IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2013] NZIPT 200834**

AT AUCKLAND

Appellant:	**EG (Parent)**
Before:	M A Poole (Member)
Counsel for the Appellant:	R Small
Date of Decision:	26 February 2013

DECISION

INTRODUCTION

[1] The appellant was a citizen of Samoa. She is now deceased. Her application for residence included her husband, also a citizen of Samoa, and now aged 74 years.

[2] On 20 September 2011, the appellant appealed against the decision of Immigration New Zealand declining her application because she was not of an acceptable standard of health. On 9 October 2012, counsel advised the Tribunal that the appellant had passed away on 7 September 2012. He submitted, at that time, that the appellant's death was a "particular event" in terms of section 189(6) of the Immigration Act 2009 ("the Act") and also constituted material information properly provided to the Tribunal, relevant to section 188(1)(d) of the Act.

[3] The issue for the Tribunal is whether, with the death of the appellant, it has jurisdiction to hear the appeal, substituting another party (the appellant's husband) as the appellant, for the purposes of the Act. For the reasons set out below, the Tribunal finds that it does not have jurisdiction.

BACKGROUND

[4] The appellant most recently arrived in New Zealand on 15 October 2001, accompanied by her husband. The couple remained in New Zealand from that time on. Five daughters from the marriage live in New Zealand, one in Samoa and one in Australia. One daughter is deceased.

[5] The appellant suffered from extensive medical problems related to diabetes and heart disease. She was determined by the Immigration New Zealand Medical Assessor to not be of an acceptable standard of health. Immigration New Zealand declined the application on 2 August 2011. As has been explained, while the appellant's appeal was awaiting allocation, she passed away as a result of her medical conditions. The appellant's death raises the question of whether the Tribunal has jurisdiction to continue to hear the appeal, making her husband, who was included in the appeal, the appellant.

[6] The Tribunal begins its analysis against the broader background of immigration law and instructions generally. The purpose of such law and instructions is to govern the entry and exit of every individual person to and from New Zealand. The presumption in the Act is that all provisions apply to an individual applicant rather than a group of interchangeable applicants.

[7] This can be seen in the provisions of the Act that control who may apply for, for example, a residence class visa (see section 71(1)) which refers to *a person* who is outside New Zealand and wishes to come to New Zealand and stay indefinitely, or *a person* who is on-shore and satisfies certain other criteria. Further, section 71(2) states "no *person* who is of a class or category that may only apply for a visa by invitation" – emphasising that every application for a residence class visa is an individual application applying to *one person*.

[8] In relation to appeals, section 187(1)(a) provides:

> "**187 Rights of appeal in relation to decisions concerning residence class visas**
>
> (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)):
>
> (ii) a decision by the Minister not to grant a residence class visa if classified information has been relied on in making the decision:

(b) a person outside New Zealand who has been granted a resident visa may appeal against a decision to cancel the visa under section 65(1):

(c) a person who has been granted a resident visa may appeal against a decision to refuse to grant the person entry permission (including in the circumstances described in section 190(2)(b)).”

[9] In defining the grounds for an appeal, section 187(4) 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] In the Immigration and Protection Tribunal Regulations 2010 (SR 2010/355), regulation 4 requires that a notice of appeal to the Tribunal must be signed by *the* appellant and regulation 5(1) provides:

> “**5 Requirements for appeals generally**
>
> (1) A notice of appeal to the Tribunal must relate to 1 person only.”

[11] A clear exception to the requirement that a notice of appeal to the Tribunal must relate to one person only is regulation 6, which provides:

> “**6 Requirements for appeals under section 187 of Act**
>
> (1) Despite regulation 5(1), a notice of appeal for an appeal under section 187 of the Act against a decision concerning a residence class visa may relate to a principal applicant for the residence class visa and any of the following persons included in the application for that visa:
>
> (a) the principal applicant's dependent children:
>
> (b) the principal applicant's spouse or partner.
>
> (2) If a notice of appeal referred to in subclause (1) relates to more than 1 person,—
>
> (a) the principal appellant must sign the notice of appeal; and
>
> (b) the appeal must be treated as an appeal by all of the persons specified in the notice of appeal, unless the principal appellant states otherwise in that notice.
>
> (3) For the purposes of this regulation, the principal applicant is taken to be the principal appellant.
>
> (4) In this regulation, **principal applicant**, in relation to an application for a residence class visa, is the person deemed under regulation 20(5)(b) of the Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010 to be the principal applicant.”

[12] These provisions, which enable a family unit to make one residence application (and therefore one residence appeal) signal that the inclusion in an application of a family group is an exception to the normal provision that each person must lodge their own application and appeal. That is because, under the applicable regulations and instructions, an application for residence can include the spouse or partner and children of the principal applicant. Regulation 6(1) provides that a notice of appeal "may relate to a principal applicant ... and any of the following persons included in the application for that visa". That the wording is "*and* any of the following persons", rather than "or", is a clear indication that the other applicants included do not have their own appeal rights.

[13] The Immigration (Visa, Entry Permission and Related Matters) Regulations 2010 (SR 2010/241), at regulation 20(5) and (6), provides:

> "**20 Applications involving family members**
>
> ...
>
> (5) For the purposes of the application or notification and any relevant immigration instructions,—
>
> (a) each person included in the application is an applicant; and
>
> (b) the applicant who is declared to be the principal applicant on the application form is deemed to be the principal applicant; and
>
> (c) the requirements in relation to the application (including any that an immigration officer may require an applicant to meet before determining an application) must be met in relation to the principal applicant and each applicant, except that—
>
> (i) any applicant less than 18 years old is not required to sign the application; and
>
> (ii) only 1 fee is required for the application; and
>
> (d) evidence of the relationship of each applicant to the principal applicant must be given with the application.
>
> (6) To avoid doubt, except as provided in this regulation, a child (regardless of age or dependency), spouse, or partner of an applicant for a visa must make a separate application for the appropriate visa and pay the prescribed fee."

[14] Here, the dependent children and the spouse or partner of the principal applicant are regarded as being "an applicant" solely to enable each person to be required to meet the lodgement requirements and the generic (health and character) instructions. The treatment of each person included in the application as an applicant in his or her own right is a pragmatic one for the purposes of processing the application and being able to require that *each* person provides the documents necessary for the appropriate making of an application (for example,

identity, relationship, and medical documents and police certificates). However, regulation 20(5) is restricted to the application, and does not extend to the lodging of the appeal.

[15] Irrespective of the financial concession made to families applying for residence (only one application fee is payable), each member of that family is issued their own visa. Immigration status is a personal status, expressly relating to one person. That status does not survive the death of the person concerned. Where an applicant includes his partner and their children in his application, it is not their application, it is his. He can withdraw his wife and any of the children from the application if he wishes, and they have no right to insist on inclusion. When he lodges an appeal to the Tribunal against the decision of Immigration New Zealand to decline his application, he can leave out of that appeal any family member he wishes. See regulation 6(2)(b) of the Immigration and Protection Tribunal Regulations 2010. The family members have no entitlement to inclusion. If the Tribunal determines the decision to decline was not correct in terms of the instructions and returns the application to Immigration New Zealand under section 188(1)(e), and at that time the principal applicant passed away, the application would cease with him. There would be, in effect, no application remaining because the principal applicant was dead.

[16] The effect of treating any person included in an application as entitled to step into the shoes of the principal applicant for the purposes of an appeal to the Tribunal would be significant. If the Tribunal were to accept that interpretation, any person who had been listed in an application, including dependent children, would have a right to lodge an appeal. Even where, for example, the principal applicant in a Skilled Migrant Category application (where only the principal applicant can satisfy the instructions) had decided not to pursue an appeal him or herself, his or her partner would be entitled to appeal, even though, without the principal applicant, the partner would ordinarily have had no prospect of satisfying the requirements of the residence instructions. Further, allowing the “substitution” of an appellant would frustrate the categories of policy that require the submission of an Expression of Interest and an express Invitation to Apply to be issued by Immigration New Zealand before an application for residence can be made. Section 71(2) prohibits the making of an application under such a category of instructions without an invitation.

[17] Secondary applicants would arguably be entitled to separate representation, and the opportunity to present independent cases on appeal. Where issues of character, immigration fraud or other "negative" issues relating to the principal applicant had been the reason for the decline of the application, every secondary applicant in the application would be in a position to argue that they were entitled to a separate appeal to distance themselves from the conduct of the principal applicant, even though they themselves had not had a separate application. Issues of privacy between the principal applicant and others included in the application might arise where, for example, the principal applicant's standard of health had been the reason for the application being declined. Every secondary applicant would be in a position to argue for a separate assessment and a separate appeal hearing. Further, the partner or child of a diabetic or an HIV-positive person could argue that the burden on the health services of the principal applicant's medical condition was irrelevant to the partner's or child's appeal and, in fact, the existence of that medical condition and its impact on the declined parent's long-term prospects could become an independent and favourable factor in the special circumstances consideration of the other family members.

[18] The consequences that might flow from the "substitution" of an appellant are significant, and threaten to do violence to the integrity of the overall immigration scheme.

[19] The Tribunal is also conscious that it is a specialist administrative tribunal charged with hearing the appeals before it in an orderly and expeditious manner and in a way that meets the purposes of the Immigration Act (sections 220(1)(a) and 223). Accepting that family members included in an appeal can be elevated to stand in the shoes of the principal applicant would frustrate those statutory obligations, rendering the "appeal" process more complex that it was ever intended to be.

[20] Had Parliament intended that an appellant could be "succeeded" by any of the secondary applicants in the appeal, it would have been a simple matter to legislate that right. That it has not done so is a reflection of the point made above at [14] – that immigration status is a personal status, which does not survive death.

[21] Two other matters need to be addressed. The first is section 33 of the Interpretation Act 1999 which stipulates that, in statutory references, the singular shall include the plural and the plural shall include the singular. Section 5 of the Interpretation Act provides that the meaning of an enactment must be ascertained from its text and in the light of it purpose. The Tribunal is satisfied that, for the

reasons given above, in the specialist context of the Immigration Act and of immigration, resort to section 33 of the Interpretation Act is unnecessary. The inclusion of all applicants as "the applicant with the right to an appeal" runs counter to the intention expressed at regulation 5 of the Visa (Entry Permission and Related Matters) Regulations.

[22] The second matter is a decision of the Tribunal's predecessor, the Residence Review Board. In *Residence Appeal No 16086* (23 June 2009), the Board accepted the request of the appellant's wife to be treated as the appellant, following the appellant's death after the lodging of the appeal. In agreeing to the widow's request, the Board stated:

> "[38] As the Board has already noted, the principal applicant has died. This is a situation that the Act does not cover expressly. Nevertheless, the Board finds that it is appropriate for [AA] to be substituted as the principal applicant. If that substitution occurs, exactly the same policy criteria will apply to her as when she was a secondary applicant. To put it another way, because this was an application under the Family (Parent) category, nothing has ever turned on whether [the appellant] or [AA] was the principal applicant since, under that category, the policy requirements for a principal applicant are the same as for a secondary applicant. That might not be so in applications for residence under different categories of the Government residence policy, where a principal applicant must meet certain criteria that do not apply to secondary applicants."

[23] With respect, the Tribunal declines to follow the approach taken by the Board in that decision. First, no analysis was undertaken of the wording of the Immigration Act 1987 (which was applicable in that case) or the relevant regulations. No consideration was given to the legal position of a person included in an appeal as the partner of the principal applicant. The Board there determined that, because they were dealing with an application under the Family (Parent) category, nothing turned on whether the appellant or his widow was the principal applicant. Under that particular category, the requirements for a principal applicant were the same for a secondary applicant who was the sponsor's other parent. On that basis, the Board accepted the widow's request to allow her to stand as the appellant. The Board then went on to observe that this might not be the case in other applications for residence where different categories of the then Government residence policy required a principal applicant to meet certain criteria that did not apply to secondary applicants.

[24] The Tribunal does not accept that Parliament would have intended to permit different rights of appeal to attach to parties included in applications for residence according to the category of instructions under which the principal applicant had applied. That is at odds with the thrust of the Immigration Act and the obvious intention of section 187, which makes no distinction between categories as

regards appeal rights. To accept, as the Board did in that case, that the category of instructions could define the extent to which secondary applicants could access statutory appeal rights, is wrong in law.

[25] The Tribunal accepts that the appellant's widowed husband must be desolate at the loss of his wife and may well not understand that this decision is the only correct outcome under the legislation.

[26] For the reasons set out above, the Tribunal finds that it does not have jurisdiction to hear this appeal, following the death on 7 September 2012, of the appellant.

STATUTORY DETERMINATION

[27] For the reasons given above, the Tribunal has no jurisdiction to consider the appellant's appeal. The appeal is dismissed on this basis.

"M A Poole"
M A Poole
Member

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M A Poole
Member