IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2017] NZIPT 203427**

AT AUCKLAND

Appellant:	**CR (Migrant Investor)**
Before:	M B Martin (Member)
Representative for the Appellant:	T Delamere
Date of Decision:	2 March 2017

RESIDENCE DECISION

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[1] The appellant is a 48-year-old citizen of China. Her application for residence, made under the Business (Migrant Investment – Investor 2) category, includes her 18-year-old son. She and her son's father are divorced.

THE ISSUE

[2] Immigration New Zealand declined the appellant's application because it was not satisfied she had lawfully acquired her nominated investment asset.

[3] The principal issue for the Tribunal is whether Immigration New Zealand conducted a fair and proper assessment. For the reasons that follow, the Tribunal finds that it did not. Accordingly, the decision to decline was not correct and the appellant's application is returned to Immigration New Zealand for a correct assessment.

BACKGROUND

[4] On 8 August 2014, the appellant lodged an Expression of Interest under the Business (Migrant Investment – Investor 2) category. She declared that she was the director and an 82 per cent shareholder of a Chinese building supply company

called [ABC Ltd] (the "building supply company"). She would liquidate her shares in this company so as to make an investment in New Zealand of NZD1.5 million.

[5] The appellant said she would have NZD1 million available as settlement funds, which would be drawn from a property she owned in China.

[6] The appellant claimed three years of relevant business experience, relying on her management of the building supply company.

[7] Immigration New Zealand invited the appellant to apply for residence.

The Residence Application

[8] On 12 November 2014, the appellant made her application for residence. In support of her business experience and nominated assets, she produced:

(a) A tax registration certificate for the building supply company; a "Company Registration" document listing the appellant as an 82 per cent shareholder of the company, which had registered capital of RMB5 million; a "Company Profile" which noted the company was established in March 2010; a business licence; copies of sale/purchase contracts signed by the appellant; Audit Reports (2011, 2012 and 2013); and an "Assets Appraisal Report" (2014) recording that the appellant's shareholding had an equity value of RMB8,623,517.81.

(b) Various documents in respect of another company the appellant had invested in and which had been established in 2007: [DEF Ltd] (the appellant's "first company").

(c) A sale and purchase agreement and valuation in respect of the nominated settlement property.

(d) Two income certificates in respect of the appellant's previous employment. The first, from a real estate development company, recorded that she had been employed as its general manager from 1993 to 1999. Her income for that period amounted to RMB2,360,000. The second certificate recorded that she had worked for a second employer between 1999 and 2006. Her income over that period amounted to RMB3,480,000. Both companies said they had paid the appellant's personal income tax.

[9] The appellant's former representative (Mr Shang) clarified, in accompanying submissions, that the appellant had established her first company using salary and bonus income she had saved.

Letter Containing Potentially Prejudicial Information

[10] On 22 December 2015, Immigration New Zealand advised the appellant that it had a number of concerns. First, it was not satisfied she had demonstrated she met the business experience requirements of instructions. She would need to produce evidence including social security insurance statements.

[11] Second, in respect of her nominated settlement asset, she had not produced evidence demonstrating she owned the nominated property or what funds were applied towards its acquisition.

[12] Third, she had to demonstrate that her nominated investment asset (the shares) had been legally earned or acquired. She had said the building supply company was established using income from employment. The evidence she had produced showed her investment amount was RMB4,100,000. She would need to produce bank statements and tax records which showed the payment of salary and bonus income into her account(s), and that her RMB4,100,000 investment in the company was drawn from those funds.

The Appellant's Response

[13] On 20 January 2016, the appellant's former representative lodged submissions in response. His submissions on the question of the appellant's business experience, and the evidence produced in support, need not be set out here because Immigration New Zealand ultimately accepted the appellant satisfied this part of the instructions.

[14] In response to Immigration New Zealand's concerns regarding the appellant's nominated settlement asset, the property in China, the representative noted it could take some time to obtain an ownership certificate. He asked that this asset be removed from the assessment because the value of the appellant's 82 per cent shareholding was now such that she could rely on it as both her nominated investment and settlement asset. In support, he produced an updated valuation of the building supply company and the company's audit reports for 2014 and 2015.

[15] In response to Immigration New Zealand's concerns regarding the acquisition of the appellant's shareholding in the building supply company, the representative explained that the appellant used employment income to establish her first company in 2007. Her investment in the building supply company, established in 2010, came "mainly" from funds she had borrowed from her business partner (being her partner in respect of the building supply company). The balance came from "previous savings from her business income/her previous employment and was also gained from [her] divorce settlement". The representative noted that the funds advanced to the appellant from her business partner had been repaid using her "undistributed profits" from the first company. She could not produce bank statements showing the receipt of historical salary income because the bank did not keep such records.

[16] In support of the above submissions, the representative produced:

(a) A letter from the appellant, in which she noted she had worked as a senior manager for two companies when she established her own two companies. She could not produce tax certificates because the tax department could not identify her personal information in circumstances where her previous employers had deducted and paid the tax. She also noted she had been having cash-flow difficulties when she established the building supply company and so borrowed RMB2,750,000 from her business partner.

(b) A company constitution for the appellant's first company and a document entitled "Company Registration Basic Information Table" recording that the first company had been dissolved during 2015.

(c) A "Borrowing Agreement" (20 March 2010) between the appellant and her business partner. This recorded that the partner had agreed to loan the appellant RMB2,750,000 to enable her investment in the building supply company, which had to be repaid by March 2011.

(d) A "Lawyer's Testimonial" confirming that a law firm had been involved in confirming the "authenticity" of the Borrowing Agreement.

(e) A certificate from an accounting firm (4 January 2016) confirming that the appellant had withdrawn from the first company her unallocated earned profit of RMB2,750,000 for payment of increased capital in

the building supply company. These funds were withdrawn on three separate occasions (April 2010, June 2010 and January 2011).

(f) Bank statements for an account held by the appellant's first company showing the withdrawal of RMB100,000 (23 April 2010), RMB650,000 (4 June 2010) and RMB2 million (26 January 2011).

(g) Bank statements for an account held by the building supply company showing the receipt of the above repayments.

(h) Curriculum Vitae in respect of the appellant.

(i) The appellant's Divorce Certificate and Divorce Agreement (8 August 2006), the latter recording that she had received the family home, stocks, a vehicle, an unknown company, and personal belongings.

Immigration New Zealand Decision

[17] On 11 March 2016, Immigration New Zealand declined the appellant's application because it was not satisfied she had lawfully earned or acquired her nominated investment asset (the shares).

STATUTORY GROUNDS

[18] 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.

[19] 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

[20] On 21 April 2016, the appellant lodged this appeal on the ground that the decision of Immigration New Zealand was not correct in terms of the applicable residence instructions.

[21] The appellant was initially represented by Mr Shang, who had represented her during Immigration New Zealand's assessment. He made submissions on appeal (18 April 2016). Mr Shang was replaced by Mr Delamere during the course of the Tribunal's assessment. Mr Delamere makes his own submissions (21 February 2017). The Tribunal considers both sets of submissions.

[22] The appellant has produced copies of documents already held on Immigration New Zealand's files.

ASSESSMENT

[23] The Tribunal has considered the submissions and documents provided on appeal and the files in relation to the appellant's residence application, which have 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 12 November 2014 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant had not demonstrated her nominated investment asset (shares) had been lawfully earned or acquired. The relevant instructions in this case are set out below.

Business (Migrant Investment – Investor 2) category instructions

[26] The appellant made her application under the Business (Migrant Investment – Investor 2) category. The following instructions are relevant:

> **BJ5.40 Investment funds**
>
> a. The principal applicant must nominate a minimum of NZ$1.5 million to invest in New Zealand.

…

c. The principal applicant must:

i. nominate funds and/or assets equivalent to the amount that they wish to invest in New Zealand; and

ii. demonstrate ownership of the nominated funds and/or assets (see BJ5.40.1 below); and

iii. demonstrate that the nominated funds and/or assets have been earned or acquired legally (see BJ5.40.1(c) below).

…

BJ5.40.5 Definition of 'funds earned or acquired legally'

a. Funds and/or assets earned or acquired legally are funds and/or assets earned or acquired in accordance with the laws of the country in which they were earned or acquired.

b. Business immigration specialists have discretion to decline an application if they are satisfied that, had the funds and/or assets been earned or acquired in the same manner in New Zealand, they would have been earned or acquired contrary to the criminal law of New Zealand.

…

BJ5.40.20 Evidence of the principal applicant's nominated funds and assets

…

b. Principal applicants must provide evidence to the satisfaction of a business immigration specialist that the nominated funds and/or assets were earned or acquired legally.

…

d. A business immigration specialist may seek further evidence if they:

i. are not satisfied that the nominated funds and/or assets were earned or acquired legally; or

…

Effective 25/07/2011

[27] Instruction A1.5 of the fairness requirements of instructions is also relevant, and provides:

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 the application is decided in a way that is consistent with other decisions;
- whether appropriate reasons are given for declining an application;
- whether only relevant information is considered;
- whether all known relevant information is considered.

b. How much fairness an immigration officer must bring to bear in deciding an application may depend on the consequences of the decision for the applicant.

…

Effective 29/11/2010

[28] Immigration New Zealand appeared to find that the appellant satisfied all of the requirements of the Business (Migrant Investment – Investor 2) category, with the exception of BJ5.40.c.iii (the requirement to demonstrate that the nominated investment funds and/or assets have been earned or acquired legally).

The two companies

[29] In declining the application, Immigration New Zealand stated that the appellant had initially indicated the funds she used to acquire her 82 per cent shareholding in the building supply company had come from salary and bonus income she had saved over the years. However, during the course of the assessment, and inconsistent with her earlier evidence, she advised that the funds had largely been borrowed from her business partner.

[30] Mr Shang, in his submissions on appeal, submits that the appellant had not provided inconsistent evidence as to how she funded the acquisition of her 82 per cent shareholding. The Tribunal agrees. Mr Shang had stated, when the application was made, that the appellant had drawn on accumulated salary and bonus income to fund her investment in *the first company*. During the assessment, he advised that the appellant had funded her investment in *the building supply company* by relying on a loan of RMB2,750,000 (from a business partner), along with income she had saved and the proceeds that came from the sale of certain assets (a combined amount of RMB1,350,000). The appellant had not provided inconsistent evidence.

[31] The Tribunal cannot be certain that Immigration New Zealand's adverse credibility finding, above, did not have an impact on the weight it attached to other evidence produced by the appellant.

The loan of RMB2,750,000

[32] Immigration New Zealand had to determine whether the appellant's 82 per cent shareholding in the building supply company, her nominated investment asset, had been lawfully acquired. The appellant submitted, as noted above, that the majority of her RMB4,100,000 investment in the company had come from funds loaned to her by her business partner.

[33] In declining the application, Immigration New Zealand stated there was no "official or independent" evidence to demonstrate the existence of a loan, such as bank statements which showed the appellant had received RMB2,750,000 from her business partner and then transferred this to the building supply company to purchase her shares. There was also no evidence, such as bank statements, to show that the business partner had been repaid the advanced funds; the building supply company, not the business partner, had received RMB2,750,000 direct from the appellant's first company.

[34] The Tribunal accepts bank statements demonstrating the above transactions would have been helpful. They would have left little doubt as to the source of the funds the appellant had invested in the company in order to acquire her 82 per cent shareholding. However, Immigration New Zealand was obliged to weigh the evidence that had been produced in support of the loan having been made and repaid. The Tribunal is not satisfied that it did. This evidence included: a letter from the appellant setting out why she had required a loan; a "Borrowing Agreement" (20 March 2010) between the appellant and her business partner confirming he had loaned her RMB2,750,000 for a one-year period; a "Lawyer's Testimonial" recording that solicitors had been involved in confirming the loan agreement; a certificate from an accounting firm (4 January 2016) advising that the appellant had withdrawn RMB2,750,000 of her "unallocated earned profit" from the first company which was transferred to the building supply company; and bank statements showing three withdrawals from the appellant's first company's business account, totalling RMB2,750,000, which were then deposited into the building supply company's bank account before the expiry of the one-year loan repayment date.

[35] The Tribunal acknowledges that the above bank statements did not show the appellant's business partner had actually received the RMB2,750,000 which was transferred to the building supply company. However, these funds were transferred to the company in which he was a shareholder and was relevant

evidence that had to be considered in the context of all the other evidence that had been produced.

[36] A second concern the Tribunal has is that Immigration New Zealand never requested bank statements showing the types of transactions described at [33] above. In fact, it never wrote to the appellant setting out its concerns that she had not demonstrated a loan had taken place, nor did it set out its specific concerns about the RMB1,350,000 (discussed below) or that she had provided inconsistent evidence as described above. She was deprived of an opportunity to comment on these matters.

[37] The Tribunal acknowledges that Immigration New Zealand had already sent one letter to the appellant setting out concerns that it had (dated 22 December 2015). However, because it relied on new concerns in declining the application, in circumstances where the appellant was clearly making every effort to produce targeted evidence in what was a complex matter, the Tribunal finds that Immigration New Zealand should have sent another letter detailing its new concerns before making its final decision (A1.5 of the fairness requirements of instructions).

The additional funds (RMB1,350,000)

[38] The appellant submitted that the balance of her RMB4,100,000 investment in the building supply company (RMB1,350,000) came from saved income and the sale of assets she had obtained at the time of her divorce.

[39] Immigration New Zealand stated, in the letter of decline, that "minimal evidence" had been produced showing the appellant's income levels prior to the establishment of the building supply company. It was noted that she had produced income certificates, but no "independent and official evidence", which could have included bank statements showing the receipt of salary and bonus income. Without such evidence, Immigration New Zealand could not be satisfied the appellant had sufficient means to make the RMB1,350,000 payment she claimed to have made.

[40] Mr Shang advised Immigration New Zealand that bank statements for the appellant's period of employment, before she invested in her own businesses, could not be produced because her bank did not have historical account transaction statements. While it would have been appropriate for Mr Shang to produce evidence of attempts made to obtain such information from the

appellant's bank, this was, the Tribunal acknowledges, not a request that had been expressly made of him.

[41] The Tribunal does not understand why the income certificates the appellant produced were accorded only "minimal weight". They came from two different companies she had worked for and reflected a total income of RMB2,360,000 between 1993 and October 1999, and RMB3,480,000 between October 1999 and 2006. It was open to Immigration New Zealand to contact the companies that had issued the certificates to verify their authenticity and query what records had been relied on when generating the certificates, and to potentially request copies of those records.

[42] Without having sought to verify the certificates, the Tribunal is not satisfied Immigration New Zealand should have treated them as having effectively no evidential value.

[43] In terms of the appellant's indication that she had also relied on funds from assets she had received at the time of her divorce and then on-sold, Immigration New Zealand found there was insufficient supporting evidence. The Tribunal notes that the appellant had produced a copy of her Divorce Agreement listing the assets she had received, although this was of limited evidential value by itself.

[44] Immigration New Zealand never requested further evidence in support of the appellant's income received from the sale of assets, nor did it set out any concerns it had in respect of this matter so that the appellant could provide a response. It would have been appropriate, in any second letter sent to the appellant, to have requested evidence as to what assets had been sold, how much they had been sold for, how the sale proceeds had been treated at the time of sale, and what portion of this income was applied to her acquisition of the shares.

Submission that increased value of shares lawfully earned or acquired

[45] Mr Delamere submits that the increase in value of the shares in the building supply company, since inception to January 2016 (an increase he says of more than NZD1.5 million), should be considered lawful earnings in accordance with BJ5.40.c.iii. He indicates that if this submission were accepted, then it would matter not how the appellant had funded her earlier acquisition of the shares.

[46] This submission is not accepted. In *AT (Migrant Investor)* [2016] NZIPT 202803, the Tribunal did not accept that capital gain on the sale of an asset could be relied on. It stated:

> "The instructions variously at BJ5.5, BJ5.40, BJ5.40.1 and BJ5.40.5 all refer to funds or assets *which have been* earned or acquired legally. The instructions do not allow part of the nominated assets or funds to be "carved-off". The inquiry as to earned or acquired legally attaches to the whole of the asset or funds nominated and this includes all the sources of the funds used to acquire the nominated funds."

[47] This reasoning applies equally to this case. The appellant was required to demonstrate that she had lawfully acquired her 82 per cent shareholding, regardless of the fact that her shareholding had subsequently increased in value through the natural forces of the market.

Conclusion on correctness of decision to decline

[48] For the reasons set out at [29] to [44] above, taken together, the Tribunal finds that Immigration New Zealand's decision to decline the application was not correct. It did not conduct a fair and proper assessment pursuant to BJ5.40.c.iii and A1.5. The decision to decline is cancelled and the application is returned to Immigration New Zealand for a correct assessment.

DETERMINATION

[49] 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.

[50] 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

[51] 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 produce further evidence in support of her claim to have lawfully acquired her nominated investment asset (the shares). Such evidence could include: evidence detailing the nature of the relationship between the appellant's first company and the building supply company; bank statements that reflect the transfer of the loaned funds to the appellant and her payment of those funds to the company (or satisfactory evidence explaining why such evidence does not exist or cannot be produced); evidence of attempts made to obtain bank transaction histories in respect of the appellant's previous salary and bonus income payments, and any other evidence she can obtain in support of her previous salary and bonus income; and further evidence responding to the matters raised at [44] above. Immigration New Zealand must provide the appellant with copies of BJ5.40, BJ5.40.5 and BJ5.40.20.

3. Immigration New Zealand must consider any new evidence produced, along with all relevant evidence previously provided to it and the submissions provided to the Tribunal on appeal, in determining whether or not the appellant satisfies BJ5.40.c.iii. If it still holds concerns, it must write to the appellant clearly setting out those concerns and affording her a reasonable opportunity to respond.

4. If Immigration New Zealand determines that the appellant satisfies BJ5.40.c.iii, it must proceed with its assessment of the application against any instructions yet to be considered, or which need to be assessed again against updated evidence.

[52] 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.

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

Order as to Depersonalised Research Copy

[54] 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 son.

"M B Martin"
M B Martin
Member

Certified to be the Research Copy released for publication.

M B Martin
Member