IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2018] NZIPT 204742**

AT AUCKLAND

Appellant:	**VE (Skilled Migrant)**
Before:	D Smallholme (Member)
Representative for the Appellant:	D H Fisher
Date of Decision:	26 June 2018

RESIDENCE DECISION

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[1] The appellant is a 35-year-old citizen of India whose application for residence under the Skilled Migrant category was declined by Immigration New Zealand. The appellant's application includes her 40-year-old husband, and their daughter, aged eight years, also citizens of India.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it was not satisfied that her employment was sustainable.

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

[4] The Tribunal finds that Immigration New Zealand's decision was not fair because it failed to put its new concerns to the appellant before it declined her application. Immigration New Zealand also did not adequately consider the evidence when finding that the appellant's employment was not sustainable. The decision is therefore cancelled and returned for a correct assessment.

BACKGROUND

[5] On 24 July 2017, the appellant made her application for residence under the Skilled Migrant category. She claimed points for skilled employment, and bonus points for employment outside the Auckland region, relying on her employment as a retail store manager for ABC Ltd, a company that operated two convenience stores (the employing company).

[6] In support of her application, the appellant provided a copy of her individual employment agreement (1 May 2017) and the job description for her role. The terms and conditions of the appellant's employment included that she work 40 hours each week for an hourly rate of $22.

Immigration New Zealand's Concerns

[7] On 16 October 2017, Immigration New Zealand wrote to the appellant with its concerns that her employment may not be sustainable.

[8] Immigration New Zealand stated that its concerns were derived from the short time that the employing company had been in operation. The company had been incorporated in March 2016 and was therefore "very much in its infancy, and yet to establish itself as a sustainable enterprise". Immigration New Zealand recognised that businesses could be "vulnerable during the first few years of trading". It was therefore concerned that the employing company may not have been trading for sufficient duration to demonstrate the ability to sustain the appellant's employment on an ongoing basis.

[9] Without points, or bonus points, for skilled employment, the appellant's application would not meet the selection criteria of the Skilled Migrant category.

Response to Concerns

[10] On 7 November 2017, the appellant's representative, Mr Ryan, wrote to Immigration New Zealand in response to its concern that the appellant's employment was not sustainable.

[11] Mr Ryan explained that the convenience store business had been successfully and profitably operated for a number of years by a sole trader. The sole trader had made the change to a limited liability company in March 2016 on the advice of his accountant. There had been a period of financial transition between the sole trader and new limited liability company, which was represented in

supporting financial documentation. The sole trader (who was also the sole director of the employing company) had established a new venture, in which he worked full-time. Accordingly, Immigration New Zealand Zealand's concerns as to the sustainability of the appellant's employment had "no merit".

[12] In support of the response, further information was provided including:

(a) a letter (7 November 2017) from the accountant who acted for the sole trader and employing company;

(b) GST returns for the period 1 April 2016 to 30 September 2017 for the employing company;

(c) a Profit and Loss Statement for the period 1 April 2016 to 31 March 2017 for the employing company;

(d) GST returns for the period 1 April 2016 to 31 January 2017 for the sole trader;

(e) Profit and Loss Statements from 1 April 2016 to 31 March 2017, and from 1 April 2017 to 3 November 2017, for the sole trader trading as AA; and

(f) the sole trader's tax summary for the year ended 31 March 2015.

[13] The accountant advised that the sole trader had traded "under his own name" as AA, from 5 August 2011, and also as BB, from 5 May 2014, to 31 March 2016. There was no outstanding income or GST tax and the (previous) business had a "good financial position". The employing company had started trading on 13 April 2016 and "based on initial numbers" appeared to be profitable.

Immigration New Zealand Decision

[14] On 13 November 2017, Immigration New Zealand declined the appellant's application. Immigration New Zealand stated that the information provided had not alleviated its concerns regarding the sustainability of the appellant's employment with ABC Ltd.

[15] The accountant had stated that the sole trader had been trading under his own name to 31 March 2016, but this information did not appear to be accurate. The Profit and Loss Statement for the sole trader trading as AA for the period 1 April

2016 to 3 November 2017, and his GST returns for the period 1 April 2016 to 31 January 2017, suggested that he may still be trading.

[16] Immigration New Zealand noted that the employing company and sole trader's Profit and Loss Statements for the period 1 April 2016 to 31 March 2017 both showed expenses for purchases, light, power and heating, rent, telephone, tolls and internet, and wages and salaries, some of which were notated by the words "BB". Immigration New Zealand considered that it was unclear why expenses for BB were accounted for in Profit and Loss Statements for the sole trader, trading as AA. It was also unclear whether the expenses pertained to BB or AA. This information also raised concerns that the appellant may be employed by two separate entities and not a single employer, as required by immigration instructions. While it did not intend to proceed any further with that concern, the information reaffirmed Immigration New Zealand's concerns regarding whether the employing company had been trading for sufficient duration to establish itself as a sustainable enterprise. Due to the "ambiguity" surrounding the Profit and Loss Statements, Immigration New Zealand was not satisfied that the employing company was financially sustainable. There was no supporting evidence to show that the company was in a good financial position or how it planned to continue trading in the future.

[17] Immigration New Zealand also found that the information concerning the sole trader's financial position was not relevant to its concerns about the appellant's employment with the employing company, which was a completely separate legal entity. The employing company had to have the ability to sustain the appellant's employment "on its own merits". The financial information was not sufficient to demonstrate that the employing company was sustainable.

[18] Without points, and bonus points, for skilled employment, the appellant's application did not meet the requirements of the Skilled Migrant category.

STATUTORY GROUNDS

[19] 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—
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> (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.

[20] 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

[21] On 22 December 2017, the appellant lodged this appeal on both grounds in section 187(4) of the Act. In support of the appeal, Mr Fisher provides written submissions (27 February 2018).

[22] It is submitted that Immigration New Zealand's decision was unfair and incorrect as it failed to put its specific concerns to the appellant before it declined her application. Immigration New Zealand was also confused about the restructuring and subsequent transition of the business operations from the sole trader to ABC Ltd. The sole trader had intended to start trading as a limited liability company from 1 April 2016 but due to the different steps involved, including the duty to inform suppliers, he had traded under both entities until 1 August 2016. The GST returns showed that the transfer was a gradual process, not "an event". During the transitional period, expenses were accounted for by both trading entities. Immigration New Zealand was incorrect when it stated that the sole trader may still be operating. The sole trader's Profit and Loss Statement confirmed that he had earned only $239 for the period April to November 2017. It was not correct to suggest that the appellant could have been employed by two separate entities.

[23] In support of these submissions, the following new evidence is produced:

(a) Two letters (20 December 2017 and 12 February 2018) from the accountant providing further information and addressing the concerns raised by Immigration New Zealand in its letter declining the application.

(b) The employing company's Annual Report for the year ended 31 March 2017.

(c) The sole trader's Annual Report for the year ended 31 July 2016.

[24] The extent to which the Tribunal can consider the new information and evidence found in these documents 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 the exception contained in section 189(3)(a) of the Act, or under section 189(6) of the Act. Given the outcome of this appeal, it has not been necessary for the Tribunal to consider the admissibility of this information. However, the new evidence may be considered, as appropriate, by Immigration New Zealand in its reassessment of the application.

ASSESSMENT

[25] 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.

[26] 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

[27] The application was made on 24 July 2017 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because it was not satisfied that her employment was sustainable.

Sustainability of employment

[28] Residence instructions at SM7.15 require that applicants relying on points for skilled employment demonstrate that their employment is sustainable. When assessing the sustainability of an applicant's employment, Immigration New Zealand may consider a range of evidence, including the trading history of the business and its past financial performance:

> **SM7.15 Additional requirements for skilled employment**
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> ...
> b. Employment must be ongoing and sustainable. Ongoing and sustainable employment is:
>
> i. an offer of employment or current employment, with a single employer, that is permanent or indefinite, and of which the employer is in a position to meet the terms specified; or
>
> ...

Note: When assessing whether employment is sustainable, officers may consider, but are not limited to, such factors as the residence status of the employer, the period for which the employing organisation has been established as a going concern, and the financial sustainability of the employing organisation.

…

Effective 25/08/2014

[29] When deciding an application, Immigration New Zealand must act in accordance with the principles of fairness and natural justice (A1.1.c, effective 29 August 2012). Relevant factors relating to fairness are also found at A1.5 of instructions:

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 appropriate reasons are given for declining an application;
- whether only relevant information is considered;
- whether all known relevant information is considered.

...

Effective 29/11/2010

Failure to inform the appellant of specific concerns

[30] Immigration New Zealand informed the appellant of its concerns about her employer's ability to sustain her employment, in its letter of 16 October 2017. Its concerns were focussed on the fact that the employing company had been recently incorporated in March 2016. It described the company as "very much in its infancy, and yet to establish itself as a sustainable enterprise" indicating that businesses could be "vulnerable during the first few years of trading".

[31] In response, it was advised that the two convenience stores had been successfully operated for a number of years by a sole trader. On his accountant's advice, the sole trader had incorporated the employing company and transferred his interests in the two convenience stores to the employing company. There had been a transition period although the business continued to operate as before, under the

new company structure. A letter from the accountant was provided confirming the change in business structure and advising that the new business appeared to be profitable. Copies of GST returns, and Profit and Loss Statements, for the sole trader and the employing company were also provided.

[32] Immigration New Zealand then formulated new concerns about the financial sustainability of the employing company, arising from the further information it had received about the change of business structure. In addition to stating that it did not accept that the sole trader had ceased trading, Immigration New Zealand raised detailed concerns as to the treatment of expenses as between the two entities, as set out in the Profit and Loss Statements provided, and that they only recorded the employing company's income and expenses (presumably suggesting it required information about the company's equity and liabilities). It considered that the financial information failed to demonstrate that the employing company was in a "good" financial position or how it planned to continue trading into the future.

[33] However, these concerns were not set out until Immigration New Zealand declined the appellant's application. It therefore failed to inform the appellant of its concerns before it declined her application. As she was unaware of the new concerns before Immigration New Zealand declined her application, the appellant did not have a reasonable opportunity to respond to information that was harmful to her case; A1.5.a of instructions. This process was unfair to the appellant because, without a precise understanding of the information that was considered harmful to her application, she was unable to contest the basis on which Immigration New Zealand was likely to decline her application.

Inadequate consideration of whether employment sustainable

[34] In declining the application, Immigration New Zealand found that there was no supporting evidence to show that the employing company was in a good financial position or how it planned to continue trading in the future. Immigration New Zealand also stated that the information concerning the sole trader was not relevant to its concerns about the appellant's employment with the employing company, as they were separate legal entities.

[35] The Note to SM7.15 indicates that when assessing whether employment is sustainable, immigration officers may consider such factors as the residence status of the employer, the period for which the employing organisation has been established as a going concern, and the financial sustainability of the employing organisation. However, any assessment is not limited to these factors — they are

not mandatory nor are they exhaustive; see *Residence Appeal No 15633* (28 January 2008) at [33]–[34].

[36] The Tribunal accepts that it can be difficult for new businesses to establish that they are financially sustainable. There can be high set-up costs in establishing suitable premises and operating systems, which must be met before income can be generated. It is not disputed that the employing company had been incorporated for some 20 months prior to Immigration New Zealand's decision. However, the period for which the employing company had been established as a going concern was but one factor to be considered by Immigration New Zealand in determining whether employment is sustainable.

[37] The Tribunal finds that Immigration New Zealand did not properly consider the circumstances surrounding the transition of the business operations from the sole trader to the employing company. When declining the application, Immigration New Zealand expressed concern about how expenses were accounted for between the different trading entities. It stated that it was unclear why expenses for purchases, light, power and hearing, rent, telephone, tolls and internet, and wages and salaries, were accounted for by the sole trader trading either as AA, with references to BB, and why they were also accounted for by the employing company. However, Immigration New Zealand did not appear to understand that there had been a transitional period during which the business operations had changed hands (from April to 1 August 2016), despite the explanations provided by the representative and the accountant. During this period, the expenses had to be accounted for by both the sole trader and employing company.

[38] Immigration New Zealand also maintained that the history of the sole trader's management of the two convenience stores was not relevant to the issue of the financial sustainability of the employing company. It was incorrect to do so. The sole trader had successfully operated the two convenience stores for a number of years; as AA, from 5 August 2011, and BB, from 5 May 2014. As such, there was an established trading history. Given that the two stores had been successfully operated by the same owner in their local area for some time, it was likely that they had built up a solid customer base and had become known for the services they provided. Against this background, it was unlikely that a change in business structure (from the sole trader to the employing company) was to have any effect on the stores' sales figures. There was nothing to suggest that there had been any change to the business' day-to-day operations or that they would not continue to generate the same level of income as they had under the ownership of the sole

trader. Immigration New Zealand also failed to consider the context of the change in business structure. It was sensible that the sole trader had sought to incorporate a new company for his new business and, at the same time, took the opportunity to incorporate his existing businesses.

[39] The Tribunal acknowledges that questions remain as to the transfer of the business operations, including whether the employing company had taken on any debt to a third party or if it was simply that the sole trader's interest in the business was represented by the shares he gained in the employing company. However, as Immigration New Zealand did not adequately explore the circumstances of the transition between the two legal entities or, for that matter, the interrelationship between the two stores, AA and BB, there is no information before the Tribunal as to whether any such matters impact adversely on the employing company's capacity to continue to sustain its financial obligations, including payment of the appellant's wages.

[40] For these reasons, the Tribunal finds that Immigration New Zealand failed to adequately consider the evidence when determining whether the appellant's employment with the employing company was sustainable; A.1.5.a of instructions.

Conclusion on correctness

[41] For the reasons set out above, the Tribunal finds that Immigration New Zealand's decision was not fair and is therefore not correct.

DETERMINATION

[42] 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.

[43] 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

[44] 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 investigations or other aspects of the application which remain to be completed or 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 submit any further information to support her application, including an update on her employer's current financial position.

3. Should Immigration New Zealand have any concerns as to whether the appellant's employment is sustainable, then it is to inform the appellant specifically of those concerns and ensure that she has an opportunity to respond, including a reasonable opportunity to provide any further information and evidence.

4. If Immigration New Zealand is satisfied the appellant's employment is sustainable, it shall determine all other aspects of the application.

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

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

Order as to Depersonalised Research Copy

[47] 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 her family members or employer.

Certified to be the Research Copy released for publication.

D Smallholme
Member

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