts to obtain a police certificate; and
 - ii. state whether the applicant and any accompanying family members have been convicted, or found guilty of, or charged with offences against the law of that country, or have not been charged with any offences against the law of that country; and

- iii. be corroborated by other information confirming the applicant's character.
- e. Any decision to waive the production of:
 - i. a police or similar certificate; and/or
 - ii. a statutory declaration instead of a police or similar certificate;must be made by an officer with Schedule 3 delegations or above.

Effective 06/07/2015

[20] As an applicant for a resident visa in New Zealand, the appellant is required by instructions to comply with the requirement that she be of good character (A5.1.a). As a first-time applicant over 17 years of age, she is subject to the mandatory requirement to provide a police certificate or similar certificate for each country in which she has lived for 12 months or more in the last 10 years (A5.5.b.ii). This meant that the appellant was required to produce a police certificate or similar certificate from the UAE, the country in which she had lived for four years and ten months, being a period within the 10 years prior to her making her residence application.

[21] The only exception to the provision of a police or similar certificate is where Immigration New Zealand is satisfied that such certificates are not available or would be unduly difficult to obtain (A5.10.1.a). There is no evidence that a police certificate or similar certificate is not available in the UAE.

[22] In relation to whether police or similar certificates “would be unduly difficult to obtain”, instruction A5.10.1.a and b provides three examples:

- (a) where the authorities of any such country will not generally provide such certificates;
- (b) where conditions in the relevant country are such that the country's governmental infrastructure is no longer functioning;
- (c) where there are circumstances beyond the control of the applicants which prevent them obtaining the required certificates.

[23] In relation to examples one and two, there is no evidence that the authorities of the UAE will not generally provide police or similar certificates, and there is no evidence that governmental infrastructure in the UAE is no longer functioning.

[24] In relation to example three, Immigration New Zealand's finding was simply that the appellant's circumstances did not fall within the ambit of A5.10.1 to consider waiving the requirement to provide a police certificate from the UAE.

[25] The appellant had informed Immigration New Zealand, prior to its decision, that she had repeatedly tried, but failed, to obtain the required police certificate for herself. Prior to lodging her residence application (on 22 December 2017, 30 December 2017, 8 January 2018 and 17 January 2018), she made repeated requests for a police certificate through the Dubai police website. In June 2018, she contacted an overseas consultancy to assist in checking why the police clearance was still pending. She later discovered that criminal complaints had been registered against her by two banks, for the amounts of AED45,000 and AED335,000, and that, as long as she had such claims registered on the UAE Immigration Database, she was unable to obtain a police clearance certificate.

[26] Immigration New Zealand has acknowledged, in respect of the appellant, that "the only issue in terms of your character is your failure to meet your obligations and non-payment of these loans". Immigration New Zealand has had clear evidence that the inability of the appellant to obtain a police clearance certificate is due to the UAE's policy in respect of issuing police certificates in these circumstances. There is no evidence that the appellant is liable for any other convictions or charges stemming from her time in the UAE. The predicament faced by the appellant, which appears to be incapable of resolution in the foreseeable future, is such that it is beyond a mere delay in obtaining the required police certificate.

[27] The Tribunal is therefore satisfied that Immigration New Zealand has confirmation that there are circumstances beyond the control of the appellant which mean that it would be unduly difficult for her to obtain the required police certificate or similar certificate. There is therefore a valid exception to the general requirement for the provision of such a certificate. As such, Immigration New Zealand should proceed to obtain a statutory declaration, instead of a police certificate, as outlined in instruction A5.10.1.c to e.

[28] The Tribunal adds that, although Immigration New Zealand did not mention the appellant's husband's position as a reason to decline the appellant's application, it appears that he too is in a similar predicament to the appellant. He has also made repeated efforts to obtain a police certificate from the UAE, but circumstances relating to his loan repayment there have precluded this. The

Tribunal's conclusion in relation to an exception to the police certificate requirement for the husband is therefore the same.

Conclusion as to correctness

[29] Immigration New Zealand's decision to decline the appellant's application was incorrect. Immigration New Zealand did not adequately consider the circumstances in which the waiver of a police certificate could be granted.

STATUTORY DETERMINATION

[30] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers the decision to decline the appellant's visa application was made on the basis of an incorrect assessment in terms of the applicable residence instructions. However, the Tribunal is not satisfied the appellant would, but for that incorrect assessment, have been entitled in terms of those instructions to the grant of a visa.

[31] The Tribunal therefore cancels the decision of Immigration New Zealand. The appellant's application is referred back to the chief executive of the Ministry of Business, Innovation and Employment for a correct assessment by Immigration New Zealand in terms of the applicable residence instructions, in accordance with the directions set out below.

Directions

[32] It should be noted that, while these directions must be followed by Immigration New Zealand, they are not intended to be exhaustive. There may be other aspects of the application which require further investigation, remain to be completed or require updating.

1. The application is to be assessed again by an immigration officer with no previous association with this application, in accordance with residence instructions in effect at the date the application was made and without the requirement to pay any further lodgement fee.
2. Immigration New Zealand shall then undertake a new assessment, having regard to all of the information previously provided to it by the

appellant and to the Tribunal on appeal, and any additional material with which she chooses to update her application.

3. In particular, Immigration New Zealand shall proceed to assess the character of the appellant and her husband on the basis of statutory declarations instead of police certificates from the UAE (see above paragraphs [27]-[28]).
3. If, at any stage in its reassessment of the application, Immigration New Zealand decides that there are potentially prejudicial matters which must be put to the appellant, it is to do so in clear and concise terms with reasons. The appellant is to be given a reasonable opportunity to respond.
4. Immigration New Zealand shall provide appropriate reasons for its decision as to the appellant's residence application.

[33] The appellant is to understand that the reassessment of her application is no guarantee that she will be granted residence.

[34] The appeal is allowed in the above terms.

Order as to Depersonalised Research Copy

[35] 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 and her husband and son.

"Judge P Spiller"
Judge P Spiller
Chair

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Copy released for publication.

Judge P Spiller
Chair