IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2018] NZIPT 204691**

AT AUCKLAND

Appellant:	**VJ (Skilled Migrant)**
Before:	J Donald (Member)
Representative for the Appellant:	D Fisher
Date of Decision:	26 June 2018

RESIDENCE DECISION

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[1] The appellant is a 49-year-old citizen of India, whose application for residence under the Skilled Migrant category includes his wife and their three children, aged 22, 13 and 11.

THE ISSUE

[2] Immigration New Zealand declined the application because the appellant did not satisfy the English language requirements for a principal applicant. For the reasons which follow, the Tribunal finds that Immigration New Zealand's decision was correct.

[3] The principal issue for the Tribunal is whether the appellant and his family have special circumstances, arising from their length of stay and settlement in New Zealand and the best interests of the two youngest children, such as to warrant a recommendation that the Minister of Immigration consider an exception to residence instructions. The Tribunal finds that the appellant's circumstances are special and warrant consideration by the Minister of Immigration. This consideration will enable the family to establish with some certainty whether or not they will be able to live permanently in New Zealand, and to plan their lives accordingly.

BACKGROUND

[4] The appellant lodged an Expression of Interest and was invited to apply for residence on 9 August 2016. He made his application on 29 November 2016. In his application, the appellant claimed to satisfy the English language requirements of instructions through his study for a recognised qualification conducted entirely in English, namely a Level 5 Diploma in Management awarded in December 2009.

[5] Immigration New Zealand noted that it had interviewed the appellant in relation to a previous Skilled Migrant category application in January 2012, and he had had significant difficulty communicating in English. After assessing all of the evidence as to the appellant's English language ability, by email dated 21 February 2017, Immigration New Zealand requested that the appellant book and sit the next available International English Language Testing Systems (IELTS) test.

[6] The appellant booked to sit a test in May 2017. He was unable to sit that test due to illness. A new test date was booked for late July 2017. In early October 2017, Immigration New Zealand requested that the appellant provide his test results. His representative responded advising that the appellant had not yet met the English language requirements. A copy of the test results was not provided.

[7] By letter dated 16 October 2017, Immigration New Zealand advised the appellant that it appeared he did not meet the English language requirements and his application might be declined on that ground. He was given an opportunity to comment or provide further information. In response, letters of support and details of the appellant and his family's personal circumstances were provided.

Immigration New Zealand Decision

[8] By letter dated 2 November 2017, Immigration New Zealand declined the appellant's application on the ground that he did not meet the minimum standard of English for a principal applicant.

STATUTORY GROUNDS

[9] 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.

[10] 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

[11] On 14 December 2017, the appellant lodged this appeal on the ground that his circumstances are special such that an exception to the residence instructions should be considered.

[12] In support of the appeal, the representative makes submissions and produces evidence relevant to the appellant and his family's special circumstances (set out below at [19])

ASSESSMENT

[13] 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.

[14] While the appellant appeals only on the ground of his 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

[15] The appellant's application was made on 29 November 2016 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant did not meet the minimum standard of English for a principal applicant.

[16] Because the appellant was invited to apply for residence prior to 11 October 2016, the transitional provisions concerning English language ability at SM5.5.1 (effective 21 November 2016) applied to his application. These state:

> **SM5.5.1 Transitional provisions for principal applicants invited to apply on or before 11 October 2016**
>
> For principal applicants whose invitation to apply was issued on or before 11 October 2016 an immigration officer may, on a case by case basis, also consider the following as evidence of the principal applicant meeting the minimum standard of English if:
>
> a. Other evidence that a principal applicant meets the minimum standard of English is:
>
> i. was gained as a result of a course or courses of study in which English was the only medium of instruction; and
>
> ii. (if that qualification was gained in New Zealand) the qualification had a minimum completion time of at least two years and is at least a bachelor degree or it is a post-graduate qualification and the applicant has an undergraduate qualification that qualifies for points; or
>
> b. they have current skilled employment in New Zealand for a period of at least 12 months that qualifies for points (see SM7); or
>
> c. they provide other evidence which satisfies an immigration officer that, taking account of that evidence and all the circumstances of the application, they are a competent user of English. These circumstances may include but are not limited to:
>
> i. the country in which the applicant currently resides;
>
> ii. the country(ies) in which the applicant has previously resided;
>
> iii. the duration of residence in each country;
>
> iv. whether the applicant speaks any language other than English;
>
> v. whether members of the applicant's family speak English;
>
> vi. whether members of the applicant's family speak any language other than English;
>
> vii. the nature of the applicant's current or previous employment (if any) and whether that is or was likely to require skill in English language;
>
> viii. the nature of the applicant's qualifications (if any) and whether the obtaining of those qualifications was likely to require skill in the English language.
>
> d. In any case, an immigration officer may require an applicant to provide an English language test result in terms of paragraph SM5.5 (b). In such cases, the English language test result will be used to determine whether the principal applicant meets the minimum standard of English.
>
> **Note:** Full consideration must be given to all evidence of English language ability provided before a decision to request an English language test result under SM5.5.1(d) is made. If an English language test result is requested the reason(s) behind the decision must be clearly documented and conveyed to the applicant.

[17] In accord with the Note to SM5.5.1, Immigration New Zealand considered all evidence of the appellant's English language ability and decided to request that he provide an English language test. It documented the reasons for that request in its email of 21 February 2017.

[18] Ultimately, the appellant's representative advised Immigration New Zealand that he had not met the English language requirements. No English language test results were provided. Instruction SM5.5 (effective 21 November 2016) provides that applications under the Skilled Migrant category must be declined if the principal applicant has not met the minimum standard of English. Immigration New Zealand was correct to decline the appellant's application, and it had no discretion to do otherwise.

New Evidence on Appeal

[19] On appeal, the representative has produced the following material (some of which was previously produced to Immigration New Zealand):

(a) statements from the appellant, his wife and his elder daughter;

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

(c) letters of support, including from local businesses, Sikh sporting and cultural clubs, the Sikh temple attended by the appellant, the Supreme Sikh Society of New Zealand, and the intermediate school presently attended by the appellant's 13-year-old (younger) daughter;

(d) reports and certificates concerning the appellant's younger daughter's and 11-year-old son's schooling;

(e) certificates and other evidence of the appellant's younger daughter's participation and achievements in a variety of sporting activities;

(f) evidence in support of the representative's submission that the appellant is a well-known Punjabi singer; and

(g) evidence that the appellant owns residential property in India.

[20] To the extent it is relevant to the appellant's special circumstances, this material is referred to as appropriate in the Tribunal's assessment of that ground of appeal.

Whether there are Special Circumstances

[21] 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.

[22] 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.

[23] 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.

Personal and family circumstances

[24] The appellant and his family members are all citizens of India. He is 49 years old. His wife is 46 and the couple’s two daughters are aged 22 and 13 and their son is 11. The appellant has been living in New Zealand for almost 10 years and his family for nine years. The children were aged 13, 4 and 2 when they relocated to New Zealand.

[25] The appellant first travelled to New Zealand on a short-term work visa as a performing artist in 2007. He visited again in 2008 and, while in New Zealand, obtained a student visa. Upon completing his studies at the end of 2009, he was granted a Graduate Job Search work visa and eventually transitioned to an Essential Skills work visa. His current visa is valid until 20 January 2019. His wife and two younger children also hold visas current until 20 January 2019. His elder daughter holds a Post-Study work visa current until 27 April 2020.

[26] According to his application, the appellant has two brothers living in India and one in Canada. His wife’s parents and brother live in India. The couple have no family nexus to New Zealand.

Health and character

[27] Immigration New Zealand was satisfied that the appellant and his family members met the health and character requirements of residence instructions. The

appellant, his wife and their elder daughter have current, clear New Zealand police certificates dated 25 June 2018.

English language ability

[28] The appellant's application was declined because he did not satisfy the English language requirements of instructions. In *He v Chief Executive of the Department of Labour* (HC Wellington, CIV 2008-485-1300, 13 November 2008), Ronald Young J gave guidance as to what is relevant in relation to an applicant's English language ability when assessing special circumstances. At [50] of that decision, his Honour stated that what matters is:

> "... how good the appellant's written and oral English actually is. For example, if it is near the IELTS standard then this could hardly be considered a negative factor at all. If the [appellant] has virtually no written or oral English then this is likely to be a negative factor relevantly taken into account in assessing whether there are special circumstances."

[29] Apparently, the appellant has sat an IELTS test; however, those test results have not been produced to Immigration New Zealand, or disclosed to the Tribunal. That is unhelpful. In asserting that the appellant has an adequate level of English, the representative refers to his completion of a Level 5 qualification in New Zealand, his employment here and the various letters of support attesting to his English language ability. In all the circumstances, the Tribunal treats the appellant's English language ability as a neutral factor in its determination of whether he has special circumstances.

[30] Immigration New Zealand did not determine whether the appellant's wife or elder daughter satisfied the English language requirements. Given her education in New Zealand and the nature of her employment, the Tribunal is satisfied that the appellant's elder daughter has a good standard of English. There is insufficient evidence before the Tribunal to establish the appellant's wife's level of English.

Qualifications, work experience and employment

[31] In 2009, the appellant completed a Level 5 Diploma in Management at a New Zealand tertiary institute. Currently, he is employed as a restaurant manager at the ABC Hotel. He earns $23 per hour and works 32 to 40 hours per week. Immigration New Zealand did not determine whether his employment was skilled because his application was declined on other grounds. He has been in this role since October 2015. His appeal is supported by his employer who says he is a great asset to the business and able to communicate well with staff, customers and suppliers.

[32] The appellant has previously held other employment as a restaurant manager, including with DEF restaurant group. According to his representative, he left that employment when it became clear that DEF restaurant group had been mistreating and exploiting staff.

[33] The appellant's wife advises in her statement in support of the appeal that she is working and is studying horticulture.

The interests of the appellant's elder daughter

[34] The appellant's elder daughter has lived in New Zealand since she was 13 years old and is clearly well-settled here. Understandably, she considers New Zealand her home. She is now an adult, in full-time employment, and therefore not financially dependent on her parents. It is possible that, in the future, she may have a pathway to residence independent of her family.

[35] In her statement, the appellant's elder daughter writes eloquently of her aspirations and those of her parents. She explains that she has completed a Business Management diploma and wishes to study at university, but cannot afford foreign student fees. She is currently employed as a banker/customer services representative for a New Zealand bank and would like to transition to a more responsible role in commercial banking. She is grateful for the life and education she has had in New Zealand and cannot imagine a future in India.

The best interests of the appellant's younger daughter and son

[36] The Tribunal is required, pursuant to Article 3(1) of the 1989 *Convention on the Rights of the Child*, to have regard to the appellant's children's best interests as a primary consideration. However, the best interests of the children are not the paramount consideration (as per *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Tipping J). Their best interests do not automatically trump the appellant's inability to satisfy residence instructions or any other factors that the Tribunal considers weigh against him.

[37] Both of the appellant's younger children have lived in New Zealand since they were very young and in essence have known no other home. It is asserted in submissions that English is the son's first language and his mother (the appellant's wife) states that the children would face language and cultural barriers were they to return to live in India. Both children have undoubtedly made the friends and connections one would expect of children their age. Should the family return to live

in India in the future, that relocation is likely to be a real challenge for them and a significant life change. In New Zealand, both children are doing well in their schooling. The appellant's younger daughter clearly has a real talent for athletic and sporting endeavours. She participates in netball, basketball, orienteering, cross country, badminton, touch rugby and a host of other sports.

[38] The Tribunal is satisfied that it is in the younger children's best interests that they and their family be granted residence in New Zealand.

Settlement and contribution

[39] After more than nine years living in New Zealand, the appellant and his family are clearly well-settled here.

[40] [Withheld].

[41] A variety of letters of support from Sikh organisations in New Zealand are produced on appeal. The appellant is described as a well-known cultural figure in the Punjabi community, a respected person in the Punjabi community and honest, reliable and trustworthy. He plays a role at his local temple teaching children the Punjabi language and kirtans (devotional songs). His elder daughter describes the appellant as a "pillar of the community".

Discussion of special circumstances

[42] The appellant and his family are well-settled in New Zealand, where they have lived for more than nine years. It is in the best interests of the two younger children that the family remain in New Zealand permanently, as this is the only home they have known.

[43] It is unlikely that the appellant and his family will satisfy residence instructions in the future. It is therefore important that the family secure some certainty as to whether they will be able to remain permanently in New Zealand. This will enable them to better plan for their future, and in particular, make informed decisions which take into account the interests of the two youngest children. Given these factors, the Tribunal finds that the appellant's circumstances and those of his family warrant the Minister of Immigration's consideration as an exception to residence instructions.

DETERMINATION

[44] 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.

Order as to Depersonalised Research Copy

[45] 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 his family.

"J Donald"
J Donald
Member

[On 11 August 2018, the Minister determined to grant residence to the appellant, his wife and their three children as an exception to instructions.]

Certified to be the Research Copy released for publication.

J Donald
Member