IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2017] NZIPT 203768**

AT AUCKLAND

Appellant:	**NF (Parent)**
Before:	M B Martin (Member)
Counsel for the Appellant:	S Laurent
Date of Decision:	21 April 2017

RESIDENCE DECISION

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[1] The appellant is a 64-year-old citizen of India. His application for residence, made under the Family (Parent) category, includes his 65-year-old wife.

THE ISSUE

[2] Immigration New Zealand declined the appellant's application because his wife did not have an acceptable standard of health and had been declined a medical waiver. The Tribunal finds that Immigration New Zealand's decision to decline the application was correct.

[3] The principal issue for the Tribunal is whether the appellant has special circumstances, arising from his familial nexus to New Zealand, that warrant consideration by the Minister of Immigration of an exception to Government residence instructions. For the reasons set out below, the Tribunal finds that the appellant's circumstances are not special.

BACKGROUND

[4] The appellant and his wife reside in India. They have made one trip to New Zealand, which was in 2007.

[5] On 28 November 2014, the appellant lodged an Expression of Interest under tier one of the Family (Parent) category. He advised Immigration New Zealand that his 36-year-old New Zealand-citizen son would sponsor his residence application.

[6] An invitation to apply for residence was issued and, on 29 September 2015, the appellant made his application. Evidence demonstrating that he satisfied the financial requirements of instructions was produced.

Medical Certificates

[7] The appellant and his wife produced medical certificates. Immigration New Zealand accepted that the appellant's medical certificate demonstrated that he was of an acceptable standard of health. However, his wife's medical certificate recorded that she suffered from dilated cardiomyopathy with left ventricular dysfunction, hypertension, and Type II diabetes.

[8] Immigration New Zealand referred the wife's certificate to its medical assessor for an opinion on whether she had an acceptable standard of health.

[9] In response, the medical assessor stated that a report from the wife's cardiologist was required, along with a number of test results. On 15 December 2015, Immigration New Zealand invited the appellant to produce this evidence.

[10] On 28 March 2016, the appellant's wife underwent Coronary Artery Bypass Grafting (CABG) surgery in India.

Test Results and Cardiologist's Report Produced

[11] Following the above surgery, the appellant produced a report from his wife's cardiologist (9 April 2016). The cardiologist advised that the surgery was "uneventful" and the wife was asymptomatic. She would need to continue on prescribed medications for the rest of her life.

[12] Immigration New Zealand was also provided with a range of further evidence, including the wife's coronary angiography report (20 February 2016), CABG operation notes and discharge summary. The angiography report and discharge summary confirmed that the wife had been diagnosed with hypertension, Type II diabetes, diabetic cardiomyopathy (which is another name used for the previously expressed dilated cardiomyopathy), and left ventricular systolic dysfunction.

[13] The above new evidence was provided to the medical assessor.

Medical Assessor's First Report

[14] In a report dated 17 April 2016, the medical assessor determined that the appellant's wife was not of an acceptable standard of health because she had conditions listed in the instructions which were considered to impose significant costs and/or demands on New Zealand's health services. The medical assessor stated that the appellant's wife had been diagnosed with coronary artery disease and had undergone CABG surgery. Her test results were indicative of dilated cardiomyopathy and congestive heart failure, which were progressive diseases. She had also been diagnosed with diabetes.

[15] On 22 April 2016, Immigration New Zealand advised the appellant of the medical assessor's opinion. He was invited to produce a disputing medical opinion by 6 May 2016.

[16] On 4 May 2016, counsel, who had just been instructed, advised Immigration New Zealand that most of the test results relied on by the medical assessor predated the CABG surgery. Updated medical evidence would be produced, but an extension to the 6 May 2016 deadline would be required.

[17] Immigration New Zealand granted a brief extension.

Further Medical Evidence Produced

[18] On 23 May 2016, counsel produced a report from a cardiologist (not being the one who had provided the above report), along with updated test results and a list of the wife's medications. The cardiologist's report, dated 16 May 2016, stated that the wife was "expected to live normally on medication…without any further cardiac intervention (surgery)".

[19] On 30 May 2016, counsel produced a letter from the wife's general practitioner (28 May 2016) and blood test results. The doctor advised that the wife had recovered well from her CABG surgery and was "symptomatically relieved". In terms of her diabetes, her blood sugar levels were well-controlled with anti-diabetic medication and diet control. He said that the wife may, in time, be able to cease relying on diabetic medication.

[20] Counsel informed Immigration New Zealand that the appellant did not intend producing any further medical evidence at that time.

[21] Immigration New Zealand referred the above information to the medical assessor.

Medical Assessor's Second Report

[22] In a report dated 8 June 2016, the medical assessor determined that the appellant's wife did not have an acceptable standard of health because she had chronic medical conditions which were considered likely to impose significant costs or demands on New Zealand's health services. The medical assessor acknowledged that the wife's blood sugar was now controlled, but said that she had known coronary artery disease and had undergone CABG surgery. Her test results were consistent with dilated cardiomyopathy and congestive heart failure.

[23] Immigration New Zealand referred the question of the wife's health to a second medical assessor, who acted as medical referee.

Report from Cardiovascular and Thoracic Surgeon

[24] On 13 June 2016, despite having represented that no further medical evidence would be produced, and after the question of the wife's health had been referred to the medical referee, counsel produced a short report from one of the cardiovascular and thoracic surgeons who had performed the CABG surgery on the appellant's wife. In this report, dated 10 June 2016, the surgeon confirmed that the wife had been diagnosed with hypertension, diabetes, diabetic cardiomyopathy, coronary artery disease with double-vessel disease, and severe left ventricular systolic dysfunction. Her CABG surgery was uneventful, she had recovered well, and she was "symptomatically relieved". It was imperative that she remain in good health. Her "overall physical condition states that she may not require any major cardiac related intervention for another 7-10 years".

[25] The immigration officer advised counsel that this report had been referred to Immigration New Zealand's Health Assessment Team. Immigration New Zealand's electronic records show that the health team did not refer the report to the medical assessor or medical referee.

Medical Referee's Report

[26] In a report dated 16 June 2016, the medical referee determined that the appellant's wife did not have an acceptable standard of health because she had conditions listed in the instructions which were considered to impose significant

costs and/or demands on New Zealand's health services. The medical referee stated that the appellant's wife had "significant cardiac disease with coronary artery disease [and] a dilated cardiomyopathy". Although she had undergone CABG surgery for double-vessel coronary artery disease, she remained at "significantly increased risk of future acute cardiac events and chronic decompensation with [the] need for further intervention and/or hospitalisation". The referee also said that the wife suffered from hypertension, diabetes, dyslipidemia and morbid obesity, which "are all cardiac risk factors [and] have other morbidity". Cardiac services in New Zealand were already overburdened.

Wife Not of an Acceptable Standard of Health

[27] On 29 June 2016, Immigration New Zealand advised the appellant that his wife did not have an acceptable standard of health and set out the medical assessor's second opinion and the medical referee's opinion. It also advised that the latest medical report from the cardiovascular and thoracic surgeon (10 June 2016) had not been provided to the medical assessors because, by the time it had been lodged, the medical referee was already in the process of completing his or her assessment. Further, counsel had previously indicated that no further medical evidence would be produced, which is why Immigration New Zealand had progressed the final medical assessments. The appellant was invited to produce evidence in support of a medical waiver.

Submissions and Evidence in Support of a Medical Waiver

[28] On 8 July 2016, counsel submitted to Immigration New Zealand that the most recent medical report produced (being the report from the surgeon, dated 10 June 2016) should be considered by the medical assessor.

[29] In terms of a medical waiver, counsel submitted that the sponsor had a duty, as the appellant's only son, to care for his parents as they advanced in years. He was also the only one out of his siblings (he had two sisters living in India) who had the financial means to support his parents. If the appellant and his wife were not granted residence, the sponsor and his wife would have to consider returning to live in India so they could properly provide support. They would have to leave behind their various residential properties and businesses in New Zealand, the latter including a successful childcare centre in a rural town and a small business engaged in the supply and installation of security fences/gates

and the sale of surplus clothing. The couple was also currently in the process of setting up a second childcare centre in another rural community.

[30] Counsel acknowledged the potential burden the appellant's wife presented to New Zealand's health system but said, against that, was the large financial contribution the sponsor and his wife were making to New Zealand through the payment of personal and business tax (approximately $236,000 of tax paid per annum), and the potential financial contribution the appellant and his wife would make after the sale of various properties in India (a total amount of approximately NZ$290,000). Further, when assessing the wife's potential burden, it was important to recognise that her diabetes condition was well-controlled. Although she may require heart surgery in the future, this was not likely to occur within the next five years. She was taking all prescribed medications which, counsel noted, were mostly subsidised in New Zealand and would present only moderate costs.

[31] Counsel noted that the sponsor and his wife did not have any children, but when they did, it would help to have the appellant and his wife in New Zealand, assisting with the care of the children, so they could continue developing their business interests.

[32] Evidence in support of these submissions was produced and included: transfer statements for money sent by the sponsor to his parents; ownership/valuation evidence in respect of the sponsor's and his wife's residential properties in New Zealand and the family's properties in India; documentation in respect of the sponsor's and his wife's childcare business (including a lease deed for the premises, tax and financial statements (2015), and an employer monthly schedule (April 2016)); documentation in respect of the couple's proposed second childcare business (including an agreement for sale and purchase and resource consent/plan paperwork); documentation in respect of the sponsor's security fence/gate installation and clothing business (including financial statements (2015) and supplier invoices); the sponsor's and his wife's personal tax summaries and returns (2015); and information regarding subsidised medications in New Zealand.

Medical Waiver Assessment

[33] On 5 October 2016, Immigration New Zealand conducted a medical waiver assessment. After considering a range of positive and negative factors, it determined that, while the sponsor and his wife were making an economic contribution to New Zealand, this was outweighed by the potentially significant

burden the appellant's wife presented to New Zealand's health system. The medical waiver was declined.

Invitation to Withdraw Wife

[34] On 6 October 2016, Immigration New Zealand advised the appellant that his wife had been declined a medical waiver. He could withdraw her from the application but this would mean she would be ineligible for a medical waiver in any future Family category application she made.

[35] Counsel advised that the wife would not be withdrawn.

Immigration New Zealand Decision

[36] On 13 October 2016, Immigration New Zealand declined the appellant's application because his wife did not have an acceptable standard of health and had been declined a medical waiver.

STATUTORY GROUNDS

[37] 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.

[38] 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

[39] On 3 November 2016, the appellant lodged this appeal on both grounds in section 187(4) of the Act.

[40] Counsel makes submissions (23 February 2017) and produces copies of documentation already held on Immigration New Zealand's files.

[41] A report from one of the appellant's wife's specialists was missing from Immigration New Zealand's files (being the one noted at [18] above) and could not be located by Immigration New Zealand in a timely manner. The Tribunal is grateful to counsel who, at the Tribunal's request, provided this report on 11 April 2017.

[42] New evidence is produced on appeal and is set out below at [45] to [46].

ASSESSMENT

[43] 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.

[44] 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. This is followed by an assessment of whether the appellant has special circumstances which warrant consideration of an exception by the Minister of Immigration.

New Evidence on Appeal

[45] The appellant produces new evidence on appeal, including: extracts from an updated valuation of the sponsor's family home (9 August 2016); a Statement of Financial Position/Performance (2016) for the first childcare business; documentation in respect of the proposed second childcare business (including building consent approval (November 2016), an estimate of construction costs, and extracts from a valuation (January 2017)); a resource consent application and approval in respect of a third childcare centre; a Statement of Financial Position/Performance (2016) for the sponsor's security and clothing business; and documentation in respect of a proposed takeaway outlet being planned by the sponsor and his wife (including lease agreement and building consent/plan documents).

[46] In addition to the above, the appellant produces an updated report (12 January 2017) from the cardiologist who had prepared the report set out at

[18] above. The cardiologist states that the appellant's wife attended his clinic in January 2017 for her regular check up. Similar to his comments in his earlier report, he advises that the wife is asymptomatic and is "very likely to live a healthy life without any further cardiac intervention". A list of her medications was also set out.

[47] The Tribunal cannot have regard to the above new evidence in its assessment of the correctness of Immigration New Zealand's decision to decline the application because it was not before Immigration New Zealand at the time it determined the application and, to the extent that any of this evidence existed at the time the application was determined, there is no evidence to suggest that it could not, by the exercise of reasonable diligence, have been placed before Immigration New Zealand (refer to section 189(1) and (3)(a) of the Act).

[48] The Tribunal finds that the updated report from the cardiologist does not disclose a particular event materially affecting the appellant's wife's eligibility under residence instructions (section 189(6) of the Act).

[49] The Tribunal takes the new evidence into account in its assessment of whether special circumstances exist, in accordance with section 189(3)(b) of the Act. Express reference is made to this evidence where appropriate.

Whether the Decision is Correct

[50] The application was lodged on 29 September 2015 and the relevant criteria are those in residence instructions as at that time (F4.10.25.f.i, effective 17 November 2014). Immigration New Zealand declined the application because the appellant's wife did not have an acceptable standard of health and had been declined a medical waiver.

Health requirements of instructions

[51] The relevant health instructions in this case include A4.10, effective 17 November 2014. Pursuant to A4.10.a, applicants for residence must have an acceptable standard of health unless they have been granted a medical waiver or fall within the refugee exception at A4.10.f. 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.

[52] Pursuant to A4.10.b, applicants are considered to have an acceptable standard of health if they are assessed as being, among other things, unlikely to impose significant costs or demands on New Zealand's health services. "Significant costs" is anything in excess of $41,000 (A4.10.2, effective 17 November 2014).

[53] The conditions listed in A4.10.1, effective 17 November 2014, are considered to impose significant costs and/or demands on New Zealand's health services. Where Immigration New Zealand is satisfied, as a result of advice from a medical assessor, that an applicant has one of the listed conditions, that applicant will be assessed as not having an acceptable standard of health (A4.10.c). Instruction A4.10.1 includes, relevantly, "Cardiac diseases, including but not exclusive to…cardiomyopathy".

Appellant's wife not of an acceptable standard of health

[54] The appellant's wife's medical certificate recorded that she had been diagnosed with, amongst other conditions, dilated cardiomyopathy. The medical assessor and medical referee agreed that she was suffering from this form of cardiomyopathy, and various medical reports produced by the appellant during the assessment also acknowledged that the wife had been diagnosed with cardiomyopathy (at times referring to the condition as being diabetic cardiomyopathy). In these circumstances, the Tribunal finds that Immigration New Zealand was correct to determine that the appellant's wife was suffering from the above A4.10.1 condition. Because she had an A4.10.1 condition, Immigration New Zealand had no option but to find that she did not have an acceptable standard of health (A4.10.c).

Submissions on appeal

[55] Counsel submits, on appeal, that Immigration New Zealand committed an error by not referring the most up-to-date medical report (the report from the cardiovascular and thoracic surgeon who had operated on the appellant's wife, dated 10 June 2016) to the medical referee (see [24] to [25] above). Immigration New Zealand had formed the view that the June 2016 report could not be provided to the medical referee because it had been produced after the medical assessor had released his or her second report.

[56] To the extent counsel's representation of Immigration New Zealand's reasoning is correct, the Tribunal observes that it is consistent with comments

made by the Tribunal (differently constituted) in *HJ (Parent)* [2014] NZIPT 201531 at [31]. In that decision, the Tribunal stated that the medical assessor instructions (including A4.45, effective 29 November 2010) do not expressly envisage that new medical evidence will be provided to the medical referee. The medical referee's role, as defined by the instructions, is to consider all the evidence that was before the medical assessor and the medical assessor's opinions, including his or her second opinion responding to any disputing medical opinion produced by the applicant, and to then act as an "arbiter of the existing evidence".

[57] The Tribunal, considering this appeal, accepts the findings as set out above. However, it adds that there may be cases where, through the operation of other instructions or the Act, it will be appropriate for new evidence to be considered by the medical referee. Such cases could include those where new evidence has been produced pursuant to section 58 of the Act ("Obligation on applicant to inform of all relevant facts, including changed circumstances") indicating there has been a change in the applicant's health status which could affect the decision on his or her application. The immigration system would be undermined and/or unfairness caused in situations where the medical referee could not be informed of a material improvement (potentially through surgery) or deterioration in the applicant's health status following the second opinion released by the medical assessor.

[58] Even if it could be said that the report from the cardiovascular and thoracic surgeon (10 June 2016) disclosed a material improvement in the appellant's wife's health status (which the Tribunal does not accept that it does) and should have been referred to the medical referee, the Tribunal finds that the failure to do so could not be said to have caused the appellant or his wife any prejudice. The surgeon confirmed that the appellant's wife had been diagnosed with cardiomyopathy and provided no evidence challenging the fact that this condition fell within the A4.10.1 list of conditions. What could be considered a new finding, that in the surgeon's opinion the wife "may not require any major cardiac related intervention for another 7-10 years", did not change the fact that she was caught by A4.10.1 and A4.10.c.

[59] The Tribunal also finds that Immigration New Zealand acted fairly by taking the surgeon's assessment of the risk of further cardiac intervention into account in its medical waiver assessment. Its ability to correctly interpret what was a clearly expressed risk assessment was not impeded by the lack of any comment by the medical referee. While counsel suggests that immigration officers should not be

permitted to assess any medical information without the assistance of a medical assessor, it is not uncommon for officers to be put in this position where, for example, new medical evidence is produced which is not disputing evidence and so does not warrant referral to the medical assessor for a second opinion (A4.40, effective 25 July 2011). Another example is where new medical evidence is produced after the medical referee has made his or her final recommendation, and the applicant wants this new information considered as part of the waiver assessment. This evidence will typically not be inconsistent with evidence previously produced and, provided Immigration New Zealand continues to have due regard to the medical assessor's/referee's findings, will cause few difficulties at the waiver stage.

[60] Counsel appears to suggest that Immigration New Zealand was under an obligation to inform the appellant of the medical assessor's second opinion before the medical referee prepared his or her final opinion. However, the Tribunal finds that Immigration New Zealand acts fairly and in accordance with instructions where, after the medical referee completes his or her opinion, it advises the applicant of both opinions at that juncture. That is what occurred in this case.

Medical waiver assessment

[61] Immigration New Zealand conducted a medical waiver assessment pursuant to A4.60.a, effective 26 November 2012. In accordance with A4.70.b, effective 30 July 2012, when determining whether to grant a medical waiver, Immigration New Zealand must consider the applicant's circumstances to decide whether they are compelling enough to justify the grant of residence. Factors that may be taken into account include those set out in A4.70.c:

> i. the objectives of Health instructions (see A4.1) and the objectives of the category or instructions under which the application has been made;
>
> ii. the degree to which the applicant would impose significant costs and/or demands on New Zealand's health or education services;
>
> iii. whether the applicant has immediate family lawfully and permanently resident in New Zealand and the circumstances and duration of that residence;
>
> iv. whether the applicant's potential contribution to New Zealand will be significant;
>
> v. the length of intended stay (including whether a person proposes to enter New Zealand permanently or temporarily).
>
> *Effective 30/07/2012*

[62] Immigration New Zealand acknowledged, when conducting the medical waiver assessment in this case, that the appellant and his wife satisfied the requirements of the Family (Parent) category, with the exception of the requirement that the wife have an acceptable standard of health.

[63] Immigration New Zealand conducted a thorough assessment of the wife's health status having regard to the medical assessors' evidence and reports produced by the appellant during the assessment. It noted that, while her medication costs may not be significant, the costs involved in general practitioner and specialist monitoring, combined with potential hospitalisation and/or surgery in the future, would be significant. Her reliance on such services would place pressure on already stretched cardiac services.

[64] In addition to the above, Immigration New Zealand had regard to the objectives of the health and Family (Parent) category instructions; the couple's familial nexus to New Zealand (through their sponsor and his wife); the couple's potential contribution to New Zealand (not found to be significant); and, as an additional consideration, the sponsor's evidence as to his and his wife's financial contribution to New Zealand through tax payments, which counsel submitted would offset any health costs presented by the appellant's wife. It also had regard to counsel's submission that, if residence were not granted, the sponsor and his wife would have to consider returning to India to provide support to the appellant and his wife there, meaning that New Zealand may no longer benefit from the sponsor's economic contributions.

[65] Immigration New Zealand proceeded to weigh and balance the positive and negative factors that existed in this case. In the end, it determined that the economic contribution of the sponsor and his wife to New Zealand did not outweigh the potentially significant burden the appellant's wife presented to New Zealand's health system. It declined to grant a medical waiver.

Submissions on appeal

[66] Counsel submits, on appeal, that Immigration New Zealand's weighing exercise as set out at [65] above was flawed. The appellant had produced clear evidence of the economic contribution the sponsor and his wife were making to New Zealand ($236,000 of tax paid over a recent financial year). However, for reasons which were not clear, Immigration New Zealand found that this contribution was outweighed by unspecified costs presented by the wife for treatment, the likelihood of which was not properly established by the medical

assessors. Surely, counsel suggests, any costs presented to the health system would be offset by the sponsor's and his wife's significant contribution to the New Zealand economy.

[67] The Tribunal accepts that more detailed evidence as to the specific costs the appellant's wife presents would have been helpful for the purposes of the medical waiver assessment. However, in terms of the likelihood of the wife requiring cardiac treatment in the future, this was specifically addressed by the medical referee in his or her report. The referee stated, having regard to the wife's chronic cardiac and other conditions, and her recent CABG surgery, that she was at "significantly increased risk of future acute cardiac events and chronic decompensation", which would necessitate further medical intervention and/or hospitalisation. Her cardiovascular and thoracic surgeon himself acknowledged that "she may not require any major cardiac related intervention for another 7-10 years", thereby acknowledging that she may well require major cardiac intervention after the passage of seven to ten years.

[68] Due to the serious nature of the wife's cardiac conditions and the potential treatment needs people suffering from such conditions typically present, she is considered, by the operation of government policy, to present significant costs to the health system of at least $41,000.

[69] The Tribunal also notes that the medical referee found that the wife's potential health needs would impose pressure on already overburdened cardiac services in New Zealand. This potential burden, which Immigration New Zealand properly had regard to in the waiver assessment, is just as valid a concern as the concern that the appellant's wife would likely impose significant costs on New Zealand's health system.

[70] The Tribunal finds that, while the sponsor and his wife were clearly making positive economic contributions to New Zealand through their business interests, Immigration New Zealand was correct to find that the potential burden the appellant's wife presented to the New Zealand health system was significant and outweighed the positive factors that existed in this case.

[71] The Tribunal finds that the decision not to grant a medical waiver was correct.

Correctness of decision to decline

[72] Immigration New Zealand correctly determined that the appellant's wife did not have an acceptable standard of health and declined to grant her a medical waiver. In those circumstances, and with the appellant having declined to withdraw his wife from the application, Immigration New Zealand had no option but to decline the application in its entirety (A4.10.a).

Whether there are Special Circumstances

[73] The Tribunal has power pursuant to section 188(1)(f) of the Act to find, where it agrees with the decision of Immigration New Zealand, that there are special circumstances of an appellant that warrant consideration by the Minister of Immigration of an exception to the residence instructions.

[74] Whether an appellant has special circumstances will depend on the particular facts of each case. The Tribunal balances all relevant factors in each case to determine whether the appellant's circumstances, when considered cumulatively, are special.

[75] Special circumstances are "circumstances that are uncommon, not commonplace, out of the ordinary, abnormal"; *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) at [24] per Glazebrook J.

Personal and family circumstances

[76] The appellant is a 64-year-old citizen of India. His application for residence includes his 65-year-old wife. They have made one trip to New Zealand as the holders of visitor visas, from March 2007 to November 2007.

[77] The couple has three adult children. Their 36-year-old New Zealand-citizen son lives in New Zealand with his wife. He was granted residence in 2005 under the Skilled Migrant category and acquired his New Zealand citizenship in 2011. He has resided in New Zealand since 2002.

[78] The couple has two daughters, aged 35 and 39, residing lawfully and permanently in India. They are both married and have two children each.

[79] The appellant has seven siblings residing in India. His wife has three siblings, also residing in India. Their parents are deceased.

[80] Immigration New Zealand was satisfied the appellant and his wife met the requirements of the Family (Parent) category, including the requirement to be of good character, with the exception of the requirement that the wife must have an acceptable standard of health.

The appellant's wife's health

[81] As has been set out in detail above, the appellant's wife suffers from significant cardiac disease with coronary artery disease and dilated cardiomyopathy. She has recently undergone CABG surgery and, according to the medical referee, remains at "significantly increased risk of future acute cardiac events and chronic decompensation", which would necessitate cardiac intervention and/or hospitalisation. In addition, the appellant's wife suffers from hypertension, diabetes, dyslipidemia and morbid obesity, which the medical referee confirms are all "cardiac risk factors and have other morbidity".

[82] On appeal, the wife's cardiologist advises, by way of a short report (12 January 2017), that the wife attended his clinic for her regular check-up in January this year. She is "very likely to live a healthy life without any further cardiac intervention". The cardiologist made similar comments in a brief report he provided to Immigration New Zealand dated 16 May 2016, which were clearly not accepted by the medical referee (as per the comments summarised above at [81]). In fact, it appears his original comments were also rejected by the cardiovascular and thoracic surgeon who had performed the CABG, who, in his report of 10 June 2016, did not discount the possibility of major cardiac-related intervention, although he said this may not be required for another seven to ten years.

[83] The wife's medical certificate, the medical assessors' reports, and the majority of the medical reports produced by the appellant during Immigration New Zealand's assessment, make it clear that she is suffering from serious chronic conditions. She will require ongoing specialist monitoring and there is a high risk that she will, on further deterioration, require medical intervention and hospitalisation. The Tribunal finds that she presents a potentially significant burden to New Zealand's health system. This burden includes the risk of placing demand on New Zealand's already stretched cardiac health services.

[84] The appellant's wife is clearly taking steps to control her health conditions as best she can. The evidence before the Tribunal suggests that she is able to access all the medications, treatment and specialist support that she requires in India.

The appellant's son

[85] The appellant and his wife have a familial nexus to New Zealand through their son and his wife. Counsel submits, on appeal, that the appellant's two daughters in India are unable to provide him or his wife with support because they have their own families to care for and are of limited financial means. In contrast, the appellant's son has played an important role in supporting his parents to date, including by sending them money and flying to India to support his mother when she had her CABG surgery. The son is providing this level of support because he recognises, counsel submits, that as the only son, he has a cultural duty to play a lead role in caring for his parents as they advance in years.

[86] Counsel submits that, as the appellant and his wife continue to advance in years, their son will have to provide them with increased support. If they are not granted residence, the son and his wife will have to consider returning to live in India on a long-term basis.

[87] Counsel makes much of what the son and his wife would leave behind in the event they had to permanently return to India, including their family home and businesses. Extensive evidence before the Tribunal shows that the couple owns and operates a number of businesses, including a childcare centre in a small rural town. They are in the process of opening another two childcare centres in other locations in New Zealand. The couple is also about to open a takeaway outlet.

[88] Counsel submits that, through their businesses, the son and his wife are making important economic contributions to New Zealand (namely through the payment of tax and providing employment), as well as providing quality childcare options to parents.

[89] The Tribunal accepts that the appellant's son and daughter are proving to be successful entrepreneurs. They are making positive contributions to New Zealand and have firmly established themselves here. However, the Tribunal is not satisfied that, in the event the appellant and his wife are not granted residence, their needs are such that the son and his wife will have no option but to return to India to care for them. To date, the son has indicated he has only made one trip to India to support his mother, while she was having her CABG operation. The main way in which he appears to be providing support is through financial contributions, and there is no evidence to suggest that he would be unable to continue providing this type of support in the event residence is not granted to his parents. To the extent that his parents require a greater level of care in the future,

it will be for the son and his sisters to resolve how best to achieve this. It is reasonable to expect that the sisters would be able to provide their parents with a level of emotional and practical support. Paid support may also be an option, financed principally by the son.

[90] The Tribunal accepts that, if the appellant and his wife were able to relocate permanently to New Zealand, the relationship they have with their son and daughter-in-law would be enhanced, and this would remove the stress the son is currently feeling about being so far away from his ageing parents. However, it is not uncommon for parents to want to follow a child who has migrated to New Zealand, especially as they enter their older years, or for the child to want his or her parents in New Zealand so they can provide their parents with a greater level of support from here. The appellant's son made the decision to relocate to New Zealand more than 15 years ago, and there was never any guarantee that his parents, many years later, would be able to permanently join him here.

The couple's potential contribution to New Zealand

[91] Counsel submits that the appellant and his wife would liquidate their property assets in India (with a value of some NZ$290,000) and bring those funds to New Zealand. They would also provide support to their son and daughter-in-law when they start a family in the future. In addition, the appellant would likely help his son in one of his businesses.

[92] The Tribunal does not doubt the genuineness of the above expressed intentions, but they are not contributions that could be considered out of the ordinary or uncommon.

No other pathway to residence

[93] Counsel submits that this appeal represents the last chance for the appellant and his wife to obtain residence. The Family (Parent) category has been suspended and the couple would not satisfy the financial requirements of the Family (Parent Retirement) category (the Tribunal would add the wife would also encounter difficulties satisfying the health requirements).

[94] Even if the Tribunal were to proceed on the basis that the couple has no pathway to residence, this would not, by itself, make their circumstances out of the ordinary. They may have the ability to apply for further visitor visas to spend time

with their son in New Zealand, but that is not a matter the Tribunal can comment on and is not weighed in this assessment.

Discussion of special circumstances

[95] The appellant and his wife have a familial nexus to New Zealand through their New Zealand-citizen son. However, they also have a familial nexus to India through their two daughters and, between them, 10 siblings, all of whom are permanently resident there. They have lived in India all of their lives and can be expected to have built up networks within their community.

[96] While the couple's son would like to provide them with a greater level of support in New Zealand, the evidence has not established that they would be unable to receive the support they require in India, even if their son were to continue to reside in New Zealand. Of course, the son may feel he needs to spend more time in India with his parents as they continue to advance in years, which will be a matter for him to decide. There was never any guarantee that, when he moved to New Zealand some 15 years ago, he would be able to bring his parents here in their older years. The dilemma that he feels he is in is not an uncommon one for children who have migrated here.

[97] The appellant's wife is suffering from significant cardiac disease and, according to the medical referee, is at high risk of future acute cardiac events and chronic decompensation, which would require medical intervention and/or hospitalisation. The Tribunal finds that she presents a potentially significant burden to New Zealand's health system.

[98] Having considered, cumulatively, the appellant's and his family's circumstances, the Tribunal finds that they are not special, such as to warrant a recommendation to the Minister of Immigration for consideration of an exception to residence instructions.

DETERMINATION

[99] This appeal is determined pursuant to section 188(1)(a) of the Immigration Act 2009. The Tribunal confirms the decision of Immigration New Zealand to decline the appellant's application for residence as correct in terms of the applicable residence instructions. The Tribunal does not consider that the appellant has special circumstances which warrant consideration by the Minister of

Immigration as an exception to those instructions under section 188(1)(f) of the Immigration Act 2009.

[100] The appeal is unsuccessful.

Order as to Depersonalised Research Copy

[101] 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 his wife.

"M B Martin"
M B Martin
Member

Certified to be the Research Copy released for publication.

M B Martin
Member