

AT AUCKLAND

Appellant:	LB (Skilled Migrant)
Before:	D Smallholme (Member)
Representative for the Appellant:	D Fisher
Date of Decision:	19 January 2018

RESIDENCE DECISION

[1] The appellant is a 28-year-old citizen of India whose application for residence under the Skilled Migrant category was declined by Immigration New Zealand. The application includes the appellant's wife, aged 31 years, who is also a citizen of India.

THE ISSUE

[2] Immigration New Zealand declined the application because it had unresolved concerns about three payments made by the appellant to another company owned by his employer, which ran an international money transfer service. Immigration New Zealand found that these payments resulted in an unacceptable risk to the integrity of New Zealand's immigration or employment laws, policies or instructions. Without points, and bonus points, for skilled employment, the appellant did not meet the minimum selection criteria for the Skilled Migrant category.

[3] The principal issue for the Tribunal is whether Immigration New Zealand's decision was procedurally fair.

[4] The Tribunal finds that Immigration New Zealand's decision was not procedurally fair and therefore that it is not correct. Immigration New Zealand failed to give the appellant a reasonable opportunity to respond to harmful information. As it did not specifically put its concerns about the three transactions to the appellant,

he did not have an opportunity to further explain the evidence that he had provided or the basis for those payments. Had he been given an opportunity, the appellant may have been able to allay Immigration New Zealand's concerns. Immigration New Zealand also failed to explain the nexus between the appellant's employment and the risks to the integrity of relevant immigration or employment laws, policies or instructions.

[5] The Tribunal therefore cancels Immigration New Zealand's decision and returns the application for a correct assessment.

BACKGROUND

[6] The appellant lodged his application for residence under the Skilled Migrant category on 22 November 2016. He claimed 160 points, including 50 points for skilled employment of less than 12 months and 30 bonus points for skilled employment outside of the Auckland region, as he considered that his employment as a chef substantially matched the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) occupation of a Chef.

[7] On 13 March 2017, the appellant provided further information including his bank statements for the from 13 April 2016 to 9 February 2017, in response to a request from Immigration New Zealand.

[8] On 12 June 2017, Immigration New Zealand wrote to the appellant's representative with its concerns about the application including (among other things) that the appellant had obtained his employment as the result of payments he had made to his employer. Immigration New Zealand considered that information in the appellant's bank account statements indicated that he had made regular payments to another company, which had the same director and shareholder as his employing company. Both companies had their registered offices at the same address. Immigration New Zealand provided copies of the appellant's bank statements on which it had highlighted various payments. It stated that payments highlighted in yellow indicated wages payments going into his account and payments going out of his account to his employer's other company. Immigration New Zealand also asked for a detailed explanation for all the transactions it highlighted in green.

[9] On 26 June 2017, the representative responded to Immigration New Zealand's concerns. The representative advised that the employer's other company operated a legitimate international money transfer service as part of its travel agency

business. The appellant used the service to transfer money to his family members in India to whom he provided financial support. The appellant's employer, who was the common director and shareholder of the two companies, was a reputable business person. It was absolutely refuted that the appellant had paid for his employment.

[10] In support, the following information was provided:

- (a) Copies of the appellant's bank statements from 13 April 2016 to 9 February 2017 with his handwritten notes, including general references to the transactions highlighted by Immigration New Zealand in green and yellow.
- (b) Copies of the appellant's Indian bank statements for the period 11 April 2016 to 30 March 2017 with six transactions made through his employer's second company. Five transactions were referenced with the words "family's maintenance" and the sixth transaction with the words "tuition fee".
- (c) Copies of Indian bank statements for an account held by the appellant's sister for the period 23 June 2016 to 8 June 2017 which showed that she had received two payments from the employer's other company and had also received payments directly from the appellant.
- (d) Copies of statements from two different Indian banks for accounts held by the appellant's sister-in-law, showing payments made by the appellant and his sister.
- (e) A letter (14 June 2017) from the appellant's employer explaining that the payments had been made by the appellant through the international money transfer service operated to different bank accounts in India.
- (f) Copies of remittance notices for payments made through the money transfer service on 20 May 2016, 2 June 2016, 14 June 2016, 27 June 2016, 29 August 2016, 25 November 2016, 22 December 2016, 3 January 2017, 6 January 2017 and 22 January 2017.
- (g) A three-page summary (in table form) addressing each of the bank transactions that had been highlighted in green by Immigration New Zealand, including the payments made by the appellant and the

corresponding payments made to the Indian bank accounts through the international money transfer service.

Immigration New Zealand Decision

[11] On 26 July 2017, Immigration New Zealand declined the appellant's application. Immigration New Zealand acknowledged that the appellant transferred money for the support of his family members in India via his employer's legitimate second business and that there was nothing untoward with the "movement of money between parties". However, it had unresolved concerns about three transactions which it summarised as follows:

- 14 June 2016, where your employer received \$900 but sent \$1800
- 11 July 2016, where your employer received \$500 but sent none
- 22 December 2016, where your employer received \$1450 but sent \$500.

[12] Immigration New Zealand considered that there had been no satisfactory explanation for the "discrepancies" between the money received and money sent (or not sent) in these three transactions. It was also concerned that the appellant had claimed to be sending the money to his family members but that some money had been paid to his own account. Further, the appellant had not provided any evidence of how the money had been used to support his family members. It concluded that the discrepancies in the three transactions created an unacceptable risk to the integrity of New Zealand's immigration or employment laws, policies or instructions.

[13] Without points and bonus points for skilled employment, the appellant was entitled to only 80 points. His application therefore did not meet the minimum selection criteria of the Skilled Migrant category.

STATUTORY GROUNDS

[14] 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.

[15] 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

[16] On 1 September 2017, the appellant lodged this appeal on both grounds in section 187(4) of the Act. In support of the appeal, the representative provides written submissions (1 September 2017). The representative submits that the decision is unfair because Immigration New Zealand did not put its specific concerns about the three transactions to the appellant before it declined his application. Had he been given that opportunity, the appellant could have easily provided Immigration New Zealand with a comprehensive and satisfactory response to the specific concerns.

[17] Additional evidence is provided in support, including a statutory declaration from the appellant; written statements from the appellant's sister and their widowed mother, and from his wife's sister, concerning the financial support they have received from the appellant; and further information explaining the three (outstanding) transactions including bank statements showing payments to the wife's sister and the purchase of airfares for the appellant's friend.

[18] The extent to which the Tribunal can consider new information and evidence on appeal is constrained by section 189(1) of the Act. New evidence on appeal is inadmissible when considering the correctness of Immigration New Zealand's decision, unless it falls within section 189(3)(a) of the Act. In this case, the documents produced are not admissible. The information about the family's financial affairs and the appellant's friend's travel arrangements was available prior to Immigration New Zealand's decision and should have been placed before it at the time of its decision. Nevertheless, in view of the outcome of this appeal, Immigration New Zealand can consider those documents, along with the other relevant information, when it undertakes its next assessment of the application.

ASSESSMENT

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

[20] 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

[21] The application was made on 22 November 2016 and the relevant criteria are those in residence instructions as at that time.

[22] Immigration New Zealand was initially concerned that the appellant's employment was offered as a result of payments he had made to the second company owned by his employer. It relied on SM7.15.a.v of instructions which provides as follows:

SM7.15 Additional requirements for skilled employment

- a. Skilled employment only qualifies for points if the employment is:
 - ...
 - ii. genuine; and
 - ...
 - v. the employment was not offered as a result of payment made by the applicant (or their agent) to the employer (or their agent) in exchange for securing that offer of employment. Such practices are contrary to the principles of the Wages Protection Act 1983, as well as to immigration instructions.
 - ...

Effective 25/08/2014

[23] In declining the application, Immigration New Zealand accepted that the appellant had used the international money transfer service operated by his employer's second company for the purpose of transferring money to his family members in India and that there was "nothing untoward" with this. However, it had unresolved concerns about three transactions which it found created an unacceptable risk to the integrity of New Zealand's immigration or employment laws, policies or instructions. In declining the application, Immigration New Zealand purported to rely on SM7.20.d of instructions (presumably effective 1 April 2017). The Tribunal again notes that the relevant instructions are those in force at the

date of the application. In the appellant's case, these are found at SM7.20.c of instructions, effective 7 December 2015. While they effectively mirror the later instructions, these correct instructions provide as follows:

SM7.20 Requirements for employers

- a. All employers wishing to employ non-New Zealand citizens or residents must comply with all relevant employment and immigration law in force in New Zealand. Compliance with relevant New Zealand employment and immigration law includes, but is not limited to:

...

- b. ...

- c. Current employment or an offer of employment does not qualify for points if it is not compliant with all relevant immigration and employment laws in force in New Zealand or if INZ considers that the employment of the applicant creates unacceptable risks to the integrity of New Zealand's immigration or employment laws, policies or instructions.

...

Effective 07/12/2015

[24] Instructions also address the requirements of fairness in decision-making:

A1.5 Fairness

- a. Whether a decision is fair or not depends on such factors as:
- whether an application is given proper consideration;
 - whether the applicant is informed of information that might harm their case (often referred to as potentially prejudicial information);
 - whether the applicant is given a reasonable opportunity to respond to harmful information;
 - ...
 - whether all known relevant information is considered.

...

Effective 29/11/2010

Failure to give a reasonable opportunity to respond to harmful information

[25] The Tribunal acknowledges that Immigration New Zealand raised its concerns with the appellant that he had made payments to his employer through the second company. It appears to have asked the appellant to provide a detailed explanation of the more than 50 transactions that it had highlighted in green on his bank statements. In response, the appellant explained that he had used the international money transfer service operated by his employer's second company to make payments for the support of his family members in India. While he did not

specifically address every one of the more than 50 entries that Immigration New Zealand had highlighted in green, the appellant provided substantial evidence of his and his family members' banking transactions together with copies of his and their relevant bank statements, copies of remittance notices for the payments, and a three-page summary of the different transactions highlighted in green.

[26] In declining the application, Immigration New Zealand accepted that the appellant had genuinely used the money transfer service to make payments to his and his family members' bank accounts in India. Nevertheless, it remained concerned about what it considered to be "discrepancies" in three of the transactions of 14 June 2016, 11 July 2016 and 22 December 2016. The Tribunal finds that given the general nature of its initial concerns and the large number of transactions that it had highlighted in green, it was unfair of Immigration New Zealand to make its decision without first setting out its specific concerns about the three outstanding transactions. As it did not inform the appellant of its remaining concerns regarding the three remaining transactions before it declined his application, Immigration New Zealand failed to provide the appellant with a reasonable opportunity to respond to harmful information.

[27] On appeal, a detailed explanation and further evidence concerning the three transactions is provided. The representative asserts that the first concerning transaction is not probative of Immigration New Zealand's claim because (as it was suggested that the company had paid out more money than it had received) there had been no payment that could be said to be for the appellant's employment. In any event, the company's bank statements showed that the further sum of \$900 had been paid by the appellant, in cash. In respect of the second transaction, the information provided to Immigration New Zealand demonstrated that an amount of \$500 was transferred together with a further sum of \$1,400. With the third transaction, the documents evidenced that \$950 was paid in order to purchase a plane ticket for the appellant's friend. However, Immigration New Zealand had not "matched up" these payments.

[28] The Tribunal considers that had Immigration New Zealand given the appellant an opportunity to explain the three specific transactions, he may well have been able to provide that same explanation and evidence, which, in turn, may have allayed its concerns. Thus, in the Tribunal's view, Immigration New Zealand's failure to give the appellant that opportunity to explain the three transactions prejudiced the assessment process.

Failure to explain nexus between risk and employment

[29] The Tribunal has previously found that while Immigration New Zealand has a discretion to determine what it considers to be an unacceptable risk to the integrity of New Zealand's immigration or employment law, policies or instructions, any such risk must be reasonable and properly articulated; see *ZH (Skilled Migrant)* [2015] NZIPT 202233 at [56]. The Tribunal's approach has been confirmed on appeal to the High Court in *Fric v Immigration and Protection Tribunal* [2016] NZHC 1208 at [90].

[30] Having carefully considered Immigration New Zealand's decision, the Tribunal can find no explanation of how it considered that the three outstanding transactions posed a risk to the integrity of New Zealand's immigration and employment laws, policies or instructions. Presumably, Immigration New Zealand remained concerned that they were evidence of some payment made by the appellant to his employer for his employment (through the second company). However, it did not explain why it had formed this view nor why this was likely or possible, given that it accepted that the money transfer service had been used by the appellant for the legitimate purpose of making payments to his family members in India. Immigration New Zealand also overlooked the fact that any discrepancy in the first transaction of 14 June 2016 appeared to be in the appellant's favour: by Immigration New Zealand's reckoning, the second company appeared to have paid \$1,800 when it had only received \$900 from the appellant.

Conclusion on correctness

[31] The Tribunal finds that the Immigration New Zealand decision to decline the application was not procedurally fair or correct. Immigration New Zealand failed to give the appellant a reasonable opportunity to respond to harmful information. As it did not specifically put its concerns about three transactions to the appellant, he did not have an opportunity to further explain the evidence that he had provided or the basis for those payments. Had he been given an opportunity, the appellant may have been able to allay Immigration New Zealand's concerns. Immigration New Zealand also failed to explain the nexus between the risks to the integrity of relevant immigration or employment laws, policies or instructions and the appellant's employment.

DETERMINATION

[32] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers the decision to refuse the visa 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 immediate grant of a visa.

[33] 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

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

1. The application is to be reassessed by an Immigration New Zealand officer not previously associated with the application in accordance with the instructions in existence at the date the residence application was made. No further lodgement fee is payable.
2. Immigration New Zealand is to invite the appellant to update his application within a reasonable timeframe, as he sees fit.
3. If Immigration New Zealand has any remaining concerns that the appellant has made payments to his employer or any other entity for his employment, then it is to put those concerns in clear and concise terms to the appellant and to provide him with a reasonable opportunity to respond.
4. Immigration New Zealand shall then determine whether the appellant's employment is sustainable and, if necessary, whether the appellant's employment creates risks to the integrity of New Zealand's employment laws. In doing so, it is to bear in mind the matters raised by the Tribunal in [29]–[30] above. If it remains concerned that there are such risks,

then it is to clearly set out the nature of the risks and provide the appellant with an opportunity to respond to them.

5. If Immigration New Zealand is satisfied that the appellant's employer complies with the requirements of SM7.15 and SM7.20, it shall determine all other aspects of the application, including whether the appellant is in skilled employment as a Chef.

[35] The appellant is to understand that the success of this appeal does not guarantee that his application will be successful, only that it will be subject to reassessment by Immigration New Zealand.

[36] The appeal is successful in the above terms.

Order as to Depersonalised Research Copy

[37] 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 or his wife.

"D. Smallholme"
D Smallholme
Member

Certified to be the Research
Copy released for publication.

D Smallholme
Member