**IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND** **[2018] NZIPT 205086**

**AT AUCKLAND**

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| **Appellant:** | **CF (Skilled Migrant)** |
| **Before:** | M Avia (Member) |
| **Representative for the Appellant:** | D Fisher |
| **Date of Decision:** | 30 November 2018 |

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**RESIDENCE DECISION**

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[1] The appellant is a 33-year-old citizen of India whose application for residence under the Skilled Migrant category was declined by Immigration New Zealand. His application includes his 30-year-old wife, also a citizen of India.

## THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it was not satisfied that his employment was sustainable. As a result, the appellant was not entitled to points for skilled employment. Without points for skilled employment, the appellant could not succeed under the Skilled Migrant category.

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

[4] The Tribunal finds that Immigration New Zealand's decision was not correct because it did not properly consider all the information provided, including the company's financial information. The Tribunal therefore cancels the decision and refers it back to Immigration New Zealand for a correct assessment in terms of the applicable residence instructions and the Tribunal's directions.

## BACKGROUND

[5] The appellant's Expression of Interest under the Skilled Migrant category was selected from the pool on 17 July 2017. Following an invitation to apply on 4 August 2017, he made his application for residence on 1 December 2017 and claimed points for skilled employment as a Personal Assistant, relying on his employment since June 2017 as an executive assistant. His employment contract provided that he would work a minimum of 35 hours per week earning $20 per hour. Before beginning his current employment, the appellant had worked as a store supervisor at a service station until November 2016.

[6] The company employing the appellant was incorporated in June 2016 and operated cleaning, ironing, lawnmowing and gardening contracts. Its sole director was also the sole shareholder.

### Verification of Application

[7] At Immigration New Zealand's request, on 21 March 2018, the company director completed an Immigration New Zealand questionnaire concerning the appellant's role, which included an organisational chart, which showed that three people (who undertook the cleaning, ironing and lawnmowing and gardening work) reported to the appellant and, in turn, the appellant reported to the director. The director stated that the appellant started his employment in June 2016, although, as the Tribunal sets out [39], the director had mistakenly recorded 2016 when he meant 2017.

[8] Also provided was a tax return for the financial year ending 31 March 2017. The tax return recorded that for the year ending 31 March 2017, the company earned $27,207, which, after the deduction of the cost of sales ($7,015), and business expenses ($22,188), left the company with a small deficit of $1,996. The company's current assets of $5,716 were offset by minimal liabilities of $671. The shareholder's equity in the business was $48,941.

### Sustainability Concerns Raised by Immigration New Zealand

[9] On 12 April 2018, Immigration New Zealand wrote to the former representative raising concerns that the company might not have been trading for a sufficient time to demonstrate the sustainability of the appellant's employment.

[10] The information provided did not demonstrate that the company was financially sustainable. The company had made a loss in the year ending 31 March 2017, and the wages paid did not appear sufficient to cover the appellant's wages, let alone the wages of the other three employee. Further the company was recently incorporated and, as a result, Immigration New Zealand considered that there was no historic data available on which to base a budget or assess the business's past performance. As a result, it was not satisfied that the appellant's employment was sustainable.

[11] Immigration New Zealand also raised a character issue, as the appellant had been convicted of driving with excess blood alcohol in February 2013. However, the Tribunal takes this issue no further, as Immigration New Zealand later granted the appellant a waiver of the character requirements of instructions.

**Response to Immigration New Zealand's Concerns**

[12] The representative responded on 27 April 2018. In his view, an examination of sustainability should be focused on whether the business earned sufficient money to pay its employees and meet all other terms and conditions that related to the appellant's employment. With respect to the concern about whether the wages paid were sufficient to cover the wages payable, the representative noted that the employer acquired the gardening business and one other business after the company had begun. Further the attached PAYE statements demonstrated that the employees were being paid and that PAYE was forwarded to the Inland Revenue Department (the IRD).

[13] The representative also submitted that the sustainability of the employment could be assessed by taking into account all aspects of the business and not solely the financial strength. What was relevant was whether the company was in a position to continue paying the appellant's wages. The representative submitted that, despite a slow start, the business was otherwise sustainable and growing year by year.

[14] The representative produced a number of documents, a forecast of the company's financial performance for the year ending 31 March 2019, which included the company's financial results for the years ended 31 March 2017 and 2018, a covering letter from an accountant (27 April 2018), and the company's Employer Monthly Schedules from September 2017 to March 2018. Also provided were passport details of members of the appellant's family and letters of support from colleagues.

[15] In relation to the company's financial position for the year ending 31 March 2017, the forecast document contained figures similar to the 2017 tax return.

[16] In relation to the company's financial position for the year ending 31 March 2018, the forecast document recorded that it had earned $146,706.02 from sales which, after the deduction of the cost of sales and business expenses, left the company with a profit of $24,546.93. The company's current assets slightly outweighed its current liabilities ($11,725.84 to $11,243.45) and its overall assets ($82,680.95) outweighed its overall liabilities ($34,621.85), which after the company's previous loss was taken into account, left it with positive equity of $48,059.10.

[17] The forecast for the financial year ending 31 March 2019 anticipated slightly higher overall earnings ($163,181.08) and expenses resulting in a profit of $24,928.98, which was a similar level of profit to that of the previous year. Once again, the company's assets were forecast to outweigh its liabilities, leaving the company with positive equity of $47,018.92.

[18] In the letter accompanying the forecast document, the accountant added a disclaimer stating that he did not accept any legal liability relating to the accuracy of the information from which the forecast document had been prepared.

**Immigration New Zealand's Decision**

[19] On 11 May 2018, Immigration New Zealand declined the appellant's application, as it found that his employment was not sustainable. In particular, the information provided in response to its earlier concerns had not lessened its concerns that the company was not financially sustainable.

[20] Immigration New Zealand noted that a forecast and the company's financial information for the years ending 31 March 2017 and 2018 had been provided. However, because the accountant disclaimed any liability for the accuracy of the information, Immigration New Zealand considered there was reason to doubt its accuracy. Immigration New Zealand also considered that the wages for the years ended 31 March 2017 and 2018 as recorded in the forecast document did not appear to be sufficient to pay the appellant's wages or the wages of other staff, and set out its calculations that it asserted demonstrated this.

[21] Further, the Registrar of Companies had initiated action to remove the company from the register. Public notice was given of that fact on 3 May 2018. While it was not the reason for the decline of the application, Immigration New

Zealand considered that this served to reinforce its decision that the appellant's employment was with a company that was not sustainable.

[22] For these reasons, Immigration New Zealand was not satisfied that the appellant's employment was sustainable. Therefore, he was not entitled to points for skilled employment. Without those points, he did not have sufficient points to succeed in his application for a residence visa under the Skilled Migrant category.

## STATUTORY GROUNDS

[23] 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.

[24] 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

[25] On 25 June 2018, the appellant lodged this appeal on the ground that the decision of Immigration New Zealand was not correct in terms of the applicable residence instructions. In support of the appeal, the representative makes submissions (28 August 2018) and the appellant provides a letter (15 June 2018).

[26] In addition to documents before Immigration New Zealand, the representative produces:

(a) a letter from the company director (undated) and a letter from the accountant (15 July 2018);

(b) the appellant's pay slips (July 2017 to May 2018), a company printout of the appellant's earnings (July 2017 to March 2018) and his IRD

Summary of Earnings (July 2017 to March 2018), and other employees' payslips (March 2017 to April 2018); and

(c) a deed of variation with the company's franchisor (March 2017).

[27] The above information was not before Immigration New Zealand when it made its decision. In considering an appeal, the Tribunal may not, subject to statutory exceptions, consider any evidence adduced by the appellant that was not provided to Immigration New Zealand before it determined the application (section 189(1) of the Act), unless it falls into one of the exceptions at section 189(3)(a) or section 189(6) of the Act, which, in this case, do not apply. Nevertheless, given the outcome of the appeal, this information and evidence can be taken into account in the reassessment of the application.

## ASSESSMENT

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

[29] 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

[30] The Skilled Migrant instructions were changed on 28 August 2017. Even though the appellant made his application after that date, because his Expression of Interest was selected from the pool before 28 August 2017, SM3.5.10 (effective 28 August 2017) provides that his application should be assessed under the Skilled Migrant category of instructions in effect on 27 August 2017.

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

[32] To satisfy instructions at SM7.15.b, an applicant must demonstrate that his or her skilled employment is ongoing and sustainable. The Note to SM7.15.b explains that, when assessing whether employment is sustainable, Immigration New Zealand may consider factors such as the period that the employing

organisation has been established as a going concern, and its financial sustainability:

> **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 specific; or
>
> ii. an offer of employment or current employment with a single employer, for a stated term of at least 12 months; 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*

[33] Also relevant are the fairness requirements of instructions (A1.5, effective 29 November 2010), which provide that determining whether a decision is fair will depend on a number of factors including whether an application is given proper consideration.

*Sustainability*

[34] Whether a business offering or employing applicants for residence can sustain that employment is essentially a forward-looking exercise by reference to the past performance of the business. Much of the information about the past performance of a business is contained in financial information, as discussed below, but that information must also be properly understood and analysed.

[35] The Tribunal has a number of concerns about Immigration New Zealand's finding that the appellant's employment was not sustainable. In particular, Immigration New Zealand did not appear to have properly considered the evidence concerning the company's financial sustainability.

*Immigration New Zealand's rejection of the forecast document*

[36] In its decision, Immigration New Zealand rejected the credibility of the forecast document (consisting of the forecast for the coming financial year and the

financial information for the years ending 31 March 2017 and 2018) because the accountant had added a disclaimer to the document. However, Immigration New Zealand should not have rejected this evidence on that basis, without raising any other concerns about the document. The disclaimer was a standard disclaimer that an accountant would ordinarily include in the absence of audited accounts, bearing in mind that, given the cost, small businesses do not tend to have their accounts audited. Further, the forecast for the 2019 financial year appeared to be based on the figures achieved in the previous financial year, and although it contained an increase in sales and income, the increase appeared to be realistic.

*Whether the wages recorded in the forecast as being paid during the 2017/2018 financial year were sufficient to pay the appellant and the staff*

[37] Immigration New Zealand considered that the wages for the years ended 31 March 2017 and 2018 as recorded in the forecast document did not appear to be sufficient to pay the appellant's wages or the wages of other staff, and set out its calculations that it asserted demonstrated this:

> "[Y]ou have provided us with 7 months of Employer Monthly Schedules September 2017-March 2018 which adds up to $46,656 for 7 months of wages. We note that you have been working for the company since 29.06.2016 therefore if we calculate you wage for the extra 5 months which are missing from the Employer Monthly Schedules you wage alone for the 5 months will add up to $15,120 adding this amount only and not calculating any other employees wages to the total will add up to $61,776 of wages yet the financial statement provided to us is reading $53,252.99 for 2017 therefore we are still of the view that the wage amount in the financial statement is not accurate and that there are employees who many not be getting paid correctly and that the company is not sustainable".

[38] It is difficult to understand Immigration New Zealand's calculations. Immigration New Zealand stated in its decision that the appellant began working for the company in 29 June 2016. The director stated the appellant began working for the company on that date; however, it was clear that this was a mistake and that he began his current employment in June 2017. This is because it was obvious from the correspondence on the file that the appellant had been employed in a completely different part of the country as a service station supervisor until November 2016.

[39] It may be that Immigration New Zealand made the same mistake as the employer and meant to refer to June 2017 as the appellant's start date with the company. Immigration New Zealand stated that the wages the company paid "for 2017" were $53,252.99. To be clear, the evidence showed that wages of $53,252.99 were paid during the financial year running 1 April 2017 to 31 March

2018. Immigration New Zealand noted in its decision that the Employer Monthly Schedules showed that the company paid its employees $46,656 from September 2017 to March 2018. It then surmised that "if we calculate you wage for the extra 5 months which are missing from the Employer Monthly Schedules you wage alone for the 5 months will add up to $15,120".

[40] However, the appellant started working for the company towards the end of June 2017 and the date of the first Employer Monthly Schedule was September 2017. Therefore, only a little over two months of the appellant's wages were not accounted for in the Employer Monthly Schedules. Because the Schedules showed that he usually earned $3,024 per month, his wages for those months were likely to be in the region of $6,000, which when added to $46,656 is $52,656, less than the $53,252.99 wages recorded in the 2017/2018 financial information.

[41] It may be that questions remain over how much other employees were paid, and when they began working for the company. However, there is a lack of information on this issue before Immigration New Zealand, and given the above errors, this can be addressed by Immigration New Zealand during the next assessment.

[42] For the above reasons, the Tribunal finds that Immigration New Zealand failed to demonstrate that it had properly considered the above evidence. This evidence showed that the company was progressing well. While it had made a small loss in its first partial year of trading, it was followed by a profit in the second. By March 2018, the company's current assets outweighed its current liabilities and the company had positive equity. Further, the forecast for the financial year ending 31 March 2019 appeared to be realistic.

*Company registration*

[43] In its decision, Immigration New Zealand noted that the Registrar of Companies had initiated action to remove the company from the register. While Immigration New Zealand stated that this was not a reason for the decline of the application, it served to reinforce its decision that the appellant's employment was with a company that was not sustainable.

[44] If this issue is still considered relevant to the company's sustainability during the next assessment of the application, Immigration New Zealand must put it to the appellant for comment. The Tribunal notes the representative's submissions

on this matter, that an oversight on the director's part caused the situation which was then quickly rectified.

*Conclusion as to correctness*

[45] The Tribunal finds that Immigration New Zealand's decision was not correct because it did not properly consider all the information provided, including the information concerning the company's financial position. The Tribunal therefore cancels the decision and refers it back to Immigration New Zealand for a correct assessment in terms of the applicable residence instructions and the Tribunal's directions.

## DETERMINATION

[46] 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 based on 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.

[47] 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

[48] 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 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 his application, including an update on his employer's current financial position.

3. Should Immigration New Zealand have any concerns as to whether the appellant's employment is sustainable, it must properly inform him of its concerns and ensure he has an opportunity to respond to its concerns and to provide any further information and evidence in response. It shall take into account the Tribunal's concerns about Immigration New Zealand's approach to the evidence about the company's financial sustainability (at [35]–[46] of this decision).

4. If Immigration New Zealand is satisfied the appellant's employment is sustainable, it shall determine all other aspects of the application including whether his employment substantially matches the ANZSCO description, including core tasks, of a Personal Assistant.

5. If the appellant is no longer employed in the same role with the same employing company, he is to be given a reasonable opportunity to produce evidenceopportunity to respo

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M Avia
Member