

**AT AUCKLAND**

**Appellant:** **JM (Sibling and Adult Child)**

**Before:** V J Vervoort (Member)

**Counsel for the Appellant:** A McClymont

**Date of Decision:** 22 November 2016

---

**RESIDENCE DECISION**

---

[1] The appellant is a 42-year-old citizen of India whose application for residence under the Family (Sibling and Adult Child) category included her husband, aged 39 years, and the couple's daughter, aged 16 years.

**THE ISSUE**

[2] Immigration New Zealand declined the application because it was not satisfied that the appellant's offer of employment was genuine and sustainable. The principal issue for the Tribunal is whether Immigration New Zealand properly considered the evidence regarding the appellant's offer of employment.

[3] For the reasons set out below, the Tribunal finds that Immigration New Zealand's decision was not correct because it took into account irrelevant considerations and failed to take into account relevant considerations.

[4] The application is returned to Immigration New Zealand for a correct assessment.

## **BACKGROUND**

[5] The appellant made her application for residence on 18 October 2011. Her application was sponsored by her mother, a New Zealand citizen. It was allocated to an Immigration New Zealand officer for processing in June 2015.

### **Offer of Employment**

[6] The offer of employment relevant to the outcome of the application was made to the appellant in September 2015. It was a full-time permanent position as a retail worker in a superette owned and operated by her parents.

[7] By email of 23 June 2015, Immigration New Zealand asked the appellant to provide evidence of her updated offer of employment along with her “employer’s financial documents” for the last two years.

[8] By email of 28 June 2015, the appellant provided Immigration New Zealand with the financial statements of her parents’ business prepared by their accountant for the purpose of their last two years’ tax returns. The appellant noted that her parents were over the age of 65 and running a family business. She stated she would “start with supporting my parents in running the family business”.

[9] On 2 September 2015, Immigration New Zealand recorded that it had telephoned the appellant and she had confirmed that she did not have an offer of employment in New Zealand. She was advised that if she did not have an offer of employment she did not meet the instructions.

[10] The appellant subsequently provided Immigration New Zealand with a letter offering her employment. The letter (3 September 2015) from the appellant’s father offered her a full-time position in the family business. The position was for 40 hours of work per week and the appellant would undertake all the day-to-day work presently undertaken by one of the “retiring partners” of the business. The appellant was to be paid the minimum adult wage rate and any “extra time worked” would be paid “as per the rules”. The offer also provided that, on the successful completion of two years’ work, the appellant would be given the opportunity to obtain a 50 per cent share in the business, if she managed the business on a full-time basis.

[11] The appellant’s father enclosed a separate document about an incentive package that accompanied the position. The incentive package was that he would, for two years, provide the appellant with fully furnished accommodation for

herself and her family, a motor vehicle for her personal and business use, an educational allowance for her daughter, and a relocation allowance of \$10,000 once she arrived in New Zealand. The appellant's father also completed an employer questionnaire (3 September 2015). In the questionnaire he indicated that his daughter would replace him in the day-to-day operation of the business and that he would offer her a basic salary and an incentive package. He had offered her the position because he and his wife were struggling to maintain the operation of the business as they had poor health. He explained that, with his and his wife's recent absence from the business due to poor health, the business had suffered a drop in sales income.

### **Immigration New Zealand Concerns**

[12] By letter and email of 9 December 2015, Immigration New Zealand advised the appellant it was concerned about the offer of employment that she had from her parents' business. She had not submitted an employment agreement and therefore it could not be satisfied that her offer of employment was compliant with all relevant employment law in force in New Zealand.

[13] Furthermore, as the appellant's father was self-employed in his own business, this implied that the appellant would be taking up self-employment in the business. Therefore, her offer of employment did not appear to comply with the relevant instructions which did not allow for self-employment.

[14] In addition, Immigration New Zealand noted that the business had not had any employees and so there did not appear to be "an immediate need for an employee" as it appeared the business "was run smoothly" by the appellant's parents. On this basis, Immigration New Zealand was concerned as to the genuineness and sustainability of the offer made to the appellant.

### **Employment Agreement Provided**

[15] On 14 December 2015, Immigration New Zealand received a letter to the appellant from her father which formally set out the offer of employment. The appellant was offered the position as retail manager of the ABC Superette. The position was available to her "as soon as possible". Attached to the letter of offer was an individual employment agreement signed by the appellant and her father on 11 December 2015. The offer of employment was for ongoing permanent employment of an indefinite duration for a salary of \$32,000 per annum.

## **Immigration New Zealand Decision**

[16] By letter of 22 April 2016, Immigration New Zealand declined the appellant's application on the grounds that the employment offered to her was not genuine or sustainable.

### **STATUTORY GROUNDS**

[17] 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.

[18] 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](http://www.immigration.govt.nz)).

### **THE APPELLANT'S CASE**

[19] On 13 May 2016, the appellant lodged this appeal on both the available grounds.

[20] On appeal, the appellant has instructed counsel. Counsel makes submissions (26 July 2016) and produces the annual report (financial statements) of the business owned and operated by the appellant's parents for the financial year ended 31 March 2015, the IR7 (Partnership or LTC Income Tax Return Summary) for their business for the financial year ending 31 March 2015, and their individual IR3s (tax returns) for the year ending 31 March 2015.

[21] Counsel made further submissions (1 September 2016) accompanied by: evidence and information in relation to the development of a retirement village opposite the appellant's parents' business; evidence that the appellant's parents are in receipt of New Zealand National Superannuation; and evidence of the appellant's parents' medical histories. Also provided is the annual report (financial

statements) for the year ended 31 March 2016 of the appellant's parents' business.

[22] Given the outcome of the appeal, it is not necessary for the Tribunal to determine the admissibility of this new information.

## **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 treated by Immigration New Zealand as having been made on 18 October 2011 even though the appellant did not provide evidence of an offer of employment, which was a mandatory lodgement requirement. However, as Immigration New Zealand treated the application as having been made on that date and assessed the application without raising this issue, it effectively waived its entitlement to return the application to the appellant for failing lodgement requirements. Accordingly, the Tribunal proceeds on the basis that the appellant made her residence application on 18 October 2011.

[26] The relevant instructions in this case are:

#### **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.

...

*Effective 29/11/2010*

#### **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

...

#### **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
  - ii. employment on a contract basis where the applicant:
    - o has a consistent history of contract work; and
    - o has a current contract for services; and
    - o INZ is satisfied that such contract work is likely to be sustained.

---

**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*

#### *Genuine offer of employment*

[27] The purpose of requiring an offer of employment in the Family (Sibling and Adult Child) category is to ensure that an applicant, who is primarily migrating to New Zealand for family reunion reasons, is able to secure employment on terms sufficient to sustain herself (or himself) and any dependent children.

[28] The appellant had an offer of permanent, full-time employment as a retail manager in a superette owned and operated by her parents. The employment offered was “ongoing” as required by instructions.

[29] There is no instruction which prohibits an offer of employment to the applicant by a friend or a family member. In addition to offering his daughter employment, the appellant’s father gave undertakings on behalf of himself and his wife (who was the sponsor of the application), to meet the accommodation and maintenance needs of the appellant and her family for a period of two years should they be granted residence (see F6.30 (effective 15 December 2010) and

R4.10 (effective 29 November 2010)). The undertaking to meet the appellant's accommodation and related needs was given in a letter attached to the offer of employment and described as an "incentive" package by the appellant's father.

[30] In *LI (Skilled Migrant)* [2012] NZIPT 200715 at [21], in discussing offers of skilled employment under the Skilled Migrant category, the Tribunal, differently constituted, observed that the factors which indicate the genuineness or otherwise of a particular position of employment are, potentially, wide-ranging and it is not useful to pre-determine the factors to be considered. While this observation applies equally to offers of employment in the Family (Sibling and Adult Child) category, it is important to acknowledge that the purpose of the two categories of residence instructions is different. An offer of skilled employment in the Skilled Migrant category ensures not only that the applicant can support herself or himself but also that they have skills needed in New Zealand.

[31] In the context of the Family (Sibling and Adult Child) category, an offer of employment is "genuine" where the applicant intends to take up the employment and the employer intends to employ the applicant on the terms and conditions offered.

[32] There was no basis, therefore, for Immigration New Zealand to conclude simply because the appellant had provided an employment agreement, as requested, that the employment offered to her was not genuine. There had been a fulsome explanation from the appellant's father as to the difficulties he and his wife were facing, because of their health, in running their business. The offer of employment was made to the appellant, their daughter, so that she could assume a full-time position in the business thereby relieving her father, in the first instance, of the need to work in the business on a full-time basis.

[33] It was irrelevant and incorrect for Immigration New Zealand to conclude that the business did not have "an immediate need for an employee" as it was being "smoothly run" by its owners. The appellant's parents had made their position quite clear as to the problems they were facing in running their business because of their bouts of poor health.

[34] Similarly, Immigration New Zealand was incorrect to claim that, because the appellant's father was self-employed, the appellant would not be an employee but also self-employed. The appellant had been offered a future share in the business provided she had been employed by it for two years. The appellant was offered employment; she would be an employee in the first instance.

[35] Therefore, the Tribunal considers there was no basis upon which Immigration New Zealand could reasonably conclude that the offer of employment made to the appellant was not genuine.

#### *Sustainable employment*

[36] In declining the application, Immigration New Zealand determined that the business could not financially sustain the appellant's employment. In its decision, it raised for the first time that the business appeared to have insufficient profits to pay the appellant a wage. This means that Immigration New Zealand's finding on this matter was not procedurally fair and, in any event, was incorrect.

[37] In assessing the financial sustainability of an employing organisation, Immigration New Zealand must consider, amongst other things, its current and recent revenue, expenses, profit/loss figures, assets/liabilities and overall financial health.

[38] For completeness, Immigration New Zealand did not assess any of the factors set out in the Note to F6.5.25 with respect to financial sustainability. Its assessment of the financial statements of the business led it to focus on the fact that the business did not have any employees. It also focussed on the fact that the financial statements showed that the profits of the business for the years ending 31 March 2013 and 2014 were insufficient (by a small margin) to pay the appellant the salary of \$32,000 per annum which she had been offered. That analysis was inadequate because, as the appellant's father had explained, there had been a downturn in business as he and his wife had been unwell and it was anticipated that with the appellant working in the business on a full-time basis the turnover would return to its higher levels. Furthermore, the overall financial picture presented by the financial statements of the business was that the appellant's parents' equity in the business exceeded its liabilities by a reasonable margin and the business had continued to trade successfully despite the parents' ill-health.

#### *Conclusion as to correctness*

[39] Immigration New Zealand failed to properly weigh and balance the evidence regarding the appellant's offer of employment. Its finding that the offer of employment was not genuine and had in fact been "manufactured" was against the weight of evidence. Its finding that the financial circumstances of her parents' business were such that it could not sustain the offer made to her was also

incorrect, as it did not put the issue to the appellant and its analysis, in any event, did not properly consider the relevant information.

[40] For these reasons, the Tribunal finds that Immigration New Zealand's decision was not correct.

## **DETERMINATION**

[41] 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.

[42] 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**

[43] 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 which 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. Immigration New Zealand is to invite the appellant to update her application, particularly as to her offer of employment, within a reasonable timeframe, if she sees fit.

3. Immigration New Zealand shall take into account all the information and evidence before it concerning the offer of employment made to the appellant, including the information and evidence provided by the appellant on appeal.
4. Immigration New Zealand is to assess the application against the relevant instructions, ensuring that any potentially prejudicial information is put to the appellant for comment.

[44] 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.

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

#### **Order as to Depersonalised Research Copy**

[46] 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 and her parents.

"V J Vervoort"

V J Vervoort  
Member

Certified to be the Research  
Copy released for publication.

V J Vervoort  
Member