

AT AUCKLAND

Appellant: **NL (Parent)**

Before: S Pearson (Member)

Representative for the Appellant: A family member

Date of Decision: 26 May 2017

RESIDENCE DECISION

[1] The appellant is a 59-year-old citizen of Fiji whose application for residence under tier one of the Family (Parent) category includes his wife, aged 54. His application was declined by Immigration New Zealand.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because he did not have an acceptable standard of health and a medical waiver was declined. 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 as an exception to Government residence instructions.

[3] The Tribunal finds that the appellant's circumstances are not special, for the reasons detailed below.

BACKGROUND

[4] The appellant visited New Zealand with his wife, for three months in 2012 and five months in 2015.

[5] The appellant made his application for residence under the Family (Parent) category on 30 September 2015 from Fiji. His application was sponsored by a daughter, who produced evidence of her New Zealand citizenship. The appellant has another daughter, aged 33 years, who is single and resides in Fiji.

The Appellant's Health

[6] The appellant's medical report (14 October 2015) produced in support of his application for residence, was referred to a medical assessor for an opinion as to whether he had an acceptable standard of health.

Medical assessor's opinion

[7] The medical assessor's opinion (16 December 2015) was that the appellant did not have an acceptable standard of health under residence guidelines, due to his cardiac disease.

[8] Immigration New Zealand wrote to the appellant on 10 May 2016, through his then counsel. The letter advised the appellant that a first assessment of his application had been completed and the medical assessor had found that he did not have an acceptable standard of health for entry into New Zealand on the basis that he was likely to impose significant costs or demands on New Zealand's health services. The appellant was invited to provide further information from a suitably-qualified professional which would be forwarded to the medical assessor. The letter informed the appellant that in the event the medical assessor's opinion did not change, his case would be forwarded to a second medical assessor, acting as a medical referee, for a final assessment. The instructions for a medical waiver were also explained.

[9] The appellant's counsel requested a full copy of the medical assessor's notes. A full copy of Immigration New Zealand's health case report, including all health assessment notes, was sent to counsel in May 2016.

Counsel's response

[10] Counsel's letter (23 June 2016), written in response to the medical assessor's comments, enclosed a statement (16 June 2016) from a cardiologist/specialist physician at the Suva Private Hospital, as well as a report (16 June 2016) from a visiting Australian cardiologist there, and a pathology report and an echocardiography report (both dated 23 May 2016). Counsel highlighted

the Australian cardiologist's observation that the appellant was not at significant risk of requiring medical attention for heart disease over the next 10 years.

[11] Immigration New Zealand forwarded the appellant's medical file containing the disputing information to the first medical assessor on 15 July 2016. The medical assessor's opinion remained unchanged.

[12] Immigration New Zealand then forwarded the appellant's medical files to the second medical assessor for a second opinion. That opinion (27 July 2016) was as follows:

The applicant has a condition(s) listed in immigration instructions which is considered to impose significant costs and/or demands on New Zealand's health services. The applicant has significant cardiac disease with history of coronary artery disease from a relatively young age. He was investigated for angina and required a stent in 2007 and then in 2015 he had an "MI" and an angiogram revealed further coronary artery disease and he had two further stents. An echocardiogram reveals concerning abnormalities with an ischaemic cardiomyopathy and also a reduced cardiac output. He has a relatively high probability of requiring further cardiac intervention and his cardiac risk profile is significantly increased. Cardiac services are already overburdened.

Immigration New Zealand letter

[13] On 4 August 2016, Immigration New Zealand wrote to the appellant through his counsel informing him of the further opinion of the first medical assessor which was that the appellant had significant cardiac disease with a reduced heart function (ejection fraction). There was a significant risk of further cardiac events in the future and cardiac services were stretched throughout New Zealand.

[14] The letter informed the appellant that, according to health assessment procedure, his medical file, including all additional information, was referred to a different medical assessor for a second opinion. A second medical assessor had also determined that the appellant did not have an acceptable standard of health for residence on the basis that he was likely to impose significant costs or demands on New Zealand's health services. The second medical assessor's opinion, which was final, was set out verbatim.

[15] The letter informed the appellant that this meant he was not eligible for a residence class visa unless the health requirement was waived. The letter attached the relevant instructions at A4.60 and A4.70.

Information to support medical waiver

[16] Immigration New Zealand provided an extension of time for counsel to produce further information in support of a medical waiver. Counsel's letter (23 September 2016) set out the opinions of the medical assessor and the medical referee then summarised the relevant instructions. Counsel referred to a further letter from the Australian cardiologist (22 September 2016). This cardiologist had opined that the appellant was quite unlikely to require bypass surgery and his risk of requiring a further angiogram or hospitalisation for health problems was about two per cent in the next five years and 10 per cent in the next 10 years. The cardiologist had concluded that he did not regard the appellant as being at a high risk of needing major cardiac intervention in the "short or medium term". The appellant would only need regular general practitioner visits, with an annual cardiologist review to maintain his heart condition in the longer term.

[17] A letter (15 September 2016) from a general medical practitioner in Fiji listed the appellant's medications, and stated that the appellant had undergone cardiac stenting in August 2015. His blood pressure was well-controlled and he did not have any shortness of breath.

[18] The appellant's sponsor daughter provided two statements (31 August and 23 September 2016) in which she explained that she was able to accommodate her parents on the large property owned by herself and her husband in New Zealand. She was anxious about their safety in Fiji. She also undertook to pay any health costs relating to her father's health conditions. Statements were produced confirming the daughter and her husband's employment and salaries.

Medical waiver assessment

[19] On 13 October 2016, Immigration New Zealand undertook a medical waiver assessment. It was noted that the appellant met the requirements of tier one of the Family (Parent) category with the exception of the health requirement. The appellant's current medical condition was recorded in the medical assessors' opinions. In terms of his prognosis, the disputing opinion produced by the appellant was that he was estimated as having only a two per cent chance of requiring a further angiogram or hospitalisation due to cardiac problems in the next five years and this would rise to 10 per cent in the next 10 years. Further, the appellant required only review from a cardiologist every year, with an echocardiogram every year or two, and could be monitored by his general practitioner. Although the further statement from the Australian cardiologist was

received after the medical assessor and the medical referee had finalised their opinions, it was considered as part of Immigration New Zealand's medical waiver assessment. The medical waiver then considered the potential cost of likely treatment and considered the health objectives as set out in the instructions.

[20] In terms of the factors set out in the medical waiver instructions, the appellant's circumstances were considered and the positive and negative factors were weighed against each other. A medical waiver was declined.

Immigration New Zealand Decision

[21] On 18 November 2016, Immigration New Zealand declined the appellant's application because he did not have an acceptable standard of health for a residence class visa and had been declined a medical 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—
 - (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 January 2016, the appellant lodged this appeal on the ground that his circumstances are special such that an exception to the residence instructions should be considered.

[25] In support of the appellant's appeal, a statement is supplied by his wife and his sponsor daughter. Also produced on appeal is a further copy of the Australian

cardiologist's statement of 22 September 2016, and copies of documents from the Immigration New Zealand file, including the medical waiver assessment.

ASSESSMENT

[26] The Tribunal has considered the submissions and documents provided on appeal, and the files in relation to the appellant's residence application and the sponsor's husband's previous application for residence which have been provided by Immigration New Zealand.

[27] Although the appellant has appealed only on the basis that he has special circumstances, the Tribunal must first assess whether Immigration New Zealand has correctly determined his application for residence. That is followed by an assessment as to whether the appellant has special circumstances which warrant consideration of an exception by the Minister of Immigration.

Whether the Decision is Correct

[28] The application was made on 30 September 2015 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant did not have an acceptable standard of health and was declined a medical waiver.

Health instructions

[29] All applications under the Family (Parent) category must meet generic health requirements as follows:

A4.10 Acceptable standard of health (applicants for residence)

- 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).
- b. Applicants for residence class visas are considered to have an acceptable standard of health if they are:
 - ...
 - ii. unlikely to impose significant costs or demands on New Zealand's health services or special education services; and
 - ...

- c. The conditions listed in A4.10.1 are considered to impose significant costs and/or demands on New Zealand's health and/or special education services. Where an immigration officer is satisfied (as a result of advice from an Immigration New Zealand medical assessor) that an applicant has one of the listed conditions, that applicant will be assessed as not having an acceptable standard of health.
- 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).

...

A4.10.1 Medical conditions deemed to impose significant costs and/or demands on New Zealand's health and/or education services

...

- Cardiac diseases, including but not exclusive to:
 - severe ischaemic heart disease
 - cardiomyopathy
 - valve disease with a high probability of surgical and/or other procedural intervention in the next five years
 - aortic aneurysm with a high probability of surgical and/or other procedural intervention in the next five years

...

Effective 17/11/2014

Not of an acceptable standard of health

[30] The appellant's general medical certificate completed for his residence application recorded his medical history and cardiovascular disease. He had mild cardiomegaly and a significant history of coronary artery disease from a relatively young age. He required a stent in 2007 and when he had a myocardial infarction (heart attack) in 2015, two further stents were inserted. An echocardiogram indicated abnormalities with ischaemic cardiomyopathy and a reduced cardiac output.

[31] When the appellant's medical certificate and chest x-ray completed for immigration purposes were forwarded to a medical assessor, the appellant was found to be not of an acceptable standard of health under residence guidelines.

[32] The information on Immigration New Zealand's file indicates that its health assessment was conducted correctly. The appellant was informed of the first medical assessor's opinion and was invited to produce a disputing opinion which would be forwarded to the medical assessor for further consideration. In the event

that the medical assessor's opinion remained unchanged, the appellant's medical file, including the disputing evidence, would be forwarded to a second medical assessor acting as a medical referee. That opinion would be final.

[33] The appellant produced a statement (15 June 2016) from a cardiologist based at the Suva Private Hospital. A visiting Australian cardiologist reviewed the appellant's health and his report (16 June 2016) recorded that the appellant had a history of coronary artery disease and had first consulted him in 2006, when experiencing angina. The appellant subsequently had coronary artery stenting and did well, until he became "acutely unwell" in August 2015. At the time he was visiting New Zealand and received treatment here. An angiogram conducted in New Zealand indicated that some of his major coronary arteries were diseased. He also had impaired left ventricular function with a reduced ejection fraction, which meant his heart was not working properly. The appellant was treated with two further stents to coronary arteries and symptomatically had done well since that time. He had no ongoing symptoms of angina or shortness of breath, but there was clinical evidence of heart failure. There was some improvement to the appellant's left ventricular function but there was also evidence of the damage caused by the heart attack he had sustained. The cardiologist concluded his statement with the comment:

From the point of view of his visa application, the positive features that he is free of symptoms, and does not have other significant comorbidities such as diabetes or hypertension. He does however have significant coronary disease with impairment in left ventricular function, and this does place him at significant risk of requiring medical attention for heart disease over the next 10 years.

[34] The Tribunal is satisfied that Immigration New Zealand referred the further medical information back to the original medical assessor, and when the opinion did not change, referred the appellant's medical file to a second medical assessor, acting as a medical referee, who independently considered the appellant's health but came to the same conclusion that he did not have an acceptable standard of health.

[35] On appeal, the appellant's daughter complains that the Australian cardiologist's second letter (22 September 2016), which was produced as part of the material submitted in support of a medical waiver, had not been sent back to the medical assessor. She had not understood that the material invited for a medical waiver was a separate process from the medical assessors' opinions, which had been concluded. The Tribunal is satisfied that this was properly explained in Immigration New Zealand's letter of 4 August 2016.

[36] The Tribunal notes that the Australian cardiologist's letter (22 September 2016) was considered as part of Immigration New Zealand's medical waiver assessment and therefore his estimated timeframe for the appellant requiring a further angiogram or hospitalisation was considered as part of his prognosis (see below). The appellant has therefore not been prejudiced by the family's misunderstanding that this particular piece of information was not to be referred back to Immigration New Zealand's medical assessor or referee. The Tribunal also observes that the Australian cardiologist's contradictory statements in his two letters of 16 June 2016 and 22 September 2016 (see [39] below) would not have altered the medical assessors' findings that the appellant did not have an acceptable standard of health.

[37] The Tribunal has considered the procedures followed by Immigration New Zealand and finds that it correctly determined that the appellant did not have an acceptable standard of health because he had a history of severe ischaemic heart disease as well as a degree of cardiomyopathy. He was therefore caught by the diagnosis of a condition listed at A4.10.1 of instructions. That meant he had a condition deemed to impose significant costs and/or demands on New Zealand's health services (A4.10.b.ii and A4.10.c).

Medical waiver

[38] Immigration New Zealand conducted a medical waiver assessment, pursuant to A4.60.a (effective 26 November 2012). In accordance with the instruction at A4.70.b, Immigration New Zealand invited the appellant to produce further evidence to be considered for a medical waiver. In response, the appellant, through his counsel, produced a statement from his sponsor daughter in which she explained her secure financial circumstances in New Zealand and undertook to pay her father's medical costs in the future. She also had a self-contained unit that her parents could live in on her property. Also considered were the statements from the appellant's general practitioner in Fiji (15 September 2016) and the Australian cardiologist (22 September 2016).

[39] The Australian cardiologist had referred to his earlier letter of 16 June 2016. However, while he had stated in his earlier letter that "there was clinical evidence of heart failure", in his later letter he stated "there was no clinical evidence of heart failure". This is an apparent contradiction. The Australian cardiologist stated that the appellant's heart function, in terms of his "moderate impairment in left ventricular function", had improved slightly from an ejection fraction in the order of

25 to 30 per cent in 2015 to some 35 per cent. There was some risk in “that the appellant would require further cardiac treatment in the next 5 to 10 years”, but it was very difficult to accurately quantify the risk. He estimated that the appellant’s chance of needing a further angiogram or hospitalisation was about two per cent in the next five years and 10 per cent in the next 10 years. It was quite unlikely that the appellant would require bypass surgery. The Australian cardiologist concluded with the summary:

I do not think [the appellant] is at high risk of needing major cardiac intervention in the short or medium term, but with his history, this possibility cannot be excluded.

[40] The medical waiver considered the factors set out in instruction A4.70 as follows:

A4.70 Determination of whether a medical waiver should be granted (residence and temporary entry)

- a. Any decision to grant a medical waiver must be made by an immigration officer with Schedule 1-3 delegations (see A15.5).
- b. When determining whether a medical waiver should be granted, an immigration officer must consider the circumstances of the applicant to decide whether they are compelling enough to justify allowing entry to, and/or a stay in New Zealand.
- c. Factors that officers may take into account in making their decision include, but are not limited to, the following:
 - 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).
- ...
- f. An immigration officer should consider any advice provided by an Immigration New Zealand medical assessor on medical matters pertaining to the grant of a waiver, such as the prognosis of the applicant.
- g. An immigration officer must record decisions to approve or decline a medical waiver, and the full reasons for such a decision.

Effective 30/07/2012

[41] The Tribunal finds that Immigration New Zealand conducted a fair and balanced medical waiver assessment which had regard to each of the factors listed at A4.70.c. The medical waiver assessment included a weighing and balancing of the positive and negative factors related to the appellant's circumstances in Fiji and his nexus to New Zealand. It was determined that, after considering all of the factors individually and cumulatively, the medical waiver was not justified.

[42] The Tribunal is satisfied that Immigration New Zealand's decision to decline a medical waiver was correct.

Conclusion on correctness

[43] For the reasons set out above, the Tribunal finds Immigration New Zealand's decision to decline the appellant's application was correct.

Whether there are Special Circumstances

[44] 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.

[45] 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.

[46] 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.

Family and personal circumstances

[47] The appellant is a 59-year-old citizen of Fiji. His application for residence includes his 54-year-old wife. The couple continue to reside in Fiji. They have visited New Zealand in 2012 and 2015.

[48] In his application for residence, the appellant declared that his parents and those of his wife were deceased. The couple has two adult children, the elder of whom sponsored their application for residence. Their younger daughter, aged

33 years, was single and resided in Fiji. The appellant has six siblings, all of whom live in Fiji, while his wife has four siblings who also live in Fiji.

Character

[49] Immigration New Zealand was satisfied that both the appellant and his wife met the character requirements of instructions.

Health

[50] The appellant's wife's health was found to be acceptable. The most recent information before the Tribunal regarding the appellant's cardiovascular condition is that he is clinically well-managed at the moment and has been able to access specialist help when required in the past. In the event that the appellant required urgent cardiac hospitalisation in New Zealand, that would represent a considerable cost and impact on already overloaded cardiovascular services in this country. His future need for such assistance can only be estimated in general terms, as the Australian cardiologist visiting Fiji has observed.

[51] The appellant is not without proper medical care in Fiji. His health is monitored by his general practitioner and he is able to access specialist cardiologist services at the Suva Private Hospital, as demonstrated by the statements produced in support of his application and on appeal.

Nexus to New Zealand

[52] The appellant's application was sponsored by his elder daughter who gained residence in New Zealand as a secondary applicant in her husband's residence application in 2008. The daughter is eligible to sponsor her father's application and produces statements in support of it. She undertakes to pay any of her father's medical costs, but instructions make it clear that such undertakings cannot be enforced and carry no weight in the determination of an application.

[53] The appellant's daughter is employed full-time as a teacher in New Zealand and her husband is a businessman. They own a large property and she has emphasised the fact that there is plenty of room to accommodate her parents. The daughter and her husband have not been back to Fiji for over nine years as they fear for their safety there. While the daughter also expresses her fears for her parents' safety, it is apparent that they are able to continue living in Fiji. On appeal, the appellant's wife and his sponsor daughter express their hope that they

might be united in New Zealand in order that the family could enjoy living together in a multi-generational household. However, there appears to be no barrier to the daughter and her children visiting her parents in Fiji in order to spend time with her parents. The appellant and his wife have been able to visit New Zealand and return to Fiji without any difficulties, despite his elder daughter's concerns.

[54] The information before the Tribunal is that both the appellant and his wife have several siblings in Fiji and their younger daughter also lives in that country. While the appellant has a familial nexus to New Zealand through his elder daughter, he also has a significant familial nexus to Fiji through his siblings and younger daughter.

Contribution

[55] The appellant declares that he is retired, and has produced evidence that he completed a theology diploma and his wife a certificate, through an education programme run through their church. They will have connections with their community where they have lived all their lives. There is no suggestion that the appellant or his wife are vulnerable, isolated, or in need of assistance with their daily living tasks.

[56] The couple's potential contribution to New Zealand is likely to be modest and focussed primarily on helping their daughter's family.

Discussion of special circumstances

[57] The appellant satisfied all the requirements of the Family (Parent) category with the exception of the health requirements. He has serious health conditions which include ischaemic heart disease, for which he has had three stents inserted into coronary arteries. He presents a potentially significant burden to New Zealand's health system in the event that he requires hospitalisation for further cardiac intervention. He has had a myocardial infarction in the past and has a degree of cardiomyopathy, in addition to his coronary artery disease. New Zealand's cardiovascular services are already overburdened.

[58] The appellant has a familial nexus to New Zealand through his elder daughter but this factor is not, by itself, out of the ordinary. It is also not uncommon for parents to want to follow children who have migrated to New Zealand, especially as they advance in years, reach retirement age and have an increasing desire for family contact and support.

[59] The appellant and his wife continue to live in Fiji. They retain a strong familial nexus to Fiji through their siblings and their younger daughter. The evidence before the Tribunal is that the appellant has the resources to ensure he has sufficient ongoing support in Fiji, and his daughter in New Zealand has indicated she has considerable financial resources and a commitment to help her parents. There is nothing to suggest the sponsor daughter and her children are unable to return to Fiji for short or long-term visits if they so wish. Alternatively, the family can remain in contact using electronic means of communication available to them.

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

DETERMINATION

[61] 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.

[62] The appeal is unsuccessful.

Order as to Depersonalised Research Copy

[63] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to the identification of the appellant and his family members.

Certified to be the Research
Copy released for publication.

S Pearson
Member

"S. Pearson"
S Pearson
Member