IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2012] NZIPT 200721**

AT AUCKLAND

Appellant:	**DB (Parent)**
Before:	A M Clayton (Member)
Counsel for the Appellant:	A J McClymont
Date of Decision:	25 September 2012

DECISION

INTRODUCTION

[1] The appellant is a citizen of Fiji, aged 53, whose application for residence under the Family (Parent) category includes his wife and their younger son who is 20 years old. The couple's two other children are not included in the application.

[2] This is an appeal against the decision of Immigration New Zealand declining the application because, of the appellant's three children, it considered two were dependent. Therefore the family's centre of gravity was not in New Zealand as the number of adult children living lawfully and permanently in New Zealand (one) was fewer than the number of his dependent children in Fiji (two).

[3] The issue for the Tribunal is whether the fact that one of the appellant's sons in Fiji turned 25 years old during the processing of the application meant that he should no longer have been considered a dependent.

BACKGROUND

[4] The appellant made his application for residence on 13 January 2009. His daughter in New Zealand had obtained residence status earlier, on marriage grounds, and had been resident in New Zealand for the requisite period of time to

be an eligible sponsor. The appellant included his two sons in his application, AA then aged 23 and BB then aged 16. He declared them both to be dependents.

[5] On a number of occasions in April and May 2010, Immigration New Zealand sought evidence of both sons' dependence on their parents. In response, a large amount of evidence was lodged to show that AA remained dependent on his parents. In total, the appellant signed three statutory declarations to that effect and AA signed five statutory declarations. There were also letters from a friend of the family and a Justice of the Peace; evidence of the appellant's earnings; copies of the appellant's and AA's bank statements; a certificate advising that AA was then undertaking a Certificate in Light Automotive Engineering (26 March 2010); and another certificate (12 July 2010) stating that AA was in the second year of his vocational training. There was also a letter from the Inland Revenue Department stating that, according to the appellant, AA had left school in 2006, remained at home, and was dependent on the appellant. It confirmed that AA was not registered to pay income tax.

[6] On 14 September 2010 Immigration New Zealand wrote to the appellant and advised, among other things, that he had provided sufficient evidence of his sons' dependence. However, with two dependent children included in his application, he would not meet the requirement to have fewer or an equal number of dependent children than adult children living lawfully and permanently in New Zealand.

[7] On 16 September 2010 the appellant's then agent responded, complaining about the advice he had been given by the Immigration New Zealand case officer on or about 1 July 2010. Evidently the case officer had told the appellant that his two sons in Fiji needed to be dependent on him for his application to be successful. The agent queried why this advice had been given, and why requests had been made for evidence of their dependence, when in fact by having two dependents the appellant could not meet residence instructions. On the same date, the Immigration New Zealand case officer apologised for the incorrect advice he had given.

[8] On 17 September 2010 the appellant's agent requested that AA be withdrawn from the appellant's application. On 20 September 2010 Immigration New Zealand replied that the removal of AA from the appellant's application, given that Immigration New Zealand considered him to be dependent, would not make any difference to the family's centre of gravity or, consequently, to the success of his application.

[9] On 1 October 2010 the appellant's agent advised that AA was determined to become independent of his parents and he lodged a statutory declaration from AA to that effect.

[10] On the same date, Immigration New Zealand removed AA from the appellant's application at his request.

[11] On 21 October 2010 Immigration New Zealand wrote to the appellant advising that his son would need to prove his independence by way of an employment agreement or payslips. On 11 November 2010 the agent provided a letter from a panel beating and spray painting firm in Fiji, advising that AA had been in its employ since 1 November 2010.

[12] AA turned 25 years old in January 2011.

[13] On 9 March 2011 Immigration New Zealand turned down a request by the agent to undertake a site visit to the panel beating firm for which AA worked. Instead it asked for a Fiji National Provident Fund (FNPF) summary of earnings for AA. On 18 March 2011 the agent advised that AA's employer did not pay into the FNPF. As was common practice among employers in Fiji, AA was paid in cash.

[14] On 3 April 2011 Immigration New Zealand advised the appellant it was unable to verify AA's job offer. There were no FNPF statements and it had been unable to reach the employer via the telephone numbers given.

[15] On 9 May 2011 the appellant's agent gave Immigration New Zealand new telephone numbers for AA's employer. However, on 24 May 2011 Immigration New Zealand replied, stating that it was the appellant's responsibility to provide evidence of his son's employment and it would not be conducting any further investigations.

[16] On 25 May 2011 the appellant's agent wrote a formal response, advising that AA was now 25, that he had been named as executor of his parents' will, and that his employer was still awaiting a call from Immigration New Zealand. A bank statement for AA was also lodged showing recent erratic deposits in multiples of FJD50 and FJD100.

Immigration New Zealand Decision

[17] On 20 June 2011 Immigration New Zealand wrote to the appellant declining his residence application because it was not satisfied that his family's centre of gravity was in New Zealand. The appellant had one adult child in New Zealand and two dependent children in Fiji. It acknowledged that AA was no longer included in the application as a dependent child, but the only relevant considerations under the Government instructions were how many children the appellant had, where they lawfully and permanently resided, and whether they were dependent. Immigration New Zealand was not satisfied that the bank account statement lodged proved that AA was being paid wages by an employer. The appellant had not provided sufficient documented evidence to prove AA's financial independence and Immigration New Zealand therefore considered AA remained dependent on the appellant.

[18] As to the fact that AA was now 25 years old, he had just turned 23 when the appellant's application was lodged and instructions at R5.6 stated that an applicant's age at the time an application was made is the age at which the applicant shall be assessed under Government residence instructions, unless otherwise specified in a particular instruction. The fact that AA had been appointed as executor and trustee of his parents' wills did not mean he was automatically considered an adult child in terms of New Zealand Government residence instructions.

GROUNDS OF APPEAL

[19] Section 187(1) of the Immigration Act 2009 ("the Act") provides:

> (1) There is a right of appeal to the Tribunal against a decision concerning a residence class visa in the following circumstances:
>
> (a) an applicant for a residence class visa may appeal against—
>
> (i) a decision of an immigration officer to decline to grant the visa (including in the circumstances described in section 190(2)(b)):
>
> ...

[20] Section 187(4) of the Act further 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.

[21] On 8 August 2011 the appellant lodged this appeal, with the assistance of new counsel, on the ground that Immigration New Zealand's decision to decline his application was not correct.

[22] Lodged on appeal was a submission by counsel (5 August 2011).

ASSESSMENT

[23] The Tribunal has been provided with the Immigration New Zealand file in relation to the appellant's residence application and has also considered the submission provided on appeal. An assessment as to whether Immigration New Zealand's decision to decline the appellant's application was correct is set out below.

Immigration New Zealand Decision

[24] The application was made on 13 January 2009 and the relevant criteria are those in Government residence instructions as at that time.

Family (Parent) category

[25] To qualify for residence under this category, the appellant was required to have his family's centre of gravity in New Zealand. He had three children. His adult daughter, an eligible sponsor, was living lawfully and permanently in New Zealand. When he lodged his application he declared his two sons, then 23 and 16, to be his dependents.

[26] The appellant was incorrectly advised by an Immigration New Zealand case officer (some way into the processing of the application) that both sons needed to be dependent upon him in order for his application to be successful. In fact, the reverse was true. To be successful, the appellant needed to have one adult child

in Fiji, so that the number of adult children lawfully and permanently in Fiji was equal to the number in New Zealand, and only one dependent, no more than the one adult child he had in New Zealand.

[27] The appellant and his son AA generated a large amount of material (no fewer than three statutory declarations from the appellant and five from his son) to persuade Immigration New Zealand that 23-year-old AA remained dependent on his parents. Initially AA was said to be staying at home each day, on his family's sugarcane farm, because he could not find any paid employment. Later, at least in 2010, AA was studying at a vocational training centre.

[28] On the evidence that was before it at the time, the Tribunal agrees with Immigration New Zealand's conclusion on 14 September 2010 that the appellant had provided sufficient evidence of AA's (and BB's) dependence.

[29] However, in the same letter, Immigration New Zealand made the appellant aware that having AA as a dependent meant that his family's centre of gravity was not in New Zealand. Thereafter the appellant instructed that AA be removed from the application and AA set about trying to obtain paid employment.

[30] The Tribunal has reviewed the evidence presented to Immigration New Zealand about AA's newfound employment at a panel beating and spray painting firm, and shares Immigration New Zealand's scepticism about the genuineness of the employment. The employment agreement, letter offering employment and bank statement do not, even together, establish that AA was working in a genuine position for the panel beating firm. In all likelihood, AA remained dependent on the appellant, at least to the extent that he worked on the family farm rather than brought in money of his own.

AA turns 25 years old

[31] The appellant's application was not declined until June 2011. AA had been withdrawn from the application in October 2010 and turned 25 in January 2011. Immigration New Zealand did not accept that AA obtaining this age made any difference to AA's classification as a dependent in Government residence instructions. It relied on the instruction at R5.6 which provided as follows:

> **R5.6 Age of applicant**
>
> An applicant's age at the time an application is made is the age at which the applicant will be assessed under Government Residence policy unless otherwise specified in a particular policy provision within Government residence policy.
>
> *Effective 15/12/2003*

[32] The Tribunal agrees with the appellant's counsel that Immigration New Zealand's reliance on this instruction was erroneous. As at the date of the decline decision, AA was not an 'applicant' within the meaning of R2.1.5 (effective 4 December 2006) as he was no longer included in his father's application for residence. He had been removed in October 2010, approximately eight months previously. As a person not included in the application under assessment, AA's age could not be "fixed" at the date of the application and instead had to be treated like any other factor affected by the effluxion of time.

[33] In the context of the Family (Parent) category, an adult child means a child who is 17 years or older, unless they are dependent (F4.5.10, effective 5 November 2007). A child may be considered dependent up to the age of 24 if they are single and totally or substantially reliant on their parents for financial support, whether living with them or not (F4.5.5, effective 5 November 2007). Because AA was no longer 24, the upper limit allowed for dependency, it did not matter whether he was totally or substantially reliant on his parents for financial support. Given that he had turned 25, once AA was removed from the appellant's application he was an adult child whose level of dependency on his parents was irrelevant.

[34] This material change should have been taken into account by Immigration New Zealand when it determined the application. Its failure to do so means that its decline decision was incorrect and that the appellant's application therefore needs to be reassessed.

STATUTORY DETERMINATION

[35] 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 Government 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.

[36] 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 in terms of the applicable Government residence instructions, in accordance with the directions set out below.

Directions

[37] The application now includes the appellant, his wife and his younger son BB. The application will need to be reassessed by a case officer who has had no prior involvement with the appellant's case, and with no payment of any further lodgement fee. The assessment will include investigation of all aspects of the application, including any matters which need completing or updating, and including the health and character of all three applicants.

[38] The appeal is allowed in the above terms, but the appellant should understand that this outcome does not guarantee the success of his application.

"A M Clayton"
A M Clayton
Member

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A M Clayton
Member