IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

[2021] NZIPT 205855

Appellant:	**HC (Partnership)**
Before:	M Benvie (Member)
Representative for the Appellant:	H Yin
Date of Decision:	7 January 2021

RESIDENCE DECISION

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[1] The appellant is a 33-year-old citizen of China whose application for residence under the Family (Partnership) category was declined by Immigration New Zealand.

THE ISSUE

[2] Immigration New Zealand declined the appellant's application because her New Zealand-citizen husband was ineligible to support her application because he had acted as a partner in more than one previous successful residence class visa application. The Tribunal finds that Immigration New Zealand's decision was correct.

[3] The principal issue for the Tribunal is whether the appellant has special circumstances, arising from her partnership and personal circumstances, her two New Zealand citizen children, her partner's status as a New Zealand resident since 1993 and her partner's mental health disorder, such as to warrant a recommendation for the grant of residence as an exception to instructions.

[4] For the reasons given, the Tribunal finds that the appellant has special circumstances.

BACKGROUND

Application for Residence

[5] The appellant made her residence application that is the subject of this appeal on 14 October 2019, under the Family (Partnership) category. The application is supported by her partner, a New Zealand citizen.

[6] Immigration New Zealand wrote to the appellant on 22 July 2020 informing her that her partner did not appear to be eligible to support her application because he had successfully supported more than one previous residence application under the same category. Therefore, it appeared that the application could not succeed.

[7] The representative responded on behalf of the appellant on 10 August 2020. He stated that he was aware that the Minister would not intervene at this juncture in the application process and that Immigration New Zealand was unable to waive the relevant requirement of instructions. He advised that an appeal to the Tribunal would be filed after Immigration New Zealand had completed its assessment.

Immigration New Zealand Decision

[8] On 12 August 2020, Immigration New Zealand declined the appellant's application because her partner was not eligible to be a supporting partner for the application.

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 26 August 2020, the appellant lodged this appeal on the ground that she has special circumstances.

[12] The appellant's representative makes submissions (9 October and 4 November 2020). He refers to the personal and family circumstances of the appellant and her partner and emphasises the interests of the couple's two children. In support of his submissions as to the appellant's special circumstances, representative provides new evidence as follows:

(a) copies of New Zealand birth certificates for the couple's children;

(b) various letters of support from the appellant's partner, friends, family and members of the community;

(c) a bundle of photographs of the appellant, her children and partner;

(d) copies of bank account statements;

(e) a copy of a tenancy agreement;

(f) copies of emails and letters sent between the appellant and her partner while the partner was in prison (including translations from the Mandarin language to English for some of the emails sent by the appellant);

(g) a copy of a letter confirming enrolment of the appellant's eldest child at a private school for 2021;

(h) a copy of the appellant's National Certificate in Early Childhood Education (Level 5) issued by a New Zealand tertiary institution, together with an academic transcript;

(i) a letter from a New Zealand tertiary institution (28 June 2019) stating that the appellant had meet all of the requirements for the award of a New Zealand Diploma in Early Child Education, together with an academic transcript;

(j) a copy of a psychiatrist's report (22 June 2018) for the appellant's partner;

(k) copies of letters from the Department of Corrections approving visits by the appellant and her eldest child to the appellant's partner in prison; and

(l) copies of various invoices addressed to the appellant's residential address.

[13] As provided for in section 189(3)(b) of the Act, the Tribunal can take this new evidence into account when determining whether or not the appellant's circumstances are special.

ASSESSMENT

[14] 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.

[15] 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. The Tribunal then assesses whether the appellant has special circumstances which warrant a recommendation to the Minister of Immigration that an exception to instructions be considered.

Whether the Decision is Correct

[16] The application was made on 14 October 2019 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant's partner was ineligible to support the application as he had successfully supported more than one previous residence application under the same category.

[17] The relevant instructions in this case are F2.5.d.i and F2.10.10.

[18] An application for residence under the Family (Partnership) category will be declined if an applicant does not have an eligible New Zealand citizen or resident partner (see F2.5.d.i, effective 8 May 2017).

[19] The definition at F2.10.10 (effective 29 May 2017) of instructions sets out a number of conditions affecting the eligibility of a New Zealand partner to support a residence application under the Family (Partnership) category. F2.10.10.a.i states that the New Zealand partner must not have acted as a partner in more than one

previous successful residence class visa application. A New Zealand partner is considered to have acted as a partner if they previously supported a successful Partnership category application for a residence class visa (F2.10.10.b.i); were the principal applicant in a successful Partnership category application for a residence class visa (F2.10.10.b.ii); were the principal applicant in a successful application for a residence class visa that included a secondary applicant partner (F2.10.10.b.iii); or were a secondary applicant partner in a successful application for a residence class visa (F2.10.10.b.iv).

[20] The appellant's partner had supported two successful Family (Partnership) category applications on behalf of two of his former partners. Therefore, the appellant's partner had acted as a partner in more than one previous successful residence class visa application (F2.10.10.b.i).

Conclusion on correctness

[21] For the reasons set out above, the Tribunal finds that Immigration New Zealand's decision was correct as the decision was in accordance with the relevant instructions.

Whether there are Special Circumstances

[22] 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.

[23] 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.

[24] 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

[25] The appellant is a citizen of China, aged 33 years. She arrived in New Zealand in November 2014 as the holder of a work visa under the China Working Holiday Scheme. She subsequently held a succession of student

and visitor visas and currently holds a work visa valid until 8 October 2022. The appellant and her partner have two children, a four-year-old son and a daughter born in September 2020.

[26] The appellant's partner is a citizen of Malaysia. He obtained residence in New Zealand in November 1993. In addition to his two children with the appellant, the partner has eight children with two of his former partners in New Zealand.

[27] The appellant's parents reside in China. The partner's mother and one of his brothers is a New Zealand resident, while his other brother is an Australian resident.

Qualifications

[28] The appellant holds a National Certificate in Early Childhood Education (Level 5) and a New Zealand Diploma in Early Childhood Education.

[29] Prior to the birth of her daughter in September 2020, the appellant had worked in part-time roles at a Chinese language school and at a childcare centre.

English language, character and health

[30] In his submissions, the representative states that the appellant's English language proficiency has improved since her arrival in New Zealand.

[31] [Withheld].

[32] Clear Chinese and New Zealand police certificates were provided by the appellant. The Tribunal received an updated clear New Zealand police clearance for the appellant (24 December 2020). Her partner's updated police clearance (24 December 2020) discloses no further or more recent convictions beyond those set out in [31] above.

[33] Immigration New Zealand was satisfied that the appellant met the health requirements of instructions.

The appellant and her partner's relationship

[34] The appellant and her partner met in 2014 and have been living together in a relationship since October 2015. Although the genuineness and stability of the partnership was not assessed by Immigration New Zealand, the representative submits that the partnership is 'genuine and stable'.

[35] During the partner's incarceration, the appellant and the couple's son visited the appellant at the ABC corrections facility and at the DEF corrections facility at Z region. The visits to Z region required considerable commitment on the part of the appellant, involving a seven-hour round trip each time.

[36] The relationship has endured the stresses and uncertainties involved in the partner's imprisonment between May 2018 to June 2019. It has the support of family members and the couple's parish priest.

[37] The representative submits that the couple financially support each other, although they do not hold a joint bank account. The appellant pays the weekly rent and the partner's benefit from Work and Income is direct credited to the appellant's bank account.

Best interests of the appellant's children

[38] The Tribunal is required to have regard to the best interests of the appellant's children as a primary consideration: Article 3(1) of the 1989 United Nations *Convention on the Rights of the Child* and *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Tipping J.

[39] Both of the appellant's children are New Zealand citizens. As such, both children are able to enjoy the benefits that arise from being a citizen of this country, including the ability to access the public health, welfare and education systems.

[40] The representative submits that if the appellant returns to China, both children will need to obtain visas to stay in China on a temporary basis. He also submits that neither child, because they were both born in New Zealand, will be able to attend a primary school in China. The partner is not able to live in China and also needs to be in New Zealand to care for his elderly mother. The representative states that the partner's ADHD diagnosis means that the appellant will need to take "the most responsibility" for caring for the children. It appears that, given her husband's mental health issues, the stability that the appellant can provide to the children will be important to their well-being.

[41] The Tribunal finds that the children's best interests are to remain living in an environment where they have the love and care of, and ready access to, both of their parents. Realistically, this can only be assured if the appellant is able to remain living permanently in New Zealand.

Conclusion on special circumstances

[42] The appellant has become well settled in New Zealand, as a result of the six years that she has been living here, through her relationship with her New Zealand-citizen partner, and most significantly, through her two young New Zealand-citizen children. Her partner has been a New Zealand resident for 27 years. The couple have been in a relationship for the past 5 years and have had two children together. The partner's familial nexus is to New Zealand as his mother and one of his brothers reside here.

[43] It is likely that it will be very difficult for the family to resettle in China or in Malaysia. The Tribunal has found that it is in the best interests of the couple's two children that their mother remains in New Zealand.

[44] The appellant's partner is ineligible to support her application for residence. The circumstances giving rise to her partner's ineligibility occurred before the couple met and are entirely outside of the appellant's control. While the representative refers to a possible future pathway to residence under the Skilled Migrant category, any such pathway is, a matter for the future and as at today, is hypothetical. For the sake of her New Zealand-citizen children, the Tribunal considers that she should have her place in New Zealand cemented permanently now rather than at some later, and only hypothetical, date.

[45] Taking into account the length of time that the appellant and her partner have lived in New Zealand and the best interests of their two children, the Tribunal considers that, cumulatively, there are special circumstances which warrant a consideration by the Minister of Immigration as an exception to instructions.

DETERMINATION

[46] Pursuant to section 188(1)(f) of the Immigration Act 2009, the Tribunal confirms the decision of Immigration New Zealand to be correct in terms of the applicable residence instructions but considers that the special circumstances of the appellant are such as to warrant consideration by the Minister of Immigration as an exception to those instructions.

[47] Pursuant to section 190(5) of the Immigration Act 2009, the Minister of Immigration:

(a) is requested to consider whether a residence class visa should be granted to the appellant as an exception to residence instructions; and

(b) may, if granting a resident visa, impose conditions on the visa in accordance with section 50 of the Act.

[48] Pursuant to section 190(6) of the Immigration Act 2009, the Minister of Immigration is not obliged to give reasons in relation to any decision made as a result of a consideration of the Tribunal's recommendation.

Order as to Depersonalised Research Copy

[49] 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.

"M Benvie"

M Benvie
Member

Certified to be the Research Copy released for publication.

M Benvie
Member