IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND | **[2018] NZIPT 204674**

AT AUCKLAND

Appellant:	**TF (Skilled Migrant)**
Before:	M Avia
Counsel for the Appellant:	A McClymont
Date of Decision:	23 May 2018

RESIDENCE DECISION

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[1] The appellant is a 25-year-old citizen of India whose application for residence under the Skilled Migrant category was declined by Immigration New Zealand.

THE ISSUE

[2] Immigration New Zealand declined the appellant's application because his employment was not ongoing and sustainable. Without points for skilled employment, the appellant did not meet the minimum selection criteria of the Skilled Migrant category.

[3] The principal issue for the Tribunal is whether Immigration New Zealand's assessment of the appellant's application was fair.

[4] The Tribunal finds that Immigration New Zealand failed to disclose potentially prejudicial information to the appellant and failed to properly consider the application. The failures resulted in prejudice to the appellant. The Tribunal therefore cancels the decision and refers it back to Immigration New Zealand for a correct assessment in terms of the applicable residence instructions and the Tribunal's directions.

BACKGROUND

[5] The appellant made his application for residence under the Skilled Migrant category on 22 March 2017. He claimed points for skilled employment as an ICT Customer Support Officer, relying on his employment as an ICT network technician for a company that offered ICT installation services, including fibre optic cable installation, and labour hire. The appellant's employment agreement (signed 7 July 2016) confirmed that he was in full-time employment and earned $19 per hour. He began working for the company in September 2016.

Verification of Employment

[6] In April 2017, the director of the employing company completed an Immigration New Zealand questionnaire about the nature of the appellant's work and provided documents requested by Immigration New Zealand: Inland Revenue (IRD) Employer Monthly Schedules (December 2016 to February 2017), the appellant's wages and time records in the form of payslips (December 2016 to February 2017) and an organisational chart.

[7] Further financial information about the employing company was also available to Immigration New Zealand. On its file was a two-page extract of the employing company's statement of financial performance for the 2016 financial year, which included information about the company's performance in the 2015 financial year, and a company tax summary for the 2017 financial year. Notes on these two documents indicate that they had been drawn from "other visa (applications)".

Immigration New Zealand Concerns and Response

[8] On 4 August 2017, Immigration New Zealand wrote to the appellant's former representative stating that "the employer has recently supplied INZ with a copy of their financial statements for the years ended 31/03/3015 and 31/03/2016". The information raised issues about the sustainability of the company, and of the appellant's employment. However, Immigration New Zealand advised that the company's financial information was being withheld pursuant to section 28(1)(b) of the Privacy Act 1993, as it considered that releasing the information would be likely to prejudice the commercial position of the company. Further, the company's financial information could not be released without its signed authorisation. Immigration New Zealand also informed the appellant that the company could provide additional information about its financial stability, including information about

the performance of the company since 1 April 2016 and any financial forecast for the next year. Such information could be sent directly to Immigration New Zealand.

[9] On 1 September 2017, the representative made brief submissions. The representative also attached the employing company's financial forecasts from September 2017 to March 2018 and for the financial year ending March 2019.

[10] Also provided was an email (24 August 2017) from the company director to Immigration New Zealand attaching:

(a) a screenshot of the company's bank account showing a balance of more than $60,000 on 24 August 2016;

(b) the employing company's interim financial statements from April to July 2017;

(c) emails from customers requesting labour hire (24 August 2017); and

(d) a description of the company's services (undated), and a diagram setting out the company's fibre installation and labour hire customers (undated).

[11] The director stated in the same email that the company had invested significant sums during the previous year by conducting staff training and purchasing four vehicles ($22,000 per vehicle), fibre splicing and testing equipment, and safety equipment. The director then stated, "But now only I started harvesting".

[12] Two of the company's GST returns (31 May 2017 and 31 July 2017) were supplied to Immigration New Zealand on 30 August 2017.

Immigration New Zealand Decision

[13] On 1 November 2017, Immigration New Zealand declined the appellant's application because it was not satisfied that the employing company was financially sustainable and, consequently, it was not satisfied that the appellant's employment was sustainable. Immigration New Zealand acknowledged that the company's director had provided it with additional financial information but found that this was insufficient to address its concerns. It remained unable to release the company's financial information without written authorisation.

[14] Immigration New Zealand assessed that the appellant was entitled to 80 points, which, without points for skilled employment, did not meet the minimum selection criteria of the Skilled Migrant category.

STATUTORY GROUNDS

[15] 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.

[16] 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

[17] On 8 December 2017, the appellant lodged this appeal on both grounds in section 187(4) of the Act.

[18] On appeal, the appellant appoints new counsel. Through his firm's legal executive, counsel makes submissions (1 February 2018) and, in addition to evidence already on the Immigration New Zealand file, produces the following:

(a) the company's full financial statements for the years ended March 2016 and March 2017;

(b) the company's business current account statements from March to October 2017;

(c) IRD Employer Monthly Schedules (April to September 2017);

(d) a GST return (dated 31 September 2017);

(e) a client contract (22 July 2017);

(f) interim financial statements for the 2018 financial year (from April 2017 to December 2017);

(g) an email from a client confirming that the company's services would be used in the future (10 November 2017) and another client contract (7 November 2017).

[19] New evidence on appeal is inadmissible when considering the correctness of Immigration New Zealand's decision, unless it falls within section 189(3) of the Act. However, given the outcome of the appeal, the Tribunal does not consider it necessary to consider the admissibility of the documents. Nevertheless, it does note that had Immigration New Zealand properly articulated its concerns about the application (as the Tribunal sets out at [26]-[32]), some of the documents produced on appeal, in particular the documents set out at [18] (a)-(e), may well have been provided to Immigration New Zealand before the decision was made.

ASSESSMENT

[20] The Tribunal has considered the submissions and documents provided on appeal, and the file in relation to the appellant's residence application which has been provided by Immigration New Zealand.

[21] 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

[22] The application was made on 22 March 2017 and the relevant criteria are those in residence instructions as at that time.

[23] Immigration New Zealand declined the application because it was not satisfied that the appellant's employment was sustainable. Without points for skilled employment the appellant did not meet the minimum selection criteria of the Skilled Migrant category.

The relevant instructions

[24] Residence instructions require that applicants relying on points for skilled employment must demonstrate that their employment is ongoing and sustainable:

SM7.15 Additional requirements for skilled employment

...

b. Employment must be ongoing and sustainable. Ongoing and sustainable employment is:

i. an offer of employment or current employment, with a single employer, that is permanent or indefinite, and of which the employer is in a position to meet the terms specified; or

...

Note: When assessing whether employment is sustainable, officers may consider, but are not limited to, such factors as the residence status of the employer, the period for which the employing organisation has been established as a going concern, and the financial sustainability of the employing organisation.

…

Effective 25/08/2014

[25] When deciding an application, Immigration New Zealand must act in accordance with the principles of fairness and natural justice (A1.1.c, effective 29 August 2012). Relevant factors include:

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 appropriate reasons are given for declining an application;

…

Effective 29/11/2010

Failure to raise concerns with the appellant

[26] The Tribunal notes that Immigration New Zealand informed the appellant in its letter of concerns that the information it had on file raised concerns about the financial sustainability of the employing company. However, merely raising the issue of its concern about the financial sustainability of the company was not sufficient to properly notify the appellant about information that was potentially detrimental to his application. Thus, Immigration New Zealand's failure to set out

the specific issues about the company's financial situation did not give the appellant a reasonable opportunity to respond to the concerns raised, as required by A1.5.

[27] The Tribunal also has a number of concerns about Immigration New Zealand's approach to the company's financial information.

[28] Immigration New Zealand's failure to inform the appellant about its specific concerns arose from its refusal to release the financial information because it might have unreasonably prejudiced the commercial position of the employer, pursuant to section 28(1)(b) of the Privacy Act 1993. It is not apparent to the Tribunal why Immigration New Zealand relied on section 28(1)(b) of the Privacy Act to withhold the company's financial information. As the Tribunal found in *EN (Skilled Migrant)* [2017] NZIPT 204000 at [42], section 28(1)(b) is intended to be a response to a request for an individual's personal information under Privacy Principle 6. Therefore, the extent to which an employer's financial information would fall within the scope of that section is arguable. Moreover, reliance on the section prior to any such request would appear premature and could amount to predetermination in the event such a request is made.

[29] Further, in its letter of concerns and its decision, Immigration New Zealand stated that it was unable to disclose specific details regarding its concerns as it had not received "signed authorisation" from the business to do so. Other than the fact that the director had provided some documents directly to Immigration New Zealand in response to Immigration New Zealand's concerns, there is nothing to suggest that the company required that its financial information remain confidential, or that it would not have agreed to the disclosure of the financial information and concerns, had Immigration New Zealand enquired. Supporting this view was that during the assessment of the application, the representative produced the company's financial forecast to Immigration New Zealand, and on appeal, counsel produced further financial information from the company.

[30] The Tribunal has previously raised concerns regarding Immigration New Zealand's use of confidential information: see *DH (Skilled Migrant)* [2017] NZIPT 204026 at [30]. The principle that an applicant is entitled to know of any potentially prejudicial information that could affect the outcome of their application is so fundamental to the decision-making process that it might be that, in some contexts, the information should not be considered at all. In the residence context, where an applicant is seeking to obtain a privilege, it is arguable that a lesser standard applies and that confidential information may be considered, provided an applicant gives Immigration New Zealand express and informed consent to do so.

[31] Here, as in a number of other cases, Immigration New Zealand failed to disclose its specific concerns or the employer's financial information to the appellant. Relying on information it deemed to be confidential is contrary to one of the fundamental principles of natural justice, reflected in A1.5.a of instructions, of a party's right to be informed of, and have an opportunity to respond to, potentially prejudicial information. Without knowledge of the information considered harmful to his application, the appellant was never truly in a position to respond to, or understand, Immigration New Zealand's concerns. Had Immigration New Zealand properly informed the appellant of its concerns, other information relevant to financial sustainability might have been produced before Immigration New Zealand's made its decision.

[32] In respect of the company's financial information, Immigration New Zealand failed to establish whether there was any requirement for confidentiality, mistakenly relied on the Privacy Act 1993, and failed to obtain the appellant's consent to the consideration of the confidential information.

Failure to properly consider the application

[33] Although Immigration New Zealand stated that the evidence raised concerns about the employing company's financial sustainability, the Tribunal considers that there was evidence before Immigration New Zealand that might have been sufficient to allay its concerns. However, without providing appropriate reasons for its conclusion, it was not apparent that Immigration New Zealand had properly considered the application, including the evidence before it.

[34] The company had made a negligible profit during the 2015 financial year. However, there was no indication that Immigration New Zealand recognised that this was the result of profit minimisation, because salaries approximately equivalent to the level of profit had been paid to the shareholders.

[35] The company had incurred significant losses during the 2016 and 2017 financial years. In particular, the company's 2017 financial statements recorded a loss of $60,551 and negative equity of $204,129. However, while not a complete explanation, the company had spent a considerable sum that year purchasing assets such as vehicles and other equipment (that could have increased the company's productivity). There was nothing to indicate that Immigration New Zealand took those purchases into account. Perhaps, as the company director stated to Immigration New Zealand in August 2017, "But now only I started

harvesting", it was only at this point that the company was seeing the benefit of its investment.

[36] The interim accounts (April to July 2017) also showed that the company had achieved a turnaround, as it had made a profit of $61,704, and that it had positive equity. The company's GST returns (May and July 2017) recorded that GST collected on its sales and income was significantly more than the GST component of its purchases and expenses. There was nothing to suggest these positive indicators formed part of Immigration New Zealand's consideration.

[37] The Tribunal also finds that the profit and loss forecast for the remainder of the 2018 financial year appeared to be based on the figures achieved in the first four months of the 2018 financial year, and although the 2019 forecast contained an increase in sales and income, the increase appeared to be realistic. However, there is nothing to suggest that the forecasts were accorded the appropriate evidential weight, particularly given that they were prepared by an objective party, a chartered accountant.

[38] The Tribunal finds that Immigration New Zealand's failure to demonstrate that it had properly weighed and balanced the above evidence showed that it had not properly considered the application. It follows that Immigration New Zealand's approach was likely to have been prejudicial to the appellant.

Conclusion as to correctness

[39] For the reasons given above, the Tribunal finds that Immigration New Zealand's decision to decline the application was incorrect. Its failure to disclose potentially prejudicial information to the appellant and to properly consider the application was procedurally unfair and prejudiced the appellant's application. Accordingly, the application must be returned to Immigration New Zealand for correct assessment.

DETERMINATION

[40] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers that the decision to refuse the visa was made on the basis of an incorrect assessment in terms of the applicable residence instructions. However, the Tribunal is not satisfied the appellant would, but for that

incorrect assessment, have been entitled in terms of those instructions to the immediate grant of a visa.

[41] The Tribunal therefore cancels the decision of Immigration New Zealand. The appellant's application is referred back to the chief executive of the Ministry of Business, Innovation and Employment for a correct assessment by Immigration New Zealand in terms of the applicable residence instructions, in accordance with the directions set out below.

Directions

[42] 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 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 submit any further information to support his application, including an update on his employer's current financial position. This may include the company's financial statements for the financial year ending 31 March 2018.

3. Should Immigration New Zealand have any concerns as to whether the appellant's employment is sustainable then it must properly inform him of its concerns. It shall also ensure that he has an opportunity to respond to its concerns and to provide any further information and evidence in response. It shall take into account the Tribunal's concerns about Immigration New Zealand's approach to the evidence about the company's financial sustainability ([33]-[38] of this decision).

4. Immigration New Zealand is to ascertain whether the director consents to the disclosure of his company's financial information to the appellant. If he consents, then it is to disclose this information to the appellant. If not, then Immigration New Zealand is to ascertain what, if any, information it can disclose to the appellant. In approaching its reassessment of the appellant's application, Immigration New Zealand

may wish to refer to, and follow, the process set out by the Tribunal in *DH (Skilled Migrant)* [2017] NZIPT 204026 at [43]-[45].

5. If Immigration New Zealand is satisfied the appellant's employment is sustainable, it shall determine all other aspects of the application including whether his employment substantially matches the ANZSCO description, including core tasks, of an ICT Customer Support Officer.

6. If the appellant is no longer employed in the same or similar role with the same employer, he is to be given a reasonable opportunity to produce evidence of his current skilled employment or an offer of skilled employment, which Immigration New Zealand shall assess accordingly.

7. Immigration New Zealand shall give appropriate reasons for its decision.

[43] The appellant is to understand that the success of this appeal does not guarantee that his application will be successful, only that it will be subject to reassessment by Immigration New Zealand.

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

Order as to Depersonalised Research Copy

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

"M Avia"
M Avia
Member

Certified to be the Research Copy released for publication.

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