

**RESIDENCE REVIEW BOARD  
NEW ZEALAND**

**AT WELLINGTON**

**RESIDENCE APPEAL NO: 16288**

**Before:**

S Pearson (Member)

**Representative for the Appellant:**

M R Weischede

**Date of Decision:**

13 November 2009

**Category:**

Family (Dependent Child)

**Decision Outcome:**

Section 18D(1)(f)

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**DECISION**

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**INTRODUCTION**

[1] The appellant is a citizen of Tuvalu, aged 15 years.

[2] This is an appeal against the decision of Immigration New Zealand (INZ) declining the application because the appellant had not been included in her parents' application form for residence in New Zealand under the Pacific Access Category, when she was eligible for inclusion as a dependent child.

[3] The principal issue for the Board is whether the appellant has special circumstances that would justify a recommendation to the Minister of Immigration that an exception to policy be made.

**BACKGROUND**

[4] The appellant's application was made on 16 November 2007 under the Family (Dependent Child) category.

[5] The appellant arrived in New Zealand on 10 July 2006 and was granted a visitor's permit on arrival. The appellant has been in New Zealand since that time.

Her most recent temporary permit was to enable her to remain in the country to study until 19 December 2009.

### **Parents' Application for Residence**

[6] The appellant's parents made an application for residence on 23 March 2005 under the Pacific Access Category. The appellant's parents did not include her name in the registration form or the application.

[7] The Board notes in passing that the appellant's parents included their youngest child in their application. He had been born in New Zealand on 15 April 2002, and was therefore a New Zealand citizen by birth and it was not necessary to include him in their application.

[8] The Board has been supplied with the INZ file relating to the parents' application for residence. It contained a letter dated 22 March 2005 in which the appellant's father explained to INZ that the couple had been working in Fiji in October 2004 when they had been advised that their names had been selected from the Pacific Access ballot. They were required to make an application by 5 April 2005 and his focus had been to arrange for offers of employment in New Zealand in order to meet the application requirements.

[9] In the letter, the father sought advice as to whether he could delay the submission of his residence application because his wife had travelled from Fiji to her home island [named], one of the outer islands of Tuvalu, and had been stuck there because of poor weather, telephone problems due to a satellite breakdown and other unforeseen circumstances.

[10] The appellant's father had been advised to submit his application with copies of faxed police documents and other necessary documents before the deadline date of 5 April and to post the originals as soon as they were available.

### **INZ Processing of the Appellant's Application**

[11] The appellant's application was sponsored by her mother who provided evidence of her Tuvalu passport displaying her New Zealand residence permit.

[12] As part of a family cross-check, the INZ case officer obtained the registration form and the application for residence completed by the appellant's parents under the Pacific Access Category. This had been completed by her

father and disclosed the name of her mother and that of her brother, although the latter's name was deleted. At the time the appellant's parents were residing in Fiji.

### **Potentially Prejudicial Information**

[13] On 22 October 2008 INZ wrote to the appellant advising that, as a result of a family cross-check being completed, it had been noted that her parents had not included or declared her in their application made under the Pacific Access Category. This meant that she was caught by the provisions of the relevant policy at F5.35, which meant she would not be eligible to be granted residence. The appellant was invited to make any comments or supply additional information by 5 November 2008.

[14] The appellant's parents enlisted the services of a representative who replied to INZ on 5 November 2008.

[15] The representative stated that, at the time her parents received their notification of the deadline to apply for permanent residence in New Zealand under the Pacific Access Category, they were living in Fiji. It is claimed that they were given only two weeks to obtain the necessary documents in order to fulfil the requirements to lodge their application. The appellant's mother went back to visit the appellant who was living on the remote island [named] in Tuvalu, in the care of her maternal grandmother.

[16] The representative cited the policy at R5.15 claiming the right to explain the failure to declare the appellant, and enclosing a declaration made by the appellant's mother. In this, the appellant's mother declares that they only learned of the chance to make the "PAC application" two weeks before the deadline and there was no way they could obtain a birth certificate for the appellant within that timeframe. The appellant's mother stated that they had been unaware of the consequences of failing to include their daughter.

[17] The appellant's parents decided their first priority was to get their application completed and believed that their daughter could apply later as a dependent child.

[18] The representative also attached a letter of support dated 14 August 2007 from the office of a New Zealand Member of Parliament. This letter pointed out the difficult situation that the appellant was in as a result of her parents' failure to declare her in their own application for residence.

## INZ Decision

[19] The appellant's application was assessed on 4 February 2009 and declined by way of a letter dated 18 May 2009. INZ apologised in its letter of decline for mistakenly advising the appellant in a letter dated 11 March 2009 that her application had received approval in principle. This had been due to an administrative error. However, because of the policy at F5.35 and S1.40.15, the appellant did not meet the relevant policy and her application was declined.

## GROUND OF APPEAL

[20] Section 18C(1) of the Immigration Act 1987 ("the Act") provides:

"Where a visa officer or immigration officer has refused to grant any application for a residence visa or a residence permit, being an application lodged on or after the date of commencement of the Immigration Amendment Act 1991, the applicant may appeal against that refusal to the Residence Review Board on the grounds that –

- (a) The refusal was not correct in terms of the Government residence policy applicable at the time the application for the visa or permit was made; or
- (b) The special circumstances of the appellant are such that an exception to that Government residence policy should be considered."

[21] The appellant appeals on the ground that her special circumstances are such that an exception to the applicable Government residence policy should be considered.

[22] The representative provides submissions dated 30 June 2009. The following documents are produced:

1. A statement handwritten on the appeal form and a DVD from the appellant.
2. Undated handwritten letters of support from two of the appellant's classmates.
3. Two letters of support from friends of the family.
4. A statement dated 1 July 2009 from the secondary school in New Zealand attended by the appellant confirming her enrolment.
5. Pages downloaded on 30 June 2009 from a website featuring an article about New Zealand's climate refugees from Tuvalu.

6. Pages downloaded from an Amnesty International website on 30 June 2009 comprising a submission to the UN Universal Periodic Review concerning Tuvalu.

## ASSESSMENT

[23] The Board has been provided with the INZ files in relation to the appellant and has also considered the submissions and documents provided on appeal. An assessment as to whether the INZ decision to decline the appellant's application was correct in terms of the applicable Government residence policy is set out below. This is followed by consideration as to whether the appellant's special circumstances warrant consideration of an exception to policy.

[24] The appellant's application was made on 16 November 2007 and the relevant policy criteria are those in Government residence policy as at that time.

### Family (Dependent Child) Policy

[25] The policy applicable to the appellant's application is set out below:

**"F5.1 How do dependent children qualify for residence?"**

- a. Principal applicants\* meet dependent child policy if:

...

- ii they are

- aged 16 or younger, and
- single\*, and
- totally or substantially reliant on an adult (whether their parent or not) for financial support, whether they live with them or not, and
- their parent(s) are lawfully and permanently\* in New Zealand.

- b. Principal applicants\* under dependent child policy must also:

- i have been born to, or adopted by (see R3), their parent(s) before their parent(s) made\* their own application for residence, and have been declared as dependent children on their parent(s)' application for residence; or

...

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**Note:** In the event that the principal applicant was born to, or adopted by their parent(s) before their parent(s) made\* their own application for

residence, but that principal applicant was not declared as a dependent child on their parent(s)' application for residence, section R5.15 will apply.

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*Effective 30/06/2003*

**“F5.35 Application under Dependent child policy of person eligible for inclusion in an earlier Family Quota, Refugee Family Support Category, Samoan Quota Scheme or Pacific Access Category registration**

If the principal applicant in an application under Dependent child policy was eligible for inclusion in a successful registration under either the Family Quota, Refugee Family Support Category, Samoan Quota Scheme or Pacific Access Category but was not included, they will not be granted residence under Dependent child policy.

*Effective 30/07/2007*

**“R5.15 Explaining discrepancies in family details**

- a. Under the principles of fairness and natural justice, applicants must be given an opportunity to explain any discrepancies in the details of their immediate family, if those discrepancies are materially relevant to the application.
- b. Applicants, or other relevant parties, may be required to provide the explanation in writing and/or at an interview, and if given at interview the explanation must be recorded in writing.
- c. If applicants or other relevant parties are required to provide the explanation in writing, they must be given a reasonable time in which to do so and must know what it is they are expected to explain.
- d. If, as the result of an explanation, the immigration or visa officer is satisfied that the details provided by the applicant are correct, or that the applicant has genuinely misunderstood the requirements, the officer should continue to assess the application.

*Effective 30/06/2003*

[26] INZ was satisfied the appellant met the requirements of F5.1 except for F5.1.b.i because it was not in dispute that the appellant had not been declared as a dependent child in her parents' application for residence. The appellant was given an opportunity to explain the family detail discrepancy under R5.15 as provided for in the Note to the policy.

[27] The appellant's representative had explained that in the rush to obtain the "pertinent documents", to lodge their own application for residence, after having been selected in the ballot, the appellant's parents decided not to include her because of the difficulty of obtaining her birth certificate and medical certificates. It is submitted by the representative that the parents believed that, under the Dependent Child policy, they could obtain residence for her without difficulty once they were settled here.

[28] In its assessment of the appellant's application, INZ noted the explanation provided by the parents. However, the parents had registered for the Pacific Access Category ballot on 26 July 2004 and had not lodged their residence application until 23 March 2005 which meant they had nearly nine months in which they could have declared the appellant.

[29] Furthermore, the parents had not declared the appellant on the registration form and the policy at S1.40.15.c meant she was not eligible for residence under the Dependent Child category.

[30] This policy is as follows:

**"S1.40.15 Inclusion in registration of immediate family members of the principal registrant**

- a. Where the principal registrant has a partner\* and/ or dependent children\* all of those people must be included in the registration.
- b. If a registration is successful in the pool draw, only a partner\* and/or dependent children\* included in the registration may be included in the resulting application for residence under the Pacific Access Category. This limitation applies despite R2.1 concerning the inclusion of family members in an application.
- c. Any partner\* and/or dependent children\* who were eligible for inclusion in the registration but were not included must not subsequently be granted residence under the Partnership or Dependent Child policies of the Family Category.

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*Effective 02/04/2007"*

[31] It was not disputed that the appellant had not been declared on the registration form or in her parents' subsequent application for residence. While the opportunity to explain such discrepancies is extended to applicants under the Dependent Child policy via the Note in F5.1.b., via F5.15, the language set out in R5.35 is unambiguous.

[32] The Board finds that the decision of INZ to decline the appellant's application for residence was correct. She was precluded from being eligible because of the operation of F5.35.

**Special Circumstances**

[33] The Board has power pursuant to section 18D(1)(f) of the Act to find, where it agrees with the decision of INZ, that there are special circumstances of an

appellant that warrant consideration by the Minister of Immigration of an exception to policy.

[34] Whether an appellant has special circumstances will depend on the particular facts of each case. The Board balances all relevant factors in each case to determine whether the appellant's circumstances, when considered cumulatively, are special. Special circumstances are "circumstances that are uncommon, not common place, out of the ordinary, abnormal"; *He v Chief Executive of the Department of Labour* (High Court, Wellington CIV 2008-485-1300, 13 November 2008, Ronald Young J) at [42].

#### *The Appellant's Circumstances*

[35] The appellant is a 15-year-old girl from Tuvalu. She came to New Zealand on 10 July 2006 on a visitor's permit and was granted a student permit in February 2008. Evidence dated in July 2009 from the secondary school she is attending in New Zealand confirms that she is enrolled as a full-time student in Year 10.

[36] The appellant has produced a statement on appeal in which she explains in some detail that she does not wish to return to the island where she had been staying with her maternal grandparents. Not only was the house lacking in such basic amenities as beds, a television, telephone or radio, but the facilities at the school were also poor.

[37] The appellant explains that the school classrooms are dirty and the teachers hit the students whenever they make a mistake. In addition, girls did not have a chance to play sport at the school. She states that she loves attending school in New Zealand and will study hard to achieve her goal of becoming a medical doctor. She explains that this opportunity will not be available to her if she is made to return home to her grandparents.

[38] The appellant also outlines her concerns about her vulnerability in Tuvalu and is afraid that she will not be safe from rape there as such incidents have occurred.

[39] The appellant also states that she does not wish to leave her parents and brother. In New Zealand she has a better diet and standard of housing and has facilities such as libraries, the internet and a telephone which are not available to her in her grandparents' village.

[40] The appellant was born in 1994 and although her father is named on her birth certificate her parents did not marry until 2001. No details are provided as to when her parents moved to Fiji where they were apparently employed as teachers or why the appellant was left with her maternal grandmother on a remote Tuvalu island.

[41] The appellant's mother travelled to New Zealand on 24 March 2002 and her son was born here in April 2002. This gave him New Zealand citizen status. The appellant's mother then departed New Zealand in May 2002 and returned to New Zealand in November 2003 for a stay of some five months. She returned again in April 2005 and has remained here ever since. The appellant resumed living with her when she came to New Zealand in July 2006.

[42] The Board does not have any information as to the appellant's periods of separation from her mother but it is likely that she has spent time living in a remote village in Tuvalu with her maternal grandmother. The Board is satisfied that there is nothing on the INZ file to indicate that the appellant had been customarily adopted by her maternal grandmother and the appellant has made it clear that she regards her parents and her brother as constituting her family.

[43] It is also clear, from the appellant's description, that she considers she has no future to return to in Tuvalu.

[44] The appellant states that she is ambitious to do well and hopes to become a doctor. Letters of support submitted with her appeal from friends of the family and from her two classmates indicate that she is an enthusiastic student who is fully aware of the opportunities an education in New Zealand can provide.

[45] The appellant's parents have not provided statements on appeal. The mother's declaration dated 4 November 2008 repeats the assertion that the couple had only two weeks in which to organise documentation following their successful application in the Pacific Access Category ballot and this was why they did not include their daughter. A statement made by her father, when he requested an extension of time to make his application for residence, indicated that the couple's primary focus was ensuring they met the application deadline.

[46] Regardless of her parents' failure to declare her in their application for residence, their earlier omission to declare her on their registration form meant she could not be granted residence through their application or under the Dependent Child policy. Her parents do not appear to have grasped this point.

[47] However, the Board is satisfied, despite the failure by her parents to declare her during their registration and subsequent application for residence, that the appellant is an integral part of the family. She was not declared by her parents for reasons beyond her control but is clearly their natural child and it was intended that she would join them once they had settled here.

[48] The appellant has been in New Zealand long enough to become settled in her parents' home and is achieving excellent results at the secondary school she attends. Warm letters of support from two of her classmates and friends of the family are produced. As is evident in her handwritten statement, the appellant now has an excellent grasp of English and is an ambitious student.

[49] The representative points out on appeal that the family have been very pleased by the approval in principle for her application, which had been notified to them by letter on 11 March 2009. It took some time to accumulate the \$300 migrant levy and it was not until 4 May 2009 that they took the appellant's passport and the bank cheque to the INZ branch to process her residence permit.

[50] Some days later, the parents received a telephone call from the INZ manager of the branch apologising for an error made in sending out the approval letter. On 18 May 2009 they received the INZ letter declining her application. This has, understandably, had a devastating impact on the appellant, who had celebrated the approval of her residence with her classmates and the friends she had made over the previous three years.

[51] The appellant has clear medical certificates.

### *Discussion*

[52] But for the failure on the part of the appellant's parents to declare her in their registration and application made under the Pacific Access Category, the appellant would have achieved residence in New Zealand as part of their family. The appellant, who is now aged 15, has been in New Zealand for the past three years. During that time she has become an integral member of her natural family and has settled into the local community. She attends the local secondary school and has ambitions to attend university and become a doctor.

[53] The appellant has explained in her statement made on appeal that she would not feel safe on a remote Tuvalu island with her maternal grandmother. She believes girls who are not supported by a strong family structure are at risk of

sexual abuse in that community and cites an example. She does not wish to forego the opportunities that are available to her in New Zealand.

[54] The Board finds the appellant has special circumstances because of her significant family nexus to New Zealand and her status as a dependent child who will be considerably disadvantaged if she is not permitted to remain permanently in this country.

#### **STATUTORY DETERMINATION**

[55] This appeal is determined pursuant to section 18D(1)(f) of the Immigration Act 1987. The Board confirms the decision of INZ as correct in terms of the applicable Government residence policy but considers there are special circumstances of this appellant that warrant consideration by the Minister as an exception to that policy.

.....  
S Pearson

Member  
Residence Review Board

[Pursuant to section 18E(5), on 22 November 2009, the Minister granted a residence permit to the appellant.]