

AT AUCKLAND

Appellant: **OI (Partnership)**

Before: Judge P Spiller

Representative for the Appellant: W Delamere

Date of Decision: 15 June 2016

RESIDENCE DECISION

[1] The appellant is a 25-year-old citizen of India. His application for residence under the Family (Partnership) category of residence instructions was declined by Immigration New Zealand.

THE ISSUE

[2] Immigration New Zealand declined the appellant's application because it was not satisfied that he was living together with his partner in a genuine and stable relationship that was likely to endure.

[3] The principal issue for the Tribunal is whether Immigration New Zealand correctly assessed the information provided by the appellant before determining the application, and gave adequate reasons in declining the application.

[4] For the reasons which follow, the Tribunal finds that it is not satisfied that the decision to decline was correct in terms of the fairness and natural justice requirements of residence instructions.

BACKGROUND

[5] The appellant was born in India in 1990.

[6] The appellant arrived in New Zealand in February 2009, aged 18 years. He has remained in New Zealand since his arrival, except for return trips overseas in September 2010, November 2011 and January 2014.

[7] On his arrival in New Zealand in February 2009, the appellant held a student visa valid to March 2010. He completed a Diploma in Business Studies, Level 5.

[8] From March 2010 to June 2014, the appellant held a series of work visas. He worked as a customer service representative for a service station and then as an assistant manager for a fast food outlet.

[9] In July 2013, the appellant met his partner through an online website. She was born in Samoa and was granted residence status in New Zealand in 2006. She married and had two daughters, but separated from her husband in mid-2013. She and the appellant met in person in August 2013 and thereafter maintained contact. In June 2014, he moved into her house and lived with her and her sister's family.

[10] In June 2014, the appellant was granted a student visa to study towards a Diploma in Business Studies, Level 6.

[11] On 19 September 2014, the appellant applied for a work visa, based on his relationship with his partner. After Immigration New Zealand's investigation, it was satisfied that the couple's relationship was supported by family and that it received public recognition. The couple were living together and their financial interdependence had been established. Immigration New Zealand was satisfied that the couple was living together in a genuine and stable relationship that was likely to endure.

[12] On 29 October 2014, the appellant was granted a one-year work visa, based on his relationship with his partner. He worked at a supermarket.

[13] On 28 April 2015, the appellant applied for a resident visa under the Family (Partnership) category, again based on his relationship with his partner.

Immigration New Zealand Verification

[14] On 1 July 2015, Immigration New Zealand noted that evidence had been provided with the previous work visa application to show that the appellant and his partner had been living together. It noted that updated evidence had been

provided to show the continuation of their relationship since the work visa was assessed. This information included a signed statement from both parties, a letter from the property manager of their home which was rented, a letter confirming the payment of a bond in January 2015 in their joint names, a joint electricity account in their joint names from December 2014 to April 2015, joint bank account statements, joint internet, and various other correspondence sent to the same address. Based on the evidence provided, Immigration New Zealand was satisfied that the appellant and his partner had a genuine and stable relationship that was likely to endure. It was satisfied that the appellant met all the other requirements of instructions.

[15] On 7 July 2015, Immigration New Zealand advised the appellant that it had decided to approve his application in principle.

[16] On 19 July 2015, the appellant's partner contacted Immigration New Zealand and advised that she no longer wished to support his residence application. She advised that they were no longer living together, that she had not spoken to him in the past two weeks, and that their relationship was breaking down. She stated that she had been having doubts about their relationship for a number of weeks and had noticed changes in the appellant's behaviour. She said that she did not get along with his family friends and expressed concerns that he would end the relationship once he had obtained residence. She was also not aware that his residence visa had been approved in principle and that he had sent his passport and fee to Immigration New Zealand.

[17] On 20 July 2015, Immigration New Zealand telephoned the partner. She advised that she had not been living with the appellant for the past two weeks as she had moved out of the house they had shared, due to problems with her daughters requiring her to move back to Auckland. The appellant had told her that he would join her in Auckland at a later date but she was unsure if he intended to do this because things had not been going well between themselves. She reiterated that she was unaware that the appellant had received an approval in principle letter from Immigration New Zealand, and that she had recently had doubts about their relationship.

Immigration New Zealand Concerns and Further Verification

[18] On 20 July 2015, Immigration New Zealand raised concerns with the appellant about his application. It noted that his supporting partner had advised that she wished to withdraw her support of his application, and an application

under the Family (Partnership) category had to be declined if not supported by an eligible partner. Immigration New Zealand also advised that the withdrawal of support brought into question the stability of their relationship and whether it would be a lasting one. Further, the partner had advised that she and the appellant were no longer living together and had not done so for the past two weeks. Based on this, he did not meet the requirements of living together in a genuine and stable relationship.

[19] Within a week of the above letter being sent, the appellant's partner advised Immigration Zealand that she wished to re-instate her support for the appellant's application.

[20] On 25 August 2015, Immigration New Zealand interviewed the appellant and his partner separately. The appellant said that he and his partner were not living together at present, as he was living in Hamilton and she was living with her sister and working in Auckland. He said that he had applied for a transfer through his employer to work in Auckland; that he and his partner had signed a joint tenancy agreement for a property in Auckland and planned to move into this property together on 27 August 2015; and that he planned to commute to Hamilton daily to continue employment there until a transfer could be arranged. He said that he had not advised Immigration New Zealand about them not currently living together as they had had arguments, but he thought that they were going to sort matters out. In response to why he did not let his partner know that he had received an approval in principle letter from Immigration New Zealand, the appellant said things were not going too well in their relationship at that time.

[21] The appellant's partner said that, when she withdrew her support, she and the appellant were not living together at a shared address or communicating well. She said that, after the appellant had received Immigration New Zealand's letter of concern, "this all changed", they had talked and he had made a big effort to sort things out with her. He had been travelling to Auckland to visit her since receiving the letter, and he had promised to take her to India to meet his family at the end of the year. She admitted to feeling responsible for the current situation and that she had felt confused about their relationship, but she confirmed that she did want to support his residence application. She added that her sister did not like the appellant and would not have anything to do with them if they reconciled.

[22] On 16 September 2015 (prior to Immigration New Zealand's decision), the appellant's partner advised that she was pregnant with his baby. In a file note,

Immigration New Zealand recorded receipt of this information, but noted that the information did not change the outcome of the application or alleviate concerns.

Immigration New Zealand Decision

[23] By letter dated 16 September 2015, Immigration New Zealand declined the appellant's application. It was not satisfied that his relationship with his partner was genuine or stable or likely to endure. It gave this decision for the following reasons:

- (a) That the appellant's partner had earlier withdrawn her support for the appellant's application: Immigration New Zealand advised that the appellant and his partner had not provided credible reasons as to what had significantly changed in their relationship, since the time she withdrew her support, for her to make the decision to re-instate her support. It noted that the couple had made plans for them to go to India later in the year to meet the appellant's family, but it was unclear why they made these changes after, and not prior to, the partner withdrawing support. Although the partner wished to re-instate her support, it was not satisfied that their relationship could be considered stable.
- (b) That the appellant and his partner were not living together, as he was living in Hamilton where he was employed and she had moved to Auckland where she was employed. Immigration New Zealand noted that the appellant had provided a tenancy agreement in the couple's joint names showing an intention to move into a rental property together in Auckland. However, Immigration New Zealand noted that the appellant's decision to move to Auckland had come about after he received the letter from Immigration New Zealand raising concerns about the living together requirements for residence. It was therefore not satisfied that his intended move to Auckland was for genuine reasons or would be a permanent one.
- (c) That there was not a credible response as to why the appellant did not let his partner know that he had received a letter from Immigration New Zealand advising that his application had been approved in principle. It stated that couples living together in genuine and stable relationships would consider this to be significant news,

especially considering that the application was based on the support from the New Zealand resident partner.

Post Immigration New Zealand Decision

[24] On 27 October 2015, the appellant applied for a further work visa, again based on his relationship with his partner.

[25] On 2 December 2015, Immigration New Zealand interviewed the appellant and his partner separately. From the interviews, Immigration New Zealand was satisfied that the couple were now living together in a genuine and sustainable relationship. It was satisfied from the couple's explanation that the partner's withdrawal of her support and him not telling her about the approval (in principle) of his residence application were due to them not communicating well at the time. It was satisfied that the couple had sorted their dispute out and were looking forward to the birth of their baby. Immigration New Zealand was satisfied that the appellant met all the requirements of instructions.

[26] On 4 December 2015, the appellant was granted a further one-year work visa, based on his relationship with his partner.

STATUTORY GROUNDS

[27] 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.

[28] 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

[29] On 3 November 2015, the appellant lodged this appeal on both grounds in section 187(4).

[30] In support of the appellant's appeal, his representative provides submissions (3 November 2015). He submits that Immigration New Zealand failed to take into account relevant information when declining the appellant's application and so its conclusions were false; failed to assess properly the living together requirements under immigration instructions; unreasonably found information provided by the appellant not to be credible or genuine; and decided on the application in a predetermined, unfair and biased manner. He also submits that the appellant has special circumstances such that consideration of an exception to those residence instructions should be recommended.

ASSESSMENT

[31] The Tribunal has considered the submissions provided on appeal and the file in relation to the appellant's residence application which has been provided by Immigration New Zealand.

[32] 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. In view of the outcome of the appeal, it is not necessary for the Tribunal to assess whether the appellant has special circumstances which warrant consideration of an exception by the Minister of Immigration.

Whether the Decision is Correct

[33] The application was made on 28 April 2015, and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand was not satisfied that the appellant met the requirements under the Family (Partnership) category. It was not satisfied that he and his partner were living together in a relationship that was genuine and stable and likely to endure. The relevant instructions in this case are:

F2.5 How do partners of New Zealand citizens and residents qualify for a residence class visa?

- a. To be granted a residence class visa under Partnership Category applicants must provide sufficient evidence to satisfy an immigration officer that they have been living together for 12 months or more in a partnership that is genuine and stable with a New Zealand citizen or resident.
- b. For the purpose of these instructions 'partnership' means:
 - i. a legal marriage; or
 - ii. a civil union; or
 - iii. a de facto relationship

and 'partner' means one of the parties to such a partnership indicated in (i), (ii) and (iii) above.
- c. In each case the onus of proving that the partnership on which the application is based is genuine and stable lies with the principal applicant and their New Zealand partner.
- d. An application under Partnership Category will be declined if:
 - i. the application is not supported by an eligible New Zealand citizen or resident partner; or
 - ii. an immigration officer is not satisfied that the partnership on which the application is based is genuine and stable; ...

Effective 19/08/2013

F2.20 Evidence

- a. Evidence supporting an application under Partnership Category for a residence class visa should include as much information and as many documents as are necessary to show that:
 - i. the principal applicant's partner:
 - is a New Zealand citizen or resident (see F2.10.5); and
 - supports their application for a residence class visa under the Partnership Category; and
 - is eligible to support an application under partnership instructions (see F2.10.10); and
 - ii. the principal applicant and their New Zealand citizen or resident partner are living together in a partnership that is genuine and stable.
- b. Factors that have a bearing on whether two people are living together in a partnership that is genuine and stable include but are not limited to:
 - i. the duration of the parties relationship;
 - ii. the existence, nature, and extent of the parties' common residence;
 - iii. the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

- iv. the common ownership, use, and acquisition of property by the parties;
 - v. the degree of commitment of the parties to a shared life;
 - vi. children of the partnership, including the common care and support of such children by the parties;
 - vii. the performance of common household duties by the partners; and
 - viii. the reputation and public aspects of the relationship.
- c. The items listed in F2.20.1 to F2.20.15 below are examples of relevant evidence; other documents may also be relevant.

Effective 29/11/2010

F2.30 Determining if the couple is living together in a partnership that is genuine and stable

- a. When determining if the couple is living together in a partnership that is genuine and stable the immigration officer will take into account those factors set out at F2.20(b) and must consider, and be satisfied, there is sufficient proof, (from documents, other corroborating evidence, or interviews) of all four of the following elements:
- i. 'Credibility': the principal applicant and the partner both separately and together, must be credible in any statements made and evidence presented by them.
 - ii. 'Living together': the principal applicant and partner must be living together unless there are genuine and compelling reasons for any period(s) of separation (see F2.30.1).
 - iii. 'Genuine partnership': the principal applicant and partner must both be found to be genuine as to their:
 - reasons for marrying, entering a civil union or entering into a de facto relationship; and
 - intentions to maintain a long term partnership exclusive of others.
 - iv. 'Stable partnership': the principal applicant and partner must demonstrate that their partnership is likely to endure.
- b. A residence class visa must not be granted unless the immigration officer is satisfied, having considered each of the four elements in (a) above (both independently and together) that the couple is living together in a partnership that is genuine and stable.

Note: The onus of satisfying an immigration officer that the partnership is genuine and stable lies with the principal applicant and their partner (see F2.5(c)).

F2.30.1 Assessment of periods of separation

- a. If a principal applicant and their partner have lived apart for periods during their partnership, the application should not automatically be declined.

Instead, immigration officers should determine whether there are genuine and compelling reasons for any period(s) of separation.

- b. Determining whether there are genuine and compelling reasons will depend on the circumstances in each case, and may require consideration of:
- either partner's family, education or employment commitments;
 - the duration of the partnership and the length of time the couple has spent apart;
 - the extent to which the couple has made efforts to be together during the time apart.

Effective 29/11/2010

[34] Immigration New Zealand must comply with the requirements of fairness and natural justice contained in A1 of the Administration Chapter of instructions. A1.5 outlines factors to consider when assessing whether a decision is fair:

A1.5 Fairness

- a. Whether a decision is fair or not depends on such factors as:
- whether an application is given proper consideration;
 - whether the applicant is informed of information that might harm their case (often referred to as potentially prejudicial information)
 - whether the applicant is given a reasonable opportunity to respond to harmful information;
 - whether appropriate reasons are given for declining an application;
 - whether only relevant information is considered;
 - whether all known relevant information is considered.

...

Effective 29/11/2010

[35] The appellant, in applying for residence under the Family (Partnership) category, was required to provide sufficient evidence to satisfy Immigration New Zealand that he was living together with his partner in a genuine and stable relationship.

[36] When Immigration New Zealand made its decision on 16 September 2015, it had evidence provided with the appellant's previous work visa application (of September 2014) to show that the appellant and his partner had been living together. This evidence had satisfied Immigration New Zealand (in October 2014) that that the couple's relationship was supported by family and that it received public recognition; that the couple were living together and their financial

interdependence had been established; and that, overall, the couple were living together in a genuine and stable relationship that was likely to endure.

[37] Immigration New Zealand also had updated evidence to show the continuation of the appellant's relationship with his partner since his work visa was assessed. This information included a signed statement from both parties, a letter from the property manager of their home which was rented, a letter confirming the payment of a bond in January 2015 in their joint names, a joint electricity account in their joint names from December 2014 to April 2015, joint bank account statements, joint internet, and various other correspondence sent to the same address. Based on the evidence provided with the residence application, Immigration New Zealand (on 1 July 2015) was satisfied that the appellant and his partner had a genuine and stable relationship that was likely to endure, and so that his application should be approved in principle.

[38] However, Immigration New Zealand was advised on 19 and 20 July 2015 by the appellant's partner that she no longer wished to support his residence application; that she had not been living with the appellant in Hamilton for the past two weeks as she had moved back to Auckland; that she was unaware that the appellant had received an approval in principle letter from Immigration New Zealand; and that she had recently had doubts about their relationship. On 20 July 2015, Immigration New Zealand advised the appellant that it had concerns about the withdrawal of support, as he required the support of an eligible partner and withdrawal brought into question the stability of their relationship and whether it would be a lasting one. It also advised him that he no longer appeared to meet the requirements of living together in a genuine and stable relationship.

[39] Within the following week, the appellant's partner advised Immigration Zealand that she wished to re-instate her support for the appellant's application. A month later (on 25 August 2015), Immigration New Zealand interviewed the appellant and his partner separately. She confirmed that she did want to support his residence application. Both she and her partner provided explanations as to why she had earlier withdrawn her support, why they had not been temporarily living together, and why he had not told her about the approval of his application in principle.

[40] Three weeks later (on 16 September 2015), the appellant's partner advised that she was pregnant with his baby. Later that day, Immigration New Zealand issued its letter declining the appellant's application.

[41] The Tribunal finds that Immigration New Zealand did not give the appellant's application proper consideration, and did not provide appropriate reasons for declining the application. The Tribunal will now assess each of the three reasons provided by Immigration New Zealand for its decision, and then consider further factors.

[42] The first reason given by Immigration New Zealand for declining the appellant's application was that his partner had earlier withdrawn her support for the appellant's application and it was therefore not satisfied that the relationship could be considered stable. It noted that the partner wished to re-instate her support, but that she and the appellant had not provided credible reasons as to what had significantly changed in their relationship for her to reinstate her support.

[43] In relation to Immigration New Zealand's first reason, the Tribunal notes the following. By the time Immigration New Zealand had made its decision, the appellant's partner had supported his residence application over the four-and-a-half months since its lodgement, except for about one week. Her support for his residence application followed her support of his work visa application in the year before. After the reinstatement of her support, over seven weeks passed before Immigration New Zealand's decision. In this time, the partner confirmed her support (three weeks before Immigration New Zealand's decision). The partner's reasons as to what had changed in their relationship were that, after she and the appellant received Immigration New Zealand's letter of concern, they had talked, he had made a big effort to sort things out with her, he had been travelling to Auckland to visit her, and he had promised to take her to India to meet his family at the end of the year. In her words, their previous problems with communication "all changed". The Tribunal finds these to be credible reasons for her change of mind, particularly in light of her past support of the appellant.

[44] The second reason provided by Immigration New Zealand for its decision was that the appellant and her partner were not living together, as she had moved to a different town from where the appellant lived. It noted that the appellant had expressed an intention to move to live again with his partner, but, because this decision to move came only after Immigration New Zealand's letter of concern, the decision was not for genuine reasons or likely to be a permanent one.

[45] In relation to Immigration New Zealand's second reason, the Tribunal notes the following events which had taken place before Immigration New Zealand's decision. In its approval of the appellant's work visa in October 2014 (four months after he and his partner had started to live together), Immigration New Zealand

was satisfied that the couple were living together and their financial interdependence had been established. In its approval in principle of the appellant's residence in July 2015 (13 months after the couple had begin living together), Immigration New Zealand was satisfied that they had been living together. Then followed a period of less than three weeks, during which they were estranged and living part. After this they reconciled and, though they continued to live apart for a further month, the appellant travelled regularly to visit his partner, and there was evidence that they then planned to recommence living together.

[46] The Tribunal notes further that residence instructions provide that, if an applicant and his partner have lived apart during their partnership, the application should not automatically be declined. Instead, Immigration New Zealand should determine whether there are genuine and compelling reasons for any period of separation (F2.30.1.a). The instructions further provide that determining whether there are genuine and compelling reasons will depend on the circumstances in each case, and may require consideration of either partner's family, education or employment commitments; the duration of the partnership and the length of time the couple has spent apart; and the extent to which the couple has made efforts to be together during the time apart. The appellant and his partner were clear that, after 13 months of living together, there was a period of up to three weeks when they were estranged and living apart. However, a key reason provided by the partner as to why she had left Hamilton to move to Auckland was because problems with her daughters (from her previous relationship) required her to move back to Auckland. As noted above, after the couple's temporary separation, the appellant started to visit his partner regularly, and they provided evidence of their intention to resume living together the following month. In light of these considerations, the Tribunal finds that there was credible evidence in support of the appellant and his partner living together.

[47] The third reason provided by Immigration New Zealand for its decision was that there was not a credible response as to why the appellant did not let his partner know that he had been advised that his application had been approved in principle, thus again raising questions about whether they had a genuine and stable relationship. In relation to this reason, the Tribunal notes that the appellant stated that he received the letter from Immigration New Zealand during the time when "things were not going too well in their relationship". The Tribunal notes that the letter of 7 July 2015 would have been received in the interval just preceding the partner's temporary withdrawal of support. The Tribunal does not find

Immigration New Zealand's third reason a compelling factor in the assessment of the appellant's application.

[48] As against the reasons provided by Immigration New Zealand for declining the appellant's application, the Tribunal notes the weight of evidence which led Immigration New Zealand to approve his application for residence in principle. There was the evidence produced in support of the successful application for a work visa, based on his relationship with his partner. There was also the updated evidence which was provided to show "the continuation of their relationship since the work visa was assessed". Based on the evidence provided, Immigration New Zealand was satisfied that the appellant and his partner had a genuine and stable relationship that was likely to endure. Immigration New Zealand, in making its final decision, did not appear to have proper regard to this evidence.

[49] The Tribunal finally notes that residence instructions provide that, amongst the factors which have a bearing on whether two people are living together in a partnership that is genuine and stable, are the degree of commitment of the parties to a shared life and children of the partnership (F2.20.b.v-vii). Just prior to Immigration New Zealand issuing its decision declining the appellant's application, his partner advised Immigration New Zealand that she was pregnant with the appellant's child. There is no mention of this important fact in the reasons given for declining the application. In a file note (not part of the decision sent to the appellant), Immigration New Zealand recorded that the partner's information did not change the outcome of the application or alleviate its concerns. It was incumbent upon Immigration New Zealand to weigh the partner's information in reaching its decision, and provide reasons to the appellant as to what outcome was reached in relation to this evidence.

Conclusion as to correctness

[50] In light of the above, the Tribunal finds that Immigration New Zealand failed to consider relevant information, and failed to give appropriate reasons for declining his application. Accordingly, the Tribunal finds that Immigration New Zealand did not undertake a fair and proper assessment of the appellant's application, and so its decision to decline the application was incorrect.

DETERMINATION

[51] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers that the decision to refuse the visa was made on the basis of an incorrect assessment in terms of the applicable residence instructions. However, the Tribunal is not satisfied that the appellant would, but for that incorrect assessment, have been entitled in terms of those instructions to the immediate grant of a visa.

[52] 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

[53] It should be noted that, while these directions must be followed by Immigration New Zealand, they are not intended to be exhaustive. 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 assessed again by an immigration officer with no previous association with this application, in accordance with residence instructions in effect at the date the application was made and without the requirement to pay any further lodgement fee.
2. Immigration New Zealand is to invite the appellant to confirm that he and his partner remain in a partnership, and to produce updated evidence in support, including as to their living arrangements.
3. Immigration New Zealand shall then undertake a new assessment having regard to all of the information previously provided to it by the appellant, any additional material with which he chooses to update his application, and the written record of the interviews referred to above at [25]. It must ensure that all relevant evidence is properly considered and weighed in its determination of whether the couple is living together in a genuine and stable partnership.
5. If, at any stage in its reassessment of the application, Immigration New Zealand decides that there are potentially prejudicial matters

which must be put to the appellant, it is to do so in clear and concise terms with reasons. The appellant is to be given a reasonable opportunity to respond.

6. Immigration New Zealand shall provide appropriate reasons for its decision and set out the evidence it took into account to reach its decision.

[54] The appellant is to understand that the reassessment of his application is no guarantee that he will be granted residence.

[55] The appeal is allowed in the above terms.

Order as to Depersonalised Research Copy

[56] 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.

"Judge P Spiller"

Judge P Spiller

Chair

Certified to be the Research
Copy released for publication.

Judge P Spiller
Chair