IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2017] NZIPT 203679**

AT AUCKLAND

Appellant:	**QY (Partnership)**
Before:	S Pearson (Member)
Representative for the Appellant:	T Lawler
Date of Decision:	19 January 2017

RESIDENCE DECISION

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[1] The appellant is a 28-year-old citizen of the United States of America whose application for residence under the Family (Partnership) category was declined by Immigration New Zealand. Her 8-year-old son was included in her application.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because her son, who has Down syndrome, was not of an acceptable standard of health and was not eligible to be considered for a medical waiver. The principal issue for the Tribunal is whether Immigration New Zealand correctly assessed the son's eligibility to be considered for a medical waiver.

[3] For the reasons which follow, the Tribunal finds that Immigration New Zealand's decision was procedurally incorrect. Accordingly, its decision is cancelled and the application is returned for a correct assessment.

BACKGROUND

[4] The appellant and her son ("the child") arrived in New Zealand on 29 April 2014 on visitors' visas. The appellant was approved a work visa under the Family

(Partnership) category for an initial two years and a further work visa has been approved, valid until 4 March 2018.

[5] The child was approved a student visa valid until 7 September 2016. He currently holds an interim visa valid until 8 March 2017.

Application for Residence

[6] The appellant's application for residence was made on 6 January 2016. The representative's letter (3 December 2015) included with the appellant's application stated that she was in a genuine and stable relationship with a Dutch national who has permanent residence in New Zealand, and that he was an eligible supporting partner. The child's biological father, who was incarcerated in a correctional institute in the United States of America, had signed a document relinquishing his parental rights and agreeing to his child's indefinite residence in New Zealand. The representative also stated that the appellant's partner owned a successful online business based in New Zealand, which generated $292,913 gross revenue in the previous financial year.

The Son's Health

[7] In the representative's covering letter, he explained that the appellant's child has Down Syndrome and had been declined a further student visa on that basis. He was, however, subsequently granted a student visa after a "section 61" request (Grant of visa in a special case).

Temporary Visa

[8] The Immigration New Zealand file contained a paediatric report (4 March 2015) apparently produced as part of the child's application for a student visa. When the child's medical certificates were referred to a medical assessor for temporary entry, the medical assessor had found (20 July 2014) the child had an acceptable standard of health for a temporary visa until 29 January 2015, but it was noted that there was no information relating to the child's need for assistance with schooling or his eligibility for funding.

Resident Visa

[9] As part of the processing of the appellant's application for residence, the child's medical certificates were referred to a medical assessor. The medical

assessor, considering the child's medical certificate on 15 April 2016, found he was not likely to have an acceptable standard of health, and he would be eligible for Ongoing Resourcing Scheme (ORS) funding.

Immigration New Zealand Letter

[10] Immigration New Zealand wrote to the appellant through her representative on 29 April 2016 advising that a further assessment of her child's health had been undertaken and the additional information she had provided had been taken into account. The medical assessor had concluded that the child was unlikely to have an acceptable standard of health, and the assessor's comments were attached. The appellant was informed that her child was not eligible for a residence class visa, unless the health requirement was waived.

[11] The letter informed the appellant that the health requirements could only be waived in certain circumstances, as detailed in the attached immigration instructions. The appellant was informed that her child did not appear to be eligible for consideration for a medical waiver, because it had been determined that he had a physical, intellectual, cognitive and/or sensory incapacity that required full-time care, including care in the community (A4.60.a.iii). The appellant was invited to provide further information to be considered. Otherwise, her application would be decided on the basis of evidence and information already before Immigration New Zealand.

Representative's Response

[12] The appellant's representative responded to New Zealand on 13 May 2016 in a detailed letter that challenged the medical assessor's comments regarding the child's ineligibility to be considered for a medical waiver. The representative disputed the finding that the child required full-time care and explained that, since the child's arrival in New Zealand, he had been in a mainstream new-entrant classroom in a primary school, with the assistance of a teacher aide. Outside of school he was cared for by his mother and stepfather. The representative pointed out that a number of medical reports have been provided to Immigration New Zealand over the course of the child's immigration history. The paediatrician's report of 4 March 2015 was summarised and also attached. This stated that the child would require only a routine follow-up annual screening for typical Down Syndrome complications.

[13] The representative also advised that a specialist report had been prepared in July 2015, by a disability centre in New Zealand, which was an early intervention service for children and infants with disabilities. The report was compiled after a three-way assessment conducted by an occupational therapist, a speech language therapist and a psychologist. It found that the child's scores under the Adaptive Behaviour Assessment system were "towards the upper end of what we have come to expect in our use of this measure for children with Down Syndrome". The report concluded that the child had "the capacity to be an active participant within New Zealand mainstream classroom to learn, to develop and to contribute to New Zealand's society".

[14] The medical director of the centre had emailed the representative on 10 May 2016 to express her "genuine surprise and disappointment" at the medical assessor's suggestion that the child had "a physical, intellectual, cognitive and/or sensory incapacity that requires full-time care, including care in the community". The medical director explained that the centre had worked with children with Down Syndrome for almost 40 years and had followed the lives of many of them well into adulthood in the community. She offered the observation that such children varied enormously in their levels of need as adults.

[15] The medical director further stated that the appellant's child, who had started with "reasonably strong profiles early in life", was less likely to need an intense level of care as an adult. Such children, with support from their families and schools, could continue to develop well into adulthood. While it was not possible to determine exactly how competent the child would be as an adult from his presentation at age seven, there was nothing to suggest that his health needs would require full-time care, except perhaps in old age, which many people require. Support from his family, coupled with "modest levels of support in schools", was "highly likely" to result in a child who was a competent and contributing member of his family and community. The medical director did not see institutional care as being likely for the child. He might continue to live at home as an adult, as many other adults do, and he might also be able to support himself through part-time or full-time work. The medical director stated: "We simply cannot make a determination at this stage in his life".

[16] The representative submitted that the professional views of a "multidisciplinary team of specialists in the field of child disability should be weighed heavily".

[17] The representative's letter also pointed out that the child's medical condition, considered by a medical assessor at the outset, did not identify a requirement for full-time care in that assessor's opinion (30 July 2015). At that time it was noted that a child with Down Syndrome would likely satisfy the criteria for ORS funding. The most recent medical assessor's opinion that the child required full-time care including care in the community was not supported by the previous medical assessor's review.

[18] The representative attached four recent decisions from the Tribunal which involved applicants with Down Syndrome. In these, it was held that a diagnosis of Down Syndrome alone was not sufficient to make an applicant ineligible for a medical waiver consideration. It was also pointed out that a number of the appellants included in the appeals considered by the Tribunal had additional medical conditions imposing substantially greater requirement for care.

[19] The representative concluded with the submission that there was medical opinion regarding the appellant's child, as well as Immigration New Zealand's own historic treatment of Down Syndrome as a medical issue, which strongly disputed the findings of the current medical assessor.

Immigration New Zealand's Reference to a Second Medical Assessor

[20] Following receipt of the appellant's representative's response, Immigration New Zealand referred the child's medical information to a second medical assessor, whose opinion (1 July 2016) was that the child was unlikely to have an acceptable standard of health.

Immigration New Zealand Decision

[21] On 2 August 2016, Immigration New Zealand declined the appellant's application for residence because her child did not meet the health requirements for residence in New Zealand and had been assessed as having a medical condition which meant that he did not have an acceptable standard of health. Further, the child's medical certificates had been forwarded to a medical assessor and then to a second medical assessor who both found that the child was unlikely to have an acceptable standard of health. This finding was on the basis that he had a physical, intellectual, cognitive and/or sensory incapacity that required full-time care including care in the community. This level of incapacity was caught by the instructions relating to eligibility for medical waiver consideration.

Accordingly, Immigration New Zealand found that the child was ineligible for consideration of a waiver.

STATUTORY GROUNDS

[22] 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—
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> (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.

[23] 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

[24] On 6 September 2016, the appellant lodged this appeal on both grounds in section 187(4).

[25] Counsel submissions are dated 5 September 2016. Also produced on appeal are copies of correspondence and documents previously produced to Immigration New Zealand.

ASSESSMENT

[26] The Tribunal has considered the submissions and documents provided on appeal, and the file in relation to the appellant's residence application as well as her applications for temporary visas, which have been provided by Immigration New Zealand.

[27] 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

[28] The application was made on 6 January 2016 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because her child did not have an acceptable standard of health and was found to be ineligible for a medical waiver.

Health instructions

[29] Applicants for residence must have an acceptable standard of health, unless they have been granted a medical waiver. An application must be declined if any person included in that application is assessed as not having an acceptable standard of health and a medical waiver is not granted.

[30] The relevant instructions include the following:

> **A4.10 Acceptable standard of health (applicants for residence)**
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> a. Applicants for residence class visas must have an acceptable standard of health unless they have been granted a medical waiver or (f), below, applies. An application for a residence class visa must be declined if any person included in that application is assessed as not having an acceptable standard of health and a medical waiver is not granted (see A4.60).
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> b. Applicants for residence class visas are considered to have an acceptable standard of health if they are:
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> …
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> ii. unlikely to impose significant costs or demands on New Zealand's health services or special education services; and
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> …
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> d. If an immigration officer is not satisfied that an applicant for a residence class visa has an acceptable standard of health, they must refer the matter for assessment to an Immigration New Zealand medical assessor (or the Ministry of Education as appropriate).
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> ...
>
> *Effective 17/11/2014*
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> **A4.60 Medical waivers (applicants for residence class visas)**
>
> a. Applicants for residence class visas in New Zealand who are assessed as not having an acceptable standard of health and whose applications meet all other requirements for approval under the relevant Government residence instructions may be considered for the grant of a medical waiver unless they:
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> …

iii. have a physical, intellectual, cognitive and/or sensory incapacity that requires full time care, including care in the community; or

…

Effective 26/11/2012

A4.40 Seeking comment concerning health assessments

a. In all cases, an immigration officer must not decline an application on the basis that an applicant does not have an acceptable standard of health, without first seeking comment from the applicant on the report provided by the Immigration New Zealand medical assessor or the Ministry of Education (MoE) advising that the applicant does not meet the requirements of A4.10(b) or A4.15(b).

b. Where a further medical opinion on the medical condition or disability of the applicant, or a further opinion from a suitably qualified professional concerning an applicant's disability or eligibility for Ongoing Resourcing Scheme (ORS) funding is provided and this disputes the original medical or ORS assessment, officers must refer this to the Immigration New Zealand medical assessor (or MoE as appropriate) before deciding whether or not to decline the application.

c. Having regard to the opinion that disputes the assessment of the Immigration New Zealand medical assessor or the MoE, the Immigration New Zealand medical assessor or MoE assessor may either amend their original assessment or confirm their original assessment.

Effective 25/07/2011

[31] The evidence before Immigration New Zealand was that the appellant's child, nearly seven years of age, was an otherwise healthy child with Down Syndrome. During the assessment of his application for a student visa, a report from a New Zealand paediatrician (4 March 2015) stated that the level of medical care he would need would be only a routine annual screening for complications common in Down Syndrome children. The detailed report from a specialist child disability centre in New Zealand, dated in July 2015, had been compiled by a team that provided multidisciplinary early intervention services to children and infants. According to the team's speech language therapist, psychologist, and occupational therapist, the child's score was at the upper end of what to expect from children with Down Syndrome. The team considered that he had the capacity to be an "active participant" within the New Zealand mainstream classroom and he had the capacity to contribute to New Zealand society.

[32] After Immigration New Zealand informed the appellant, on 29 April 2016, that her child did not appear to meet the criteria for medical waiver consideration, her representative responded in a detailed letter, dated 13 May 2016. In this, the representative challenged the opinion of the medical assessor. Attached to the letter was the copy of an email sent by the doctor who was the medical director of the disability centre setting out experience with Down Syndrome children over a

40-year period, enabling the lives of such individuals to be followed well into adulthood. The medical director explained that individuals with Down Syndrome vary enormously in their level of need as adults. The appellant's child was demonstrating a range of important learning and cognitive skills which, while still at an emergent level, were building on the foundation provided by a very supportive family environment. The director stated:

> It is not possible to determine how competent [the child] will be as an adult from this presentation at age seven; there is nothing to suggest that he has self-needs that would require full-time care; except perhaps at old age, and most of us might need care. In the meantime, the support of this family coupled with modest levels of support from school are highly likely to result in a child who is a competent and contributing member of his family and community. I do not see institutional care is likely to be needed for [the child]. He may continue to live at home as an adult; but then so did many adults. He may be able to support himself through part-time or full-time work. We simply cannot make a determination at this stage in his life.

[33] Immigration New Zealand did not refer the child's medical certificates to the Ministry of Education for an opinion as to his eligibility for funding. Instead, a medical assessor stated, without providing details or reasons, that the child was eligible for ORS funding "and would likely require full-time care long term – community based". Immigration New Zealand should have required the medical assessor to provide a more reasoned opinion. Instead, the child's medical certificates were forwarded to a different medical assessor who, on 1 July 2016, simply stated "I agree with previous MA's decision". This was an inadequate response.

[34] The second medical assessor ticked the box on the referral form that identified that "the applicant has a physical, intellectual, cognitive and/or sensory incapacity which requires full-time care, including care in the community". That was clearly incorrect, as the objective information, set out in the medical report made available to Immigration New Zealand and forwarded to the medical assessors, did not state that the appellant's child "requires full-time care". Indeed, there was clear evidence in the disability centre's assessment, and from its medical director, that the appellant's child did not currently require full-time care and, while it was difficult to speculate, he was unlikely to require such care as an adult.

[35] The deficiencies in the medical assessors' opinions were overlooked by Immigration New Zealand, who decided that the child was not eligible for a medical waiver because he was caught by the provisions of instruction A4.60.a.iii. That was a serious flaw in Immigration New Zealand's processing of the application. While Immigration New Zealand can reasonably be expected to rely

on the opinions of its medical assessors, in this particular case, the absence of reasoning and brief reports from the medical assessors have rendered their assessments unfair and inadequate. Immigration New Zealand also failed to refer the child's specialist centre report to the Ministry of Education for an opinion.

[36] The Tribunal agrees with the representative's submissions on appeal that previous decisions of the Tribunal have made it clear that a child with Down Syndrome should not be found to be ineligible for medical waiver consideration purely on that diagnosis. Previous decisions of the Tribunal have found a distinction between a child's intellectual cognitive disability, that is characteristic of Down Syndrome, and a physical disability. The paediatrician's report (March 2015) and assessment from the disability centre made it clear that the appellant's child was in good physical health and did not require any particular assistance. The child's speech development had been slowed by ear infections as an infant and he was benefiting from ongoing speech language therapy support. The child lived with his mother and stepfather, without assistance.

[37] As the Tribunal (differently constituted) in *IJ (Partnership)* [2014] NZIPT 201487 commented at [34]:

> A medical waiver cannot be declined simply because an applicant does not have an acceptable standard of health. The medical waiver is an applicant's opportunity to set their health problems against the context of other relevant factors including an estimate of the burden on the New Zealand taxpayer of any particular health or special education services required. The Tribunal has already observed that the medical assessor's reasoning was inadequate and Immigration New Zealand's failure to consider a medical waiver for the son simply compounded the error.

[38] Immigration New Zealand therefore was incorrect to determine that the child was not entitled to consideration for a medical waiver on the faulty assumption that he requires full-time care.

Conclusion on correctness

[39] Because of the flaws in the processing of this application, the Tribunal finds that Immigration New Zealand incorrectly declined the appellant's application. It failed to make a proper assessment of the child's health, failed to refer his medical information to the Ministry of Education, and failed to consider a medical waiver.

DETERMINATION

[40] 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.

[41] 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

[42] The following directions are not exhaustive but they must be followed by Immigration New Zealand.

1. The application is to be reassessed by a different Immigration New Zealand officer in accordance with the instructions in existence at the date the appellant's application was made and without the payment of further lodgement fees.

2. The appellant is to be invited to produce any further relevant information or evidence relating to her partnership and her potential contribution to New Zealand. She is also to be invited to produce any further relevant medical information regarding her child's health and his current developmental progress.

3. Immigration New Zealand is to complete its assessment of the appellant's partnership and resolve any perceived issues relating to the custody of the child. When this is satisfactorily concluded, Immigration New Zealand is to turn its mind to the child's health.

4. Medical certificates and reports forwarded to a medical assessor who has not been previously involved are to be accompanied by an instruction that full reasons are to be provided for his/her opinion. If the medical assessor opines that the child is caught by the instruction

at A4.60.a.iii, this is to be supported with reference to specific medical issues, in light of all relevant information available.

5. Immigration New Zealand is to ensure that the child's eligibility for a medical waiver is carefully and properly considered. In the event he is regarded as ineligible for a medical waiver, clear reasons are to be provided to the appellant for comment.

6. It is to be expected that medical assessors will recommend a referral to the Ministry of Education to ascertain the child's eligibility for ORS funding. In that event, the Ministry of Education is to be asked for a detailed opinion as to the extent of the assistance that the child will require until he is 21 years of age, in order that a reasonably accurate estimate can be made as to the likely costs involved.

7. If a medical waiver assessment is undertaken it is to include a detailed examination of all relevant matters, including the contribution the appellant's mother and his stepfather can reasonably be expected to make to New Zealand.

8. Immigration New Zealand shall then make a final determination on the appellant's application. In the event that any prejudicial matters arise during the processing of the appellant's application, these are to be clearly articulated and put to the appellant with reasons, and she is to be provided with a reasonable opportunity to respond.

[43] 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 a proper and fair reassessment by Immigration New Zealand.

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

Order as to Depersonalised Research Copy

[45] 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.

"S Pearson"
S Pearson
Member

Certified to be the Research Copy released for publication.

S Pearson
Member