**IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND** **[2016] NZIPT 203432**

**AT AUCKLAND**

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|---|---|
| **Appellant:** | **JK (Sibling and Adult Child)** |
| **Before:** | P Fuiava (Member) |
| **Representative for the Appellant:** | T Delamere |
| **Date of Decision:** | 9 November 2016 |

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**RESIDENCE DECISION**

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[1] The appellant is a 43-year-old citizen of the People's Republic of China ("China") whose application for residence under the Family (Sibling and Adult Child) category, which included her 48-year-old husband and their 18-year-old son, was declined by Immigration New Zealand. Her husband and son are also citizens of China.

## THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it was not satisfied she had an acceptable offer of employment that was sustainable and genuine.

[3] The principal issue for the Tribunal is whether the application was given fair and proper consideration by Immigration New Zealand. For the reasons that follow, the Tribunal finds that it was not. The application is returned to Immigration New Zealand for a correct assessment.

## BACKGROUND

[4] The appellant's application for residence under the Family (Sibling and Adult Child) category was made on 3 May 2011. She produced an offer of

employment as a full-time call centre supervisor for a small telecommunications company. Her employment agreement (31 March 2011) stated that she was to be paid a salary of $32,000 per annum.

[5] The employing company was incorporated in New Zealand in January 2004. The managing director of the company ("the prospective employer") explained in an Immigration New Zealand questionnaire (5 August 2014), that he chose the appellant because of her many years of work experience as a marketing and sales training manager in China.

[6] The prospective employer subsequently provided Immigration New Zealand with his company's financial statements for the financial years ending 31 March 2012 to 31 March 2015.

**Immigration New Zealand Concerns**

[7] On 15 December 2015, Immigration New Zealand advised the appellant that it appeared her proposed employment was neither sustainable nor genuine.

[8] The company's financial report for the year ending 31 March 2014 showed that it had current assets of $67,247, current liabilities of $432,639, and a working capital of -$365,393. The company's current ratio (current assets/current liabilities) was 0.16. The company's financial report for the year ending 31 March 2015 recorded current assets of $115,710, current liabilities of $466,406, and a working capital of -$350,696. Its current ratio was 0.25. With a negative working capital and a current ratio of less than 1.0 (anything less than 1.0 showed that a company's current liabilities were greater than its current assets) for two consecutive years, it appeared the company was in "financial trouble" and would not be able to meet its short-term obligations.

[9] In addition, the appellant's offer of employment did not appear genuine because there was no call centre recorded on the company's organisation chart. Further, call centre workers in New Zealand earned between $36,000 and $50,000 per annum. The appellant's position was that of a call centre supervisor, but her salary was less than the salary range for a call centre worker.

**Appellant's Response**

[10] In response to Immigration New Zealand's concerns, the prospective employer stated in a letter (16 January 2016) that the company was established

in 2004 (a copy of the company's certificate of incorporation was attached to the letter) and that it was in its 12th year of operation. It had been through two business cycles in New Zealand: a "booming" period, which started in 2003, and a recession, which began in 2008. Since 2009, the company had continued to grow.

[11] The prospective employer explained that the company had survived because it did not compete, but rather worked alongside the bigger companies such as Spark, Vodafone, 2 Degrees and Vocus. The company's niche was the Asian Market, and more than 80 per cent of its customers came from China, Taiwan, Hong Kong, Korea, and India.

[12] To stay competitive, the prospective employer sold his calling card business for $80,000 because he realised that software messaging such as WeChat and WhatsApp were replacing calling cards. He stated that he also sold a subsidiary business for more than half a million dollars and, consequently, the company had sufficient cash flow. The prospective employer provided an accounts overview of his company's bank accounts with a major bank (18 January 2016). Among other things, this showed that the company had $102,714.03 in its business current account and $10,679.41 on term deposit.

[13] With respect to the appellant's salary, the prospective employer stated that she needed training as she had not worked in New Zealand before. Her salary would be increased to $36,000 per annum or more once she demonstrated her ability to bring in more business for the company.

[14] The prospective employer provided Immigration New Zealand with a report from a chartered accountant who was engaged to provide an independent review of the company's financial report for the year ending 31 March 2015. The accountant stated that the "current ratio" was a measure as to whether a firm had sufficient resources to pay its debts over the next 12 months. For the financial year ending 31 March 2015, the company's current assets amounted to $115,710 and its current liabilities were $466,405. Of that $466,405, $307,363 related to the owner's introduced capital, which should not have been taken into account in calculating the current ratio.

[15] The accountant stated that the company's current liabilities for the 2015 financial year were $159,042 ($466,405 less $307,363) and its current ratio was 0.73 ($115,000/$159,042), which was "a lot higher" than the current ratio of 0.25 used by Immigration New Zealand.

[16] The accountant stated that the company had cash reserves of over $100,000 and that the owner's initial investment in capital and infrastructure caused the company's current ratio to fall below 1.0 (a ratio above 1.0 meant that a business's current assets exceeded its liabilities). Since then, the company had been steadily recovering.

### Immigration New Zealand Decision

[17] On 1 March 2016, Immigration New Zealand declined the appellant's residence application because it was not satisfied she had an acceptable offer of employment that was sustainable and genuine. Immigration New Zealand stated that the company's financial status was not healthy and its working capital had been in the negative for the last two financial years. While it was submitted that the owner's capital should have been removed from the company's current liabilities to make working capital and current ratio "look better" (this was not what the accountant had said), the owner's capital was part of a company's current liability. Immigration New Zealand was not satisfied the company could sustain the appellant's "claimed" annual salary.

[18] Further, the appellant's income was lower than the market rate for her position. While her prospective employer was prepared to give her a pay rise depending on her capability in the industry, Immigration New Zealand was not satisfied that her offer of employment was genuine.

## STATUTORY GROUNDS

[19] 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.

[20] 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

[21] On 23 April 2016, the appellant lodged this appeal on both grounds of section 187(4) of the Act.

[22] On appeal, the appellant is represented by an immigration advisor. The representative produced submissions (undated). Annexed to those submissions were documents, most of which had previously been provided to Immigration New Zealand.

## ASSESSMENT

[23] 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.

[24] 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.

### Whether the Decision is Correct

[25] The application was made on 3 May 2011 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because it was not satisfied the appellant had an acceptable offer of employment that was sustainable and genuine.

### Family (Sibling and Adult Child) Category Instructions

[26] The appellant made her application for residence under the Family (Sibling and Adult Child) category. Paragraph F6.1 states:

> **F6.1 How do siblings and adult children qualify for a resident visa?**
>
> a. Siblings and adult children of New Zealand citizens or residents meet Sibling and Adult Child Category if:
>
> ...
>
> ii. they have an acceptable offer of employment in New Zealand.
>
> ...
>
> c. Principal applicants with dependent children must show that they will meet a minimum income requirement if they come to New Zealand, which is intended to ensure they can support themselves and any dependants. The

table below sets out the gross minimum income requirement for principal applicants with dependent children:

| Number of dependent children | Total family income per year |
|---|---|
| 1 | $30,946 |
| … | … |

...

*Effective 29/11/2010*

[27] The definition of 'acceptable offer of employment' is contained at F6.5.20, which relevantly provides:

**F6.5.20 Definition of 'acceptable offer of employment'**

a. Offers of employment are acceptable if they are for ongoing and sustainable employment with a single employer, or for one or more contracts totalling at least 6 months, if the principal applicant has provided evidence of having had at least two years of contract work (see F6.5.25 below); and

…

d. genuine; and

...

*Effective 29/11/2010*

[28] Paragraph F6.5.25 defines 'ongoing and sustainable employment' as follows:

**F6.5.25 Definition of 'ongoing and sustainable employment'**

a. Employment is ongoing and sustainable if it is:

i. an offer of employment or current employment with a single employer and permanent, or indefinite, or for a stated term of at least twelve months with an option for the employee of further terms, and of which the employer is in a position to meet the terms specified; or

...

**Note:** When assessing whether employment is sustainable, officers may consider, but are not limited to, such factors as the residence status of the employer, the period for which the employing organisation has been established as a going concern, and the financial sustainability of the employing organisation.

*Effective 29/11/2010*

## Whether the Proposed Employment was Sustainable

[29] In declining the application, Immigration New Zealand stated that the financial status of the company was not healthy and that its working capital had

been “negative” for the last two financial years. Further, the company’s current ratio was 0.16 and 0.25 for the 2014 and 2015 financial years, respectively. Immigration New Zealand also rejected the submission made by an accountant that the owner’s capital should not have been included as a current liability.

[30] In *HO (Sibling and Adult Child)* [2014] NZIPT 201559, the Tribunal stated:

> [32] It is relevant, at this point, to have regard to various decisions of the Tribunal and its predecessor, the Residence Review Board, which state that, with respect to the issue of sustainable employment, while it is reasonable for Immigration New Zealand to consider financial records, it must proceed with caution when overriding an employer’s judgment that the employment offered is sustainable (see *Residence Appeal No 14705* (9 March 2006) and *Residence Appeal No 15452* (22 June 2007)). Without compelling financial or other evidence that an employer cannot sustain an applicant’s employment, it is not reasonable to dismiss a claim that it is sustainable (see *Residence Appeal No 15082* (20 October 2006) and *FJ (Sibling and Adult Child*) [2013] NZIPT 201065).
>
> [33] In addition, it has been previously stated that there are limitations to the assistance Immigration New Zealand can receive from examining private company accounts because they are prepared primarily for tax purposes and may not demonstrate its viability. Also, such accounts are usually geared towards minimising profit and may not necessarily provide a clear picture of the company’s ability to employ a person. Further, accounts are historical, not prospective, and may not reflect the benefit that an employee might have on profitability, both directly and by freeing up other staff to generate income (see *Residence Appeal No 15236* (25 May 2007) and *FJ (Sibling and Adult Child)* [2013] NZIPT 201065).

[31] Immigration New Zealand was provided with financial end-of-year reports for the company from 2012 to 2015. The Tribunal observes that the current ratio in each of these reports was below 1.0. In other words, the company’s current assets were less than its current liabilities. Despite having a current ratio of less than 1.0 for four consecutive financial years, the company has continued to trade. If the current ratio is a reliable measure of a company’s financial business, which it is not, it is unlikely the prospective employer’s business could continue to exist.

[32] The Immigration New Zealand decline decision does not acknowledge the company’s longevity. It was incorporated in New Zealand in 2004 and has been trading for over 12 years. Given that most new businesses fail in the first five years, this was an achievement which warranted greater consideration. Further, the company’s 2015 financial report records that it made a net profit of $9,135, which was a modest increase from the profit it made in the previous year of $7,966.

[33] The Tribunal considers the employer’s claim that the appellant’s employment was sustainable, should not have been overridden in this case. This is a business that has been in trade for over 12 years and that has returned a

profit for the financial years ending 31 March 2015 ($9,135), 31 March 2014 ($7,966), and 31 March 2013 ($67,472). There was bank evidence before Immigration New Zealand that the company had over $100,000 in its bank account. *Prima facie*, there was evidence to support the employer's claim that the appellant's offer of employment was sustainable.

[34] In this case, Immigration New Zealand used the company's current (asset/liability) ratio as a measure of its financial state of health. However, this practice is not supported by instructions, which does not expressly require an employing company to have a minimum current ratio. The current ratio is only one measure, but it is too broad to be determinative of a company's financial position. There is no quick fix in understanding financial documents; no one test which is determinative of a company's state of health. The Tribunal endorses the approach in *HO*, which emphasises the need for caution when relying on historical financial documents to override the "real time" advice of an employer.

[35] For completeness, the application was also declined because Immigration New Zealand was not satisfied that the appellant's offer of employment was genuine (F6.5.20.d) because she was not paid the market rate for her position.

[36] While there is no express requirement under this category of residence for an applicant to be paid the market rate for his or her position, the Tribunal has previously considered the absence of market rate evidence in determining whether an offer of employment is genuine (see *FB (Sibling and Adult Child)* [2013] NZIPT 201021 at [28]). In the present case, Immigration New Zealand relied on market rate information, which it had obtained. The Tribunal finds that such evidence is not, of itself, determinative of the issue of genuineness of employment. While the appellant's proposed salary was modest, it was, nevertheless, sufficient in terms of the minimum income requirement of F6.1.c for one dependent child and the Minimum Wage Act 1983. Immigration New Zealand needed more evidence before it could conclude, as it did, that the appellant's offer of employment was not genuine.

*Conclusion on correctness*

[37] The Tribunal finds the Immigration New Zealand decision to decline the appellant's application was incorrect because it did not properly consider all relevant information before it declined the application (A1.5, effective 29 November 2010). The application must be returned for a correct assessment.

## DETERMINATION

[38] 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 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.

[39] 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

[40] It should be noted that while these directions must be followed by Immigration New Zealand they are not intended to be exhaustive and 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 reassessed by an Immigration New Zealand officer not previously associated with the application in accordance with the instructions in existence at the date the residence application was made. No further lodgement fee is payable.

2. The appellant is to be invited to update her residence application.

3. When reading financial documents, Immigration New Zealand must proceed with caution. It is to consider all the employing company's financial information and any new material provided. Immigration New Zealand must assess whether the appellant's offer of employment is sustainable, pursuant to F6.5.25 of the instructions. In doing so, it is to note the Tribunal's comments at paras [33]-[34] above.

4. If the appellant's offer of employment is no longer available, she is to be given a reasonable opportunity to submit a new offer of employment.

[41] The appellant is to understand that the success of this appeal does not guarantee that her application will be successful, only that it will be subject to reassessment by Immigration New Zealand.

[42] The appeal is successful in the above terms.

**Order as to Depersonalised Research Copy**

[43] 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 or her family.

"P Fuiava"
P Fuiava
Member

Certified to be the Research Copy released for publication.

P Fuiava
Member